Justice Deficit Systemic Disorder in Sri Lanka

Linking Democracy, Rule of Law, and Human Rights

TEACHING GUIDE HAND BOOK

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Prepared and Edited by the Research Team of the

Asian Legal Resource Centre (ALRC)

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- Linking Democracy, Rule of Law, and Human Rights

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Prepared and Edited by :
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A country becomes anarchic due to a delay in justice

நீதி கிடைப்பதில் ஏற்படும் தாமதத்தின் காரணமாக நாடே சட்டமில்லா நிலைக்கு மாறுகின்றது

RLF
RULE OF LAW FORUM

ACKNOWLEGEMENT

This handbook has been prepared mostly as a collection of training modules for teaching purposes for those who are interested in trying to find practical approaches to the resolution of the economic, political, societal and civilizational crises prevailing at the present time in Sri Lanka. It must also be noted that circumstances somewhat similar to Sri Lanka also prevail in many other developing countries in Asia and elsewhere.

The handbook is based on the premise that the above-mentioned crises have changed the very character of the State and also the people's ways of life in a profound way.

Therefore, a new conversation is needed. A discussion on the structural problems of the State itself must be at the heart of this new conversation. A mere regime change will not in any way displace the underlying problem. 'The system change' has become a popular demand and even a street level demand.

The problem that almost everyone is faced with is as to what this system change means. People, through their own conversations, should articulate what is the change that they want, particularly from a systemic point of view.

This handbook is prepared in order to contribute to creating an intelligible conversation on more difficult issues that have caused the present situation. There is no assumption that this handbook will provide a solution to the grave problems besetting the people and the society. Its' humble ambition is to focus on serious and fundamental issues and to prevent the waste of time purely on superficial criticism.

This handbook is not purely an academic product. It is a product which sums up literarily thousands of conversations carried out over a long period of time which involves a vast number of people. We first of all acknowledge the contributions made by many of these people in various forms through these

conversations. We owe a great debt to all those who were seriously engaged in creating and spreading this conversation. We hope that our efforts will help to promote the cherished dreams of those who aspire for a fundamental change of all our institutions and our ways of life.

During our previous educational work, we have used some selected text which we thought would be useful for wider circulation for the benefit of those who are participating and will be further joining in the future. We are grateful to the Tom Bingham Foundation for allowing us to translate the book, the 'Rule of Law' published by the great British jurist Tom Bingham. That translation in Sinhala has been available for many years now. We have included two chapters from this book which form important material in understanding the basic idea of the rule of law.

In this handbook, we have given prominence to administrative justice reforms among which a prominent place is assigned to Police reforms. In our perspective, without improving the capacity of the law enforcement authorities, it is not possible to make any progress in overcoming the disorder that prevails in Sri Lanka. The reports on law reforms go back to the British colonial times and the report made by Justice Francis' Truth Commission is a very vital document in this regard. We have included a memorandum attached to this report written by a prominent jurist and the first Vice Chancellor of the Peradeniya University Ivor Jennings, as it will help the present generation understand about the root causes of Sri Lanka's failure in this regard. We have also added a translation of a letter published by the present Inspector General of Police (IGP) of Sri Lanka who himself has seriously critiqued the system.

We are also grateful for persons who participated in the recent discussions based on the outline of this handbook. Their responses have helped to sharpen the focus of this material.

We thank those who made videos, transcriptions, translations, and even provided us with the cartoons based on these themes.

This handbook is a collective product to which many people have contributed and without their help, this book will not become a reality.

This publication is not a commercial publication. This print is supported by the Canada Fund for Local Initiatives (CFLI) in Sri Lanka. Much of the educational work relating to this work was also supported by MISEREOR Germany (the German Catholic Bishops' Organisation for Development Cooperation) and NUNCA MAS Denmark (the International Network for Human Rights and Psycho-Social Response).

Mr. Basil Fernando
On behalf of the Research Team
October, 2022

How to use this hand book as an educational tool

This handbook is created to address ground realities and practical problems obstructing good governance, democracy, the rule of law, and human rights in developing countries.

Two factors combined to create underdevelopment. The first is the overwhelming poverty that affects the majority of the population, which also creates a very large segment of the destitute poor. The other factor is the deadening repression. Any effective action to change should address both of these issues at the same time. This handbook attempts to bring about an approach that combines problems related to both the factors.

The usual approach adopted by the civil society is to address good governance, democracy, the rule of law, and human rights as separate issues. Organizations that deal with good governance, work on issues of transparency and accountability, particularly dealing with such issues as corruption and the abuse of power. Those dealing with democracy usually deal with problems of free and fair elections, electoral systems, and other direct problems of the political system. Those who deal with the issue of the rule of law are mostly lawyers and judges while some civil society actors also deal with certain issues relating to the absence of proper legislation to deal with the balance of power and other defects relating to laws. Those who deal with civil rights deal with issues such as illegal arrests and detentions, various forms of the denial of fair trials, the use of torture and ill treatment, and the denial of the rights of the freedoms of expression, association, and assembly. Those who deal with socio-economic and cultural rights deal more with issues such as the denial of the right to education or health and the like. Those who deal with gender rights will mostly deal with the gender related deprivation of rights, and so on.

In the context of a developing country, such separations are artificial. For example, if there is no credible system for the

administration of justice, the control of corruption will become next to impossible. The entire electoral system can be undermined and disabled by violence and thus, despite grave grievances, people cannot overthrow a bad Government or elect a Government that will address these grievances. Despite massive violations of civil rights even by large scale disappearances, extra-judicial killings, arbitrary detentions, and every form of corruption, there is hardly any effective legal remedy available. That lack of protection also spreads to gender based violence, State violence, as well as domestic violence. Thus, one kind of attack on any of the four aspects of governance, democracy, the rule of law, and human rights impacts on the others.

The United Nations (UN) recognized this problem already in December, 2013. In the UN General Assembly document from the report of the UN High Commissioner for Human Rights (HCHR) on the role of the public service as an essential component of good governance in the promotion and protection of human rights (A/HRC/25/27), this inseparable link as mentioned above was recognized. The report says: "A seminar on good governance practices for the promotion of human rights, jointly organized in 2004 by the Office of the UN HCHR and the UN Development Programme, concluded that there is a mutually reinforcing relationship between good governance and human rights (E/CN.4/2005/97, page 2). "Human rights principles' provide a set of values to guide the work of Governments and other political and social actors… Moreover, human rights principles' inform the content of good governance efforts. They may inform the development of legislative frameworks, policies, programmes, budgetary allocations and other measures. However, without good governance, human rights cannot be respected and protected in a sustainable manner. The implementation of human rights relies on a conducive and enabling environment. This includes appropriate legal frameworks and institutions as well as political, managerial and administrative processes responsible for responding to the rights and needs of the population." Moreover, "governance is

central for effective policy formulation and implementation, including for the integrated delivery of essential services, such as education, water, sanitation and health."

As for the Asian Legal Resource Centre (ALRC) and the Asian Human Rights Commission based in Hong Kong, the main thrust of their work since 1993 has been based on the wholistic link between these major theses. These organizations have worked with many partners in Asia to promote this approach to their work because much of the work which has been done by separating these themes has failed to produce significant change for the better. The development of a holistic approach is also essential to make a significant difference for the better. This handbook is based on the experience of working for over three decades in several countries in order to find a solution to the above mentioned problems.

How to use the handbook for lessons:

1. Each of the lessons will be prepared in terms of a particular audience who will attend and suitable changes will be made to meet particular requirements.
2. Each lesson will begin by introducing a set of questions to facilitate their participation by enabling them to discuss their own experiences within the theme to be discussed. The questions will be designed to enable practical experiences based on each of the participants' positive or negative experiences relating to the particular theme.
3. The particular theme will be introduced by a resource person using the prepared educational materials such as videos and other audio materials.
4. The participants will be encouraged to raise any questions during the presentations.
5. The participants will be divided into smaller groups and encouraged to discuss the theme. A few resource persons will be available to assist where needed.

6. A set of questions will be posed at the end to test whether the participants have grasped the basic principles and proposed approaches to the work.

Action plans

Each of these lessons will lead the participants to actively support the objectives of protecting democracy, the rule of law, and human rights, in terms of the concepts and strategies explained in this handbook while the action plans would be around these themes.

For the spreading of education based on the concepts and strategies that can be perused from this handbook.

The development of support for the campaigns and other activities related to the above-mentioned objectives. These campaigns may be of a general nature like reforms of a particular institution or of a specific nature like support for a particular issue or even for a particular individual who needs protection. The issue may arise at the discussion stage where the participants may come up with suggestions for particular actions.

The development of social media-based work so that larger numbers of people will be informed about the ideas, strategies and action plans of this project.

Specific requests from the Government and the political establishment for reforms relating to the subject matter covered in this handbook or very specific issues that may arise from time to time.

All these are envisaged as means of influencing popular opinion in favour of much needed reforms in order to enable the country to arise from the deep crisis in all aspects of life that they are facing now and which crisis is likely to continue for the immediate future.

Justice Deficit Systemic Disorder (JDSD) – as a Threat to Global Human Rights Project

Basil Fernando

Justice Deficit Systemic Disorder (JDSD) means the Disorder created in all systems that constitute a society or a nation due to the deficit or near absence of the justice factor. The Justice Deficit transforms all public institutions. The Justice Deficit alters the very meaning of the law. When the law is divorced from justice, it transforms the very nature of public institutions. These institutions cease to be public institutions capable of carrying out public duties. Such institutions become, metaphorically, privatized; they lose their links to public norms and standards. That way, it becomes impossible for these institutions operate on the principles of the supremacy of the law or the rule of law. Thus, disorder results from public institutions becoming disenabled from operating through a just system of laws. Such disenabling becomes systemic, thus creating systemic injustice. Systemic injustice in turn creates systemic irrationality. Systemic irrationality, once it enters into the operations of public institutions, creates Disorder and chaos throughout all the systems of the State.

Above is a short summing up of my experiences regarding the obstacles to the protection and the promotion of human rights under the prevailing circumstances in the world generally, but mostly in the developing countries. In that short paragraph, I have summed up my conclusions on the basis of work done under various circumstances, in various different countries, under different political regimes and circumstances, and perhaps most importantly, under very different cultural contexts, for nearly 40 years.[1]

Features of Justice Deficit Systemic Disorder

1. A vast gap between written laws and the actual practices prevailing in the institutions of the legal system

2. Diminishment or even complete absence of space for Public Law
3. Arbitrariness in the practice of criminal law and criminal procedure
4. Allowance of arbitrary punishments, including extrajudicial executions, enforced disappearances, arbitrary detentions for prolonged periods and the like
5. Space made available to intelligence services carry out clandestine operations without oversight meeting generally accepted democratic standards
6. Limitation and sometimes removal of judicial power and judicial independence
7. Neglect to provide adequate budgetary allocations for functioning of institutions of administration of justice—i.e. Policing, Prosecutions, Judiciary and Prisons
8. Direct and indirect forms of impunity
9. Diminishment of the role, function and independence of lawyers

In 1948, in the wake of the Second World War, the United Nations (UN) was formed and the Universal Declaration of Human Rights (UDHR) was adopted. Related to these important changes were certain assumptions about civilization based on the respect for individual freedoms. The UDHR spelled out these basic freedoms in a succinct manner.

In the subsequent decades, the freedoms described in the UDHR were raised to a more legally binding status by the

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1. The data and analysis contained in this article is based on decades of experience, many books, articles and seminars, 61 issues of Article 2 magazine (referring to Article 2 of the International Covenant on Civil and Political Rights (ICCPR)), which was published by the Asian Legal Resource Centre (ALRC) for over 16 years as a quarterly magazine. Article 2 magazine has covered reports on the following countries - Bangladesh, Cambodia, India, Indonesia,Nepal, Myanmar,Pakistan, The Philippines', Sri Lanka and South Korea. All the issues are available at Article 2.org. A list of articles published in Article 2 can be viewed at _. Besides these, the ALRC has also published numerous books and a vast body of articles on the same themes in English and other local languages, which are also available on the Internet.

development of two international covenants: the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Various aspects of these two Covenants were later developed into different conventions detailing out the obligations of the States in ensuring the enforcement of these rights.

It was quite natural that much of the earlier decades of work on the new international agreements on human rights, and also the work of the UN in the field, were concentrated more on a detailed articulation of these rights and in the attempt to propagate these rights throughout the globe.

Perhaps the achievement of these decades was the language of the UN Conventions on human rights entering into the global and local discourses in almost all the countries. In terms of the popularizing of ideas about human rights, the achievement was remarkable.

However, there were certain considerations that do not seem to have entered into the discourse on the promotion of human rights, and, as a result, with time, there emerged a very vast gap, particularly in the countries outside Europe and the United States, on the actual possibilities for people to assert these rights within the context of the actual institutional frameworks that existed in each particular nation, as against the ever-growing popularity of the rhetoric on human rights.

Greater efforts to promote the human rights project came mainly from what are usually called the 'Western countries' and the contributions for resources also came mostly from these countries. It may have been quite natural that the experts from these countries had far more influence in the development of both the concepts as well as in dealing with various implementation measures relating to human rights work. It was perhaps as a result of this that some of the major problems that were faced by the developing countries in particular, in terms of the actual institutions that were available in their countries for the implementation of these rights, did not

received the required attention at any stage of the development of the overall global approach of this project.

Essentially, to people from functioning systems, a constant in their assumptions is the practical implementation of laws that are introduced. But, in certain contexts, there is clearly a broken link between ratification and implementation. Understanding what causes these differences is part of the theoretical and analytical development necessary in this area. One could compare it, as a laymen, to the discovery of the different responses by particles at a quantum level; the discovery of the difference is not a rejection of other theories, but should be an impetus to study the phenomenon. In the context of observing that the mere ratification of treaties does not seem to solve human rights problems in certain contexts, expanding our understanding of what is actually happening can lead to devising better methods to ensure human rights can actually be implemented for the benefit, as intended, of each person.

Perhaps it would interesting to undertake a study on how to remedy the problems relating to institutions, which have from the beginning been assumed to be the very necessary foundational mechanism for the implementation of human rights; despite its importance, this had not become a constant preoccupation of those who were involved in promoting this project, both within the UN system created particularly for this purpose, or in various developed countries where certain governments took a greater interest in the promotion of human rights.

Administration of Justice - Policing

It was quite obvious that most nations would not openly admit the extreme backwardness of the basic institutions that were particularly important in the delivery of justice. Naturally, a nation would not admit that the kind of policing system that the country had been able to develop so far did not match up to the required standards making them capable of adequately protecting individual rights as required under the UN Conventions.

However, a closer examination of the failures in the implementation of human rights in many developing countries will clearly demonstrate that the nature of the policing systems that exist in these countries are in many ways inadequate to deal with the task of protecting the rights enshrined in the Conventions.

Policing as an institution is an essential part of the protection of human rights, both of individuals and also of social groups. A nation may fail to develop a proper policing system that is capable of protecting individual rights as well as group rights for many reasons.

Some of these reasons could be summarized as follows:

Resource allocation: A major reason for the inadequate development of a proper policing system is often claimed to be the lack of resources allocated. In almost all the countries that have been observed in this regard for the purposes of this article, quite clearly, inadequate resource allocation for the development of proper institutions of policing remains one of the major reasons for the deficiencies not only of the policing institutions but of the entire State apparatus in the protection of human rights.

The inability or unwillingness to spend adequate resources for the development of a proper system may be due to many factors. Often, other development objectives receive a greater priority than the development of a policing system. For example, the development of agricultural, industrial and commercial schemes, road development, hospitals and schools, etc. are more direct recipients of relatively better resource allocations for various reasons. One such reason may be the factor of political considerations in terms of electoral politics within which certain direct objectives relating to matters such as economic development, employment, health and education and the like naturally receive the attention of the electorate rather than the issue of properly developing protection for the people through a well-functioning policing system.

Another reason could be a lack of understanding of the need for a proper and functional justice system, including policing

institutions, for any of the other projects to actually function with adequate oversight, anti-corruption measures and efficiency.

In other contexts, political developments may not favour a more liberally functioning policing institution. Certain types of political regimes may prefer a policing system that is more compliant with the requirements of dealing with the problems that the Executive is concerned with rather than in the promotion of freedoms and rights which may create conflicts for the existing political system. This overall concern of limiting the perspective and capacity of a policing system in order to limit the overall freedoms enjoyed by the people as a whole, particularly in the areas of the freedom of association, freedom of assembly and the freedom of expression, appears to be one of the major considerations in shaping the nature of a policing system that exists within a particular territory. If, for example, the overall concern of a political regime is to attract foreign investors to invest in their country, it would not be in their interest to promote the free trade union movement or political movements which promote better wages and working conditions for the workers. Under those circumstances, the Executive would try to use policing in order to curb rights rather than to promote rights. That said, an executive-heavy/arbitrary system that does not abide by the rule of law is inherently unstable, and may have the inverse effect of damaging the potential for foreign investment.

Taking a broader approach, there is a general assumption that every society must on some level agree to be bound by rules and accept certain concepts related to equality, fairness and the like. As experience has shown, these assumptions rely on the existence of forms of moral education and cultural values, which are not always in place; for example, the concept of equality before the law is antithetical to the caste practices that dominated the Asian subcontinent and other parts of Asia for centuries. The caste of a person determined whether a certain behavior should be punished and what that punishment should be. An obvious example is the murder of low caste persons for getting an education.

There are other circumstances where the development of a civilian policing system has never been attempted. In a number of former colonies, both of the British as well as the French, the models of policing that were established during that period were militaristic in nature. The trainers that were brought from these countries had many complex problems to deal with in the early development of the policing systems in these new countries. The very idea of modern policing was completely absent in these countries. The kind of feudal controls that existed within these former colonies were not based on the ideas of the rule of law or on the basic recognition of the individual or individual freedoms. Thus, the very establishment of policing systems was a completely new task to these societies. In some countries, historical research has been done into the development of their policing systems at these early stages. These studies demonstrate such problems as the unwillingness of people recruited from particular localities who did not want to engage in such tasks as arrest, detention, the interrogation of suspects, the recording of information in writing and also being subordinate to a system of courts in terms of the performance of their duties. The officers recruited from mother countries, either England or associated countries like Ireland or France, played the main role in the setting up of these institutions. However, given the vastness of the territories and having to deal with varieties of circumstances even within each country, this was rather beyond the capacity of recruits from outside. So, it was a very gradual process of recruitment, training and development of a policing system. Studies into some of these trainings have demonstrated that most of the trainings given to the police were similar to the trainings given to the military. Early morning exercises and many other military-like practices occupied most of the time of the new recruits.

The experience of military style policing differs from country to country. There are several countries which still use even the titles of officers in terms of the military titles. Reviews done by certain colonial authorities, particularly by the end of their time as colonial masters, revealed that they were profoundly aware of

the militaristic nature of the systems that they had established as the police and that in order to develop a policing system that suits a democratic society, much more work needs to be done if the policing system is to contribute to the overall political objectives and social objectives of a newly emerging democracy.

However, the development of their systems of the administration of justice is quite clearly a task that most of the newly independent nations did not take upon themselves after they obtained independence. There may be many complex reasons for this neglect. One major reason could be that a newly independent nation had many urgent tasks to deal with in terms of developing the traditions of Parliaments, the establishment of systems of civil administration of these countries, the development of suitable models for economic development and many other such tasks. A more difficult problem would have been for the newly elected representatives of Governments to envisage the task of ruling the nation. Under the colonial powers, most of those persons who later became political leaders in their countries were merely subordinates of the colonial system. The task of making decisions for their nations and of developing such systems of gaining consensus within their nations were all new to these newly-elected governing representatives.

An even more difficult task for them would have been to deal with the civil unrest which came to be expressed more strongly with the gaining of independence. In almost all former colonies there grew many new movements of people from various perspectives and with various objectives in order to demand what they had been denied for long periods, either during earlier feudal times or during the colonial period itself. In dealing with these popular movements, the newly elected Governments also had the question of dealing with security; in many places, this became a serious issue as the demands arising from various sectors of the society were of an overwhelming nature. Under these circumstances, the newly elected Governments turned to the police more as an instrument of control of these social movements and thus at the

very start of independence, new problems of using the police force more for military-like tasks increased. The process of controlling society during emergencies and such circumstances, gave the police a greater power than what would have been available to them under normal circumstances. Thus, in many countries, the issue of natural security began to play a major role in shaping the nature of the policing institutions from the very start of the post-independence period.

This also had a political impact as the people began to see the policing institutions not so much as protectors of their rights but as the protectors of the Governments and instruments that have been used more for repression than for assisting new democracies to expand their democratic freedoms. Thus, it could be easily seen that many of the new democracies have developed a serious conflict between the new aspirations for the greater democratic participation of the people and, on the other hand, the ever-increasing restrictions on the freedoms of the people imposed through policing systems. When the policing systems were inadequate, even the military was called for direct duties, and in those circumstances, the police and the military worked more as collaborators, and thus the distinctions between the military function and the police function was blurred.

These internal factors are even more aggravated when internal conflicts within countries develop into various forms of civil wars. Many conflicts between various territorial factions within the same country, and also factors such as race, ethnicity and religion, have created many extremely serious conflicts, including armed conflicts. When faced with these problems, governments tend to shift their responsibility for maintaining stability by giving greater powers to the national security institutions. Particularly when faced with armed conflicts, almost all rules for maintenance of individual freedoms get suspended. For example, the various forms of extrajudicial killings and the use of enforced disappearances in particular are seen as the most effective methods of control of these internal conflicts. In order to enable the use of such practices,

normal legal safeguards are suspended through the promulgation of emergency laws or national security laws. As a result, there are several countries where very large numbers of persons have been illegally arrested, detained, interrogated, tortured and thereafter killed and their bodies are disposed of. Under such circumstances, in order to mobilize the security apparatus to engage in these activities, it becomes necessary for these states to ensure to these officers that their impunity is assured. With that there are very long periods during which the normal laws of the country are suspended. All obligations for record-keeping of arrests, detentions, interrogations and all other matters relating to these, including recording of deaths, are often suspended.

Thus, during these periods of unrest, a different institutional culture enters into the practices of these institutions that completely and negatively transform the nature of the institution itself. Any attempt to disturb such newly-established thoughts and ideologies would lead to the internal balance of the state apparatus itself being seriously disturbed. Even in spite of national and international pressures, the states resists taking any serious actions under these circumstances as they fear that resistances that can come from their own security institutions could have repercussions that may create political situations which are beyond their control.

Due to all those factors mentioned above, they are developed within the policing and other security agencies within a country, where certain institutional doctrines which expresses the very opposite of what is required to the international norms and standards of human rights which may form the basis of international agreements and even some domestic laws.

The non-application of the principle of the rule of law affects all walks of life because they impact the institutions that are supposed to keep the state functioning. In that way, the institutions that are part of the regulatory infrastructure of a state – from keeping buildings up to code, ensuring food safety and other basic areas, as well as crime prevention – can be used to undermine the very functions that they are tasked to perform.

Doctrines Prevailing in Institutions

Some of these institutional doctrines relating to the relevant developing countries are as follows:

That torture and ill-treatment are essential elements that are required in dealing with the criminal investigations.

That, for purposes of fair trial, the presumption of innocence may be valid, but at the stage of arrest, detention and investigations, this is a principle that cannot be followed as it would lead to many difficulties for the investigators. A more 'efficient' method is based on arrest on suspicion and then, at the investigation stage, laying the burden of proving innocence on the suspect himself. The fact that the evidence gathered in this manner may not be used in the courts may be regarded as of little relevance as the expectations within these policing systems for resolving crimes is not so much the ultimate success after a fair trial but the initial successes in arresting, detaining and reporting what are considered successful investigations. Given the long delays that in trials, the ultimate outcome of the trial is usually regarded as of little consequence.

Thus, there is a very different pattern of thought and practice at the ground level where the police and other security agencies operate. The human rights discourse has not penetrated into this limbo of ideas and practices which are the real measurements of the manner in which people are treated when confronted with these institutions.

Unless capacities are developed within the human rights community to penetrate into these areas and bring these into the discourse, it is very unlikely that any significant achievement would be made at a practical level in improvement of the respect for human rights within these particular contexts.

Policing as the instrument of investigations is also at the core of what determines the work the of prosecutors and also of judiciary on matters relating to criminal justice. If the policing methodologies of dealing with persons fall far below the required

international standards, then there is hardly any room available for the prosecutors and the judiciary to be able to overcome the obstacles that are created in those initial investigations.

Two Suggestions

Following the observations made in this chapter, two main suggestions are offered as at least partial solutions to the existing lack of attention to the obstacles created by the local institutions for the administration of justice for the protection of human rights:

The first is that the Office of the United Nations (UN) High Commissioner for Human Rights should take the initiative to establish an office, such as an ombudsman's office, whose function should be to review the work of all Mandate Holders, all Working Groups and Treaty Bodies from the point of view of their effectiveness in addressing the obstacles created by the local institutions for the implementation of human rights, particularly the local systems of the administration of justice to provide adequate and effective remedies for human rights violations in terms of Article 2 of the International Covenant on Civil and Political Rights and similar provisions in other Conventions. The task of the ombudsman's office will not be to duplicate the work of these other mechanisms but to engage in a review of how effectively the various recommendations that are being made by these UN mechanisms are being implemented and to make recommendations to the UN system itself in order to improve its orientation as well as its effectiveness so as to address particularly the issue of the needed institutional improvements for the implementation of human rights for individuals and groups.

Similar institutions exist in many developed legal systems. An office of the ombudsman or a similar institution has the task of observing the overall system in order to ensure that the needs that are supposed to be served by the judicial system are in fact being achieved and are not what causes the obstacles, and then to also suggest recommendations for overcoming them.

The existence of an ombudsman's office has a further advantage in improving the entire system of the implementation of human rights not only within the UN system but also the other institutions available in the local system. That is by way of generating discourses on the missing link in the field of human rights which is how to link the institutional development relating to the protection of rights to the advancements that are being made in the articulation of rights. If this discourse develops, the academic institutions throughout the world could greatly contribute to a greater understanding of these problems existing in different countries in different parts of the world. Such a generation of a knowledge base with the contributions of the academic communities could greatly enhance the human rights project in a positive direction.

Above all, this will provide the incentive to civil society organizations and also global civil society institutions to engage in this issue of overcoming institutional obstacles to achieving human rights aims.

For some reason, both the UN human rights mechanisms and the civil society movements have so far shown a certain reluctance to enter into this area of institutional development as part of the human rights mandate. In certain discussions, particularly from the Western sector, it has often been expressed as reservations regarding engagement with this issue. One such objection is that this is the work of Governments and that this is not the work of civil society organizations. This of course means that if the Governments on their own do not take the initiative to improve the basic institutions dealing with these problems, then, there is no role for the civil society to fulfil which would mean that the civil society should accept this situation with resignation and do only whatever that is possible within a bad framework of institutions. That is where in most countries, human rights work got stuck and therefore, the very purpose of this paper is to show that so long as this problem remains at that stage, there will not be a solution to many of the human rights violations that exist in the world.

Further objections seem to be that international human rights organizations may feel that they are inadequately equipped to deal with this problem. That is, to some extent, a justifiable observation. The way to overcome this is by motivating their partners in the civil society to engage with this issue and to encourage them in every possible way to build partnerships with them so that on the basis of the work done at the ground level by the civil society to build a solid knowledge base on the existing obstacles, the international organizations could take up these issues to the global human rights community.

Perhaps, the most fundamental objection is from more developed countries, stating that it would be difficult for experts who have been bred within their own institutional framework which is adequately developed by now, to understand another world where these institutions have not yet achieved the desired developments. This is a natural problem for persons born and bred in different cultures to understand other legal cultures. That has to be deliberately addressed by persons who recognize the problem and are motivated to deal with it if many of the efforts that they themselves are making in other ways are to be effective for the actual beneficiaries of this work; that is, the people who have to face human rights violations on the ground level.

The second suggestion is on the need for an institute for ground research on the nature of the legal systems and institutions that operate in developing countries.

The global knowledge on the actual systems that operate as legal systems in many of the less developed countries is little known to the world. There is an absence of a knowledge base on the real workings of these systems. No systematic work has been done for the gathering of information on how the systems actually work and for the meticulous examination of the factors which cause these systems to work in the manner that they do under the present circumstances.

This lack of knowledge remains the major obstacle for any kind of planning or designing of effective assistance programmes

and even concerning the actual criticism on the implementation of human rights obligations by the States in the relevant countries. The lack of this knowledge also prevents the various UN agencies and Mandate Holders from making the kind of recommendations that could actually practically work on ground, thus paving the way to overcome some of the most besetting problems that have been recurring for many years, despite the many attempts by these international agencies to help in trying to overcome these problems.

However, at the ground level, among the litigants, among the various organizations which attempt to help and support the victims of serious human rights abuses and the denial of legal rights, and also among the lawyers and others who are professionally involved with the system, there is a body of understanding which has been gained over the years about the actual nature of the workings of these systems. Thus, this knowledge base that exists naturally in the community could lay the ground work to developing a systematized understanding of the problems affecting these legal systems. What is required is a collaboration between a group of experts and these persons who share the knowledge about the ground realities to authentically record how the systems work in individual cases as well as how the overall defects of the system affect the actual justice related processes in dealing with such cases. The adequate amount of resources needed for the gathering of this information is not formidable. Where such gathering of information has been attempted with rather limited resources, there has been a great deal of information that has been collected on these issues. The work of the Asian Legal Resource Centre based in Hong Kong, which has been working in around ten countries in South Asia and South East Asia is an example of how much information could be collected on these systemic problems, relating to legal systems. [2]

2. E.g. Narrative of Justice in Sri Lanka: 400 torture cases book

An institute based in Asia, as well as similar institutes that could be based in Africa and the Latin American countries, and the like can contribute to the generating of this new knowledge, which could make a considerable difference to the manner in which human rights problems are understood in the world at present.

The academic work created through the ground level connections could be shared with the Governments, with the various institutes in each country as well as the civil society and also with the academic communities throughout the world as well as the UN agencies and other developed countries' agencies which are concerned with the issues of democracy, the rule of law and human rights.

Without such a well thought out strategy to break the gap between the generalized discussions on human rights and the actual ground realities, it will be impossible to break the deadlock that exists today within the global human rights efforts to promote and protect human rights.

Fear of being killed and indication of the failure of the justice system

There is an overwhelming sense of the fear of being killed or otherwise being seriously harmed, which has spread throughout the country, affecting almost everyone except a small group of powerful persons or the rich. This fear affects every aspect of life, for example, the running of legitimate business enterprises, engaging in a healthy environment for all sorts of globally competitive activities, having or expressing independent opinions, and above all, any kind of activism to promote the freedoms and rights of the people, resisting or exposing corrupt practices, being socially daring in a society particularly threatening to women, the self assertiveness of the poor and the underprivileged, and those who exercise the freedoms of expression, association, and assembly. The most dangerous consequences are threatened against those who oppose blatantly illegal activities such as the drug trade and organized crime.

Besides these, tremendously frightening threats are made and often carried out against those who criticize illegal acts and abuses of the Police and other Security Forces.

The result of all these is that the Sri Lankan society as a whole is a very frightened and insecure society. This insecurity is expressed in all vital areas of life such as the functioning of the electoral system which virtually threatens the possibility of free and fair elections where the parties can organize themselves in an atmosphere of freedom. As a result, they are unable to resort to peaceful participation in political life by way of expressing their grievances and the demanding of reforms.

The purpose of a functional system of justice is to remove fear and to expand the possibilities of the peaceful enjoyment of life and to enhance peaceful and joyful participation. Good governance, the rule of law, democracy and human rights all

require the active participation of the people. When participation is crippled, the entire social life is paralyzed.

People invest in their own society only when they trust that their society is functionally healthy. All these fears spreading through society is a clear expression that the blood veins of the economy have got seriously sick.

These days, when these discussions are taking place about the ways to overcome the worst economic crisis that Sri Lanka has ever faced, it is vital to consider how to remove the sickening impact of the fear that has spread throughout the society and find ways to enable the blood veins of the economy to be revived by the healthy flow of the fresh blood of trust and competence.

While the agents that generate fear are manifold, the ultimate instrument through which the fear can be spread or on the other hand dispelled, is national security institutions among which the institutions of the administration of justice are the most important instruments. The prevalence of fear is a clearest indication of a failed system of justice.

This brings us back to the theme of the fundamental importance of the administration of justice for all in Sri Lanka, even from the point of view of presently overcoming the debt default stage that the Sri Lankan economy is in.

Any intelligent and responsible approach to dealing with the present catastrophic crisis requires a wise strategic approach that displaces this overwhelming fear generating environment that prevails in Sri Lanka now.

The practical conclusion of this is that without comprehensive Police reforms, revitalizing Sri Lanka's economy is a baseless idea. Together with Police reforms, a comprehensive reform of the system that creates insecurity which is however wrongly termed as a national security system, is essential. So long as this is not addressed, all talk about the resolving of the economic and political crisis will be just blab. Together with comprehensive

Police reforms, all aspects of the administration of justice such as the work of the Attorney General's (AG's) Department and the Judiciary itself require such thorough reforms.

Finally, without comprehensive reforms of the administration of justice, it is not possible to revive the collapsed system of public administration. Therefore, Sri Lanka cannot raise its head being a failed State as it is now. Sri Lankan civil society movements and individuals must make the attempt to understand this grim reality, "if it is to contribute creatively to rising up from the status of the abyss that the country is in."

සිරකරුවෝද මනුෂ්‍යයෝය

Prisoners are human beings,too

சிறைக்கைதிகளும் மனிதர்களே

සිරකරුවාගේ ආහාරවේල නිල මැස්සන්ගෙන් බේරාදීම මානව යුතුකමක් නොවේද ?

Isn't it a human right of the prisoners to get their food protected from bluebottle?

தமது உணவினை இலையான்களிடம் இருந்து பாதுகாக்கும் மனித உரிமை சிறைக்கைதிகளுக்கு இல்லையா?

RLF
RULE OF LAW FORUM

PART 01: DEMOCRACY

Section 01: A short introduction to the programme

1.1 The programme

Objectives

This course has been designed in a situation where the general public across Sri Lanka is experiencing an unprecedented crisis due to the fact that Sri Lanka has fallen into a state of economic bankruptcy. The resultant food shortage is not only unprecedented in Sri Lanka, but is likely to worsen in the future. According to international reports that have been released at present, about 28% of the population of the country are suffering due to the food shortage. According to these reports, 1.7% of the children under 5 years of age are suffering from malnutrition, and 17% of them are suffering from acute malnutrition. This crisis is indicative of all the other shortages prevailing in the country. The crisis the economy is faced with seriously affects all the other sectors connected to the country's economy.

Apart from the economic crisis the country is experiencing, the crisis prevailing in the political field, too, is enigmatic. This need not be discussed in detail as it is widely spoken of at present.

The crisis that has occurred in the economy and in the politics has resulted in a deterioration in all aspects of social life – the family disputes that have occurred due to unaffordable costs, various problems that result from the worries associated with the difficulties faced in sending children to school, the distressing experiences caused by the shortage of medicine, huge transportation costs and many other issues of this nature have affected all segments of the population.

As a result of all such issues, the number of persons facing serious mental problems has increased greatly throughout the country.

What is worse than all those issues is that there is no basis to have any confidence that solutions will be found for any of those issues in the near future.

The main question that this situation has given rise to is as to what kind of a vision should be adopted in order to gradually recover from the present situation.

This course has been developed with the view to discussing a wide range of basic views and basic concepts that can be applied to solve the problem of the vision for the future and how the necessary basic structural changes and basic institutional changes can be brought about. This course has been designed as a first step towards developing the education sector that is required for effecting a change.

The starting point

When making the journey to seek solutions, there are various views as to where the journey should be started from. Such views include:

* It should be started from the economic sector.
* It should be started from the political sphere.
* The first priority should be given to bring about the necessary changes in the minds and attitudes of all the people in the country.

The alternative offered by this course

The alternative methodology on which this course is based is that the beginning of the change should be started from the country's law enforcement sector. In a background where the law is not implemented, as prevailing at present, it is not possible to bring about any positive change in the economy, in politics, in the social sector or in human attitudes.

From this basic standpoint, a number of basic concepts and principles related to that perspective will be introduced in this

course. Such introduction is made in an interactive atmosphere where the participants in the course get actively involved in the discussion.

The course consists of three parts:

Module 01 (Summary)

1. By providing a deep insight about the philosophy of rule of law, showing how the prevailing economic, political, social and attitudinal crisis in Sri Lanka arises from the collapse of the rule of law. For this purpose, an introduction is made not only about the philosophy of rule of law, but about the law enforcement institutions as well.

   1.1. For example, the curriculum covers areas such as the role of the criminal investigation system in the country in eliminating corruption and in preventing abuse of power, the need for a criminal investigation system that is capable of creating stability in the economy and in society, prevention of illegal arrests, illegal detentions, torture and killing, disappearances and other forms of harassment through a law-abiding police service, and protecting the rights such as the freedom of speech, assembly and association as well as the right to peaceful protests. How discipline should be maintained from top to bottom in the police service and the existing legal traditions related to not allowing anyone to interfere with the administration of justice are also discussed.

   1.2. Role of the Attorney General

   It is the Attorney General's Department that performs the most powerful function related to prevention of crimes in the country. The Department acts as the prosecutor for all serious crimes. The country's economy, politics, social system and the positive attitudes can be maintained only as long as this Department works within the framework of the law. If not, the entire state

structure will collapse. Therefore, the situation that has arisen in this respect should be properly understood. A vision for the future is also needed on how to change the existing situation.

1.3. It is the judiciary that ultimately determines the rule of law. This is the exclusive function of the judiciary. Neither the executive nor the legislature should be allowed to override that function. It is necessary that the prevailing situation in Sri Lanka related to this area is understood and that changes are brought about in that situation.

Module 02 (Summary)

2. Effective prevention of corruption

It is now widely accepted that effective prevention of corruption is one of the most difficult issues affecting Sri Lanka. Despite such general acceptance, no one has so far presented any vision on how to overcome this issue.

However, it is an indisputable fact that the economic bankruptcy and the unsolvable political crisis that the country is now facing is undoubtedly the result of the aforementioned corruption.

Accordingly, it is obvious that the grave, unsolved problem that affects Sri Lanka is the issue of corruption.

There is no space for thinking about the future of the country without thinking of how this serious issue can be overcome and without building visions for the future.

Therefore, as it is impossible to think about the future without discussing ways as to how the issue of corruption can be addressed, the most important part of this educational course should be to make efforts to build a vision for the future to eliminate corruption.

The following points related to this theme are important:

02.1 non-implementation of the existing anti-corruption laws accordingly

Under this theme, the following points should be considered; i.e., the following points should be studied regarding the gaps in the present Bribery and Corruption Commission of the country.

2.1(a) To what extent is the Bribery and Corruption Commission independent? What are the obstacles that affect its independence?

2.1(b) How efficient is the Bribery and Corruption Commission? In performing functions such as receiving complaints, recording complaints, investigating complaints, prosecuting based on those investigations and resolving those cases within a reasonable period of time, how professionally reasonable are the leadership and the officials of the Commission, and are they working with a high level of professionalism and training?

2.1(c) Are the necessary technical facilities available to support the efficiency and intellectual prudence? Does this Commission and other corruption prevention institutions such as the FCID have the professional knowledge and skills needed to conduct investigations, particularly regarding financial matters?

2.1(d) Has the manner in which the Chairman and the members of these commissions should act in performing their duties been properly legislated? To what extent is acting on their discretion restricted?

2.1(e) Is attaching investigators to these commissions from the police service itself an obstacle to the effectiveness of these commissions? Is it not possible to maintain more independence and the required confidentiality by establishing and developing a carder of independent investigators within these institutions themselves without attaching officers to these commissions from the Police or other government institutes? Shouldn't lessons be learnt

from the experiments carried out in other countries in this regard?

2.1(f) How can the latest laws and rules that have been developed in the world to fight against corruption be promptly incorporated into the Sri Lankan law?

2.1(g) To what extent has the United Nations Convention against Corruption been incorporated into the Sri Lankan law?

Module 03 (Summary)

3. How the existing 1978 constitution interferes with the rule of law in the country and with the prevention of corruption; why should the entire constitution be reformed?

3.1 The terrible wrongs in the 1978 constitution include ignoring the principle of rule of law and formulating it based on principles contrary to that, ignoring the internationally accepted principle of distribution of power, making the executive a state body with supreme power overriding the parliament and the judiciary, raising the office of the executive presidency to a level above the law, distorting the concept of the sovereignty of people and thereby creating a situation in which the election system has become highly corrupt, paving the way for the spread of corruption within the parliament, imposing serious restrictions on governing the entire state mechanism through the judiciary subject to the law and thereby allowing the deterioration of rule of law, allowing corruption to enter into government institutions, and many more serious issues.

3.2 How can these wrongs be corrected? It can be done only by adopting a new constitution. How can it be done? It can be done by –

* Holding a referendum to change the constitution.
* Establishing a Legislative Council based on the mandate received from the referendum.

This Legislative Council should include representatives of the parliament as well as people's representatives who are directly appointed. The composition of the Legislative Council should ensure the representation of all sections belonging to various fields such as agricultural sector, industrial sector, business sector, financial institutions, labour and trade unions, women's organizations, students' organizations, religious and cultural sectors, and minorities. The affairs of the Legislative Council should be held in public, and it should not function under the control of any party or group of parties.

* The Articles relating to constitutional amendments in the existing 1978 constitution should be changed in order to enable the establishment of this Legislative Council. This can be done either through a constitutional amendment or by making it a part of the referendum itself.

Outlined above is the broad field of the abovementioned course. Supplementary notes and other materials will be provided for each topic on the relevant occasion.

Videos are being produced on each of the above-mentioned topics, and they will be presented as part of the course itself.

Reading List

Module 01

Rule of Law – Tom Bingham

http://www.humanrights.asia/wp-content/uploads/2020/08/Neethiya-Matha-Palanaya.pdf

Module 02

Law and Discipline – an AHRC publication

http://www.humanrights.asia/wp-content/uploads/2019/07/Neethiya-Saha-Vinaya.pdf

1. United Nations Convention against Corruption

Link: https://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf

2. European Convention against corruption involving public officials

Link: https://eur-lex.europa.eu/EN/legal-content/summary/convention-against-corruption-involving-public-officials.html

The EU has adopted two materials to combat corruption.

A. Convention on the fight against corruption involving EU officials or officials of EU countries

Link: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A41997A0625%2801%29

B. Council Act drawing up the Convention on the fight against corruption involving EU officials or officials of EU countries

Link: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A31997F0625%2801%29

Module 03

01. Gyges' Ring – The 1978 Constitution of Sri Lanka

http://www.humanrights.asia/resources/books/gyges-ring-the-1978-constitution-of-sri-lanka/

02. Gyges' Ring – The 1978 Constitution (Sinhala Translation)

03. For What is a New Constitution? (a publication)

http://www.humanrights.asia/sinhalabooks/Aluth+Viyavasthawak+Kumatada

A series of other articles.

1.2 The modules for teaching on rule of law and its relevance to resolving of economic, political and legal system problems of Sri Lanka.

General introduction:

This series of modules for teaching of the rule of law within the special context of Sri Lanka was undertaken particularly in terms of the worst economic crisis that has hit Sri Lanka since about February 2022. This economic crisis is also acknowledged connected to a political crisis. The political crisis is a result of certain constitutional changes which were undertaken particularly since 1978 when a new constitution was introduced into Sri Lanka which virtually displaced the notion of supremacy of law and the rule of law. Thus, we have a total crisis where different areas of crisis are deeply interconnected. Resolution of one requires understanding of also others. Particularly, understanding of the legal system crisis which has virtually made the operation of law in Sri Lanka difficult is one of the major themes that need to be understood.

Thus, at the introduction of this first module, we will concentrate on how the crisis of the rule of law has a direct connection to the present economic catastrophe in Sri Lanka and try to demonstrate that no sustainable solution could be found for that economic crisis without also addressing the problems relating to the serious collapse of the rule of law in the country. The present economic crisis which has brought Sri Lanka to be lifted among the countries which are characterized as having fallen to what is known hard default is regarded by the experts as one of the worst manmade disasters in recent times. There is a common understanding and agreement that this situation came about due to a failure of management of the economy as a whole.

Careless borrowings without any plan for improved investments and generation of income resulted in an economy where import expenses are far higher than it exports. Result was ever increasing gap between the two. Finally, it reached a point

when the country became incapable of paying back the parts of loans and also interest. With that, Sri Lanka has been classified as a country that is incapable of honoring its obligations under the international trade. Thus, it created serious trade problems such as bringing of oil, gas and other power related materials and also basic necessities as food, medicine and the like.

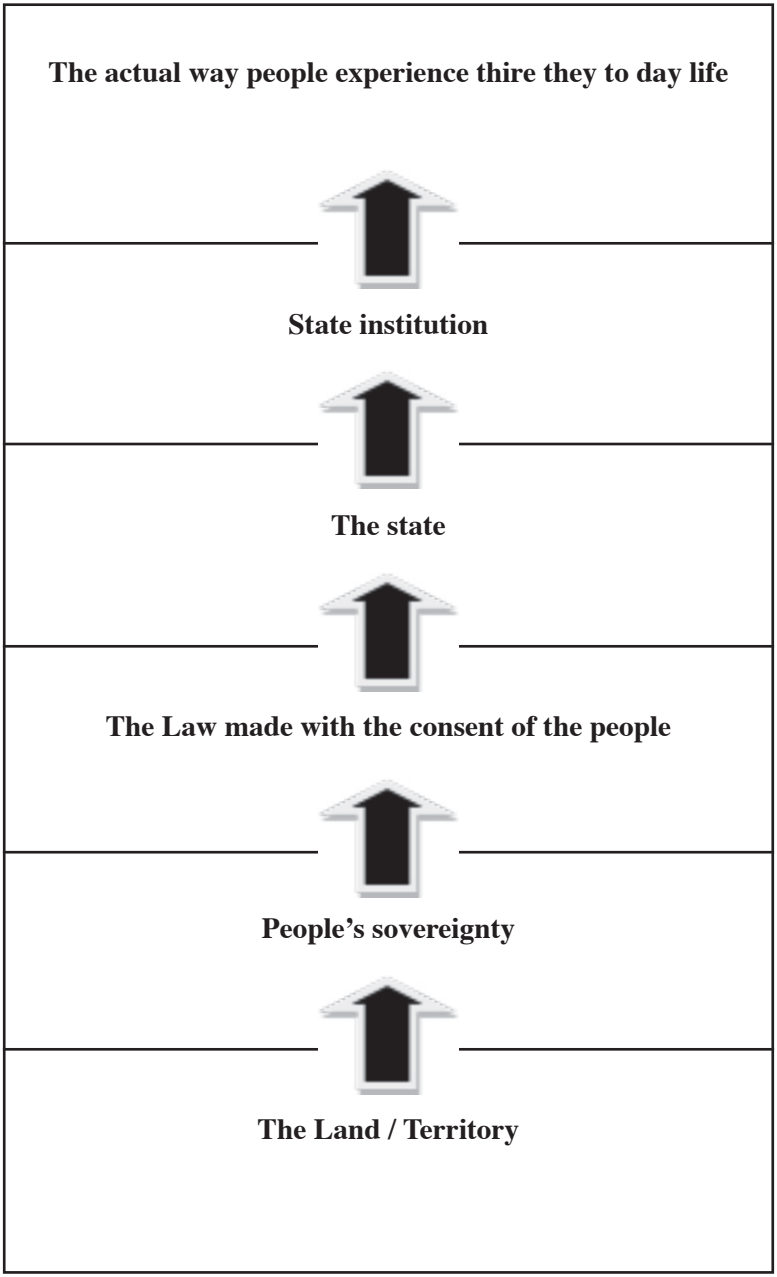
We need to analyze what mismanagement means in the light of principles of rule of law. The rule of law requires that everybody is bound by the legal obligations prevalent in the country. By creating a system of political management which was not bound by the principles of supremacy of law, the entire system went through a great disturbance. Generally, this problem is known in Sri Lanka as the problem of the executive president. This means that the chief of the executive who has a title of executive president is above the law. Through the executive president, entire executive also acquires this character of being able to do whatever that the government wants to do irrespective of as to whether such decision and actions contravenes the basic principles of law. Thus, the executive is able to disregard the legality of their action. When the legality of actions is an irrelevant factor, then there is no way to control the entire system of governance within the framework of law. This allows the practices of mismanagement to be spread into all areas of governance, all the public institutions. The rules and regulations which have been developed over a long period of time in order to keep the system within a framework of strict rules in order to avoid corruption and abuse of power is thus displaced. When this spread into the entirety of public institutions, the whole of the state bureaucracy is affected by that and from then on there is no way to hold the government accountable for their actions. When this spread also to the regulatory framework of finance in the country, then even the most important institutions that sustain the economy like the central bank, treasury and the like all get affected and as a result, it becomes impossible for the financial system to be kept within a framework that will sustain the economy.

It was that situation which finally created a problem of government expenditures which far exceeded the government

income. This gap has by now become so vast that the government became incapable of honoring its obligations to the institutions that have provided international loans which has gradually become so enormous that it is not within the power of the government anymore to deal with these problems.

When governments are faced with this kind of crisis rarely, there are international mechanisms through which some actions can be taken in order to restructure these loans and find a way of recovery. Mismanagement within Sri Lanka was such a great proportion that even these measures were not taken in time and that too was recognized as one of the major causes for the present economic crisis.

Thus, in trying to understand the economic crisis, it is also necessary to understand how the operation of supremacy of law and the rule of law helped a nation's public institutions to be kept within a system of controls where such mismanagement will be noticed quite easily and measures can be adopted in order to stop it at the most initial stages. Thus, what is called mismanagement in economics and what is called disorder in the language of the rule of law arise from the same route. The route is the inability to ensure that the principles of the rule of law is pursued in all dealings in both public and private sectors whereby public order is maintained in all areas including the management of the economy. In this module, this will be studied in detail in order to understand how relevant this issue is to Sri Lanka at the moment. Connected to the issue of the economic disorder is the political disorder that prevails within the country. It is possible to argue that it was the political disorder that created the disorder within the economy. In order to demonstrate that during this module, there will be a brief analysis of Sri Lanka's constitutional crisis. The 1978 constitution and the chaos which created in the system of ruling in the country will be studied for the purpose of understanding how that crisis itseld is fundamentally a situation which has written due to displacement of the notions of supremacy of law and the rule of law.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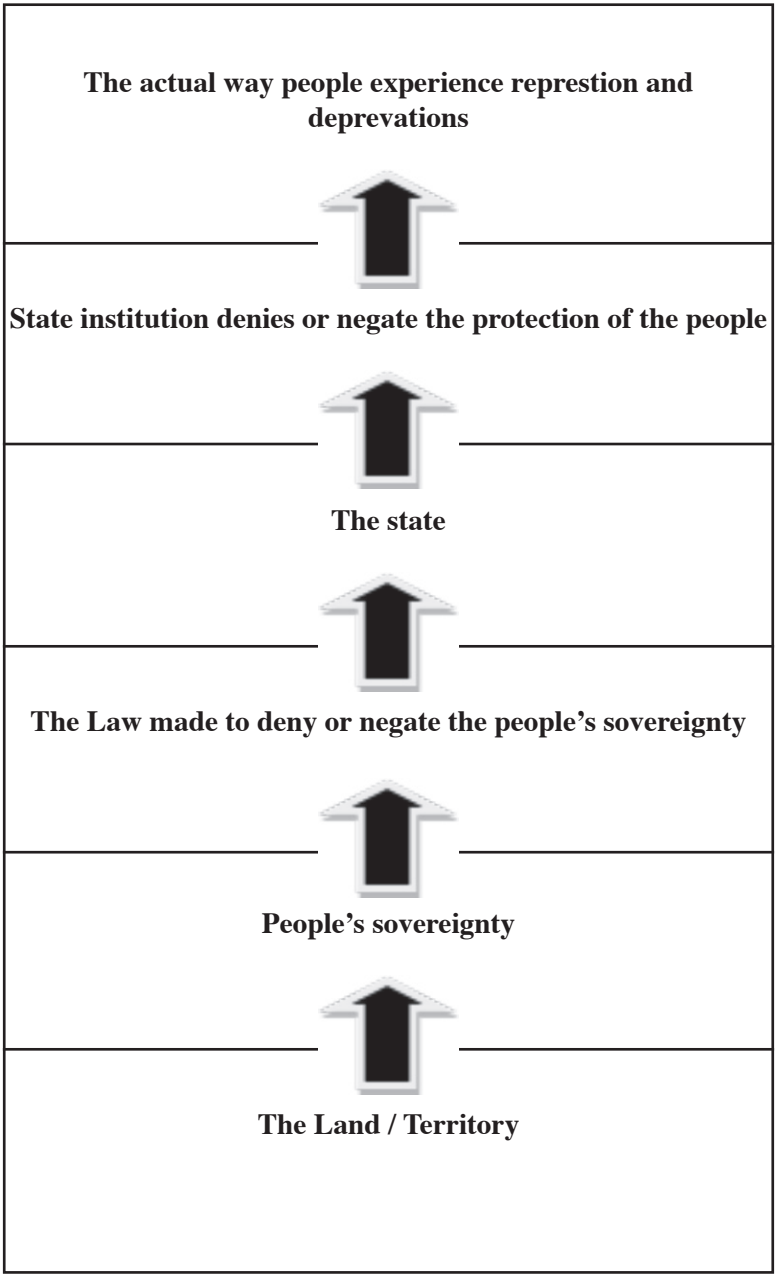
The state
The Law made with the consent of the people
People’s sovereignty
The Land / Territory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The state
The Law made to deny or negate the people's sovereignty
People's sovereignty
The Land / Territory

Section 02: Questionnaire on Democracy, rule of law and human rights

1. General

1.1 Is there a general understanding that the overall legal system in Sri Lanka is based on the principle of the rule of law?

1.2 When was the principle of the rule of law introduced as the overall binding thread of law in Sri Lanka?

1.3 Prior to this introduction, what were the principles on which the previous legal system was based?

1.4 In the previous legal system (before the introduction of the new system by the British), was there any principle of law which was above the power of the monarch? Were there any limitations on the power of the king and his representatives in the use of their own wishes and discretion in making rules, in implementing orders, or imposing punishments?

1.5 Were there any universal norms applied to the whole country on the basis of the recognition of the equality of all citizens?

1.6 Was the principle of disproportionate punishment forbidden under the previous legal system?

1.7 How far were physical punishments such as the cutting off of hands or any parts of the body, the lashing of suspects, the death sentence, including most painful forms of physical punishments, and the public exhibition of executions, accepted as normal forms of punishments?

1.8 Was there a system for the examination of the truth of any allegation against suspects before they were found to be guilty or punished? Further, was there any legal obligation to faithfully maintain a record of any such examination or inquiry?

1.9 Was there any recognition of the principle of complete freedom from torture or cruel and inhuman treatment?

1.10 Was there any idea of the proof of the truth of any allegation or suspicion? Were mere personal impressions by the one who is imposing the punishments considered as adequate?

1.11 Were there any written judgements stating the charges, the evidence, the finding of the truth of the allegations, and the reasons for the judgement and further punishments and reasons for such punishments?

1.12 Was there any procedure for the conduct of such proceedings? Was the whole process of making allegations and imposing punishments done in a purely arbitrary manner?

1.13 Was there a right of appeal? Was the idea of an appeal known in Sri Lanka in the period prior to the introduction of the new system by the British?

1.14 Were there positions like independent judges and independent prosecutors, existing during the period prior to the introduction of the new system by the British?

1.15 What is the difference between the king being bound by traditions and everyone being bound by the law under the new system?

2. On the Constitution

2.1 Is the principle of the rule of law a foundational principle of the 1978 Constitution? What are the differences on that issue between the Soulbury Constitution (1947) and the 1978 Constitution?

2.2 Was there anyone who was considered outside the principle of equality before the law under the Soulbury Constitution? Is the situation the same under the 1978 Constitution?

2.3 Is everyone bound by the same laws and entitled to the same benefits under the 1978 Constitution?

2.4 Are all laws in Sri Lanka made in public – meaning with public consensus and consent arrived at following a credible process of consultation which reflects the people's consent for such laws?

2.5 By what ways has the 1978 Constitution created restrictions for the obligation to make all laws in public – for example, the shortening of the period available for consultations and interventions by the people for Bills presented to the Parliament, the limitations imposed on the judicial review of legislation, public security laws which give extraordinary powers to the Executive to suspend the operations of normal laws, and the making of special laws and regulations without proper consultation with the people by way of special gazette notifications, and other such methods?

2.6 What damage has the restrictions mentioned in Paragraph 2.5 done to the principle of the operation of the rule of law and in particular to the principle of the making of laws in public?

2.7 Of the powers given to the Executive under the 1978 Constitution and also to Ministers in relation to the official decisions that they make on the behalf of their Ministries, what of those are exempted from judicial scrutiny, and the violation of the basic principles of the rule of law relating to everybody being equal before the law?

2.8 Is the Legislature bound by the principle of the rule of law in the making of laws as well as in the conduct of all proceedings as Legislators?

2.9 Can the Legislators make laws which displace or modify the application of the principle of the rule of law by the making of legislation for the purpose of undermining the rule of law?

2.10 Can the Legislature by whatever majority, directly or impliedly, remove the legislative measures created for the purpose of protecting and safeguarding the rule of law?

2.11 Can the Legislature remove the rule of law as the foundational principle of the Sri Lankan legal system? Thus, is the position that the Sri Lankan Constitution does not have a basic structure which is unalterable, a correct position? If such a position is held to be correct, then, is there any real value or meaning of having a Constitution?

2.12 Is the Judiciary bound by the principle of the rule of law?

2.13 Can the Judiciary declare as valid any legislation including a Constitutional Amendment if such proposed legislation is in conflict with the principle of the rule of law and the supremacy of the law?

2.14 Is it valid to impose a limit to challenging the law including even a Constitutional Amendment by confining the time period prior to the passing of such legislation?

3. The bureaucracy

3.1 From where does the bureaucracy at all levels derive their power, authority, and legitimacy of action, except through the operation of the principle of the rule of law?

3.2 How to assure uniformity of behaviour of the State towards all citizens in all parts of the country, except through the operation of the principle of the rule of law?

3.3 How to assure uniformity of expectations among all citizens except through the practice of the principle of the rule of law by all those agents of the State acting in various capacities?

3.4 How to assure a sense of fairness and the belief in the equality of opportunities except through the operation of the principle of the rule of law by all those agents of the State acting in various capacities?

3.5 How to assure discipline in the management of the State including that of the private sector except through the operation of the principle of the rule of law by all those agents of the State acting in various capacities?

3.6 How to prevent bribery and corruption within State agencies and outside if the principle of the rule of law is respected and enforced?

3.7 Can 'orders received from above' justify State officers acting contrary to the principle of the rule of law?

3.8 Can 'orders received from above' justify State officers of whatever rank failing to carry out their duties as prescribed by their job descriptions which are based on the principle of the rule of law?

3.9 If the job descriptions are themselves opposed to the principle of the rule of law, are those job descriptions binding and would they be a defence to those who carry out the tasks given under such job descriptions? For example, if the job description of a particular State officer or a group of officers includes the right to use unnecessary and excessive force, are such officers excused by relying on such job descriptions? Can a Head of State or Head of a Ministry or a Head of a Department state that "whatever I say is the law and you are obliged to obey and carry out my orders even if they are contrary to the principle of the rule of law"?

3.10 Can valid laws be interpreted in a manner so as to suit particular political and personal agendas which are in violation of the principle of the rule of law?

3.11 If any section of the State bureaucracy and in particular the Security Forces like the Police and the military violate the principle of the rule of law, can such a country prevent itself from falling into disorder and anarchy?

3.12 Can the prevalence of disorder and anarchy, and the spread of bribery, corruption and the abuse of power be separated?

3.13 Is not the present state of economic bankruptcy a result of the failure of the State bureaucracy and the rulers to strictly follow the principle of the rule of law?

3.14 Does the term 'system change' mean anything if lawless ad-hoc systems that now operate in the country are brought down and the rule of law is instituted in its place?

The rule of law and the institutions for the administration of justice – the Police, the prosecutions and the Judiciary

4.1 What are the links and differences between the passing of a law and the implementation of a law?

4.2 What are the State agencies through which laws are implemented?

4.3 What are the measures by which the violations of laws are prevented by competent, efficient, and speedy action taken to punish perpetrators of the violation of laws?

4.4 Is Sri Lanka an example of such a system of the competent, efficient, and just implementation of laws?

4.5 What is the role of investigations into crimes in punishing offenders and preventing the commission of crimes?

4.6 Does the Sri Lankan Police system have a reputation of conducting competent, efficient, speedy and just investigations into crimes?

4.7 Does the Sri Lankan Police consider that it is a part of its obligation to investigate into all crimes?

4.8 Does the Sri Lankan Police desist from investigations into crimes due to repercussions which may be political or which may arise from powerful persons or gangs engaged in organized crimes?

4.9 How far does corruption play a role in preventing investigations into crimes?

4.10 Does the principle of command responsibility operate within the Sri Lankan policing system in ensuring investigations into all crimes and in particular those crimes which are of a more serious nature?

4.11 Does the principle of command responsibility operate from officers beginning with the Inspector General of Police (IGP) down through various ranks below him/her or do persons outside the Police organizational structure interfere with and control the investigations into crimes?

4.12 Can the Executive represented either by the political leaders or senior officers acting on behalf of the senior office of the bureaucracy in turn acting on behalf of those who hold political authority, interfere with the functioning of criminal investigations by the Police?

4.13 Are the officers belonging to the Police who resist such interferences protected by those who hold higher positions within the policing organizational structure, or are such officers who act with integrity exposed to punishment?

4.14 Is there a widespread fear within the members of the Police force to the effect that doing their duty with integrity will expose them to serious consequences and punishment?

(i) Illegal arrest

4.15 In arresting persons, does the Police act in terms of the legal provisions as contained in the Constitution of Sri Lanka, the criminal law of Sri Lanka, the Criminal Procedure Code in Sri Lanka, the laws relating to Police regulations and other laws prescribing the manner in which decisions for arrest should be made and how arrests must be carried out?

4.16 Do the arresting officers fully respect the rights of the persons arrested and treat the arrestees with respect and dignity?

4.17 Do the arresting officers explain to the arrestees their rights while in custody, for example, the right for protection including freedom from torture and ill treatment, the right for food and water, the right for sanitation, the right for medical treatment where necessary, the right of access to their family and legal counsel, and the right to communicate with their family?

(ii) Maintaining records

4.18 Do the Police maintain the Police information book where all matters relating to complaints and investigations are properly recorded?

4.19 Are all the details of an arrested person from the time of arrest to the time of release or production before a magistrate, faithfully and currently recorded?

4.20 Do the Police maintain their pocketbooks by making the necessary entries from the time of leaving the Police station up to the return to the Police station, including all entries relating to the arrest of a person and the gathering of other information in these notebooks? If notebooks are maintained, what use is made of such reports gathered from the notebooks?

(iii) Reporting to courts

4.21 Do the Police present truthful records about their investigations to the magistrates?

4.22 Is there any system or method to check the veracity of the information presented when the suspects are produced before courts?

4.23 Do the Officers In Charge (OICs) of Police stations and the Assistant Superintendents of Police (ASPs) play the role that is expected of them under the law in ensuring that the reports presented to the magistrates are reliable and truthful to the best of their knowledge?

4.24 Are all investigating officers properly instructed on their obligations to be truthful to the courts and avoid misleading the courts?

4.25 By whom and by what means are such institutions to maintain a relationship based on integrity in reporting matters to the courts?

4.26 Do the magistrates themselves take a very strict approach in order to ensure that a relationship of trust is respected by the Police in relation to the courts?

4.27 Is there an instance where a magistrate has taken the Police to account for false or fake reports presented to them by the Police?

4.28 Is there an instance when ASPs or other high ranking officers have intervened when citizens make complaints about false allegations or false reports submitted against them by any Police officer?

4.29 Is there a fear among high ranking Police officers to maintain strict discipline within the policing system, and in particular, the relationship of the Police to the courts?

4.30 Do the Police comply with court orders like the execution of warrants or do the Police obey these orders only selectively?

4.31 Do the Police object to bail for some suspects purely for the purpose of harassing them through periods of remanding such persons?

4.32 Are the objections of the Police for the refusal of bail to a suspect strictly based on legally valid grounds?

(iv) The quality of high ranking officers

4.33 Do the OICs of Police stations and those above the rank of OICs generally enjoy the people's confidence and trust?

4.34 Do you agree with the recent statement by the IGP that a very large percentage of OICs presently holding that

position have not been recruited through the procedures established within the Police Department but through undue influences? If this is the case, is it reasonable to expect that they will perform their duties in proper manner?

4.35 If the OIC's role fails, is it possible to expect that the rest of the officers belonging to the Police station will not exploit that situation?

4.36 Do the ASPs perform duties expected of them in terms of the Departmental orders of the Police and other legal and administrative responsibilities?

4.37 Do the weekly visits expected to be done by the ASPs actually take place and if so, is it in a proper manner? Do they do their functions of monitoring and inspection as required by the laws and regulations?

4.38 Have neglect and corruption eroded into this system of supervision by the ASPs?

4.39 What is the quality of performance of other high ranking officers such as ASPs, Deputy Inspectors General of Police, and the IGP in ensuring that the proper legal processes are followed by officers who are under their charge?

4.40 Do these high ranking officers control the policing establishment or on many important matters, is the control exercised from outside?

(v) The militarization of policy

4.41 From the 1970s, there has been a prolong period of civil conflicts in Sri Lanka. During this time, officers of the Police Department were taken out of their duties and were put to work closely with the military. As a result, the distinction between the civilian character of the Police and the military characteristics got further messed up. At present, how much of the civilian characteristics of policing have still remained intact against the military characteristics?

4.42 In general, Police officers maintain a polite, cordial, and friendly relationship with the people. Do the people have trust and confidence in the Police and the policing system?

4.43 Do the Police greet everyone irrespective of social status and rank?

4.44 Has the Police been taken away from their normal law enforcement functions and instead deployed more for security operations?

4.45 Is there an adequate number of trained and competent Police officers to conduct inquiries into crimes?

4.46 Has the engagement with the military caused a change of mentalities and attitudes among the Police in favour of the use of violence, for example, the use of torture and ill treatment, the commission of acts of extra-judicial killings and other engagements reflecting violent behaviour?

(vi) Treatment of the people

4.47 Do the police treat everyone equally without racial, ethnic, or religious bias?

4.48 Do the Police treat women with equality and respect?

4.49 Is there a special complaint unit for women about sexual harassment?

4.50 Is there an adequate number of women at Police stations and do they provide special protection for women?

4.51 Are the attitudes of women officers different from the dominating attitudes of male officers?

4.52 Is the use of rough and even vulgar language common at Police stations?

4.53 Are there equal opportunities for career advancement of women within the Police Department?

(vii) Resource availability of the Police

4.54 Do the Police have adequate resources in order to maintain reasonable salary requirements which are on par with the salary related standards of the country?

4.55 Do the Police have adequate resources to carry out their duties such as transport, and the materials needed to conduct inquiries such as camaras, recorders, and other material instruments to enable thorough and speedy inquiries?

4.57 To what extent is modern equipment such as computers, information technology facilities, and other communication technologies introduced into the workings of Police stations and other policing institutions.

4.58 How much of training is facilitated for the officers on the use of such technologies for their day to day work?

4.59 How far do internal rules and regulations change or readjusted in order to computerize and digitalize information collected at Police stations relating to crimes and other matters?

4.60 How far have modern communication channels that have been developed been put into the policing system as a whole so that there could be a greater exchange of information within the institution which in turn will help in making the decision making processes speedier?

4.61 How far are the supervisory capacities developed, maintained and enforced within the Police Department in order to ensure the proper functioning of the whole system?

Similar questions can be developed relating to the functioning of the AG's Department, the Judiciary, and the Prisons Department.

Section 03: A List of Most Basic Reforms Needed

- Legally re-state the rule of law as the foundational principle of the Sri Lankan Republic - This will make the problem of the excessive power of the Executive President disappear. Further, such re-statement will make the Parliament a reliable, credible institution.
- Remove all obstacles placed against the Judiciary to function fully with the foundational principle of the rule of law for this purpose. Reinstate the separation of powers principle as required within a democracy. As an equal branch of Government - the Judiciary, judicial review powers must be fully re-instated.
- Reassert strongly the power to criminalize interference with the administration of justice, so as to protect the foundational principle of the rule of law.
- Thoroughly reform the Police and the prosecutor's role played by AG's Department to bring these institutions to function with the foundational principle of the rule of law.
- Strengthen corruption prevention laws and provide for the strict enforcement of those laws.
- Provide for the protection of State officers, so that they need not fear repercussions for performing their duty within the framework of the law.
- Link good governance and the rule of law.
- Re-instate the electoral law within the foundational principle of the rule of law and provide for any violation to be dealt with within that framework.
- End delays in justice, as it is not possible to enforce the rule of law so long as there are such delays.
- Provide for effective legal redress for the violation of human rights.

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Section 04: A reading on the link between the democracy, rule of law, and human rights

Human Rights Council
Twenty-fifth session
Agenda items 2 and 3
Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General

Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development

Report of the United Nations High Commissioner for Human Rights on the role of the public service as an essential component of good governance in the promotion and protection of human rights

Summary

The present report begins by providing some background information on good governance and human rights and definitions of relevant concepts. It then addresses the role of public service as an essential component of good governance in the promotion and protection of human rights and highlights the major challenges to public service in the promotion and protection of human rights. It also contains a compilation of good practices based on submissions received from Member States, intergovernmental organizations, national human rights institutions, a non-governmental organization and an observer to the United Nations.

I. Introduction

1. In its resolution 19/20 on the role of good governance in the promotion and protection of human rights, the Human Rights Council requested the Office of the High Commissioner for Human Rights to prepare and present to the Human Rights Council, at its twenty-fourth session, a comprehensive report outlining the role of the public service as an essential component of good governance, including a compilation of best practices based on information received from Member States of the United Nations, national human rights institutions (NHRIs) and non-governmental organizations (NGOs). At its twenty-fourth session, the Council was informed that, in accordance with the calendar of thematic resolutions of the Council, the report would be submitted to the Council at its twenty-fifth session.
2. The Council invited the relevant stakeholders to provide information on "good practices and their views regarding the organization, training and education of the public service in the promotion and protection of and respect for human rights". The submissions were to include views on "impartiality, accountability and transparency and the highest standards of efficiency, competence and integrity, as well as activities developed to assist and support the public service".
3. Submissions were received from 35 Member States, 4 intergovernmental organizations, 1 NGO, 2 NHRIs and 1 observer to the United Nations.

II. Background and definition of concepts relating to good governance and human rights

A. Defining the role of public service as a component of good governance and its linkage with human rights

4. The definition of good governance has evolved over time and has shifted from governance priorities aimed at increasing economic efficiency and growth to those governance policies and institutions that best promote greater freedom, genuine

participation, sustainable human development and human rights. The international community has, directly or indirectly, established the interconnection between good governance, human rights and sustainable development in a number of declarations and other global conference documents. In making the link between good governance and human rights, Human Rights Council resolution 7/11 recognizes that transparent, responsible, accountable and participatory government that is responsive to the needs and aspirations of the people, including women and members of vulnerable and marginalized groups, is the foundation on which good governance rests. It also recognizes that such a foundation is an indispensable condition for the full realization of human rights, including the right to development. [3]

5. There is no universally recognized definition of "public service". Public service is often broadly bracketed with public administration and public sector governance. According to the United Nation Development Programme (UNDP), "Public administration refers to: (1) The aggregate machinery … funded by the state budget and in charge of the management and direction of the affairs of the executive government, and its interaction with other stakeholders in the state, society and external environment; (2) The management and implementation of the whole set of government activities dealing with the implementation of laws, regulations and decisions of the government and the management related to the provision of public services." [4] Closely linked with this is the notion of

3. The concept of good governance was earlier dealt with by the former Commission on Human Rights in a number of resolutions between 2000 and 2005. In its resolution 2000/64, the Commission identified the key attributes of good governance as transparency, responsibility, accountability, participation and responsiveness to the needs and aspirations of the people. The resolution also expressly linked good governance to an enabling environment conducive to the enjoyment of human rights and to promoting growth and sustainable human development.
4. UNDP *Public Administration Reform: Practice Note,* pp. 1–2. Available from www.undp.org/content/dam/aplaws/publication/en/publications/democratic-governance/dg-publications-for-website/public-administration-reform-practice-note-/PARPN_English.pdf.

public sector governance which, according to the Definition of basic concepts and terminologies in governance and public administration (E/C.16/2006/4), "has been defined as regimes of laws, rules, judicial decisions and administrative practices that constrain, prescribe, and enable the provision of publicly supported goods and services" (para. 26).

6. While definitions vary, this report focuses specifically on those aspects of public administration and public sector governance that relate to delivery of and equitable access to public service, transparency in budgets and public finance, responsiveness to the views of the people, their participation in decisions that concern them and enhanced accountability.

7. Various themes that fall within the rubric of good governance are inextricably linked with the promotion and protection of human rights. Four prominent themes are: (a) strengthening democratic institutions; (b) improving service delivery; (c) the rule of law; and (d) combating corruption. [5] Notably, "in the realm of delivering State services to the public, good governance reforms advance human rights when they improve the State's capacity to fulfil its responsibility to provide public goods which are essential for the protection of a number of human rights, such as the right to education, health and food." [6]

B. Good governance and human rights: complementarity and convergence?

8. The relationship between good governance and human rights is a complex one, given the different origins and usage of the concepts. In earlier connotations, the good governance concept had a technocratic bias which was aimed at creating the best possible conditions for economic development.

9. A seminar on good governance practices for the promotion of human rights, jointly organized in 2004 by the Office of

5. *Good Governance Practices for the Protection of Human Rights* (United Nations publication, Sales No. E.07.XIV.10), p. 3

6. Ibid., p. 2.

the United Nations High Commissioner for Human Rights (OHCHR) and UNDP, concluded that that there is a mutually reinforcing relationship between good governance and human rights (E/CN.4/2005/97, p. 2). "Human rights principles provide a set of values to guide the work of Governments and other political and social actors … Moreover, human rights principles inform the content of good governance efforts: they may inform the development of legislative frameworks, policies, programmes, budgetary allocations and other measures. However, without good governance, human rights cannot be respected and protected in a sustainable manner. The implementation of human rights relies on a conducive and enabling environment. This includes appropriate legal frameworks and institutions as well as political, managerial and administrative processes responsible for responding to the rights and needs of the population." [7] Moreover, "governance is central for effective policy formulation and implementation, including for the integrated delivery of essential services, such as education, water, sanitation and health." [8]

10. In resolution 19/20, the Human Rights Council outlines the following good governance principles: accountability, transparency, integrity, non-discrimination, participation, equality, efficiency and competency. Many of these principles overlap as human rights principles, though it is essential that when the two concepts are linked, good governance should ideally be defined and guided by existing normative interpretations of these human rights principles and human rights standards more broadly. This general approach of using human rights as a guide can also apply to good governance principles such as integrity, which is not a human rights principle per se, but in the context of good governance, integrity is a key element that completes the notion of accountability and transparency.

7. Ibid., pp. 1–2; see also E/CN.4/2005/97, para. 8.
8. Global Thematic Consultation on Governance and the Post-2015 Development Framework: Consultation report, 2013, sect. 4.1.1.

III. How can a human rights-based approach contribute to improving public service?

A. General added value of a human rights-based approach to public service

11. "States are responsible for delivering a variety of services to their populations, including education, health and social welfare services. The provision of these services is essential to the protection of human rights such as the right to housing, health, education and food." [9] The role of the public sector as service provider or regulator of the private provision of services is crucial for the realization of all human rights, particularly social and economic rights. Certain services, such as policing or administering justice, focus directly on the protection of individual freedoms and others, such as education, health and food, have a markedly social character which is essential for building the human capital necessary for sustainable development and the realization of economic and social rights.

12. A human rights-based approach to public services is integral to the design, delivery, implementation and monitoring of all public service provision. Firstly, the normative human rights framework provides an important legal yardstick for measuring how well public service is designed and delivered and whether the benefits reach rights-holders. The human rights framework empowers rights-holders and requires States as duty bearers to act in conformity with their human rights obligations. Secondly, human rights principles can contribute to guiding and improving public service, complementing existing value systems such as public service ethos and other good governance principles such as efficiency, competency and integrity. This approach also leads to improved public service outcomes and better quality of public service.

9. *Good Governance Practices for the Protection of Human Rights* (United Nations publication, Sales No. E.07.XIV.10), p. 38.

Thirdly, public service providers should not underestimate the financial or reputational costs of violating human rights and the resulting loss of public trust, low morale and poor public perception. Fourthly, a human rights-based approach also protects against discrimination and tests whether existing public service systems protect the rights of persons who are vulnerable and marginalized or whose access is hampered by poverty, disability or other forms of exclusion.

13. Public authorities often handle complaints with human rights implications across a wide range of public services, but what is missing is an awareness and consideration of these implications. A human rights-based approach can be used more broadly to inform policymaking by public officials and development specialists, enabling them to take decisions that are in line with the international human rights obligations of the State.

B. Applying human rights principles to public service

14. In order to follow a human rights-based approach, key human rights principles must be applied to decision-making regarding public service and in all aspects of public service.

15. As indicated in the Definition of basic concepts and terminologies in governance and public administration (E/C.16/2006/4), accountability entails holding elected or appointed officials charged with a public mandate responsible and answerable for their actions, activities and decisions (para. 48). Social accountability is of particular importance in the arena of public services. In a recent report, OHCHR and the Center for Economic and Social Rights pointed out that "'Social accountability' is used to refer to a broad range of activities in which individuals and CSOs [civil society organizations] act directly or indirectly to mobilize demand for accountability … They frequently employ participatory techniques of data collection and lobbying for transparent access to the information needed to evaluate budgets, monitor public expenditure and delivery of public services, create

citizen and community score cards, run social audits, etc. Aided by new information and communication technologies, CSOs and social movements have been creative in inventing new techniques of social accountability. These include community mapping through crowd-coursing or use of global positioning systems to display and analyse information about service delivery." [10] Citizen engagement is a core element of social accountability, and has the potential to empower citizens and elevate the voices of the most vulnerable. The report of the twelfth session of the Committee of Experts on Public Administration underscores several issues that are important for citizen engagement, including the culture of public service and the need to promote the highest standards of public service (E/2013/44-E/C.16/2013/6, para. 34).

16. Also linked with accountability is the existence of accessible and effective remedies for violations of rights. Avenues through which individuals can complain can include NHRIs, public service internal appeals processes and legal action through national courts. Relevant bodies must be vested with the power to order reparations and to have their decisions enforced; decisions should be transparent, and knowledge of them should be disseminated widely, as a lack of awareness of these processes can hinder the effective realization of human rights and lead to a failure to prevent abuses.

17. The act of whistle-blowing also plays an important role in ensuring accountability for human rights violations. If people who expose illegal conduct or misconduct in public service administration are not protected by law, they are less likely to disclose information that might be of significant public interest. Provisions on whistle-blowing should include the existence of reporting mechanisms and legal protection for the whistle-blower.

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10. OHCHR and Center for Economic and Social Rights, *Who Will be Accountable?: Hu man Rights and the Post-2015 Development Agenda* (New York and Geneva, United Nations, 2013) p. 44.

18. Transparency ensures unfettered access to timely and reliable information on decisions and performance. Various United Nations mechanisms have stressed the need for transparency for those responsible, inter alia, for administering social assistance payments,[11] the extractive industries[12] and security and criminal justice sectors,[13] as well as with regard to the privatization or contracting out of services.[14]

19. During the recent twelfth session of the Committee of Experts on Public Administration, "the right to access information was underscored for its role in promoting transparency. Governments should not only recognize the right of access to information but engage in the proactive disclosure and elimination of requirements to provide prior proof of interest … The judiciary must be capable of enforcing these rights and/or responsible institutions could be charged with guaranteeing implementation" (E/2013/44-E/C.16/2013/6, para. 56). In his 2013 report, the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression points out that "the right to access information is one of the central components of the right to freedom of opinion and expression, as established by the Universal Declaration of Human Rights (art. 19), the International Covenant on Civil and Political Rights (art. 19 (2)) and regional human rights treaties" (A/68/362, para. 2). He also lists some of the core principles that are crucial to guaranteeing the right to information, including maximum disclosure, obligation to publish, promotion of open government, limited scope of exceptions, processes to facilitate access, limited costs, open meetings and the fact that disclosure takes precedence over laws that are inconsistent with the right to information (A/68/362, para. 76).

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11. Committee on Economic, Social and Cultural Rights, E/C.12/UZB/CO/1, para. 54.
12. Special Rapporteur on Toxic Waste, A/HRC/9/22/Add.2, para. 106.
13. Working Group on the Universal Periodic Review, A/HRC/15/14, para. 69.3.
14. Committee on the Rights of the Child, CRC/C/MYS/CO/1, para. 54.

20. The principles of non-discrimination and participation underpin the perennial theme of equality in international human rights law. Non-discrimination means that no individual or group should be treated adversely due to race, religion, ethnicity, sexual orientation or any other defining characteristic.[15] Setting standards for recruitment purposes, for example, dictating that certain academic achievements must be met by applicants, is not discriminatory as it seeks to maintain a high level of professionalism in the delivery of services. In addition, temporary special measures such as the implementation of quotas for the employment of women or for persons with disabilities are not deemed to be discriminatory, so long as the measures are reasonable and not permanent. [16]

21. The participation of individuals or groups representing individuals engenders joint decision-making and ownership by the recipients of public services. [17] This is reflected in article 25 of the International Covenant on Civil and Political Rights and article 3 of the Declaration on the Right to Development, which places emphasis on free, active and meaningful participation of everyone, including by extension, participation in public service provision and decision-making. Obstacles to effective participation can include language barriers, geographical remoteness of communities, poverty, lack of access to basic services, as well as inefficiency on the part of public administration, and corruption. In promoting human rights principles and good governance in the context of public services, information and communications technologies can be

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15. See Committee on the Elimination of Racial Discrimination, CERD/C/MAR/CO/17-18; Committee on Migrant Workers, CMW/C/GTM/CO/1; Committee on the Elimination of Discrimination against Women, CEDAW/C/TKM/CO2; and Human Rights Committee, CCPR/C/CHN-HKG/CO/3.
16. Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (Kehl am Rhein, Engel, 2005), Chapter on Article 2, para. 34.
17. See Committee on the Rights of the Child, CRC/C/15/Add.139; Committee on the Elimination of Discrimination against Women, CEDAW/C/TUV/CO/2; and the report of the Special Rapporteur on the human rights to water and sanitation, A/HRC/18/33/Add.2.

an effective tool to foster greater participation.[18] 21. As the Committee of Experts on Public Administration noted at its twelfth session, "it is undeniable that a framework enabled by information and communications technologies is essential for public administration, particularly for the effective delivery of public services" (E/2013/44-E/C.16/2013/6, para. 78).

C. Legal framework of human rights in public service

1. Which human rights obligations inform public service?

22. The legal framework of human rights in the context of public service can be briefly summarized as follows: States have core human rights obligations under human rights treaties and pertinent national laws, which are applicable to all public services. These include both positive and negative obligations, and the obligations to guarantee non-discrimination and ensure equality. If rights are violated in the context of public service provision, accountability must be ensured and in particular, remedies must be provided.

23. Article 21 of the Universal Declaration of Human Rights recognizes the importance of a participatory government and article 28 states that everyone is entitled to a social and international order in which the rights and freedoms set forth in the Declaration can be fully realized.

24. Article 2 of the International Covenant on Civil and Political Rights requires States parties to respect and ensure the rights recognized in the Covenant and to take the necessary steps to give effect to those rights.

25. According to article 2 of the International Covenant on Economic, Social and Cultural Rights, each State party undertakes to take steps, individually and through international assistance and cooperation, especially economic

18. Global Thematic Consultation on Governance and the Post-2015 Development Framework: Consultation report, 2013, sect. 4.2.3.

and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the Covenant by all appropriate means, including particularly the adoption of legislative measures. In its general comment No. 3 (1990) on the nature of States parties' obligations, the Committee on Economic, Social and Cultural Rights pointed out that "other measures which may also be considered 'appropriate' for the purposes of article 2 (1) include, but are not limited to, administrative, financial, educational and social measures" (para. 7). These measures can be interpreted to include the delivery of public services.

26. In its general comment No. 12 (1999) on the right to adequate food, the Committee on Economic, Social and Cultural Rights stated that good governance is essential to the realization of all human rights, including the elimination of poverty and ensuring a satisfactory livelihood for all (para. 23). Moreover, "on the part of states … this requires capable public sector institutions, including effective legislative, electoral, regulatory and anti-corruption institutions and an independent judiciary. It also requires oversight over other responsible actors such as the private sector. On the other hand … rights-holders need to be empowered to participate in decision-making processes and to hold to account those who are responsible for formulating policies and delivering services". [19] States should also not take steps which may lead to retrogression and minimum core obligations must be met.

27. The obligations to ensure equality and non-discrimination are recognized in article 2 of the Universal Declaration of Human Rights and are encountered in many United Nations human rights instruments, such as the International Covenant on Civil and Political Rights (arts. 2 and 26), the International Covenant on Economic, Social and Cultural Rights (art. 2 (2)), the Convention on the Rights of the Child (art. 2), the

19. Ibid., sect. 4.1.1.

International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (art. 7) and the Convention on the Rights of Persons with Disabilities (art. 5). In terms of public services, this means that States have an immediate obligation to ensure that deliberate, targeted measures are put into place to secure substantive equality and that all individuals have an equal opportunity to enjoy their right to access public services.

28. States should also provide an effective remedy to individuals when their rights are violated, and provide a fair and effective judicial or administrative mechanism for the determination of individual rights or the violation thereof. Article 2 (3) of the International Covenant on Civil and Political Rights refers to the right to "an effective remedy", and paragraph 5 of general comment No. 3 (1990) of the Committee on Economic, Social and Cultural Rights and paragraphs 3 and 9 of its general comment No. 9 (1998) on the domestic application of the Covenant refer to the need to provide judicial or other effective remedies.

29. Specific treaties also include obligations that are relevant to public service. According to article 2 of the Convention on the Rights of Persons with Disabilities, "'reasonable accommodation' means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms". Interpreting the Convention on the Rights of the Child, the Committee on the Rights of the Child has addressed the issue of governments' capacity to coordinate policies for the benefit of the child and the issue of decentralization of services and policymaking. It has also addressed corruption as a major obstacle to the achievement of the objectives of the Convention.

2. Substantive human rights standards relevant to public services

30. Human rights standards require States to provide access to services, including education, health, housing, food and water and sanitation. States are primarily responsible for enforcing human rights standards, but their accountability extends to all levels of government as well as other institutions to which States devolve authority.

31. Article 25 (c) of the International Covenant on Civil and Political Rights provides for the right to equal access to public service and article 25 (a) enshrines the right to take part in the conduct of public affairs. In addition, other provisions of the Covenant, together with the Universal Declaration of Human Rights and the Convention against Torture, suggest that public services may be relevant in the promotion and protection of a number of other civil and political rights, including the rights to life, liberty and security, a fair trial, freedom of expression, freedom of thought, conscience and religion, freedom of peaceful assembly, freedom of association, the rights to vote and to birth registration, as well as the prohibition against torture and other forms of ill-treatment.

32. In the context of public services, a range of economic, social and cultural rights are clearly implicated. This includes economic rights such as freedom from forced labour, the right to favourable working conditions as well as equal pay for work of equal value. Social rights include the right to an adequate standard of living, the right to health, the right to water and sanitation, the right to food, the right to housing, and the right to education. Cultural rights include the right to take part in cultural life and to enjoy the benefits of scientific progress and its applications.

33. The human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water

for personal and domestic uses.[20] The Special Rapporteur on the human right to safe drinking water and sanitation has also set out a post-2015 agenda with targets that include everyone having water, sanitation and hygiene at home.[21] In order for States to be able to realize this human right, they should allocate funding for the effective dissemination and sanitization of water through their respective geographical jurisdictions, and ensure that effective monitoring of services takes place.

34. The right to health embraces a wide range of socioeconomic factors that promote a healthy life. It extends to food and nutrition, housing, access to safe and potable water and adequate sanitation, safe and healthy working conditions as well as a healthy environment.[22] The availability, accessibility, acceptability and quality of health-related services should be facilitated and controlled by States. This duty extends to a variety of health-related services ranging from controlling the spread of infectious diseases to ensuring maternal health and adequate facilities for children. On the issue of health systems and financing, the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health has stated that States should ensure adequate, equitable and sustainable financing for health.[23]

35. The right to education is both a human right in itself and an indispensable means of realizing other human rights.[24] Whether education is provided publically or privately, States should adopt a human rights approach to ensure that it is of an

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20. Committee on Economic, Social and Cultural Rights, general comment No. 15 (2012) on the right to water, para. 2.
21. Available from www.ohchr.org/Documents/Issues/Water/eliminatingsheetPost2015.pdf. See also the report of the Special Rapporteur on the human right to safe drinking water and sanitation (A/67/270).
22. Committee on Economic, Social and Cultural Rights, general comment No. 14 (2000) on the right to the highest attainable standard of health, para. 4.
23. See the interim report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health (A/67/302).
24. Committee on Economic, Social and Cultural Rights, general comment No. 13 (1999) on the right to education, para. 1.

adequate standard and does not exclude any child on the basis of race, religion, geographical location or any other defining characteristic.

36. The Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, has stated that, in addition to legislative measures, administrative, judicial, economic, social and educational steps must also be taken to ensure adequate housing provision.[25]

37. Distribution of food across all geographical areas needs to be monitored by States, as well as ensuring that water and sanitation facilities reach everyone and are maintained at a healthy standard. In addition, States need to consider carefully whether the privatization of certain basic services such as water and food would impede access by remote groups of people or those living in extreme poverty. The Special Rapporteur on the right to food has stressed that States must facilitate economic access to adequate food.[26] The rights and needs of all communities should be met; even people living in remote geographical locations should, for example, be guaranteed the provision of education and potable water.

3. Vulnerable and marginalized groups

38. When considering how public services facilitate the realization of human rights, States must bear in mind that there are demographic groups in every society that may be disadvantaged in their access to public services, namely women, children, migrants, persons with disabilities, indigenous persons and older persons.[27] States need to ensure that the human rights of these groups are not undermined and that they receive adequate public services.

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25. See www.ohchr.org/en/issues/housing/pages/housingindex.aspx.
26. Interim report of the Special Rapporteur on the right to food (A/63/278), para. 9.
27. See, for example, the thematic study on the realization of the right to health of older persons by the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health (A/HRC/18/37).

39. The universal periodic reviews have included several recommendations to States to intensify measures to fully realize the rights of indigenous peoples, in particular their representation in civil service and public institutions. [28]

40. The participation of women and the effective provision of services to them should also be considered when administering the delivery of public services. It follows that States should also monitor the implementation of those services for quality control purposes on an ongoing basis.

41. Poverty acts as a major barrier in relation to public services. For those individuals living in poverty, it is imperative that access to services is ensured, using multiple delivery channels to ensure the most effective outreach towards and saturation of the relevant beneficiary groups.[29] The right to social security is of central importance in guaranteeing human dignity, particularly for those in situations of extreme poverty.[30] To ensure that poverty is not a barrier to receiving adequate public services, measures need to be put in place, such as participatory and pro-poor budgeting, which focus more directly on citizens in budget formulation, implementation, monitoring and control. [31]

D. Public services at the international level

42. International, regional and subregional organizations have grown rapidly in strength and number in recent years. In today's globalized community, they are working with States on an increasingly collaborative basis to improve public service administration, especially in conflict, post-conflict and disaster situations.

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28. See, for example, the report of the Working Group on the Universal Periodic Review on Argentina (A/HRC/8/34).
29. See the report of the Independent Expert on the question of human rights and extreme poverty (A/HRC/17/34).
30. Committee on Economic, Social and Cultural Rights, general comment No. 19 (2007) on the right to social security, para. 1.
31. E/C.16/2006/4, para. 52.

43. The achievement of the Millennium Development Goals as a global development agenda is inextricably linked with the provision of effective public services. Many of the Millennium Development Goals, such as achieving universal primary education, aim to improve the delivery of public services. Given the impending target date for the Millennium Development Goals — 2015 — attention is now being focused on post-2015 development, not only within the United Nations,[32] but also across States. The Report of the High-Level Panel of Eminent Persons on the Post-2015 Development Agenda[33] proposes universal goals and national targets, global accountability and assistance for countries to implement national plans. In articulating the post-2015 development agenda at the intergovernmental level, it will be important to ensure that the delivery and monitoring of public services using a human rights-based approach feature prominently in indicators and targets for measuring achievement, including global partnerships for development, in order to ensure reliable and consistent financing of development and in turn, the provision of public services.

44. The United Nations works at both the regional and global levels, focusing on thematic and country- and region-specific issues. The following bodies work extensively on public service provision issues: UNDP, the United Nations Office on Drugs and Crime (UNODC), the Division for Public Administration and Development Management, the United Nations Children's Fund (UNICEF) and the United Nations Entity for Gender Equality and the Empowerment of Women (UN-Women).

45. The International Monetary Fund (IMF) provides policy advice and financing to members in economic difficulties and works

32. See, for example, UN System Task Team on the Post-2015 UN Development Agenda – Realizing the Future We Want for All: Report to the Secretary-General, June 2012. Available from www.un.org/millenniumgoals/pdf/Post_2015_UNTTreport.pdf.
33. United Nations (2013), "A new global partnership: eradicate poverty and transform economies through sustainable development". Available from www.un.org/sg/management/pdf/HLP_P2015_Report.pdf.

with developing nations to help them achieve macroeconomic stability and reduce poverty. As the world economy struggles to restore growth and jobs after the recent economic and financial crisis, the IMF has increased its lending, using its cross-country experience to advise members on policy solutions, and has supported global policy coordination. This new role in the crisis has serious implications for countries that are pursuing reforms, especially austerity measures that may have an impact on the effective delivery of public services and the realization of human rights.

46. The World Bank provides financial and technical assistance, low-interest loans, interest-free credit, and grants to support investments in areas such as education, health, public administration, infrastructure, financial and private sector development, agriculture, and environmental and natural resource management.

47. World Bank and IMF lending can influence policy formulation regarding trade liberalization, investment, deregulation and privatization of services and industries. Conditions have sometimes required that borrower States reform the public sector or privatize public services. It is important that the human rights impacts of these reforms or conditions are assessed and potential damage prevented and remedied.

48. The World Trade Organization (WTO) provides a forum for negotiating agreements aimed at reducing obstacles to international trade and ensuring a level playing field for all. These activities include administering and monitoring the application of WTO rules on trade in goods, trade in services, and trade-related intellectual property rights. The substantive scope of the WTO General Agreement on Trade in Services is determined by article 1 of the Agreement, which precludes the application of the Agreement to "services supplied in the exercise of governmental authority" (para. 3 (b)), which are themselves defined in article 1, paragraph 3 (c) of the Agreement. It is important that any rules for trade in services

and related agreements should be assessed for their human rights impacts.

IV. Major public service challenges that affect human rights

A. Organization of authority in relation to public service

49. Decentralization refers to the structuring or organization of governmental authority in order to establish a system of co-responsibility between institutions at the central, regional and local levels. There are several advantages and disadvantages to decentralization. It can lead to improved access to public services, with the participation of local communities in decision-making and local dispute settlement and remedies. Through decentralization, there may be better grass-roots implementation of services and a more results-driven approach. The disadvantages are that decentralization can increase the likelihood of duplicating public service efforts, with the consequent fiscal loss which could have a direct impact on the funds available for the delivery of public services. There is also less likelihood of maintaining consistent standards and implementation of services, such as staff training. Regardless of whether services are decentralized, it is recognized that strategy is often set at the national level and implementation activities are carried out locally. It is therefore important that centrally formulated policy should take into account the needs of citizens throughout the country.[34]

B. Privatization and public-private partnerships

50. Effective accountability mechanisms are needed when privatizing public services or in the case of public-private partnerships. Regardless of whether services are privatized or not, there must be careful monitoring in place for quality control of each service, as well as rigorous and transparent procedures for tendering them out. The public service ethos

34. Report of the Special Rapporteur on the human right to safe drinking water and sanitation (A/HRC/18/33), para. 83 (d).

should attach to the public service, not the status of the service provider.

51. When services are privatized, there can be adverse human rights impacts such as inadequate participation of communities in decision-making processes. A rights-based understanding of governance includes ensuring that private actors comply with human rights standards. It also embodies the view that the delivery of services such as health and education are rights that achieve and secure the dignity of all individuals.[35] The Guiding Principles on Business and Human Rights, adopted in 2011, indicate that States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations and in any public service they deliver.[36]

C. Corruption

52. The good governance principles of transparency, accountability and integrity in public services act as a preventative mechanism against corruption, which can exist in numerous forms, including nepotism, payment for services that do not require it, bribes, or tenders for privatization or third party delivery being given on a non-competitive basis. There have been several regional and international efforts to combat corruption.[37] Measures can be implemented to prevent corruption, such as rotating staff in highly influential positions within public service governance, regularly training and assessing staff, and ensuring free access to information concerning contentious issues such as tendering out of services and budgetary records.

35. Global Thematic Consultation on Governance and the Post-2015 Development Framework: Consultation report, 2013, sect. 4.1.3.
36. Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework. Annex to the Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises (A//HRC/17/31), p. 7.
37. See the summary report of the Human Rights Council panel discussion on the negative impact of corruption on the enjoyment of human rights (A/HRC/23/26). See also UNODC's Action against Corruption and Economic Crime, available from www.unodc.org/unodc/en/corruption/index.html?ref=menuside and UNDP anti-corruption work, available from www.undp.org/content/undp/en/home/ourwork/democraticgovernance/focus_areas/focus_anti-corruption/.

D. Conflicts, disasters and countries in transition

53. Conflict, post-conflict situations and disasters pose particular challenges to the effective functioning of any public service, which might be in a state of suspension, fragmented operation, or at worst, complete decimation. Humanitarian agencies can provide invaluable assistance during periods when there might otherwise be nothing in place. In addition, when States enter the post-conflict or post-disaster phase, it can take many years to instil trust in service users when rebuilding administrative functions. Good governance principles are particularly important in these fragile situations, ensuring that the foundation of any emerging government administration is one of integrity, transparency and capacity.[38]

V. Compilation of good practices based on submissions received

54. Contributions were received from the following Member States: Argentina, Australia, Azerbaijan, Bosnia and Herzegovina, Burkina Faso, Cameroon, Chile, Colombia, the Czech Republic, Egypt, Estonia, France, Georgia, Guatemala, Iraq, Kazakhstan, Latvia, Lithuania, Mauritius, Mexico, Moldova, Montenegro, Morocco, Paraguay, Poland, Qatar, Romania, the Russian Federation, Serbia, Slovenia, Spain, Sri Lanka, Tanzania, Thailand and the United Arab Emirates. The following intergovernmental organizations submitted contributions: the Council of Europe, the Economic Commission for Europe, the Division for Public Administration and Development Management, the Department of Economic and Social Affairs and the World Meteorological Organization. Two NHRIs submitted contributions: Equality and Human Rights Commission (United Kingdom) and the Rwanda National Commission for Human Rights. The NGO

38. See the draft resolution of the Human Rights Council on the promotion and protection of human rights in post-disaster and post-conflict situations (A/HRC/22/L.23). See also the Planning Toolkit, available from www.un.org/en/peacekeeping/publications/Planning%20Toolkit_Web%20Version.pdf.

SIA Mali submitted a contribution. The Holy See submitted contributions as an observer to the United Nations.[39]

55. The following is a summary of the good practices described in these contributions.

Public service commitment

56. Some States have a publicly stated set of aims which serve to engender a sense of accountability. For example, Morocco has a Charter of Public Service and Sri Lanka has a Citizens' Charter.

Recruitment

57. Nearly all Member States have examinations or open competitions for the recruitment of civil servants, which aids transparency and integrity. This also ensures that the highest possible standards are maintained when employing those who administer services to the public. For example, Moldova stressed that both progress within the civil service and first-time recruitment are based on a meritocratic system that depends on skills and performance.

Training

58. Many Member States incorporate human rights education into the training given to staff working in public services, although this is not always compulsory and the frequency of the training varies. In Montenegro, it is conducted annually. In Qatar, human rights education is a legal requirement and the United Arab Emirates has a system of credit hours for the training of public servants. There are efforts in some States, notably Georgia, for human rights training to be disseminated as widely as possible. Serbia noted that "education on the protection and respect of human rights can be successful only in an environment where human rights are consistently

39. The full text of all contributions can be consulted at www.ohchr.org/EN/Issues/ Development/ GoodGovernance/Pages/Documents.aspx.

exercised and respected". In many States, such as Australia and Estonia, training is delegated to agency heads, which means that central Government is not responsible for it. In Burkina Faso, the Ministry of Human Rights assists in training. In Mauritius, the National Human Rights Commission gives lectures to the police. Latvia has a school of public administration that provides training. Similarly, Slovenia has an academy dedicated to administration with a compulsory human rights module, and Tanzania has a college dedicated to public service.

Assessing public service employees

59. Some Member States have a system of assessing employees using key performance indicators and taking into account the views of online communities. Latvia has introduced new regulations that allow for a 360-degree performance evaluation for those working in public service.

E-technology

60. Many Member States are modernizing their public service systems with the use of e-technology, given that increasing numbers of people have access to mobile telephones, even in remote and poor areas of Burkina Faso and Morocco. Cameroon has a website (and a radio programme) on public services. Mauritius has introduced a human rights e-portal.

Modernization of public service systems

61. A recurrent theme in the contributions, as highlighted by France and the Russian Federation, was efforts to simplify, modernize and streamline overly bureaucratic processes. In Georgia, "one-stop shops" have been introduced, providing easy access to information and forms, and websites offer similar services. The hope is that this will transform the public service from a bureaucracy to a results-driven organization, delivering on governments' social contracts with citizens, and building credibility and trust, as in Georgia. There was

mention of the increasing creation and use of multiple service delivery systems, such as in Egypt, where public services can be accessed in post offices, call centres and kiosks.

Temporary special measures

62. Many Member States, such as Columbia, employ temporary special measures in order to recruit women into positions in the public service. Sometimes this is extended to persons with disabilities. In some countries, such as Argentina and Sri Lanka, there are quotas for people with disabilities, but not for women. The quotas vary: France has a minimum gender quota of 40 per cent for both genders and applies financial penalties to public bodies that do not adhere to the quota policies.

Respect for equality and diversity in public services

63. Many States have domestic laws to promote and protect equality. With regard to public services, Australia has a workplace diversity programme. Sri Lanka promotes the learning of multiple languages for public servants, as significant portions of the population speak different languages. France has a charter for the promotion of equality in public services.

Corruption

64. Some Member States take measures to prevent corruption, such as the Russian Federation where civil servants are rotated in and out of highly desirable positions, and also by providing training. Georgia has taken steps to rid its public service of corruption, including by introducing a law on conflict of interests and corruption, and is now building its public service on a customer-oriented model. Some States, including Burkina Faso, Chile and Guatemala, publicly disclose costs, and Chile has a legal framework on transparency and good governance as well as a Transparency Board. Guatemala has legislation on access to public information and has set up a working group to address good governance and human rights.

Audits

65. Several States have created supervisory bodies and/or undertake audits. This acts as an accountability mechanism and aids transparency.

International, regional and United Nations assistance

66. Some Member States described their collaboration with regional and international assistance, either in the form of anti-corruption initiatives, assessments, or, in the case of Kazakhstan, training. United Nations agencies play a crucial role in helping to rebuild public services, especially after conflicts, declarations of independence and disasters. In Iraq, intergovernmental organizations have been and still are involved with public services. In situations where public services suffer, such as in Iraq, States will revert directly to the principles set out in international law. Mauritius pointed out that UNDP and UNODC have facilitated police reform in order to achieve a "human rights compliant organization".

Creating a culture of human rights

67. Some Member States and the Council of Europe highlighted the fact that they take a proactive approach to creating a culture of human rights, as it is called in Columbia, or a "human rights climate" in Mauritius, or a "culture of respect for human rights" in the case of the Council of Europe and France.

Community participation

68. Many Member States, such as Sri Lanka, encourage public and community participation, including joint decision-making processes. In Georgia, during public procurement processes, citizens can participate online, and there is a dispute resolution board on which civil society is represented on an equal footing with public officials.

Bilateral relationships

69. Some Member States utilize bilateral support mechanisms where both countries' public services benefit from the relationship, as is the case with Colombia and Spain.

Complaints processes

70. Multiple avenues exist in many Member States through which complaints about public officials, incidents or tender processes can be pursued, including ombudsmen, the courts and service commissions.

Accountability

71. National Human Rights Commissions play an important role in ensuring the accountability of service providers, as the Commissions monitor the activities of service providers and can raise complaints, as well as offering training. The Division for Public Administration and Development Management recognized that "the overriding purpose of promoting public service is to support peace and security, social rehabilitation and human rights and development". Qatar has outlined its work with not-for-profit organizations and UNDP; some NGOs in Qatar provide some public services.

Human rights education

72. Mauritius is planning on introducing human rights education programmes into high school national curricula in order to help create a national culture of human rights awareness.

Third-party delivery

73. Latvia has a law that sets limits on the delegation of public services to third parties, and creates exceptions in the cases of some public services which may not be delegated. Tanzania has a Public-Private Partnership Act which provides a performance management system and under which non-State actors perform non-core functions of service delivery.

National goals

74. National plans of development that highlight human rights principles are in existence in some States, including Mexico, Moldova, Qatar and Romania.

VI. Conclusions and recommendations

75. The management of public service is a critical link between duty bearers and rights-holders. Delivery institutions such as hospitals and schools and providers of infrastructure and other basic facilities such as energy, water and sanitation are essential to the implementation of human rights. How these services are perceived and actually delivered has a significant impact on how governance is assessed within a State. When a public service is run down, has shortages of staff and basic infrastructure, struggles to provide basic services, is poorly managed in terms of financial and other resources, or when people experience corruption and inefficiency, there is a resulting lack of confidence in all other aspects of governance. A sustained effort should therefore be made to integrate human rights principles and standards into the public service and into governance more broadly.

76. These principles and standards should be promoted and instilled in the national public service through education and capacity-building programmes that are mandatory for all those delivering or administering public services.

77. Practical measures that can be adopted to further the implementation of a human rights approach to public services include: (a) integrating human rights considerations in the recruitment of personnel; (b) providing human rights training and guidance for all staff; (c) incorporating human rights into codes of conduct and practice; (d) establishing transparent, responsive, inclusive and participatory approaches to public service; (e) providing incentives for achievements in human rights and public services; (f) integrating and applying

human rights standards across all services, alongside legal and financial implications; (g) creating adequate grievance mechanisms and effective remedies; and (h) systematically measuring the impacts of service delivery on internationally guaranteed human rights.

78. International efforts relating to public service improvement are fragmented across a number of international treaty regimes and organizations. There is a need for human rights-based policy coherence and coordination to support public service improvements globally.

79. International financial and trade institutions have a significant impact on public service provision through their policies and rules. There is a need for better synergy between international financial institutions and United Nations mechanisms. This may also assist in moving towards a credible and transparent global accountability framework in relation to public service, in a manner consistent with human rights obligations.

සිරකරුවෝද මනුෂ්‍යයෝය
Prisoners are human beings
சிறைக்கைதிகளும் மனிதர்களே

ඔවුන්ටද පිරිසිදු වැසිකිළියක් පාවිච්චි කිරීමට අයිතියක් ඇත
They also have the right to use a clean toilet
தூய்மையான கழிப்பறையினைப் பாவிப்பதற்கான உரிமை அவர்களுக்கும் உண்டு

RLF
RULE OF LAW FORUM

PART 02: RULE OF LAW

Section 05: Major legislative obstacles to rule of law in Sri Lanka

Major legislative obstacles to the rule of law in Sri Lanka

The following are some of the major legislative obstacles to the rule of law in Sri Lanka. They are;

1. The 1978 Constitution: The Constitution rejects the supremacy of the law and the rule of law as the foundational principle on which the Sri Lankan Constitution should be based. Instead, the Constitution is based on the supremacy of the Executive and gives primacy to the discretion of the Executive in place of the law. Also, it provides for arbitrary actions of the Legislature that is for the Executive President and the Cabinet of Ministers to supersede over the law. The manner in which the supremacy of the people is defined by the Constitution undermines the democratic notion of the supremacy of the people and instead it provides for the supremacy of the Executive. And also, the Constitution removes the checks and balances concerning power and undermines the Legislature and the Judiciary. This process undermines the process of public administration in favour of direct political control by the Executive President or his/her representatives.

   The idea of constitutionality is interpreted in a way so as to legitimize what are otherwise blatantly illegal acts against civilized norms and good governance, and can be displaced by legislation, thereby constitutionally paving the way for the abuse of power and corruption. The Constitution does not recognize the basic structure that protects the democratic framework of governance and the Republican character.

No room is left for Constitutional reform for a return to democracy or against the absolute power of the Executive (these and other matters are explained in the other sections of this handbook).

2. Other legislative obstructions:

2a: Excessive powers that could be used for the abuse of authority by the Security Forces, are given through constitutional means and emergency and national security legislation, in contravention of liberal democratic principles and international law.

2b: Legislation that limits room for official intervention for the protection of individuals as well as group rights.

2c: The Prevention of Terrorism (Temporary Provisions) Act as amended and room for arbitrary detention without speedy judicial remedies in the event of abuse.

2d: A weak system for the protection of human rights which leaves room for the excessive use of force and the abuse of power.

3. Institutional weaknesses that pave the way for the use of excessive power by State agencies – by State agencies what is meant is in particular the Police, the criminal investigation agencies, the intelligence services, the Armed Forces, paramilitary forces, and others who are working as agents for each such organization.

   Details of these have been worked out in other sections of this handbook.

4. The failure to comply with international obligations on human rights – in particular, the failure to provide for the implementation of Article 2 of the International Covenant on Civil and Political Rights, which requires that the State party provide for legislative, judicial and administrative means for the implementation of State obligations to protect human rights. Of particular importance are administrative

measures such as the provisions of funds in order to run proper investigative, prosecutorial, and judicial functions that could function with competence and efficiency in order to provide a sense of protection for citizens.

5. The lack of a special protection mechanism for the protection of minorities and vulnerable groups.
6. The absence of an effective work mechanism for the protection of women against violence and against the sexual abuse of children.
7. The weaknesses of other institutions such as the Human Rights Commission, the National Police Commission, and numerous other commissions that have been appointed but are not provided with the powers, the funding and other resources required for the proper functioning.
8. Special problems unaddressed or inadequately addressed:

8a: Torture, extra-judicial killing including enforced disappearances.

8b: Illegal arrest and detention as a means for political revenge or the prevention of peaceful protests.

8c: The harassment of persons through processes of questioning without any basic legal justification.

8d: The abuse of the legal process by making fake charges and the abuse of the legal process by unnecessary obstructions for the normal process of bailing out persons.

9. Obstructing the legal process by placing restrictions on the freedoms of assembly, association, and expression.

Section 06: Questionnaire on rule of law

You may answer any four of these questions

1. Can there be good governance without the strict enforcement of the rule of law? Can human rights be protected, if there is a serious breakdown of good governance and the rule of law? Explain your answers shortly (10 Marks)

2. Can laws be made secretly or partially secretly? - (Yes/No)

Can the ruler or public officers be above the law? – (Yes/No)

Can a public officer in his/her official capacity do any act that violates any of the country's laws, or fail to do what the law has tasked him/her to do? – (Yes/No)

Can the Police, the military, the intelligence of other security officers or officers of the AG's Department be allowed to violate any of the human rights of any person? - (Yes/No)

(20 Marks)

3. Some officers of the Dungama Police Station inquiring into a serious crime are looking for a suspect named Sirisena. They arrest an innocent man who is also named Sirisena. Officers take him to the Police Station and assault him, asking for details of the crime, despite the man saying that he knows nothing about the crime. Sirisena gets very seriously injured and suffers kidney failure. Officers fail to take him to the hospital. Only the day after the arrest, when a politician intervenes, is he taken to a hospital. About this incident, a complaint is made to a high ranking Police office. However, they fail to conduct an investigation.

Explain what human rights of Sirisena were violated by the acts of the Police. (20 Marks)

4. The economy of country X, suffers a great fall due to the inefficiency of the system of governance in that country. As a result, there is a severe shortage of foreign exchange

which results in the inability to pay for essential goods. There is very high inflation, as a result of which, food prices skyrocket. Low income groups cannot have their normal meals and severe malnutrition affects over one per cent of the children.

Can you analyse this from the point of view of the violation of the right to life. (20 Marks)

5. A young foreign woman comes to do business in Sri Lanka. She has an arrangement for the conduct of a restaurant with her local partner. She puts the money but the partner cheats her and runs away with the money. She approaches a local politician to get some assistance to get a visa extension. The politician and some of his friends' gang rape her. She complains to the Police but they do not take any action to investigate and bring the culprits to justice. After much effort and her country's embassy's involvement, the AG orders an inquiry. Sometime later, the culprits are arrested. Since then, several years have passed. No prosecution is done. And her business partner who cheated her money has not even been arrested.

Based on the facts of this case, kindly write short notes on the following;

A. A woman's right to protection.
B. Sexual attacks by a politician.
C. Delays in Police investigations.
D. Delays in justice in courts.

(20 marks)

6. Write short notes on the following rights and how they are violated or respected in Sri Lanka. You may refer to any known violations.

A. Right to the freedom of expression.
B. Right to the freedom of assembly.
(30 Marks)
C. Right to association. (20 Marks)

Section 07: Reading and YouTube materials on the rule of law

1. Rule of Law – Tom Bingham
   http://www.humanrights.asia/wp-content/uploads/2020/08/Neethiya-Matha-Palanaya.pdf
2. Law and discipline
   http://www.humanrights.asia/wp-content/uploads/2019/07/Neethiya-Saha-Vinaya.pdf
3. United Nations Convention against Corruption
   https://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf
4. European Convention against corruption involving public officials
   https://eur-lex.europa.eu/EN/legal-content/summary/convention-against-corruption-involving-public-officials.html
5. Convention on the fight against corruption involving EU officials or officials of EU countries
   https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A41997A0625%2801%29
6. Council Act drawing up the Convention on the fight against corruption involving EU officials or officials of EU countries
   https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A31997F0625%2801%29
7. Gyges' Ring – The 1978 Constitution of Sri Lanka
   http://www.humanrights.asia/resources/books/gyges-ring-the-1978-constitution-of-sri-lanka/
8. Why a new constitution
   http://www.humanrights.asia/sinhalabooks/Aluth+Viyavastha-wak+Kumatda
9. Rule of law explained
   https://www.youtube.com/watch?v=YmkvWpMSDu0

Section 08: Good Governance, Bad Governance and No Governance

(Published in Gronds-Views on 27 June)

Good governance means a system of governance that ensures economic efficiency guaranteeing economic stability throughout a nation. This economic efficiency can only be brought about by the observance of transparency, accountability and integrity in all areas of public life. That situation could be brought about only when the system is founded on the basis of the rule of law. The rule of law is the foundation of good governance. When all these factors are present to a relatively satisfactory degree, it becomes possible to improve the wellbeing of the people. By people it means people of all groups such as entrepreneurs, working people, women, minority groups and children and other vulnerable groups. A healthy way of life is guaranteed in this manner to everyone. This does not mean a perfect society or an extraordinarily prosperous society. While aspiring to greater heights may remain a major goal, the most important achievements of good governance is to ensure an acceptable way of life to everyone without undue disturbances. Even if some imbalances happen now and then, it is possible for a system of good governance to deal with some situations and return to normal within the shortest possible time.

Bad governance

Bad governance is when any one of the aspects of good governance is absent. Then there is the gradual development of conflicts and confusion, which slowly undermines the basic aspects of economic and social stability. The most marked features of bad governance are the increase of corruption and the abuse of power. However, at this stage of the degeneration of the system of governance, there is still room and space for fighting back and to overcome the causes that created bad governance and gradually returning to a functional system of good governance. The stage of

bad governance is a stage in between a stable form of governance and the total absence of governance.

No governance

No governance means where only the mask of a governing system exists but in fact the substance has completely disappeared. The test of no governance is the extent to which the principles of the rule of law have ceased to exist. If the most fundamental aspects of the rule of law have deteriorated to an extent that it is no longer workable, then what exists is no governance. No governance means that no one takes responsibility in real terms for things that go wrong including within the economy itself. Corruption and the abuse of power are no longer treated as abnormalities; they become a normal way of life within such a context. The administration of justice and enforcement of law happens only in the most superficial way. The appearance of public institutions remains but public institutions fail to perform the duties that they are entrusted with.

When people are confronted with economic collapse deprivations of all sorts, even threat to food and basic necessities such as education and health, their first reaction is to demand that the existing government correct the situation. However, if it has deteriorated to the stage of no governance, there is no possibility that whatever exists in the name of governance is able to respond positively to the demand. There will be constant protests and loud cries that take place on the streets while those who behave as if they are still the rulers can only make artificial gestures but cannot really do anything about it.

No governance in Sri Lanka

The situation in Sri Lanka has reached the stage of no governance. This is why there are demands such as that the entire parliament should resign. While these are just slogans, the mere fact that they have received wide approval from society shows that people are talking about a profound change that has taken place

within their country, which they find difficult to accept and even the most vocal protestors find it hard to articulate.

A no governance situation is one that poses grave problems in terms of how to solve it. If what exists is a situation of bad governance, some changes can be brought about by way of pressures such as large-scale protests and strikes. However, when there is no governance, then it is not possible to resolve the problems by merely putting pressure in a conventional form.

1978 Constitution and displacement of rule of law

The major cause for the development of no governance in Sri Lanka is the 1978 Constitution. It attempted an impossible form of governance. The entire concept and structure of the 1978 Constitution is based on the idea that the state institutions themselves are an obstacle to good governance. As institutions are based on the foundational principle of the rule of law, the rule of law itself was considered an obstacle for pursuing the kind of aims that the 1978 Constitution wanted to pursue.

What the 1978 Constitution wanted to pursue has hardly ever been tried except under some of the world's craziest rulers such Jean-Bedel Bokassa, the former president of the Central African Republic. The 1978 Constitution was created with the idea that one man can rule the country. It was thought that one man, at the time President J. R. Jayewardene, was clever enough to make the decisions and that Parliament, judiciary and public institutions should be shaped in a way to adjust to whatever he wanted to do. Although this system had been described as the Executive Presidential system, it is not an Executive Presidential system but a one-man system, which by the very definition is a contradiction. One man cannot be a system.

An absurdity

That one man can be a government was an absurd conception from the point of view of the concepts of governance and from the

point of view of constitutional law. What was called a constitution was not in fact a constitution but the abrogation of the most fundamental notions of constitutionalism.

Therefore, it was not a surprise that the country gradually descended to a situation of no governance, which is what the current situation is. The highest expression of the no governance situation is the total collapse of the economy due to the inability of the state to even pay back its loans. The loan taking and the expenditure of the funds obtained from the loans have been done without following any rules of governance. The no governance style of ruling has created the present economic catastrophe.

It is this no governance problem that needs to be addressed when talking about how to find a solution out of the present situation.

Schizophrenia in the political mind of Sri Lanka. Published in Colombo Telegraph on 28 June

There appears to be a well pronounced schizophrenia in the political mind of Sri Lanka, on all vital matters that decide the nature of the Sri Lankan State and also the nature of the political role of the people of Sri Lanka. Perhaps, it is better to explain this through illustrations. Is Sri Lanka a Republic?

A Republic?

According to the Constitution, Sri Lanka is a Republic. However, the foundational notion of a republic is the supremacy of the law as against the supremacy of an individual or a particular office. In the 1978 Constitution, the supremacy of the law was abandoned in favour of an Executive President who is above the law. This split between the notion of a republic was expressed by Thomas Paine in terms of the United States as "in the United Kingdom, the king is the law. In the United States, the law is the king." These are two completely opposing points of view and they are irreconcilable. In fact, the entire history of building the idea of a republic was to defeat the idea of the monarchy where the king

decided everything including what the law is in the country. Acting outside the law was quite normal within those circumstances as the king was not bound by any laws and there were no restrictions to his power. Thus, in the very heart of the Sri Lankan Constitution which is supposed to be the supreme law of the country, there is a very great split. So long as this split exists, the Sri Lankan State is bound to suffer from enormous confusions and unsolvable problems because the two fundamentally opposed ideas are being treated as valid within the same Constitution.

Role of the Rule of Law?

Flowing from this split of fundamental ideas is another split which is opposing notions about the role of the rule of law within the Sri Lankan State. On the one hand, the basic public institutions such as the Parliament, the Judiciary, other institutions of the administration of justice such as the Police and the Attorney General's Department, the civil service, all other public institutions such as the Inland Revenue Department, corruption control agencies and the like are theoretically speaking, supposed to work within the framework of the rule of law. However, in their real functioning, all these institutions including even the Central Bank recently was controlled directly by the orders of the Executive irrespective of whether these directives conformed to the norms of the rule of law or not. Thus, the officers acted more on the direct orders of the President himself or others who work on his behalf. This is a crucial conflict because by definition, the rule of law requires that all those who work for the State in their institutional or private capacity has to act within the law that has been publicly made. Every person who acts on behalf of the State is bound to perform the duties he/she is expected to carry out in terms of his/her office and also not to exceed the limits to his/her power imposed by the law. Thus, an officer of the State can commit offenses of commission or omission in terms of the abuse of power or in terms of the failure to perform the duties that go with the office. However, when a person has to act on the basis of orders from outside which may be opposed to the law, then the

very idea of the officer of the State itself is challenged in a very fundamental way. The major criticism that is brought against the present system of governance is that the State officers are placing such circumstances that they are compelled to carry out the orders from others irrespective of whether these orders are legal or illegal.

A Democracy?

Another fundamental area in which there is a major split in the political mind of Sri Lanka is as to whether Sri Lanka is a democracy. The Constitution enshrines a Democratic, Socialist Republic of Sri Lanka. The most fundamental idea of a democracy is that power must be bound and restricted within a framework of the law that has been publicly made. In explaining the American Constitution, the Founding Fathers have taken lot of effort to explain that the valid principle for good governance is to have a distrust in those who are placed in power. That is not due to any reasons of a personal nature of a particular person but due to the very nature of power which tends to corrupt and the cliché is that absolute power corrupts absolutely. Thus, within the Sri Lankan Constitution, there is an irreconcilable conflict on the one hand of proclamations where we state that it is a democracy and is bound by the principles of democracy, while on the other hand, removing all the restrictions to power which are normally placed within a democracy against the Executive. This means that at an operational level, this conflict gets manifested all the time. This results in great confusions and both the officers of the State and the people are influenced by this great confusion.

The Role of the Parliament?

There is also a split in the ideas relating to the role of the Parliament itself. Within a democracy, there is a notion of the supremacy of the Parliament. However, when the Executive is above the law, the Parliament can be turned into merely an instrument serving the Executive than being a separate branch of governance. From all appearances, the Sri Lankan Parliament observes the rules and rituals that give the appearance of an

independent Parliament. However, through the very nature and the structure of the 1978 Constitution, the role of the Parliament is to support the President to get through the laws he wants and to approve the budgets that he requires. The Parliament's power to hold the Executive responsible for wrongdoings is extremely limited and most difficult to practically achieve. Thus, there is a tremendous confusion on the actual role of the Parliament and this confusion goes into almost every affair of the State and also into all affairs such as even the control of the finances of a country.

The Role of the Judiciary?

There is also a split in the mind regarding the role of the Judiciary. The Constitution states that the Judiciary exercises the power of the Parliament. On the other hand, it is said that the Judiciary is independent. For the Judiciary to be independent, it should be a separate branch of governance. The very idea of independence is that it acts to prevent wrongdoings on the part of the Executive or of the Legislature itself. Thus, the operations of the doctrine of checks and balances are based on the idea of the Judiciary being a separate branch of governance. In Sri Lanka, according to the Constitution, it is not a separate branch of governance. Thus, the claim of independence is restricted by the lack of equal power with the other branches of the Government when dealing with problems which need to be dealt with in a decisive manner. Hence, there is a need for the removal of the split that exists in the political mind of Sri Lanka about the actual role that should be played by the Judiciary.

The Role of the Police

There is also a split of the mind as to the role of the Police. In a letter written by the Inspector General of Police (IGP) which recently became highly publicized in the media, the IGP himself talks about the officers in charge of police stations which is a function which carries enormous responsibility having not even been chosen on the basis of any interviews as required by the regulation. What is implied is that these appointments have been

made by other persons following other persons and not by the IGP following the normal processes of making such appointments within the Department. The law enforcement function is a fundamental function within a State. If within the law enforcement division itself there is a huge split of mind, then the entire fabric of the society will be greatly disturbed by that split and Sri Lanka is suffering from that state of confusion regarding this matter. Also, with regard to the Police, there is a fundamental split in terms of the function of the Police investigations. For the efficiency of the functioning of the State and society, the investigative function of the Police is a vital function. However, there is a split of opinion as to what crime should be investigated and what crimes need not be investigated by the Police. These are decided not on the principles of criminal law or criminal procedure but for extraneous reasons. Therefore, the citizen has no way of knowing whether the crimes the society may complain of will be investigated or not. There is also a question as to whether these investigations will be conducted independently following the professional rules or on the basis of directions given by extraneous forces. When the law enforcement function itself undergoes such a split of the mind, it is not possible for the society to function. These are just a few examples of the fundamental split in the mind of the State and the people of Sri Lanka which makes the very idea of the rights of the people highly questionable. Can rights exist in a country which calls itself a Republic but has arranged itself to function outside the basic notions of the rule of law and in every other way has created the irreconcilable distinctions between what is proclaimed as principles and what is being practiced as legitimate within the State.

In a country which has remained within that state for over 40 years now, it is not even a surprise that the economy has collapsed. The functioning of an economy requires consistency in principles as much as individuals require consistency of mind in order to function properly. These basic splits need to be addressed and cured if Sri Lanka is to come out of the present situation of extreme crisis which has pushed the State and the people into an abyss.

Section 09: SRI LANKA - Wild Politics and Brutal Policing

Published in Ground Views and AHRC List Server

Police brutality is very much a normal part of the abnormal way of life that exists in Sri Lanka just as attacks by wild elephants have become an usual part of life for people living in remote villages. How that came about has a history of its own and it is the same regarding the police.

It is not just the people who say that the police have become quite a wild lot. The Inspector General of Police (IGP) himself has said so while giving details about what is happening within the policing system. In a report dated December 31, 2021, which became well known after the events of May 9, he exposes a failed system including how people who are not qualified have been put into high-ranking positions such as the officer in charge of a police station due to political reasons. He reveals many details about the sad state of affairs of the premier law enforcement agency.

The system has completely lost credibility. The issue of importance is whether there is any way out. Is substantive reform of the policing system a possibility?

It would be very hard to convince anybody that such reform is possible. Many questions will be asked. One is "Who is going to make the reforms?" That is the most difficult question to answer. There does not seem to be any will on the part of the government in power to have a better system of law enforcement. The present system suits its purposes although sometimes it does not even do that. The events of May 9 were a clear signal that the police did not intervene even to protect the houses of the ministers or members of parliament of the ruling party. That is notwithstanding the present style of policing that serves one purpose for the government, which is to unleash brutality on people engaged in legitimate protests. Events of the last few weeks have seen how

the police were engaged in the arrests and filing of false reports against people who were protesting against some of the worst deprivations they have suffered in their lives. The photographs of policemen trying to threaten people waiting in queues for oil or gas with pistols in hand were seen by the public.

People want reforms

As to who wants police reform, the only clear answer is that the people want it but they have no belief that there is a way to bring about reform.

How did such a situation come about? From the time the police as an institution was initiated in the latter part of the 19th century and for many decades thereafter, there were tenuous efforts to build a policing system that was capable of enforcing the law within the framework of the rule of law. On the one hand, taking all steps necessary to enforce the law within the framework of Criminal Procedure Code and on the other hand, safeguarding the rights of the people including those who are subjected to arrest and detention within a framework of the rule of law were ideas that were implanted in Sri Lanka during the formative years of making of a police service.

However, this initial attempt took place within the framework of control by a colonial power; there were limitations which several police commissions understood and by the time of gaining independence, there were proposals for more radical reform for a civilian policing system. But for various reasons, this approach was not followed by governments that came to power after independence.

The key reason for the policing system developing into the pathetic situation that it is today comes after the 1972 and 1978 constitutions. One main error that was made within the constitutional framework itself was to displace the fundamental principle of the rule of law as a foundational principle of the legal system. This happened due to political reasons.

The cornerstone of a republic

The cornerstone of any republic is the notion of the rule of law. A republic differs from a monarchy specifically on this premise. As Thomas Paine, the American writer and revolutionary who inspired a generation of people at a time when basic constitutional ideas were developed in the United States, stated, in the United Kingdom, the king is the law. However, in the United States, the law is the king.

What is really wrong with the policing system is that it lacks a guiding principle to keep its organization together. That guiding principle can be nothing else except the principle of the rule of law.

Thus, the policing system is a system that is not based on a solid principle nor is it a system run on the basis of a set organizational system run by a leadership that is committed to the fundamental notion of the rule of law.

Until the constitutional framework is changed to reinstate in unambiguous terms that the foundational principle of Sri Lanka as a republic is the principle of the rule of law, there is no way to prevent the policing system being an abnormality and a crude reflection of the worst aspects of brutality and the use of force against the people.

Courts

The courts have made many judgements against the fundamental violations of human rights by the police. There had been criticisms by international and local organizations regarding the failure of the policing system. However, these have not made the policing system any better because if the constitution itself has created a situation of lawlessness, then it is not possible to expect proper law enforcement agencies to function within civilized norms in carrying out their official duties.

Even the protestors, while they complain about the use of police brutality, have not yet taken up the issue of substantive

police reform as a major aspect of political reforms that are required. There is frustration and demoralization but such reactions have not been expressed by way of a demand for a radical police reform that will reinforce the principle of the rule of law within the policing system itself and within the country as a whole.

Section 10: Delays in Justice As a Major Cause of Economic and Political Catastrophe

Published in Colombo Tepegraph, Morning and AHRC List Server

Delays in justice as a key factor that destroyed the economic and political System Everybody's talk during the last few months has been about the catastrophic economic crisis in the country and also the crisis of the political system. The link between the two has been well understood by everyone. However, in the discussion of the causes, what is usually mentioned is about certain wrong decisions taken mainly by the present Government of Gotabaya Rajapaksa and also earlier decisions which were taken to borrow money without a proper system for regenerating income and paying back the loans. As that matter has been rightly discussed at length and has more or less been well understood in the country, it is also time to go into deeper factors which made the neglect of the economy and the political system so disastrous to the country. It is about one such factor that this article deals with. Although it is one of the factors to the disaster we are dealing with in Sri Lanka, it is perhaps one of the most important factors which made the neglectful behaviour of those who managed the economy and the political system possible. This factor is the extraordinary delays in the delivery of justice in Sri Lanka.

Criminal Justice

The argument is not that there was a delay in dealing with commercial disputes mainly. It is the delays in the adjudication relating to criminal justice that is much more important. This needs to be understood if the required changes in order to overcome the present state of neglect in the management of the economy and also the bitterly criticized defects of the political system are to be dealt with in any significant manner.

Criminal justice does not merely apply to murders, theft, robbery, rape and the like. It is the operation of criminal justice that makes the environment for creating a proper management in all public institutions within a country. The system of punishment for the failure to carry out basic duties can only be created by a properly functioning criminal justice system. If a system of punishment does not exist for the criminal neglect of duties, the consequence is that the discipline within the public institutions will break down. That the discipline in all public institutions in Sri Lanka has broken down is a fact that everyone is complaining about not only in this critical time but also over a long period of time.

Impunity for Financial Crimes

Thus, impunity does not merely imply the failure to hold the culprit of a certain crime liable. In fact, it applies to the failure to hold all who are guilty of criminal neglect to be held liable. While in Sri Lanka, criminal justice is an area that is very much limited to what we call ordinary crimes in developed economies, more emphasis is made on the crimes which are relating to finances and matters like corruption and the abuse of power. However, those who are responsible for such acts are not the ordinary people but mostly people who hold high positions and who belong to a different social status. Unfortunately, in Sri Lanka, the criminal justice system did not develop to hold those who are holding higher positions and also those who belong to more fortunate income routes to be brought under criminal justice except on very rare occasions. This limitation of the criminal justice system is one of the very important factors that have contributed to the breakdown of discipline within all public institutions.

There is an obvious reason as to why these persons from higher social status have been virtually left out of the purview of criminal justice. This is due to other things such as the ability of those who are more affluent to challenge any accusation brought against them by the use of their relatively stronger economic strength and also due to social influence. Sri Lanka's criminal

justice system is a very weak one. Its' capacities for investigations are quite limited. Even from the point of view of training and also the facilities available for inquiries into

more serious finance related crime is rather poor. Although modern technology has provided enormous possibilities for better investigations into financial crimes, this area of criminal investigations into finance related crimes has not received a priority within the policing system.

However, the greater cause for the inability to develop a proper criminal justice system lies in the displacement of the principle of the rule of law as the most important fundamental premise on which the entire criminal justice system should have been rooted. Particularly since the introduction of Republican Constitutions, the foundational notion of the rule of law has been displaced.

It is within this context that a highly confused system of criminal justice has developed in Sri Lanka. The major factor that helps the perpetuation of this weak and untrustworthy criminal justice system is the delays in justice. Through the manipulation of delays in justice, it is possible to derail any attempt to hold people liable for serious crimes in every area of life.

Impact On Public Institutions

Thus, delays in criminal justice are not merely a matter of inconvenience. It is a matter of the highest importance in order to maintain a properly functioning public institution which guarantees the possibility of having a credible system of managing an economy. It is also the precondition for holding those who are engaged in political life liable for any form of abuse of power or corruption.

In these times when the need for a system change has become a major demand, it is essential to consider not merely what outwardly appears as the most obvious economic issues and political system issues but it is also to connect these matters to the overall system within which the administration of justice

completely rests. Overcoming the delays in justice is an essential ingredient for a proper functioning economic system as well as a political system.

An Interview with Mr Basil Fernando: "Sri Lanka's problem is the breakdown of the rule of law"

Written by Sydney Nelson; Extracted from Right Livelihood (www.rightlivelihood.org/news)

2014 Right Livelihood Laureate Basil Fernando **and his colleagues at the Asian Human Rights Commission (AHRC) have been working on a common problem for the last 40 years: the breakdown of the rule of law. Today, Fernando said, one does not need to look any further than Sri Lanka, his home country, to see this process play out in real-time, as well as understand how to turn it around.**

For the past six months, Sri Lankans have gathered en masse to protest against the government. The administration's bad governance and mismanagement of the economy have driven the country into an economic crisis. As a result, people are suffering from malnutrition, fuel shortages and daily blackouts, and the government cannot import necessities like medicine.

While the protests have made significant progress, Fernando says that without rebuilding the rule of law, Sri Lanka will not recover from the deep economic, social and political turmoil it is currently in.

The crisis has affected everyone. People of every political ideology, age, and ethnic background have gathered to protest the government.

"Huge numbers, unexpected numbers, began to gather," Fernando said. "Their main demand was that the president should resign. The slogan was GotaGoHome, with Gota being the family name. It became a national thing, resounding everywhere."

The slogan proved to be successful. It has now been more than two months since the protesters' main demand was met and

President Gotabaya Rajapaksa resigned. According to Fernando, however, this is where the real struggle begins.

"When you say GotaGoHome and President Get Out, everybody understands," said Fernando. "But, if you say the judiciary needs to be improved, that is not easy."

The problem is that the crisis goes much deeper than the current government, Fernando explained. From the British occupation to the brutal killings of student revolutionaries in the early 1970s, there have been many moments in Sri Lankan history where the government failed its people.

However, Fernando said, one historic event was especially detrimental. In 1978, a right-wing president introduced a new constitution that centralised presidential power and weakened the judiciary and legislature. It also gave the president complete legal immunity.

"The constitution says that the president cannot be brought to court for any reason, not even a personal matter," Fernando said. "The result was, whatever the government did, they could use this immunity provision. And it was extended to ministers."

The immunity enjoyed by government officials eventually spread to all public institutions.

"Corruption has increased to a level that is far beyond any imagination," said Fernando. "Earlier, there were limited levels of corruption. Today, corruption is simply in everything."

The complexity of this crisis means there are no easy solutions. Even when broken down into smaller pieces – politics, economics, and human rights – everything comes down to rebuilding the rule of law, Fernando said.

"Very often, people do not see the link," he said. "To run a central bank, you need to observe rules. It's the same with everything. But, once the observance of the rules becomes irrelevant, you can do whatever you like. And without putting that back somehow, how can you expect a solution?"

When a crisis like this occurs and a country is unable to fix it themselves, Fernando explained, the United Nations and the rest of the international community often step in to offer recommendations. The problem is that these recommendations rarely turn into actions.

"In the UN, various bodies come out with huge amounts of recommendations every year," explained Fernando. "They centre around just three things: have investigations, prosecute offenders, and compensate the victims. But, if you have no machinery to investigate, who is going to investigate? If we don't investigate, who is going to prosecute? If you don't have prosecutions, then who is going to pay compensation?"

To overcome this problem, Fernando emphasised the importance of understanding the local context and studying the existing judicial system.

Fernando proposed there should be a dedicated research centre on each subcontinent that focuses on studying local legal systems, as well as closing the gap between the UN's recommendations and implementing real solutions.

"There should at least be one centre of dialogue," said Fernando. "Where we can bring various people, experts, judges, lawyers, politicians to engage in research on how to improve the rule of law. If you have a centre like that, it will be constantly engaged and it can feed the UN system with better, more in-depth information."

While these types of solutions require significant resources and time, Fernando remains optimistic and continues to believe that rebuilding the rule of law is possible.

"I have continued to talk about it and write about it," Fernando said. "And somehow, if we are able to communicate this, and get some discussions going in this area, I think we can make much more progress. Even within the governments there are a lot of people who understand the problem. They want ways out of it too."

Section 11: Reading – A section from Tom Bingham's book " The Rule of Law"

The Importance of the Rule of Law

Credit for coining the expression 'the rule of law' is usually given to Professor A. V. Dicey, the Vinerian Professor of English Law at Oxford, who used it in his book An Introduction to the Study of the Law of the Constitution, published in 1885. The book made a great impression and ran to several editions before his death and some after. But the point is fairly made that even if he coined the expression, he did not invent the idea lying behind it. One author has traced the idea back to Aristotle, who in a modern English translation refers to the rule of law, although the passage more literally translated says: 'It is better for the law to rule than one of the citizens', and continues: 'so even the guardians of the laws are obeying the laws. Another author points out that in 1866 Mr Justice Blackburn (later appointed as the first Lord of Appeal in Ordinary, or Law Lord) said: 'It is contrary to the general rule of law, not only in this country, but in every other, to make a person judge in his own cause …'. The same author points out that the expression 'The Supremacy of the Law' was used as a paragraph heading in 1867. So Dicey did not apply his paint to a blank canvas. But the enormous influence of his book did mean that the ideas generally associated with the rule of law enjoyed a currency they had never enjoyed before.

Dicey gave three meanings to the rule of law. 'We mean, in the first place,' he wrote, 'that no man is punishable or can lawfully be made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land.' Dicey's thinking was clear. If anyone – you or I – is to be penalized it must not be for breaking some rule dreamt up by an ingenious minister or official in order to convict us. It must be for a proven breach of the established law of the land.

And it must be a breach established before the ordinary courts of the land, not a tribunal of members picked to do the government's bidding, lacking the independence and impartiality which are expected of judges.

Dicey expressed his second meaning in this way: 'We mean in the second place, when we speak of "the rule of law" as a characteristic of our country, not only that with us no man is above the law, but (which is a different thing) that here, every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals.' Thus no one is above the law, and all are subject to the same law administered in the same courts. The first is the point made by Dr Thomas Fuller (1654–1734) in 1733: 'Be you never so high, the Law is above you.' So, if you maltreat a penguin in the London Zoo, you do not escape prosecution because you are Archbishop of Canterbury; if you sell honours for a cash reward, it does not help that you are Prime Minister. But the second point is important too. There is no special law or court which deals with archbishops and prime ministers: the same law, administered in the same courts, applies to them as to everyone else.

Dicey put his third point as follows:There remains yet a third and a different sense in which 'the rule of law' or the predominance of the legal spirit may be described as a special attribute of English institutions. We may say that the constitution is pervaded by the rule of law on the ground that the general principles of the constitution (as for example the right to personal liberty, or the right of public meeting) are with us the result of judicial decisions determining the rights of private persons in particular cases brought before the courts; whereas under many foreign constitutions the security (such as it is) given to the rights of individuals results, or appears

to result, from the general principles of the constitution.

Dicey's dismissive reference to foreign constitutions would now find few adherents. But he was a man of his time, and was concerned to celebrate, like Tennyson,

A land of settled government,

A land of just and old renown,

Where Freedom slowly broadens down from precedent to precedent.

('You ask me, why …')

Thus, he had no belief in grand declarations of principle (and would, I think, have had very mixed views on the Human Rights Act 1998), preferring to rely on the slow, incremental process of common law decision-making, judge by judge, case by case.

Dicey's ideas continued to influence the thinking of judges for a long time, and perhaps still do, but as time went on they encountered strong academic criticism. His foreign comparisons were shown to be misleading, and he grossly understated the problems which, when he wrote, faced a British citizen seeking redress from the government. As the debate broadened, differing concepts of the rule of law were put forward until a time came when respected commentators were doubtful whether the expression was meaningful at all. Thus Professor Raz has commented on the tendency to use the rule of law as a shorthand description of the positive aspects of any given political system. Professor Finnis has described the rule of law as '[t]he name commonly given to the state of affairs in which a legal system is legally in good shape'. Professor Judith Shklar has suggested that the expression may have become meaningless thanks to ideological abuse and general over-use: 'It may well have become just another one of those self-congratulatory rhetorical devices that grace the public utterances of Anglo-American politicians. No intellectual effort need therefore be wasted on this bit of ruling class chatter.' Thomas Carothers, in 2003, observed that 'There is also uncertainty about what the essence of the rule of law actually is'. Professor Jeremy Waldron, commenting on the decision of the US Supreme Court in Bush v Gore – the case which decided who had won the presidential election in 2000, and in which the rule of law had been invoked by both sides – recognized a widespread impression that utterance of

those magic words meant little more than 'Hooray for our side'. Professor Brian Tamanaha has described the rule of law as 'an exceedingly elusive notion' giving rise to a 'rampant divergence of understandings' and analogous to the notion of the Good in the sense that 'everyone is for it, but have contrasting convictions about what it is'.

In the light of opinions such as these, it is tempting to throw up one's hands and accept that the rule of law is too uncertain and subjective an expression to be meaningful. But there are three objections to this course. The first is that in cases without number judges have referred to the rule of law when giving their judgments. Thus in one case, concerned with an effective increase made by the Home Secretary in the term to be served by a young convicted murderer, Lord Steyn, sitting in the House of Lords, said: 'Unless there is the clearest provision to the contrary, Parliament must be presumed not to legislate contrary to the rule of law. And the rule of law enforces minimum standards of fairness, both substantive and procedural.' In a very different kind of case concerned with appeals against decisions made on issues of town and country planning, Lord Hoffmann, also sitting in the House of Lords, said: 'There is however another relevant principle which must exist in a democratic society. That is the rule of law.' Statements of this authority, and many others like them, cannot be dismissed as meaningless verbiage.

The second objection is that references to the rule of law are now embedded in international instruments of high standing. Thus the preamble to the Universal Declaration of Human Rights 1948 – the great post-war statement of principle associated with the name of Mrs Eleanor Roosevelt – described it as 'essential, if man is not to be compelled to have recourse, as a last result, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law'. The European Convention of Human Rights 1950, of which the UK was the first signatory, referred to the governments of European countries as having 'a common heritage of political traditions, ideals, freedom and the rule of law …'. Article 6 of the Consolidated Version of the Treaty

on European Union, to which the UK is also a party, provides: 'The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.' Thus there is a strong international consensus that the rule of law is a meaningful concept, and a rather important one at that. The 1996 Constitution of South Africa, declaring in clause 1 the values on which the Republic is founded, lists the 'Supremacy of the Constitution and the rule of law'. Although 'the rule of law' is, obviously, an English expression, familiar in the UK and in countries such as Ireland, the United States, Canada, Australia and New Zealand, whose law has been influenced by that of Britain, it is also meaningful in countries whose law is influenced by the jurisprudence of Germany, France, Italy, the Netherlands and Spain. In Germany, for instance, reference is made to the Rechtstaat, in France to the État de droit, which, literally translated, mean 'the law-governed state'.

The third objection is that reference is now made to the rule of law in a British statute. The Constitutional Reform Act 2005 provides, in section 1, that the Act does not adversely affect '(a) the existing constitutional principle of the rule of law; or (b) the Lord Chancellor's existing constitutional role in relation to that principle'. Under section 17(1) of the Act the Lord Chancellor must, on taking office, swear to respect the rule of law and defend the independence of the judges. So, there we have it: the courts cannot reject as meaningless provisions deliberately (and at a late stage of the legislative process) included in an Act of Parliament, even if they were to sympathize with some of the more iconoclastic views quoted above, as few (I think) would.

The practice of those who draft legislation is usually to define exactly what they mean by the terms they use, so as to avoid any possibility of misunderstanding or judicial misinterpretation. Sometimes they carry this to what may seem absurd lengths. My favourite example is found in the Banking Act 1979 Appeals Procedure (England and Wales) Regulations 1979, which provide

that: 'Any reference in these regulations to a regulation is a reference to a regulation contained in these regulations.' No room for doubt there. So, one might have expected the Constitutional Reform Act to contain a definition of so obviously important a concept as the rule of law. But there is none. Did the draftsmen omit a definition because they thought that Dicey's definition was generally accepted, without cavil, and called for no further elaboration? Almost certainly not: parliamentary draftsmen are very expert and knowledgeable lawyers, whose teachers would have expressed scepticism about some features of Dicey's analysis. More probably, I think, they recognized the extreme difficulty of devising a pithy definition suitable for inclusion in a statute. Better by far, they might reasonably have thought, to omit a definition and leave it to the judges to rule on what the term means if and when the question arises for decision. In this way a definition could be forged not in the abstract but with reference to particular cases and it would be possible for the concept to evolve over time in response to new views and situations.

Once the existing constitutional principle of the rule of law had been expressly written into a statute, it was only a matter of time before it was relied on by a litigating party. This duly occurred, perhaps sooner than anyone expected, in a case challenging a decision of the Director of the Serious Fraud Office to stop an investigation into allegedly corrupt payments said to have been made by BAE Systems Ltd. to officials in Saudi Arabia. His decision was held by one court to be contrary to the rule of law, although the House of Lords ruled that it was not, and therefore did not have to rule on what the rule of law meant in that context. But the question is bound to arise again, and the task of devising at least a partial definition cannot be avoided indefinitely. So, I think we must take the plunge.

The core of the existing principle is, I suggest, that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in

the courts. This statement, as will appear in Chapters 3–10, is not comprehensive, and even the most ardent constitutionalist would not suggest that it could be universally applied without exception or qualification. There are, for example, some proceedings in which justice can only be done if they are not conducted in public, as where a manufacturer sues to prevent a trade competitor unlawfully using a secret and technical manufacturing process. But generally speaking, any departure from the rule I have stated calls for close consideration and clear justification. My formulation owes much to Dicey, but I think it also captures the fundamental truth propounded by the great English philosopher John Locke in 1690 that 'Wherever law ends, tyranny begins'. The same point was made by Tom Paine in 1776 when he said 'that in America THE LAW IS KING. For as in absolute governments the King is law, so in free countries the law ought to be King; and there ought to be no other.'

None of this requires any of us to swoon in adulation of the law, let alone lawyers. Many people on occasion share the view of Mr Bumble in Oliver Twist that 'If the law supposes that … the law is a ass – a idiot.' Many more share the ambition expressed by one of the rebels in Shakespeare's Henry VI, Part II, 'The first thing we do, let's kill all the lawyers.' Few would choose to set foot in a court at any time in their lives if they could avoid it, perhaps echoing an Italian author's description of courtrooms as 'gray hospitals of human corruption'. As for the judges, the public entertain a range of views, not all consistent (one minute they are senile and out of touch, the next the very people to conduct a detailed and searching inquiry; one minute port- gorged dinosaurs imposing savage sentences on hapless miscreants, the next wishy-washy liberals unwilling to punish anyone properly for anything), although often unfavourable. But belief in the rule of law does not import unqualified admiration of the law, or the legal profession, or the courts, or the judges. We can hang on to most of our prejudices. It does, however, call on us to accept that we would very much rather live in a country which complies, or at least seeks to comply, with the principle I have stated than in one

which does not. The hallmarks of a regime which flouts the rule of law are, alas, all too familiar: the midnight knock on the door, the sudden disappearance, the show trial, the subjection of prisoners to genetic experiment, the confession extracted by torture, the gulag and the concentration camp, the gas chamber, the practice of genocide or ethnic cleansing, the waging of aggressive war. The list is endless. Better to put up with some choleric judges and greedy lawyers.

Section 12: Memorandum by Dr. Ivor Jennings

I presume that the Commission wishes me to give evidence on the more general matters covered by its terms of reference, and particularly on the relations between Police and public. Before I do so, however, I should like to point out that my work in this field has been done in Great Britain, where the homogeneity of the population makes generation possible. Ceylon is not homogeneous in the sense that it has a single set of social conventions applying to all classes and to all sections of the country. The class structure is far more rigid; there seems to be a much greater variation between the urban and the rural population; the different regions impose different social conventions; caste differences still play their part; each community has a different set of inherited traditions, and, above all, the section of the population with which I have been in contact, the English-educated middle class, is not typical of the rest of the population. Accordingly, it would be very difficult to generalize even if it were possible to study the whole population. I doubt if anybody has done so, and I am quite sure that have not. Accordingly, I give evidence with all reserve and express opinions merely as suggestions to be followed up.

It is inevitable that the machinery of enforcement should be blamed for a high crime rate. The citizen who fears that his property may be stolen or who considers it dangerous for his daughter to be abroad after dusk asks for more and better Police protection. The primary problem is, however, not to secure punishment for breaches of the Law but to prevent them. Law enforcement is one aspect only of obedience to law. Indeed, if the law is not obeyed it cannot be enforced. Great Britain's low crime rate is not due in any large measure to the efficiency of its Police forces; on the contrary, the efficiency of its Police forces is due primarily to a low crime rate. It has a law-abiding population, with the result that enforcement becomes comparatively easy. The Police have to deal

not with the great mass of the population but with small minority, most of whom become "known to the Police", and against which the force not only of the Police but also of the vast majority of the population is arrayed.

If this analysis is correct (and in Great Britain it could be supported not only by a multitude of examples but also by a historical explanation of the development of the tradition of obedience to law) we have to seek the main causes of high crime rate not so much the deficiencies of the Police forces as in the deficiencies of public opinion. Before I suggest the lines on which these deficiencies might be examined however, I should emphasize that adequate enforcement of the law itself helps to create a tradition of obedient. Lawlessness is, if I may use the term, socially incautious. The one certain conclusion which can be drawn from the voluminous reports of the President's Commission on Law Enforcement in the United States is that the Prohibition experiment, by creating a branch of the law which could not be enforced in many parts of the United States, gave rise to a general tradition of lawlessness which spread to all parts of the country and to all branches of the law. Enforcement reacts an obedience on the efficiency of enforcement. Readers of Dickens' works will be aware that little more than a century ago London was one of the most lawless places in the world. The change over the past century has been due mainly to changes in social opinion, but reforms in the machinery of enforcement also played a part. Those reforms by themselves would have had little effect, but the changes in social opinion would have been much less effective if Peel's Act of I829 had not created the Metropolitan Police and the machinery of the criminal law had not been vastly improved. I shall revert presently to the machinery of enforcement. At the moment I am concerned with public opinion.

In this connection I think that the following questions should be answered: —

Are the laws in tune with public opinion?

It is well known that laws which lack public support are not observed. The Prohibition laws of the United States were the best

examples. They almost certainly had behind them a majority of the people taking the United States as a whole, but a large minority which in cities like New York, Chicago and San Francisco was perhaps a majority—thought them a stupid and unnecessary interference with the liberty of the subject. There have also been examples in England—for instance street betting in the East End of London. The distinction between mala prohibita and mala in se cannot be supported in analysis but it, does represent a very popular reaction to law. If there are too many, mala prohibita which are not regarded as mala in se the result will be a general practice of non-obedience.

Of course, the solution may be not to change the laws but to change public opinion. Black market offences seem to me to supply an excellent example. A Food Minister in Great Britain once remarked that rationing offences were not merely illegal, they were also bad form. In large measure that was true of Great Britain and it explains in part why the rationing system was so good. At least the citizen who broke the laws did not boast about it, and if he claimed some eminence he had to conform. Persons of comparable status in Ceylon on the other hand have actually paraded their extensive knowledge of the black markets. However, this is a question to be taken up later. It may be that there are in Ceylon unnecessary laws, or laws which diverge from public opinion. If so, it should be considered whether they ought not to be repealed of; if considered necessary, explained and justified. In this connection, too, it needs to be emphasized that laws which are not enforced are laws only in a formal sense. If, for instance, the law of compulsory education can be broken with impunity, it really is not law; it is nothing more than an admonition. I presume that the crowds which hang on to trams, buses and trains are breaking the law, but nobody seems to bother much about it. In so far as those who break the laws knew that they are doing so and that they can continue to do so with impunity, the laws are brought into contempt; and if one is contemptuous of one set of laws one is contemptuous of all laws. Conventions grow up which are positively illegal and there is a complete divergence between law and opinion. Of a

slightly different order are laws passed by the State Council which are not put into operation because no administrative machinery has been provided. Sometimes it is provided that the Ordinance shall come into operation on a date fixed by Proclamation, but no Proclamation is issued sometimes, as in the case of the Maternity Benefits Ordinance, for the first couple of years, the Ordinance is theoretically in operation but is ignored in practice. All this seems to me to weaken if not to destroy the essential social convention that the laws ought to be obeyed.

Are the laws known and understood?

This follows naturally from the preceding question. It is of course true that nowhere in the world are the laws accurately known. A person who knows the difference between larceny by a trick and obtaining by false pretenses is either a lunatic or a lawyer, or perhaps both. What the citizen has, or ought to have, is a general knowledge of what is wrong. He is not expected to know the exact meaning of "malice aforethought", but he ought at least to know that hitting people over the head with a mamoty is not highly approved in the best circles. The danger of much making of laws is that people will not know about them outside the Legal Draftsmen's Office.

There are obviously special difficulties in Ceylon. The most important is the very low standard of literacy. The citizen of Hoxton spends his Sunday morning studying the criminal law of England in newspapers which cater to his taste. In Ceylon eighty-five percent of the population could not read a newspaper with ease even if they could afford to buy one; nor do the newspaper help very much, for they generally record the wattles of persons

who seem to the reader to have committed crimes but whose conviction was impossible owing to some technical flaw in the evidence. Further, not all the religions of the Island require its professors to give regular lectures on civic morality, whereas in Europe a crime is almost invariably a sin, so that a flaw in the evidence may not avail much in wit may justly he called the long run.

It seems probable that in any case not enough effort is made to explain the laws and justify them to the general population. Most Ordinances consist of legislation by reference; the Bills are explained to the members of the State Council, but the Ordinances are not explained to the people who have to obey them, presumably on the assumption that the member of the State Council needs to be helped through the Legislative Enactment of Ceylon, whereas the urban worker or the villager keeps a set rolled up in his sleeping-mat and reads a page or two every night. In Great Britain if any piece of legislation requires the collaboration of the general public a leaflet is prepared in as simple a language as possible. Where positive action by citizens is required newspaper advertisements in words of one syllable are prepared and widely published. These are quite unlike the advertisements published (at least in the English press) by some of the Government Departments in Ceylon, which generally require the reader to have passed in Latin at the Higher School Certificate Examination. How they read in Sinhalese and Tamil I do not know, but I can guess that they would be equally intelligible to the villager if they were published in Hebrew. There used to be a rule for political speakers to select the most stupid-looking member of an audience and watch if he showed any glimmer of intelligence as the speech proceeded; if he did, the audience understood. It is a useful rule for the Government Departments to write for the least educated members of the public, not for Government University Scholars. Actually, the War Publicity Committee found it quite impossible to get most Departments to explain themselves at all: they went on shovelling out regulations with no attempt whatever to explain what they were about.

Is the general attitude to laws of the educated classes, correct?

The so-called decent and respectable citizen sets the tone, or ought to set the tone, for the general population. In a law-abiding country he not only reforms from breaking laws but actively assists m their enforcement. In fact the social ostracism which is

applied to the criminal is a far greater deterrent than anything that can be ordered by a court. It does not much matter what the judge says. But it does matter what the neighbours say. A criminal is a cad, a social pariah. The chief cause of the wave of lawlessness in the United States in the 'twenties was that it ceased to be bad

form to break the laws, in fact it was bad form not to break the Vaulted Act. Some of my contemporaries went to American universities in 1926 carrying with them the Englishman's belief that they ought to obey the laws of the United States. They were distressed to find that they were regarded as "stuck-up Englishmen" until they fell into the general practice of carrying a flask of contraband gin. In fact, however, we had precisely the same phenomenon in England with the motor car laws. For a time the "best people" did not obey those laws, and so we too had a wave of lawlessness. If it is permissible to drink contraband liquor in Central Park, it is equally permissible to wage gang warfare in the Bronx; if it is permissible to risk human life in Mayfair, it is equally permissible to risk it in Lime house; if it is permissible to buy black-market tyres, it is equally permissible to steal them. The only people in Ceylon who have any right to complain about the prevalence of crime are those who invariably obey the laws.

Such knowledge as I have of the English-educated classes suggests that the question under discussion might be subdivided as follows: —

Is it considered that a breach of the law is unpatriotic?

It is surely true that the maintenance of law and order is the fundamental duty of the State. The patriotic citizen, therefore, considers that his primary duty is to assist the State in maintaining law and order. He is entitled to question the justice of the laws and, if he considers them unjust, to try to secure their amendment, but he is not entitled to break them or to encourage others to break them. These principles are so obvious that one is almost ashamed to quote them: but are they universally observed in Ceylon? If they are not, the criticism must not be limited to those who take

part in or foment illegal strikes. demonstrations, and other illegal methods of political propaganda: it must also be addressed to those who buy petrol or textiles or rice in the black-market and those who buy fish above the controlled price.

Is it considered clever to evade the laws by finding loopholes?

Obedience to law is not a matter of obeying the letter but of obeying the spirit. I have mentioned already that the ordinary citizen cannot be expected to know the precise nature of his legal duties, what he does know is that actions of a certain type are wrong. In other words, he tries to carry out not so much the law as its purpose. In my lectures in England I used to quote the Ten Commandments, for instances " Thou shalt not kill ". Most Christians consider that in certain circumstances homicide is justifiable or excusable, but they know the general purpose of the Commandment and seek to carry out that purpose. If, however, a small section of the population which can afford to take legal advice on the precise extent of its duties sails as near the wind as it can get without landing in court, the ordinary citizen, who has not those advantages, cannot be expected to have such a respect for the law as with encourage him to conform to the best of his ability. Similarly, if wealthier citizens who are charged with offence of the type clearly contemplated by the laws manage to secure acquittal by employing Counsel to find holes in the drafting or in the presentation of the evidence, the law is brought into contempt. I do not know whether these practices are more or less widely prevalent in Ceylon than elsewhere, but they are clearly undesirable and it would be unfortunate if public opinion actually approved the " cleverness " of the near criminal.

Is it believed that the laws are administered with partiality or corruptly?

If so, the laws are necessarily brought into contempt. I refer, of course, not to administration by courts, but to administration by Government Departments in those many cases where a

licence or permission has to be obtained. Law ought clearly to be administered in Government offices as in the courts "fairly and freely, without favour and without fear". What is more, justice must not only be done, it must be seen to be done. These rims of legal administration seem to me to be essential to maintain the tradition of obedience to law. If a citizen believes that a wealthy person can obtain what he wants by bringing a subordinate officer, or that a person of influence can secure advantages by speaking personally to a senior officer or a minister, the citizen has no incentive to obey that or any other law. or is there any difference in this respect between corruption and mere partiality, for the effect is, precisely the same. To give, way to political or social pressure or mere friendship brings the law into contempt as quickly as to take a bribe.

Is there misplaced sympathy with the criminal who is caught and punished?

Part of the success of English justice has been due to the ruthlessness with which the criminal is tracked down and punished. In the case of a young offender or any other person whose reformation seems possible, every effort is made to secure it: but punishment has a valuable deterrent effect which is essential to the creation of a sound public opinion. The sentimental person who points out that the crime as an error of judgment (all crimes are, if the criminal is discovered), that the punishment is hard on the wife and children or the aged mother, or that the criminal had an exhalant school record before he entered upon his criminal career, is a nuisance to society.

Public opinion must condemn the criminal, not sympathize with him, and social condemnation, as I have said, is a valuable means of securing conformity. I have noticed that sentimentalism of this type is widely prevalent, but I am unable to say how prevalent it is. It should certainly be pointed out emphatically that if a person receives sympathy because he is socially or politically prominent the rest of the population cannot be expected to regard breaches of the law with any abhorrence.

The establishment of a sound public opinion about crime is obviously not an easy matter. Perhaps at this stage I ought to try to explain how the change occurred in England during the nineteenth century. It seems to me to have been almost entirely a religious movement which became secularized late in the century. So far as the wealthier classes were concerned it was an evangelical revival within the Church of England which produced among many an acute social conscience. William Wilberforce and the Earl of Shaftsbury were the outstanding examples, and their influence on public opinion and upon public policy was profound: but it may be pointed out that those who did most to clean up the corruption of the Unreformed Constitution, especially statesmanlike William Pitt, Sir Robert Peel, Sir James Graham, and Mr. Gladstone, were influenced by the same movement. The effect of the movement can be seen in the universities and schools also. Oxford and Cambridge were intensely concerned with religious questions a hundred years ago, while the Oxford Movement owns at its height. The public schools were inspired with the same spirit, especially after Arnold went to Rugby.

Among the working classes all sections of the Christian Church including the Roman Catholic Church after its release from most of its legal disabilities took a hand. They operated directly, through churches, chapels and missions, and also indirectly through schools, and it is a significant fact that by 1860—that is, before the State had established a single school-- we had as high a proportion of children at school as Ceylon, with its alleged compulsory education has now. After 1870 a substantial part of the educational movements became secularized but it did not lose what may perhaps be called its evangelical character. Expressed in secular terms, it may be said that the essential function of a school, whether it was a public school for the rich or a board school for the poor, was to produce good citizens. The result: was to spread the public school spirit, more or less on the lines inculcated by Arnold a' Rub, but often deprived of its religious background, through all the schools and therefore, after education became compulsory in 1880, through all classes. Victorian morality had its odd ties, but

it did succeed in establishing an acute social conscience which, inter alia made it immoral improper, unpatriotic and undignified to break the

laws of England. It is so still, so that not only does the individual conform to law almost instinctively but also he is under constant social pressure towards conformity. The need for obedience to law is impressed upon him at stages of his training at home, in the school, in the factory, and in the streets. It should be emphasized, however, that conformity to law is only one aspect of the matter; it is general social behaviour, which includes such apparently trivial matters as keeping off the grass borders, avoiding flower beds in the parks, queuing, passing down the ear, and keeping one's elbows to oneself. Obedience to law, in other words, is merely common decency or good form. The criminal, as I said before, is a cad.

There is, however, another aspect of the matter. Charles Booth in the great Survey of London Life and Labour which he compiled in the 'eighties, described the poorest workers as belonging to the "semi-criminal classes". They were not described because they were poor but because the environment in which they lived tended to produce criminals. No English student of social conditions would accept the doctrine, which I have heard expounded in Ceylon, that people are dishonest because they are poor. On the contrary, people are often dishonest because they are rich, or because they feel it necessary to keep up a standard of living for which they have inadequate resources. In Great Britain certainly—and perhaps in Ceylon also the sort of person who used to be described as "the respectable working man" is often is more conscientious and law-abiding citizen than the more pretentious member of the middle classes. Charles Booth's semi- criminal classes were, however, the slum-dwellers, living in grossly overcrowded conditions in insanitary tenements, with the streets as the only playgrounds for the children and the public houses the only recreation for the adults. They were correctly described as "semi-criminal" because poverty, illiteracy, overcrowding, disease, drunkenness, vice and crime went together. In this

respect there had bean a remarkable improvement in the fifty years before the war. Though the New Survey of London Life and Labour produced by the London School of Economics in the 'thirties showed that one-ninth of the population was still living below a reasonable level of subsistence, the environment had been fundamentally changed. The most impressive social document I have ever seen consisted of two photographs published by the London County Council in 1939. The one showed a typical group of schoolboys in the early years of the century. They looked like a collection of young thugs. The other showed a typical group in 1939, bright, cheerful looking boys who were a credit to their parents and their country. The change may have been due in part to a rise in the standard of living, but much more important was the alteration of the environment in which they lived. The 1939 group were the children of parents who had at least eight years of compulsory education: the areas in

which they lived were still slums, but there had been vast improvements— air and light had been let in by slum clearance campaigns and rebuilding programmes, parks had been provided, public libraries opened, schools immensely improved, new forms of recreation established as substitutes for the public houses, and so on. The decrease in crime in Great Britain, therefore, was not due only to religious zeal which propagated the social virtues, but also to compulsory education and other social reforms which had in large measure succeeded in combating the social vices.

Generally speaking, the environment in Ceylon is far better than the environment in the East End of London a hundred or even fifty years ago, and I do not wish to suggest that this island has to face a problem at all comparable with that which the newly industrialized Great Britain had to face in the nineteenth century. The experience of Great Britain suggests, however, that an attack on crime may take two forms. First, there may be a steady propagation of the social virtues. Secondly, there may be an attack on the social conditions in which crime tends to flourish. Specific suggestions should be made by someone more familiar with the

social conditions of the Island than I am, but the following may stipulate thought:

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I.

The leaders of opinion, religious, social and political might make it part of their duty to emphasize the civic virtues in their public addresses. I doubt if "anti-crime societies" as such are of such value because something more positive is required, the development of the notion that it is the duty of the citizen to give every assistance to the State. Of course, it is useless for Satan to reprove sin. If a politician makes speeches about social obligation and then obtains it privileges for influential constituents he gives an effective answer to his own propaganda.

Assuming that every child was given an adequate school education, which is at present far from being the case, the schools could do a great deal. The experience of Great Britain is that it cannot be done by teaching " civics ", because what are wanted is not knowledge but an attitude. The method used is that originated by Arnold at Rugby, the development of a corporate spirit in the school itself, the stimulation of a loyalty to the school which induces the child to recognize his obligations to his fellows. This means, of course, that the school must be distinctive, an institution of which the child can be proud, with its own method and tradition. It cannot be done in a barrack or a cattle-shed built by the Public 'works Department and inspired by the Department of Education. On the other hand it has been shown by British experience that it can be done as easily in an elementary school as in Royal College. Once this idea of social obligation has been developed. it can easily be given a wider and national character by emphasis on the history and geography of Ceylon And the `ways of he and

thought of her people. A strident and raucous nationalism, such as has been common among some sections of opinion would defeat its own end, for it is founded not on the merits of Ceylon and her peoples but on the alleged deficiencies of others. The

child must feel that he is a unit of a worthy people, with a long' tradition of its own, to which it is his duty both to conform and to contribute. In other words, his attitude to the nation must be the same as his attitude to the school, and this attitude is created not by formal teaching but by suggestion. All this may seem remote from the Commission's terms of reference, but the fact is that children cannot be taught not to be criminals whereas they can be taught to be good citizens, and the latter includes the former.

Adequate social services can help to improve the environment. Improved housing has been of immense influence in Great Britain, and it might be so among sections of the population of Ceylon also, but this is to travel well outside the Commission's immediate sphere of interest.

If there is any suggestion that crime in Ceylon is due (as it was in Great Britain) to the absence of facilities for healthy recreation; it would be desirable to provide them, or to stimulate their provision by voluntary bodies. In Great Britain a large amount of juvenile and youthful crime was due to the absence of means by which young people could divest themselves of their surplus energy or use their spirit of adventure. Part of it was sheer boredom. Accordingly, the fundamental change was the provision of public libraries, boys' and girls' clubs boy scouts and girl guides, cycling clubs, falsities for hiking, games of all kinds, and so on. These facilities are sadly lacking in Ceylon, and generally they are provided, if at all for the middle classes. Possibly an even more important development was the spread of the cinema and the dance hall, which replaced the public house as the centre of amusement.

Finally, I would suggest that the Government itself does very little to encourage the good citizen to collaborate with it. It does not adequately explain what it is doing and why. Even at this distance and even though I am professionally concerned with Ceylon education, I know more about the recent British reforms than the recent Ceylon reforms. I bought the necessary documents in a bookshop, where they were exhibited for the benefit of anybody who was sufficiently interested, and they are comprehensive. The

only document about the recent Ceylon reforms is the Report of the Special Committee on Education. I presume I could get a copy if I went to the Secretariat and poked my head through a hole in a partition there: but the Report has been superseded by decisions of the State Council and the Executive Committee of Education. There is no simple method of finding out what they are; in fact on some parts of the policy there is no method at all except to ring up the Director of Education and ask.

Let me give an even more typical example. The Englishman reading his morning paper discovers that the Secretary of State for the Colonies has made a statement in the House of Commons on the Government's policy in relation to constitutional development in Ceylon, and the text of the statement is set out. The newspaper adds a summary of a White Paper issued simultaneously. If the Englishmen is sufficiently interested, he will telephone his local bookseller and ask him to send a copy of the White Paper when it arrives. It will in fact arrive next day, and the Englishman will receive an attractive pamphlet of eight pages octagon headed: "Colonial Office: Ceylon Statement of Policy on Constitutional Reform". The pamphlet mentions that it is published by His Majesty's Stationery Office price 2d. It will in fact be on sale in all the bookshops where there is likely to be any demand for it. Now let us switch to Ceylon where the policy is of much greater public interest. No statement is made in the State Council, but Reuters reports the statement in the House of Commons and the newspaper gives a summary of the White Paper. Diligent inquiry may show that the White Paper has been published as Ceylon Government Gazette Extraordinary, No. 9,480. I have the text before me. It is in the unreadable form of the Gazette. It mentions that it was printed at the Ceylon Government Press, but does not indicate whether copies can be purchased, There may be copies in the bookshops, though I have never seen them. I suppose that, if I had not received a complementary copy, I might have been able to get one if I had poked by head through the hole in the partition at the Secretariat. In actual fact, I prefer to use the English White Paper, which I had sent to me by my Cambridge bookseller.

All this is of general application. His Majesty's Government takes care to keep the electors informed of its policy through statement in Parliament and numerous publications. These publications are on sale at attractive shops maintained by the Government in London, Edinburgh, Cardiff and Belfast. Copies are supplied on trade terms to the bookshops. They are well printed and cheap. Sometimes, indeed, the price bears no relation to the cost because large circulation is considered desirable. Where the documents are too complicated for the ordinary- reader, they are summarized in attractive leaflets and pamphlets. If necessary, seminaries of the summaries are published as newspaper advertisements. I would suggest to the Commission that something on these lines should be done in Ceylon. Obedience to law does not consist only in refraining from those acts which are forbidden; it consists also in collaborating with the Government in carrying out its policy.

It should be added, too, that the public opinion which should be developed by the instruments of propaganda ought to emphasize the duty of the individual to collaborate in that policy whether he agrees with it or not. As a citizen he is entitled to use all the democratic means available for getting the policy changed if he does not agree with it: but so long as it is Government policy his duty is to carry it out. Ceylon has perhaps suffered from the fact that in the past the Government's policy has not necessarily been that approved by the majority in that Legislature. That will not be so under the new Constitution, and it is implicit in responsible government that the ordinary citizen should axpect and do his best to carry out the policy that has been approved by Parliament.

II.

My knowledge of Ceylon is much too limited to make it possible for me to offer more than incidental remarks on the relations between Police and public. I can, however, describe the situation in England from the point of view of a citizen who was also a magistrate for a few years. It will be appreciated that the

general attitude described in previous paragraphs makes the task of the Police comparatively ease. Except in certain of the more turbulent areas, the ordinary citizens regard the Policeman as the preventative of that law and order which the citizen himself is anxious to protect. The Policeman can almost invariably rely on the assistance of passers-by if he has to make an arrest; and if controversy develops in the streets, or an accident occurs, it is assumed by every one that the Police Officer takes charge of the situation as soon as he arrives on the spot. As the Royal Commission put it in 1929 (paragraph 300): —

"There is, we believe an instinctive and deep-rooted sympathy between the public and the Police, which has never really been broken, in spite of minor misunderstandings and cases of friction which occasionally ruffle the relations between them."

One aspect of the matter, to which attention may perhaps be drawn, is that the Police perform many functions for the public, which are not connected with law enforcement at all. It was mentioned in the course of previous evidence that nobody had ever seen a Ceylon Policeman help an old lady across the road. The question, which occurred to me, was whether I had ever seen any person in Ceylon help an aged person across the road. I mention it because I: have a d distinct recollection of a lesson at school, when I was perhaps nine years of age, in which we were told that it was our duty to help aged people across the road (I remember it especially because it is associated in my mind with a horrid sentimental verse which has the refrain: "She's somebody's mother, boys, you know". A Police officer cannot be expected to have a much higher standard of civic morality than the ordinary citizen, and if the general standard of civic morality goes up the standard of the Police improves it is nevertheless true that the Policeman ought to be regarded as a guide, if not a philosopher or a friend. We always instruct our children that, if they are in any kind of trouble, they must go to the nearest Policeman, who will do all he can to help. He would, for instance, show them the way home, or lend two pence for a bus fare, or put them in somewhere

out of the rain. Every visitor will have seen the Policemen outside schools, taking parties of children across the road. Nor is their assistance limited to children. The old song, "If you want to know the time, ask a Policeman" has a good deal of truth in it, though he will have something to say if he is asked while he is standing under the clock, will tell not only the time, but the way to get to an address (he is trained to do it properly), the best place for a steak or fried fish and chips, and perhaps even the winner of the 2. 30. All this must not be idealized, but the point is that the Police set out deliberately to help the public in the belief that, when it comes to the point, the public will help the Police.

It should be mentioned, too, that the Police do not carry arms openly— I stress the word " openly "—in order to emphasize that they are a citizen force. Nor do they march in military formation. The Police stations always have inquiry- counters, at which members of the public can ask all kinds of questions, stupid and otherwise, and receive helpful answers from a courteous sergeant. Here, too, there is a motive: at the just sign of trouble of any kind, the citizen's first reaction is to inform the Police, and he knows where to go because he went to make inquiries about his lost budgerigars some months before.

All this depends, of course, upon the peculiar social relationships of Great Britain, and I do not suggest that it is applicable to Ceylon: but the principle may be—that is, that the Police should set out deliberately to help the public. It should be mentioned, too, that there were a good many complaints against the English Police in the ' twenties. They are referred to in Chapter X of the Royal Commission's Report. I need not mention them specially except to say that they seemed to disappear after 1930.

III.

The Commission will presumably not wish me to discuss the general procedure for investigating and preventing crime, particularly since I do not know the Ceylon law and the English

procedure is fully discussed in the Report of the Royal Commission. I may perhaps mention one point, which occurred to me as rather odd when a student who had been arrested very rightly telephoned to ask my help. My first question was to ask for the charge and I then found that though all the facts were known he was being detained without being charged. No doubt this was correct law, but it seemed to me to be very odd that a citizen could be detained by a Police Sergeant who was not prepared to formulate a charge against him. Eventually he was released on my undertaking to produce him if he was needed.

When I was advising the Civil Defence Commissioner, more or less unofficially, on food propaganda I suggested that a few very rapid prosecutions for selling black-market rice would have excellent deterrent value. I was told that this could not be arranged because it would take months to bring a case to sentence. I do not understand why this, if true, should be so. When I was a magistrate we usually managed to dispose within a week of any case where the accused was under arrest. Occasionally, but only occasionally, we remanded n custody for a week more. Even an indictable offence would be disposed of within three months, because if our quarter sessions or assizes were not coming soon we committed to the Old Bailey. Most cases dealt with on summons were disposed of on the day on which the summons was returnable. We sat until we had completed the best, and I do not remember a single occasion on which we adjourned a case, though sometimes the Chief Constable asked for a postponement in order that his inquiries might be completed.

My experience of Police prosecutions was that the Chief Constable was fully competent to take an ordinary case but that most of the Inspectors-- we had only a small borough force— were not. Also, the Chief Constables knew his limitations, and if any difficult point of law was likely to arise he let the Town Clerk, a qualified solicitor, take the case. If there was any great complication—for instance charges against a dairyman where it was known that there was going to be an appeal to the cow—Counsel was briefed; and

of course if the Director of Public Prosecutions took over a case--Counsel was always briefed. In the great majority of our cases, however, the accused pleaded guilty, and if it was an ordinary motor car case we always accepted a plea of guilty by letter--though not, of course, in a case of dangerous or careless driving or driving while under the influence of liquor. Consideration might be given to the question whether a Director of Public Prosecutions might not be appointed in Ceylon. His functions are discussed in Chapter VIII. of the Royal Commission's Report.

IV

There are perhaps a few points about appointments on which I can give useful evidence. In England, as is well known, all appointments below the rank of Chief Constable are filled by promotion. I think- it should be realized, however, that this system relates to a very different social and educational system from that of Ceylon. The educational status of a person has not much relation to the social status of his parents' because a generous system of scholarships enables any student of more than average ability to go from elementary school to secondary school and from secondary school to the University. The public-school boys, of course, rarely think of the Police as a career; if they are excluded, it makes no difference at what educational stage one takes a Constable, he will always be of the working-class or the lower middle-class. There is thus no loss of social status when a University graduate becomes a Constable, but the effect of his education is to make promotion more rapid, provided that he possesses the necessary personal qualities. This is not so in Ceylon. Owing to our bursary system and the practice of the denominational schools in giving financial assistance to deserving boys, we are now getting more Students from the working-classes; but at least 85 per cent of our University students are drawn from the English-speaking middle class. I am afraid that there is not the slightest chance of their joining as Constables. During the war quite a number of students discussed with me the question of

getting commissions in the Ceylon Defence Force or the Ceylon Royal Naval Volunteer Reserve. In almost every case I suggested joining the ranks and earning a commission. In not one case was the suggestion acceptable. I presume that much the same tradition of social prestige is to be found in the secondary schools.

This is of course no argument against promotion from the ranks. I feel convinced, from personal experience and from general University experience, that 80 per cent of the ability of the country is being wasted by our absurd educational system. If the Police can tap that ability they will get as good Policemen as they could get at the secondary school or University level. The fact that they know no English is immaterial: if they need English they can be taught it. The difficulty is, of course, that under the rigid class system of Ceylon a person who has not a Senior School Certificate is regarded as a sort of inferior being, whereas in England nobody knows and nobody cares.

If University men are required as Assistant Superintendents of Police, we can supply a very good type, the sort of man who has shown leadership at games or in other ways. Unfortunately he usually does badly at examinations, and there is a tendency to exaggerate the importance of the

examination. I have acted as adviser to the boards which appointed probationary Assistant Superintendents of Police, and generally I felt that the right person was appointed: but only the Inspector General of Police can say whether they have been successful as Police officers.

University of Ceylon,

Colombo, May 22, 1946. (Sgd.) W. IVOR JENNINGS.

Section 13: The Letter by the IGP on the situation of the Police Sri Lanka

CONFIDENTIAL

Secretary
Ministry of Public Security

Explanation about Maintaining the Administration of Sri Lanka Police and Appointment of Officers-in-Charge of Police Stations

Out of the many positions of authority in Sri Lanka Police, the most important position as regards maintaining law and order and maintaining discipline within the police station is the position of officer-in-charge of the police station.

2. The office of officer-in-charge of a police station is legally, pragmatically and administratively very important, and there are numerous responsibilities unique to that position.

   If the officer-in-charge of a police station lacks a sound knowledge of law and of practical police procedures, does not have knowledge of administrative procedures, is an inefficient and/or corrupt officer, or lacks the exposure or experience necessary for understanding the composition and the distribution of the population in the relevant police area, the behavioural patterns of criminals, the prevalence of crimes in the area, as well as geographical diversity-based methods of crimes, which is an essential factor required for the administration of that police area, it is inevitable that maintaining law and order in that police area declines to a poor level.

   Further, under such circumstances, it is unpreventable that the police officers attached to such police stations become corrupt or inefficient, and failure to orient the officers in the right direction gives rise to administrative issues which results in public dissatisfaction due to the inability to fulfill the law-

related needs of the people living in the area as well as of those who travel through that area to the expected level.

Under these circumstances, people in the relevant police area will ignore the police and will express their opposition against the police, and consequently, the entire Sri Lanka Police, as well as the government, will have to face its repercussions.

3. There are two factors that contribute to the success of a police force – effectiveness and accountability.

   Out of these two, 'effectiveness' refers to a process in which the police expeditiously carry out investigations relating to a complaint by the public or a conflict among the public regarding an incident due to which maintaining of law and order is disrupted, find all the relevant evidence and productions, properly produce such evidence and productions to the judicial process, and the perpetrators are imposed due penalties through the judicial process within a reasonably minimum period of time.

   When the police take action to fulfil that task within a minimum period of time, there may occur likelihood of violations of civil laws and infringement of fundamental human rights as well as violations of the criminal law, and taking of all actions that officers in various positions take and/or should take is referred to as 'accountability'.

   Follow-up of that process is done institutionally as well as externally. For that, an internal follow-up methodology and an external follow-up methodology have been established.

   Vesting of disciplinary powers in the officers, establishment of special investigation units, establishing and maintaining formal disciplinary procedures, maintaining a structure for internally issuing orders as methodologies for internal follow-up are examples.

   Establishing institutions such as the National Police Commission, Public Services Commission, Commission to Investigate Allegations of Bribery or Corruption and Sri Lanka

Human Rights Commission with due powers and redresses that can be judicially executed can be cited as follow-up methodologies external to the institute.

By imposing legal provisions including the Constitution in order to make Sri Lanka Police operate subject to such procedures, the government gives an assurance to the international community that execution of the executive powers of the government takes place subject to and in accordance with the internationally accepted law implementation methodologies.

Therefore, if the officers-in-charge of police stations do not act with a proper understanding of these methodologies and the objectives of imposing them, they themselves and the Sri Lanka Police and the country as a whole will have to face its adverse effects nationally as well as internationally.

4. Further, there are two more key factors that contribute to the success of the police service:

   i. The gap between the amount of roles that the public demand the police to fulfil, and out of that, the amount the police is capable of fulfilling for the public.

      However much the public expect from the police, the police has the capacity to fulfil only a limited amount of tasks based on the duties that can be fulfilled within the legal framework, and depending on the knowledge, strength, commitment, maturity, exposure and experience of the officers performing duties and the amount of physical resources available at the police station. However, even performing of that limited amount of work depends on the ability of the officer-in-charge of the police station – the one who gives leadership to the police station.

      This gap gives rise to a conflict between the society and the police, and only an officer-in-charge of a police station who is capable of maintaining a good relationship with the public, and who has developed his temper through his

knowledge, strength, commitment, maturity, exposure and experience can handle these conflicting situations.

ii. The roles expected of officers in each rank of the hierarchy of the police service have been set. An officer who is appointed to some rank should act having decided up to what extent he/she will fulfill the role expected of officers in that rank, and whether the role expected of such officer is fulfilled will be determined based on the capacity of that officer.

In so doing, there develops a gap between the role expected of the relevant office and the role fulfilled by the officer who is holding that office depending on the capacity of that officer. A large gap is indicative of the officer's incompetence and failure. That leads to a conflicting situation between the society and the police, too.

Therefore, in order to minimize this gap, it is essential that officers with proper qualifications are appointed to the relevant offices.

5. Moreover, community police service is an absolutely essential part for ensuring a good police service. The community police service is built up on two theories:

i. The majority of the members of society are of good will and are committed to the betterment of society, and they are always ready to extend their cooperation to work for the advancement of society. (Normative Sponsorship Theory – NST)

ii. When some organization takes action to get the social, economic and political needs of some person fulfilled, that person will be persuaded to extend his fullest cooperation to that organization. (Critical Social Theory – CST)

Therefore, it is necessary that police officers with practical knowledge of the above mentioned theories are appointed to the office of officer-in-charge of the police station in order to have a successful community police service.

Moreover, while a group of officers attached to a police station perform duties under strict supervision, they argue that some other group of officers are engaged in community police service freely as they wish without being subjected to such strict supervision. Also, if the community police officers take to corrupt or wrongful acts consequent to lax administrative methodologies, it is inevitable that the group of officers who are performing duties very well even under strict supervision become dissatisfied.

Therefore, officers-in-charge of police stations who possess a clear understanding of such situations and who are well experienced are necessary for the proper implementation of the community police service.

6. As seen from the facts described above, it is the office of the officer-in-charge of the police station that becomes the key factor in the field for the success of a police service. Therefore, in order to have a good and effective police service, it is necessary that experienced officers-in-charge of police stations are properly selected and placed based on their skills and capacity.

7. An officer-in-charge of a police station reaches that level of maturity gradually through long periods of service in each division/grade at various police stations and by serving as the officer-in-charge of police stations of various grades. Therefore, if an officer who does not have such experience is appointed directly as the officer-in-charge of a police station of a higher grade, the administration of that police station may become weak due to his lack of maturity, and consequently the officers in that police station may take to corrupt acts and inefficiency will increase.

   However, in an occasion where an officer displays outstanding performance in administration and criminal investigation, it is appropriate that he is directly appointed to a police station of a higher grade.

8. Sri Lanka Police has a long-established tradition for the selection and training of police officers who are suitable to be appointed as officers-in-charge of police stations and for their placement so that they get the opportuniy to gradually get exposure and experience.

   Initially, the talented officers in the rank of Sub-Inspectors of Police are attached to various divisions of police stations such as the administration division, criminal investigation division, traffic division, and anti-vice division, and are given the opportunity to gain understanding about police duties. Those traditions were always maintained even amidst various difficulties, disturbances and challenges.

   According to the abovementioned methodology, an officer who has gained competence in various divisions in this manner and has been promoted to the rank of Inspector of Police or Chief Inspector of Police, is initially appointed as the officer-in-charge of a police station of "C" grade or "D" grade. In police stations of these grades, the functions are not categorized into separate divisions.

   Therefore, in a police station of "C" grade or "D" grade, the crimes reported should be investgated by the officer-in-charge of the police station himself, and various complaints that are reported should be resolved by the officer-in-charge himself.

   In the past, there were police stations of "D" grade and later they were done away with, but now, police stations of "D" grade have been established again. Since these police stations have been established covering small areas of land and since the administration of such police stations is done with a small number of officers, officers in the rank of Sub-Inspetcors of Police or junior officers in the rank of Inspector of Police are appointed as the officer-in-charge of these police stations as a training for them to perform their duties directly engaing with the public in order to enable them to gain experience in police administrative affairs.

After receiving experience as described above, those officers get qualified to be appointed as the officer-in-charge of a police station of "B" grade or "A3" grade. In police stations of these grades, the functions have been divided into separate divisions. The officers who are appointed to such police sations gain a thorough understanding about the roles and responsibilities assigned to the office of the officer-in-charge of the police, and when they have held the office of the officer-in-charge of the police station of a number of police stations of "B" grade or "A3" grade in different areas of the country, they gain a thorough knowledge about crimes, various complaints, vices and worngful acts etc, and various cultures, behaviours and manners of the people, which are unique to those areas.

Officers who get extensive experience in that manner are then appointed as the officers-in-charge of police stations of "A2" grade or "A3" grade, which have a lot of responsibilities, and are assigned with complex administrative affairs, and are hence, very busy. When making such appointments, experienced officers in the rank of Chief Inspector of Police are always appointed.

By appointing officers-in-charge of police stations as described above, officers with a thorough knowledge/understanding about the area of duties and responsibilities assigned to that office are always appointed to police stations of higher grades.

Further, on occasions where it is discovered through the reports obtained from the intelligence sources or through the recommendations of the senior supervising officers that the administration in a police station has become poor or that there is an increase in vice and crimes within the police area due to the poor supervision of the officer-in-charge of the police station or due to his misconduct, there also was an established tradition to remove such officers from the office of officer-in-charge of the police station.

9. By appointing officers-in-charge of police stations in accordance with the traditionally existed procedure described above, an effective administration can be established in the police station, and the functions of the police can be effectively fulfilled as expected by the public. This will create an environment in which the people in the relevant area can live peacefully without any fear of crimes being committed, and it will also minimize the tendency of police officers taking to acts of misconduct. As the ultimate result of this, establishment of the rule of law can be ensured.

10. In relation to the period from 01.01.20.21 to 03.11.2021, 184 appointments have been made to the office of officer-in-charge of police stations, and details of those appointments are given below:

1.	Number of officers-in-charge of police stations appointed	184
2.	Out of those officers, the number of those who did not attend an interview	126
3.	Out of the officers who attended the interview, but was not recommended for an appointment as an officer-in-charge of a police station, the number of those who were appointed as officers-in-charge	03
4.	The number of those who had not held the office of officer-in-charge of any police station previously, but were directly appointed as the officer-in-charge of a police station of “A1” grade or “A2” grade	13
5.	The number of those who had not held the office of officer-in-charge of any police station previously, but were directly appointed as the officer-in-charge of a police station of “A3” grade	21
6.	The number of those who had previously held the office of the officer-in-charge of a police station of “B” grade or “C” grade and had not held the office of officer-in-charge of a police station of “A3” grade, but were appointed as the officer-in-charge of a police station of “A1” grade.	19

11. As regards the incidents of obstructing the duties of police officers and the incidents of police officers taking to misconduct during the period under consideration by the report, a considerable number of incidents have been reported during this year, and accordingly, 283 incidents of obstructing the duties of police officers and 359 incidents of police officers taking to misconduct have been reported. It is observed that this is above the normal level.

12. Moreover, during the abovementioned period, 21 police officers have been arrested for possessing illegal drugs and information has been reported about 156 police officers who have become addicted to drugs. In addition to that, intelligence information has revealed that 130 police officers have had relationships with drug traffickers during the period under consideration. This is a very unusual situation, too.

The officers-in-charge of the relevant police stations have failed to dig up information about the abovementioned officers until the intelligence sources have disclosed information about them. Therefore, it is observed that this situation will develop to a level that it will exert an adverse impact on future operations and raids on illegal drugs.

13. The present-day society, which is armed with modern methodologies of information technology, always has a keen interest in and an understanding of the social impacts, and particularly, it is obvious that the way Sri Lanka Police functions is assessed through the internet in comparison with the functioning of law enforcement institutes of the other countries of the world.

The state policy on rule of law is reflected in the way Sri Lanka Police, which is a key arm of the executive, functions, and it is unpreventable that an assessment about implementation of the state policy is done not only locally, but internationally as well based on how Sri Lanka police functions.

14. Although the public expects a good police service, and although there arises opposition in the minds of the people

against the inefficiency of the police and against the corrupt and oppressive situations, people do not have the capacity to directly go into conflict with the police because of the power of the legal authority the police possess. This gives rise to serious disappointment and frustration in the minds of people against the police. As it is the government in power that maintains such a police force, it is inevitable that public opposition is directed against the factor that caused such disappointment and frustration.

Therefore it is recommended that the most appropriate decision should be made taking into consideration the situations described above when appointing officers to the office of officer-in-charge of police stations in order to protect the police service and the government from the situation described above.

Signed by:

C.D. Wickramaratne
Inspector General of police

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Freedom from Malnutrision is a human right.

போஷாக்கின்மையில் இருந்து விடுதலை பெறுவது மனித உரிமையாகும்

මන්දපෝෂණය ජීවිතයේ අයිතිය හා දරුවන්ගේ අයිතිවාසිකම් කඩුගා දැමීමක් නොවේද ?

Is malnutrition not a violation of the right to life and the rights of children ?

போஷாக்கிண்மை உயிர் வாழ்தலுக்கான உரிமையினதும் சிறார் உரிமையினதும் மீறல் இல்லையா ?

RLF

PART 03: THE CONSTITUTION

Section 14: Towards a constitution that Fosters Peoples Participation & Economic Development

Basil Fernando

Chapter 01

Formulating a Constitution by a Committee

A constitution is an anthology of decisions reached by the people of a country on the type and the form of political & legal frame to guide them in achieving their future needs in the realms of governance and development.

Generally, a Constitution is based on the views and principles acknowledged by the people which have been presented in the form of a binding document expressing their consent to be governed by them in regard to how a sustainable and peaceful existence in the society be maintained, the manner in which all economic activities were to be pursued in accordance with accepted norms and traditions and the legal framework of the country; how could a persistent policy of reconciliation be maintained in the society by resolving various conflicts which are likely to arise from time to time in whatever way, and how to create a fully civilized social environment while maintaining the moral values and discipline in the country etc.

The main principles to be adhered to in formulating a constitution could be summarized as follows.

The entirety of the content of the Constitution should be based on the awareness and the will of the people.

Such a document could be formulated only through a deep and clear understanding of the society on the need for having a constitution

The understanding of this nature can be reached only through profound dialogues conducted within the society itself. Accordingly, a Constitution made in the absence of an intense public dialogue will invariably become a spurious and absurd document.

In view of the above, the documents described as Constitutions can be classified into two main categories.

The first category consists of Constitutions which are genuine and credible. This implies that the fundamental structure of the society in which the people should live, and the legal framework required for facing all issues that may arise within that basic structure, would be formulated by the people themselves. A legal frame alone is not the singular solution to all problems. Problems in society arise persistently, and solving them is a practical need to be pursued constantly. What a Constitution does is to set out the guidelines and limits to be adhered to, by a society that is engaged in such a practical exercise so that it could accomplish the tasks undertaken in a proper manner. The above principle is based on the recognition of the fact that 'doing anything anyway' is a factor that will invariably lead to ruin and destruction. The aim of this process is to apprehend this tendency that exists in the people as well as among social groups and prevent them from committing offenses, and give a legal expression to the principles that would contribute to refraining them from doing so, and rescue the society from becoming a victim of such offenses.

By formulating a Constitution, the people give credence to a specific methodology to be followed in maintaining the social harmony without leaving room for unnecessary and unexpected confusions and problems to arise in the society. There are diverse people and social groups living in the society. But there is a wide consensus between these people and social groups. At the same time, there are issues leading to conflicts and problems also among them.

In formulating a Constitution, what is being done, is to bring the essence of all the positive aspects and agreements in the

society into the Constitutional system itself, which is the supreme legal framework of the country, and at the same time to establish the legal foundation for resolving the issues between diverse individuals and social segments in an intellectual and civilized milieu.

Accordingly, on one hand, building a constitution based on strong consensus of society, gives a lasting expression to the social consensus, and on the other hand, by creating a way for resolving conflicts within the society itself, paves the way for the conflicts and disputes to gradually wither out, and also, as long as they exist, it offers a peaceful way to resolve them without resorting to violent means. This aspect constitutes an essential part of formulating a Constitution.

Usually a Constitution is formulated at a certain stage of the development of a society. That is, at a time when a series of historical events are in progress. Most likely, such an instance may arise particularly at times when a strong perception is firmly rooted in the society that some decisive change is going to take place in the society.

A country gaining freedom from colonial rule and becoming an independent state of its own is one such occasion in which a new Constitution is formulated based on the belief that some change was imminent. A country that has gained independence from colonial occupation and become a sovereign state is most likely to emerge as a new country by formulating a new Constitution based on consensus as to the type of legal frame that should be adopted in guiding it in the future governance.

There are occasions the countries tend towards adopting new Constitutions when they feel it is no longer possible for them to find solutions to deep social problems only through practical means and within the existing system , and it requires a broad social consensus and a legal framework based on that consensus. For example, instances are not rare in which certain countries have adopted new Constitutions in the event of protracted civil wars that had been going on for very long periods causing great

loss of life and creating adverse consequences that have been extremely detrimental to society, as a means to resolve them, as well as to use it as a basis to re-establish the society on a new footing at the end of the civil war; and also as a new foundation to prevent the recurrence of similar kind of conflicts and civil wars in the future.

The conflicts in society are not limited to civil wars only. At some point, large-scale breakdowns could occur in society for a variety of reasons. The Constitutions are formulated when the countries are encountered with serious situations such as complete collapse of the country's financial system; complete breakdown of law enforcement mechanism in the country; prevalence of unacceptable disparities in the distribution of state power leading to the assertion of power arbitrarily resulting in creating a great havoc in the country and occurrence of or likely to occur a large-scale food shortage in the country causing a major disaster; and these situations could lead the society to reach consensus as to the alternative remedial measures to be adopted and express it explicitly through a legal framework thereby creating a path to arrest the extremely anomalous circumstances arisen in society and rescue the society from the calamity.

The current feeling that Sri Lanka needs a new Constitution has come to the fore at a time when the country is facing a large-scale catastrophe in its modern history which is unprecedented, a fact which is widely acknowledged by the entire society. The massive collapse of the country's financial system making it impossible to afford even the cost of essential needs of the country is one major aspect of this situation. The Government as well as all others have now admitted openly that the policy of indiscriminate and uncontrolled borrowing of money by successive governments over a long period has been the main cause of the current financial crisis facing Sri Lanka. Against this backdrop, the prices of all goods have gone up substantially, exacerbating the inflation at an uncontrollable rate while creating many more problems.

This has resulted in the depreciation of real wages of everyone affecting the cost of day-to-day expenses. Meanwhile, due to the

economic crisis, a situation is created in the country in which the people find it extremely difficult to bear the cost of education, health and other basic necessities. On top of all these, there is a great fear that the agriculture, the main source of food supply of the country may be severely disrupted causing a large-scale food shortage in the near future which might even lead to a severe state of famine .The complete breakdown of the law of the land is another major problem linked with these issues; the police as a law enforcement agency has become a deteriorated institution creating a negative attitude in the public against it; similarly the public has lost faith in the legal system of the country as it has become politicised; the power, role and independence of the judiciary are greatly impaired due to undue external interferences and interventions; all these issues constitute the topics being talked about across the country gaining wide public consensus.

Under the circumstances, the process of Constitution making in Sri Lanka has come to the fore with the intention of creating a path for rescuing the country from a large-scale social catastrophe as outlined above. It is only by giving priority for this objective above all else, that a meaningful constitution could be formulated for the country.

Chapter 2

Spurious Constitutions, What are those?

Earlier we discussed that the Constitutions formulated in good faith serve as a permanent foundation for resolving the perennial and recurring problems of a country.

But a Constitution can be formulated with devious and unscrupulous intentions as well. It happens when the rulers want to carry out their activities in an arbitrary manner. Such documents are referred to as 'Spurious Constitutions'. The key element of spurious constitutions is that they are formulated with the intention of disregarding or circumventing the common law of the country which is generally accepted by the people. The

spurious constitutions are formulated to facilitate the exercise of power without restraint. The ultimate result of the constitutions of this nature would be the abolition of the sovereignty of the people to a great extent or sometimes completely. Thus the intention of making a spurious constitution would be to depreciate the rights of citizens to a level of an invalid coin.

The implication of this can be further clarified by discussing the above point citing practical examples. The Constitutions enacted in 1972 and 1978 in Sri Lanka, fall into the category of spurious documents. The objective of the 1972 Constitution was to change the existing legal framework applicable to the governance of the country and adjust it in such a way that the control of it could be brought directly under the Executive. It was fulfilled by limiting the powers of the bureaucracy of civil service, drastically. Consequently, the powers of the top officials of the hierarchy of civil service, that is the Secretaries to the Ministries, were abolished and vested in the Ministers.

Thus, appropriating the rights of civil service on themselves and obstructing its legitimate and disciplined functioning, the politicians have managed to broaden their sphere of intervention in the civil service and manipulate it arbitrarily with political decisions at their whim and fancy. Thus, the 1972 Constitution was not formulated for the progress of the country and the welfare of the people, but to create a civil service built around the politician, for narrow political gains. To this day, the people of Sri Lanka have suffered severely from the ill effects of the 1972 Constitution.

The 1978 Constitution was adopted to establish a system of governance based on what is called the 'institutionalised arbitrariness' on a much larger scale than the 1972 Constitution. It is one of the foremost among the spurious documents. The difference between the arbitrary rule and the rule of law is as wide as the difference between the sky and the earth. On the contrary a genuine constitution formulated in good faith naturally aims at eliminating, to a greater degree, the possibility of the rulers acting arbitrarily.

It is linked to the great concept that the national wealth which can be controlled by power and authority should be used only for the welfare of the country and the people. The so-called 1978 Constitution which has been formulated with an ulterior motive, disregarding this great concept and being prompted by the desire to achieve narrow and opportunistic interests has invariably created a state of maximum chaos in Sri Lanka.

By creating a chaotic condition in the country, JR Jayewardene, the founder of this spurious document, enacted it, on the belief that he could achieve a number of goals he had in mind by adopting an arbitrary approach at its maximum.

The main objective of Mr. Jayewardene in formulating and enacting the 1978 constitution was to stay in power as long as it was possible. Though he was appointed the Prime Minister for five years, he desired to remain in office for the rest of his life. However, the electoral system operative in Sri Lanka proved to be the biggest obstacle for him to realise this goal. In terms of the electoral system of Sri Lanka, the citizens elect their leader and the government from time to time, which is expected to remain in power for a limited period only. This limit has been enshrined in the Constitution adopted at the time of independence. Thus, one of the basic tenets or the well accepted notion upheld by the countries in the world that follow democratic tradition, that a government should be appointed only for a limited period has been enshrined in the constitution itself . Jayewardene, having realized that it was an essential condition to abolish this Constitutionalised attitude to achieve his goal of remaining in power for a long time , made use of the 1978 Constitution which is a spurious document created by him.

There were several other motives that Jayewardene wanted to achieve. One of them was to limit the power of judiciary. The authority of deciding the legitimacy of decisions made by a government has been traditionally vested in the judiciary. This is one of the core concepts of the rule of law. The rule of law cannot exist without a judiciary that asserts its independence fully. On the

other hand, a judiciary which asserts its independence strongly, and a ruler who feels that he should have all the powers cannot co-exist. In such a situation, either the ruler must admit the idea that he is subject to the independence of judiciary and leave the supremacy of judiciary to prevail or else should suppress the independence of judiciary and assert his authority.

The ability of the ruler to suppress the independence of judiciary is determined by the extent to which the attitude of the people rooted in the society in regard to the need for safeguarding the independence of judiciary. This has been stated by a judge who has served on the Supreme Court of Australia responding to a question posed to him as to how the judiciary should protect itself if the Executive interfered with the independence of it; he further said that the security of judiciary is entirely rested on the belief that there is an atmosphere in our country where the people will take themselves to the streets against anyone who attempts to obstruct the powers of the judiciary. Mr. Jayewardene wanted to abolish the power of judiciary altogether, but he was unable to do so as there was an obstacle for him to do it at that time.

It was because there was an ideological conviction rooted in the middle class of Sri Lanka, in regard to the independence of judiciary. Therefore, he was not able to destroy the independence of judiciary completely. There existed an obstacle for it in the society itself. So much so, what he did was to obstruct the role of judiciary and its functioning by imposing various restrictions on it. For example, it would be possible to hamper the functioning of judiciary by preventing it from receiving adequate funds required for its proper functioning. He was able to thwart the qualitative change that Neville Samarakoon, the then Chief Justice was trying to make in the judiciary by obstructing the grant of necessary funds for the appointment of new judges. He was also able to interfere with the independence of judiciary in various other ways, such as, by interfering with the appointment of judges as well inculcating and spreading various fears under the dreadful circumstances prevailed at that time.

The independence of judiciary is largely linked with the independence of all the institutions involved in the administration of justice. For example, if the police that are responsible for conducting criminal investigations do not perform their role properly, the judiciary may lose the ability to hear serious criminal cases and administer justice. Our legal system which is based on evidence is largely dependent on the police investigators who are the collectors of evidence. By influencing the police, that is, by obstructing the administration of justice, the role of judiciary could be severely weakened. In this manner, what Mr. Jayewardene has done was to carry out a program of weakening the judicial system in Sri Lanka using the spurious constitution that he introduced in 1978.

By the year 2000, the serious damage caused to the country by the 1978 constitution had begun to be felt by almost everyone in the country. Therefore, the idea that this Constitution should be abolished had become a generally accepted opinion throughout the country. This view was greatly instrumental in bringing Chandrika Bandaranaike's government to power in 1994. But after coming to power, that task was evaded. The rulers were reluctant to renounce this spurious constitution as it allowed them to retain more power under their jurisdiction. However, at least to contain the public pressure mounted on the demand for reducing the power, the 17th Amendment to the Constitution was made and some attempt was made to appoint the top officials of the country's major institutions on an independent system. But a clash between this attempt and the power of the Executive President was inevitable. Consequently, at a later date, the 18th Amendment was introduced eliminating even the limited changes made to the Constitution by the 17th Amendment. In the same way, the 19th Amendment sought to revive the 17th Amendment; but with the introduction of the 20th Amendment, the space available for the President's arbitrariness was expanded granting him more powers than ever before.

The proposed new Constitution that is being drafted now is most likely to further enhance the arbitrariness and pave the way for creating an environment in the country where the rule of law

will be diminished to a minimum or to a level of no rule of law, at all.

There is a huge difference between the tradition and the formulation of a constitution in good faith to address and solve the problems of the country. The difference is contrasting like white and black. The 'Spurious Constitutions' will invariably widen the scope of the arbitrary existence of the ruler. On the contrary, the 'Genuine Constitutions' will expand the scope of intervention of the people and the functioning of the rule of law and convert the idiosyncrasies and conduct of the ruler into responsibilities to be discharged within a legal framework.

Chapter 3

Crash of the Monetary System & Constitution making in Sri Lanka

Some people think that the crash of the monetary system is simply an economic problem. Perhaps, some may question the connection between the monetary system and the Constitution.

The occurrence of a financial crisis is not only an economic problem. The basic legal framework of the country applies to both the occurrence of a financial crisis and the prevention of such a crisis. In fact, the legal issue is more powerful than an economic issue in creating or preventing a financial crisis.

The background of the current financial crisis facing Sri Lanka has been created by indiscriminate borrowings. Inability to repay the loan instalments and interest component has grown up to a dollar deficit in the state treasury today. It has become a root cause of almost all other problems in the country.

Could this situation have been avoided if certain constitutional principles had been followed? This is a very important issue affecting not only the current crisis but also one that will help eliminating the occurrence of such crises in the future.

The stream of legal concepts surrounding this crisis is based on the wide deference –contrasting like black-and-white that prevails between the two concepts: the rule of law and arbitrariness. Arbitrary rule is legally defined as the ability to make decisions arbitrarily, ignoring the rule of law. How has the arbitrariness affected Sri Lanka in procuring loans? The law will determine the steps to be followed to prevent catastrophic and prejudicial consequences of every action that takes place in the country. It could be done by establishing a very clear legal framework for obtaining loans and allowing it to take place only within that framework. In other words, the procurement of loans outside the established legal framework will be made illegal; also a methodology will be introduced within the legal tradition itself to discourage and gradually stop the procurement of loans. Also, devising strategies to ensure that the conditions imposed are strictly adhered to will constitute a function of the legal system. Thus, the law will create an orderly system for every action being pursued by the government and grant it the legal authority for functioning.

Accordingly, if the system of obtaining loans in Sri Lanka had been properly designed and regulated with appropriate checks and balances, a situation could have been created in which the controls were imposed on obtaining excessive volumes of loans and using such loans for economic progress of the country. The law will set out a specific procedure to be followed when loans are obtained. A country should have a legal framework that revolves round all natural conditions which are usually addressed in obtaining loans such as, what is the need of obtaining a loan? In what sources is it expected to be obtained? How could the loans obtained be managed in a way that it will not prove to be detrimental to the country? What is the procedure to be followed to repay the loan etc.

The following are some of the basic criticisms on borrowings today: To a large extent borrowings have been used as an alternative source of generating money for consumption which should have been generated through economic production. One commentator

has remarked that Sri Lanka's budget is not an estimation of revenue and expenditure, but an estimation of debts. The rulers had made it a habit to borrow money to meet consumption expenses of the country.

The States that obtain loans should act in a prudent manner, the way an average intelligent person does, when he or she resorts to obtain a loan. They ought to realise that obtaining a loan is basically a matter that can have dire consequences. Therefore, if there is no real strategy to prevent those dismal consequences, they tend to refrain from securing loans so as not to fall prey to those consequences. It is deeply embedded in the public consciousness that if an ordinary person obtains a loan and fails to repay it and the interest payable on it; he is likely to lose his property and even to be plunged into the street. Consequently, the difficulties faced by those who have acted without prudence are deeply ingrained in the psyche of the people. Accordingly, it remains a part of wisdom and intellect that people inherit from generation to generation. In spite of this awareness there are some who ignore it and get into trouble again and again, and eventually realise that the common wisdom is in fact based on true facts.

A country is not a private property of anyone. It is a public property system. Therefore, simply allowing the incumbent ruler to decide on the procurement of loans and placing on him the responsibility of avoiding undue consequences of borrowings could be described as an undesirable practice that might lead to adverse consequences. It is therefore important that the collective wisdom is used always in imposing limits which are generally accepted for management and control of public or collective property.

There two important elements involved in the process of obtaining a loan, the need for doing it in such a way as not to cause damage to public or collective property and finally, the desire to achieve the collective good.

The management of any process requires a specific knowledge relevant to that process. Rowing a boat in a river requires some order to be followed. Anyone who does not know the order or fails

to follow it will inevitably be compelled to face the consequences of it. In this way the knowledge of the ferryman is different from that of a driver. The wisdom of the driver is different from that of an engineer. Similarly, the knowledge of debt management is based on a subtle process that is inherent in each of the disciplines of money transactions. They have become accepted traditions followed by every country. Therefore, obtaining loans is something that any country can do, but the ability to control debts is not something that any country can do as it pleases. The basic principles that exist in this regard should be followed, and the ability to adopt those principles ought to be acquired.

What we experience in Sri Lanka is a crisis created by the abandonment of limits of burrowing and obtaining loans haphazardly and in arbitrary manner regardless of consequences, particularly during the post-1978 period. Borrowing more and more to solve the crisis created by persistent borrowing has gradually escalated the crisis reaching the point where it is no longer possible to borrow any more today.

This process has to be handled under legal control. The proposed new legal framework should be based on a system which is open, accountable, and capable of monitoring those processes; and it should include adequate provisions to prevent prejudicial actions revealed by the monitoring process and restrictions imposed not allowing anyone to work outside those provisions.

This is done through the rule of law. It could only be achieved if there is an effective legal framework and law enforcement system that can help maintain the rule of law in the country. The basic structure of this order will be created by the Constitution, the supreme law of a country. All the other laws are made based on the Constitution. Thus, the disregard of laws which have been enacted in conformity with the provisions of the Constitution will necessarily amount to violating the Constitution itself. It will become a crime committed against the entire nation. The financial stability of the country could be achieved only by preventing the rulers from violating the laws of the country.

However, it was absolutely an opposite process that had prevailed in Sri Lanka since the 1960s. In other words, the Constitution has been made an invalidated document by breaking the rule of law, and in that context the rulers had gained ability to act in defiance of all relevant laws, thus being able to act at their own will and pursue an extremely destructive borrowing policy.

This has been done by undermining the Constitution, the supreme law of the land. The appointment of an Executive President above the Constitution meant the reign of arbitrariness over the law. This is not just a question of individuals, but a complete abandonment of the concept of the rule of law. Although the term 'rule of law' is included in the Constitution and other laws in word, the 'obstinate person' , by subtly undermining the Constitutional Law, has been able to exacerbate his obstinacy over and above all the laws. This situation is the main source of the current financial crisis and the resulting dollar crisis facing the country.

Therefore, the people who have received an opportunity to formulate a new constitution in good faith should seriously intervene to strictly control the borrowing process by making the new constitution a meaningful document giving priority for the rule of law and subjecting the ruler, the head of state to the rule of law.

One major doubt about the borrowing process in Sri Lanka is that most of the money borrowed through many loans have been syphoned off for corruption and also to produce wealthy tycoons who have reaped the benefit of a good share of loans obtained for their personal advantage. Consequently, the entire parliamentary system and the country are in a state of degeneration. The politicians as a breed have lost their recognition and integrity. The milieu in which the politicians were considered a virtuous lot has largely disappeared from the country. The whole system is overwhelmed by an air of extreme dissatisfaction.

The reason for this is not just an issue of individuals, but a situation created by obstacles encountered in the functioning of

the country within a legal framework. A stable financial system could be created in Sri Lanka by removing the obstacles to the rule of law and strengthening the obstructions to control and resist arbitrariness. To do that, a fundamental legal document that reigns supreme over the rule of law and deprives all those who oppose it of their powers, should be formulated and enacted as the main law or the supreme law of the country. That is where the connection between the Constitution and the financial control of the country lies.

Chapter 04

Constitution & Agriculture

Everyone will agree that there is an unprecedented agricultural crisis in the country at present. It is also important to note that there are a number of other crises which are interrelated with the agricultural crisis. A close review of these crises reveals how much the crisis involving the Constitution of Sri Lanka has contributed to create these issues. It also appears that if the process of formulating a spurious constitution is pursued further, inevitably the problems associated with agriculture and the other related issues will intensify and create large scale destruction. It is therefore evident that the crisis involving the Constitution is inextricably linked to the crisis of agriculture.

A number of factors contributing to the agricultural crisis have already been discussed in public forums.

Fertilizer crisis

First of all, the debate was focussed on the crisis of chemical fertilizer. The crisis was exacerbated by the sudden ban on the use of chemical fertilizer. According to news reports published by some media organisations, about 20 precent of farmers has abandoned farming due to their inability to pursue agricultural activities without fertiliser. All media institutions have reported that there will be a major collapse in the agriculture harvest in the coming months leading to a large-scale food shortage which is

unavoidable. Under the circumstances, it is important to find out as to how the situation has been created in Sri Lanka in which the President could make an arbitrary decision on the use of chemical fertilizer. This is an issue that no political power should be allowed to interfere with. The decisions of this nature are usually reached through comprehensive processes developed after persistent discussions held with the experts in the field and gaining a clear understanding of the subject. So much so, the farmer should be given the first priority in this process. It is the farmer who possesses the greatest wisdom in farming. Everyone else plays only a secondary role in this task.

Making far-reaching policy decisions on food production calls for having genuine, deep, long and clear discussions with the farmers to comprehend the problem in its correct perspective, identify whether their suggestions are appropriate to solve the problem, and also to ensure that the suggestions made by experts of the subject and other parties are pragmatic and realistic, and the decisions taken outside this process can be described as one among the great follies. It will not be possible to rectify the present situation or prevent occurrence of such situations in the future without probing into the circumstances that had led to create an atmosphere in Sri Lanka, where the head of state had been prompted to make an extremely a foolish decision

How can the Constitution impact on making prudent decisions? Formulating a constitution for the country intends to prevent the executive making wrong decisions disregarding the public opinion; understanding of it will certainly help gain practical wisdom for solving the problems facing the country. That is what it is meant by interfering with arbitrariness. In other words, to create a legal framework that obstructs the initiation of imprudent activities. The Constitution is at the apex of this legal framework. The Constitution enshrines the procedure to be followed in resolving issues within a legal framework and makes it an imperative requirement. That is what is meant by legalization. In fact, there should have been a provision in the legal system of

Sri Lanka to repeal the ban on the import of agro-chemicals. Such provisions exist in every country where the rule of law and the supremacy of law prevail.

When the process of a certain activity is legalized it invariably gets socialized as a thing to be followed compulsorily. Failure to do so will make the activity illegal and render it an invalid process.

Revoking the wrong decisions of the executive

The executive is liable to make wrong decisions. That is why the judiciary has been vested with the right to declare certain decisions of the executive, illegal or not in conformity with the constitution. It is to facilitate the performance of this onerous task that the right to review the laws and decisions of the executive has been vested in the judiciary. If the citizens had the capacity to make an appeal to the Supreme Court or the Court of Appeal and obtain an injunction against the sudden decision of the government to ban the importation of agro- chemical, it could have been possible to overturn and revoke the government's policy.

This provision, which is inherent in the law of Sri Lanka, has been repealed by the 1978 Constitution of Sri Lanka. Thus, all those engaged in agriculture have been rendered extremely helpless by depriving them of the right to challenge the decisions of the president, before a court of law. Helplessness means that there is no refuge. The law is the process of providing redress for all injustices. What the Constitution of Sri Lanka has done was to make all the people of the country the victims of this helpless situation. Had the power of the president been restricted and that of the judiciary restored enabling it to make speedy decisions , by the Constitution , the latter would have been able to decide whether or not the actions taken by the former on all matters of importance in the country were legitimate, just or liable to bring dangerous consequences; and the crisis over agriculture also could have been resolved.

Moreover, this problem would not have arisen at all if the judiciary had not been deprived of the right to order the government to revoke the decision taken to ban the import of chemical fertiliser; if so, the judiciary would have ordered the government to import the required fertiliser without further delay. Thus, the agricultural crisis and the other crises that have arisen in association with the Constitution of Sri Lanka are inextricably linked together. In order to develop objective agricultural policies and procedures in the future, it is important that the legal provisions are revitalised empowering the judiciary so that it could exercise its powers to control the arbitrary acts of the executive. A number of other issues related to agriculture are also being discussed now. One is the question of the modernization or technological advancement of agriculture. Experts in agriculture are of the view that this is an essential step. In this process, too, it is most likely for the above-mentioned legal situation to arise again.

Agricultural technology

The success of technological development in agriculture will primarily depend on the extent to which it will discuss with the farmers engaged in agriculture and implemented with their involvement and cooperation. It is a key factor to ensure its success. Whether this dialogue with the farmers should be pursued or not should not be decided at the sole discretion of the relevant officials or experts only. It is important that laws are enacted making it imperative to hold a dialogue on the issue. The atmosphere conducive for that can only be created by affirming the right of the judiciary to intervene in the enforcement of such laws. The Supreme Court must have the authority to stop all attempts to force technology into agricultural sector by officials, experts or government executives in an arbitrary manner. The Supreme Court takes such action only after listening to all parties concerned. Therefore, holding such debates before the judiciary is an essential step to develop the level of objectivity and intelligence of a country.

Discussing the pressing issues that arise in the country, summoning the opposing parties involved in such issues before

the court, consulting their views and resolving the problems in mature way is a national task expected of the judiciary. Most of the provisions available for that have been abolished by 1978 constitution. What remains of it is destined to be destroyed by the proposed spurious constitution. The need for having a program of action aimed at reaffirming the powers of the judiciary has arisen, and is essential so that the judiciary could initiate a rich dialogue into which all the people could participate to formulate a constitution in good faith, not just a spurious one. This will be an essential condition for developing the link between technology and agriculture.

Safeguarding the land ownership of the farmer

The issue of land belonged to farmers is the next major issue surrounding agriculture. Sri Lankan farmers protect their farms with highest regard for them. Various critics have strongly pointed out that there is an attempt across the country to take out the farm lands from the farmers and pass them onto the hands of big businessmen. This is something that has often happened in some countries of dictatorial rule. This process is in operation especially in Asian and African countries where democracy is not rooted in. What they do is to transfer the lands owned by the farmers into the hands of the big business men and turn them into a source of income for the latter while making the farmers miserable and plunging them into poverty. This process is taking place in a very large scale. It is evident that Sri Lankan farmers are keen to avoid the occurrence of such a situation.

One of the issues that arise here is the protection of farmers' land ownership; the other issue is the expansion of the extent of farmland to increase productivity. At a glance there seems to be a very deep conflict between these two issues. In many countries this conflict situation had arisen in the past and they have been able to introduce various measures to resolve them in a reasonable manner so that both objectives, that is the protection of land ownership and the establishment of large farms would be achieved simultaneously.

What matters most in this case is the question of integrity. How the farmers have been deceived and robbed of their lands by spurious means has been poignantly recorded in the history. This can be prevented by the law, by creating a situation in which one could and should act in good faith. This has become an extremely crucial issue today. The farmers are being deceived and their lands transferred to various big companies allowing them to make profit from them. There are ample chances for politicians to thrive on commissions they receive in this process. The likelihood of using the proposed new constitution for this purpose is also huge.

Therefore, the issue of protecting farmers' lands is a very serious issue facing the nation today. In order to address this situation, a legal framework in which the property rights of the people, particularly the right of the farmer to claim for an agricultural plot and assert this right before the court of law should be enshrined in the Constitution as an essential condition. A constitutional system is required to be set up to introduce this legal framework. The Constitution can create the conditions for the achievement of the aforesaid objectives. Thus, the task of safeguarding agricultural lands and land reformation needs to suit the present day requirements could be carried out in a manner that does not interfere with the rights of the farmers.

Issues of the sale of Agricultural Crop

The other most pressing issue encountered by farmers is the severe unfairness they face in marketing their goods, that is, their produce. This is an issue that has been discussed by the Sri Lankan farmer again and again for decades. In several instances, legal steps too, had been initiated to resolve the issue. The cooperative system was one such remedy. Another aspect of this is the modern laws that have been put in place by the government regarding the purchase of farmers' produce for sale, safekeeping and marketing. However, by repealing all these laws, the 1978 Constitution strongly protected the rights of businessmen while at the same time developing processes that suppressed the rights of the farmers.

Finding a solution to these issues is tantamount to interfering with an extremely difficult sphere. Intervention in such areas can only be achieved by enacting and enforcing reasonable principles on how to address such issues within the framework of Constitution itself. This is not just an attempt to create business entrepreneurs. In many countries we have witnessed how the agriculture has suffered a complete destruction in trying to do so. Instead, a conducive atmosphere must be created to purchase and sell the agricultural produce in a reasonable manner, and also protect consumer rights as well. The opportunity received to formulate a new constitution in Sri Lanka offers a great prospect to realise these objectives. If this opportunity is missed, the aforesaid serious problems will only get worse and will not find a solution.

Chapter 05

Constitution & the Fisher folk

At present, Sri Lankan fisher folk have faced a number of serious problems. One major issue is the illegal entry of Indian fishermen into Sri Lankan waters and catching fish using prohibited fishing gear and methods which are extremely detrimental to the survival of fish in Sri Lankan waters. Apart from that, the fisher folk are compelled to lead a life full of hardships and difficulties; they face many obstacles in carrying out their livelihood. There are large-scale obstacles in regard to the safety and protection of fishermen and the marine resources of Sri Lanka. Ocean is a great asset to Sri Lanka. The ocean around the island is a rich source of vast resources having great potential to add to the enhancement of the country's economy. Protecting it and conserving marine resource and the contribution it could make for resolving the food problem of the country have a significant impact on the stability of the country. But Sri Lanka has remained extremely backward in developing and conserving this valuable resource.

Essentially special attention must be paid to the ocean which is a very valuable resource base when formulating a new

Constitution for the country. On the one hand, it is related to the question of sovereignty of the country. Safeguarding the territorial integrity and sovereignty of the country are two key issues which should receive highest priority in making a Constitution for any country. Therefore, the Constitution, the supreme law of the country, should provide the basic legal basis to develop the legal framework required for that.

Although sovereignty in general has been discussed in making constitutions previously, the questions involving sovereignty of the country and the ocean that belonged to it, have not been discussed at length and in depth. In the past, this issue has been dealt with, only to the extent that issues pertaining to this sphere could be resolved by practical interventions. But experience has proved that it has not helped to create an atmosphere conducive to generating successful results.

It is therefore essential that the issues such as the protection of Sri Lanka's coastline, reaping maximum benefits of the sea to enrich the country's economy and society and also the conservation of marine resources etc are carefully evaluated and a roadmap is devised to realise them while the dialogue is in progress for making a new Constitution for the country.

A democratic Constitution is a Constitution formulated with maximum participation of the people. The purpose of the Constitution is to create a strong link between the state and the people in order that a positive, creative and persistent relationship is established and maintained between the two parties involved. In terms of governance, considering the ruler as omnipotent or omniscient authority is a very backward idea.

No one can have knowledge of everything. Similarly no state could achieve that. Wisdom is something that must be achieved through hard work and constant efforts on a land (in a world) where great triumphs do occur and constant and persistent processes of nature are in operation.

No matter how many intellectuals there are in a country, the highest knowledge on various fields of activities rests on the

people who have been involved in those activities for a long time. No one else can claim to have a better knowledge on farming than the traditional farmer himself. Similarly, no one else except the fisher folk who have engaged in the fishing industry which is their traditional occupation, possess the store of knowledge gained by them.

Therefore, as an essential condition for resolving fisheries issues there should be a deep and constant dialogue between the fisher folk and the various state corporations/ institutions in the country. The cooperation is the basic principle upon which the Constitutional law is based. The principle of cooperation can be implemented through a constructive and rich dialogue between individuals and government agencies in various sectors of the country, professional groups that are constantly engaged in enhancing the knowledge of the people and the media organisations of the country etc.

It is the fisher folk themselves who are most aware of the piracy issue of marine resources of Sri Lanka. Therefore, there should be a strong relationship between the fisher folk and the Navy working for the protection of the sea. As long as this cooperation exists, the task assigned by the government to the Navy to protect the sea can be properly carried out.

Therefore, whenever a problem arises posing a threat to the safety of the fisher folk and marine resources, the fisher folk should be able to bring it to the notice of security forces of the country as soon as possible, and obtain redress. In the recent past, it was seen that the fisher folk themselves had to intervene in chasing out the Indian fishermen who used to trespass territorial waters wherein the Sri Lankan fishermen were engaged in their profession. They were compelled to go deep into the sea in their boats and chase away the Indian fishermen entering the territory of Sri Lankan waters. In the process, there arose clashes between them, incurring damages and losses. But in a state where the rule of law prevails, there should not have been an atmosphere for fisher folk to intervene for their own safety.

But the fact that they had been compelled to adopt such measures to draw the government's attention to this issue shows that there are significant shortcomings in regard to the safety of the oceans and the fishermen themselves.

At the same time, every community as well as the fisher folk, when they face a serious problem, should have the right to seek assistance of the judiciary if they fail to get it resolved with the relevant government agencies expeditiously. If they had been able to take up the matter with the court of law and seek immediate relief as and when the fisheries problems were arisen, it would have been possible for the court to resolve the issue efficiently and peacefully by ordering the relevant state corporations to take prompt action. However, the existing legal system has largely blocked the possibility of such easy access to court of law and obtaining orders against the authorities.

Therefore, it is essential that an in-depth and genuine discussion is held between the parties engaged in making the new Constitution and the fisher folk at the time of drafting the Constitution. Like all other communities, fisher folk to, should have the opportunity to gain an understanding of the law of the country. Also they should have the right to point out deficiencies in the law if any, and to suggest appropriate measures to protect their profession and the ocean, the domain in which they operate.

Therefore, it is essential that an in-depth dialogue is carried out between the fishing community, society and all those who are directly and practically involved in the making of the proposed new Constitution. It is a comprehensive exercise which takes time. Constitutions cannot be formulated suddenly and hastily. It is because safety issues and professional issues are not able to be resolved suddenly and hastily. They are extremely complex issues. These complex issues can only be understood through a dialogue with the people involved.

Therefore, the attempt to adopt a Constitution in a hurry should be stopped and a dialogue shall be held with the fisher

folk and other communities and develop an appropriate legal framework conducive for protecting and enhancing their lives and the resources from which they earn their livelihood to make their future prosperous and also to make the said legal framework a part of the fundamental law of the country.

Some might argue that there are other laws for this. But past experience has proven convincingly that they are not forceful enough to solve the problems. Due to large ambiguities and inadequacies in the existing law as well as the methods of enforcing the law, the possibility of resolving this issue within the existing laws is very limited. The purpose of the Constitution, the supreme law of the land, is to bring all these laws under one framework. The Constitution should be made an inclusive supreme law. Depriving the opportunity to accomplish it will lead to the collapse of the whole country. If that happens, the consequences of it, have to be suffered by all communities in the country, including fisher folk.

Chapter 06

Power Centre and the Constitution

A powerful myth prevailed in Sri Lanka throughout the past has been that there is a centralization of power in the current Constitution and what is needed is the decentralization of power. Here what is meant by the centre of power is that all the powers have been vested in the Executive President. But a centre of power does not mean such a situation. Under the executive presidential system currently operative in Sri Lanka, what has really happened is that the power has become disorganized and begun to manifest itself in the form of a series of major conflicts at the highest levels of governance. The executive president is not just the final arbiter of the state rule; he has become the mediator of every problem from their beginning to the end. This situation has led to a great confusion in the power of all the Ministers, MPs and the bureaucracy working in the centre of power. Thus, the emergence of the executive presidential system as a method that renders the

centre of power inactive has primarily caused the collapse of the existing management system of the country and the spread of inefficiency to every nook and corner of the state administration.

There is a prime need in Sri Lanka to initiate a very clear public dialogue throughout the country on what is meant by centralization of power in the context of steering the a state mechanism. A power centre is an entity by which the entire fabric of the state machinery of the country is held together with each component of it resting on the strength of the other. Accordingly, in essence, a power centre is a conglomeration of collective social relations. So much so , the power centre is meant to exercise the entirety of power to coordinate all the elements involved in the exercise of power, promote collective cooperation that should exist among them, and direct them as one single force for the pursuit of various objectives.

If anyone working in power centres feels that he lacks the power, will not be able to perform with concentration required for the functioning of that power centre. At this stage, it is important to find out for what purposes that all those who exercise power with concentration and cohesive manner should work collectively.

First and foremost, the primary task of the power centre would be to reach a consensus in regard to the objectives they should use their power for, and the policies required to be adopted to achieve those objectives. Formulation of policies and implementation of those policies based on various practical actions constitute the main responsibility of the Power Centres of the Government.

The biggest criticism against the current executive system in Sri Lanka is that it lacks an in-depth understanding of the specific objectives of it; and on the other hand, it does not formulate policies to achieve the desired goals. Accordingly, there is a tendency for changing the policies from time to time, and so much so , whatever the executive president thinks good for the country today, to be declared as a policy, on the following day and thereafter to refer them for budgetary provisions and then to take

practical action to implement them on ad-hoc manner. Invariably, this tendency has created an extremely unstable situation in the country.

Policy making is a collective exercise that involves the participation of different people. Having an in-depth dialogue with the people must be the first and foremost condition in formulating proper policies. This is because the policies formulated by the government are meant to fulfil the needs of the people and the people themselves are the most powerful source to determine the policies they actually need. After that, the most important part of this process is accomplished by the public sector, which does the necessary practical work. The connection between policy making and research work constitutes a key element of the concept of the implementation of power that has emerged in modern times. This involves that the methodology used to achieve the desired goals are based on the findings of research work, and follow up the progress adopting highly scientific, objective and intelligent approaches in resolving the problems that may arise in implementing them.

Such a process existed to a certain extent before 1972. Accordingly, the government officials in the key sectors of the state, used to gather information relevant to each sector and, with the assistance of their respective experts, proposed a set of policies to be implemented by the government. Those proposals were debated and discussed by the experts in other areas within the respective power centres. The consensus that emerged through this process eventually became the government policy, and the practical steps taken to implement those policies became the procedure of the government.

Thus, when a state functions this way, there is a space for new ideas to develop over time, logically and practically. Consequently, there grows some consistency and continuity in the policies adopted and the implementation of them. The policies do not change frequently as one policy today and another tomorrow.

When different changes do occur in the country, the necessity may arise that the policies that have been developed up to that

point have to be adjusted to suit the changing circumstances, but there won't be completely new policies being adopted or put into practice solely on account of the changes that have occurred from time to time. Thus, the power centre becomes a truly vibrant, intelligent and active entity that controls the life of the country by developing and implementing unitary action programs in the society as a whole. One of the most important functions of the power centre is the financial control. Assigning one person to spend money on various things at his will is an extremely unwise course of action. Since the exercise of all powers is carried through the financial provisions, it must be monitored constantly, collectively and in a very responsible manner based on professional decisions. The ruler does not command these divisions. What he does is to serve as a symbol of consensus on monetary policy, and make it feasible by giving his final verdict for its implementation. Therefore, the co-operation of the state authorities with regard to financial matters becomes an essential condition of a power centre.

The process began in 1978 by giving all the powers to one person has added an absurd feature to the system of governance. It is definitely an absurd feature. This absurdity cannot be ascribed to one person or different persons. It must be perceived as a situation created by the systematic breakdown of the way the power centre works.

Disintegration of the centre of power.

During the last few decades the power centre of Sri Lanka has disintegrated. What is meant here by the power centre needs to be explained. The power centre means the development and implementation of a standard process on how all sectors of the country should operate cohesively. The first step of this process would be to communicate the basic objectives of the country very clearly; formulate the state policies based on those objectives; and make them explicitly public; and then to plan the course of action to be taken to achieve those policies; then the allocation and preparation of financial provisions required for the implementation

of the plans; then implementing the plans and overseeing the proper functioning of them .These include the main activities of the state, which are to be managed by the government. Also, the term 'rule' implies the proper conduct and maintenance of the entirety of the power centre.

All functions mentioned in the paragraph above involve a process that requires group action; they cannot be performed by a single person. There are many persons involved officially in the above activities of the government. Among them are the political authorities who represent the executive, and above all, all the top officials of the civil service who are constantly engaged in this process, all those who have the expertise and experience to advise on that process, and all the officers who are in charge of directing all relevant institutions and corporations particularly those who are responsible for managing the country's financial system. Thus the power centre of the government functions through a broad coordination of all those who are responsible for fulfilling all above tasks. So in essence, this is a process being implemented by a whole team.

Chapter 07

Rationality and the Constitution.

Peaceful existence of a society and socio economic development of a country depends on the level of rationality of the organizational structure of that society. Being rational is not a new concept to mankind. Throughout human history there has been a great deal of dialogue on what is meant by being rational, how to identify whether a society is rational and also how to improve it.

Based on those dialogues, it would not be difficult to identify the basic elements of rationality. There is a great deal of documented literature on philosophical vision that helps one to acquire a deeper understanding of these basic elements. Here we are trying to identify those elements roughly.

The profound view that 'truth' can be reached to a great extent is foremost among the basic elements of rationality. The 'truth' implies the existing reality. It recognises the fact that the various aspects of the universe can be recognised separately as well as in general to gain a very close understanding of them. Underlying this concept is the conviction that there exists an external world, and the man has the ability to comprehend and grasp it, and also there are various methods and techniques that can be used to determine whether what is recognised is correct. A number of principles have been identified in the process of rational development of mankind testifying that the external world is not something that grows by chance, and there are interconnected and interdependent processes within it, and if those processes were not recognized, it could lead to various catastrophes.

The attempts to identify these realities have been gradually directed towards finding solutions for practical problems. This has given rise to the development of all the sciences. The study of various subjects based on their principles, and identification of the characteristics unique to each of them have been rendered possible by the progress of science. With the advancement of physics, a great deal of knowledge on all subjects has been made possible to be acquired today. Similarly, through the study of other subjects, a great deal of knowledge has already been acquired in the realms of diagnosis and treatment of various diseases while making consistent efforts to develop these subjects further. In this way, a great store of knowledge on each subject has been achieved by using scientific methods and techniques.

These exercises need not to be restricted to the phenomena of external world only; a similar level of advancement in rational choices can be achieved in the social sphere as well. In fact, there have been large-scale developments in various spheres of society. For example, agriculture depends on the knowledge gained on all the subjects related to agriculture such as soil science and seed germination etc. Today, the development of agriculture in the world has reached such an advanced level that the vast body of the traditional knowledge in agriculture that the people

had accumulated over time through practical experience could still be utilised by giving it a formal and scientific facelift and also making positive changes and adjust it to suit the needs of the external world. It has been now realised that the benefits of such developments are not restricted only to the advancement of production capabilities, but also they could be extended to identify the potential problems that may arise in those sectors in the future. Therefore, those who seek to gain knowledge in a particular subject will not stop at simply identifying only the outline of it; , instead, they pursue further to ascertain the practical aspects or the functionality of it , and also to intervene in them to some extent; at the same time they endeavour to make it a part of their life by identifying the problems that may arise in the future and finding remedies for them in keeping with the methods outlined above.

This is an extremely important principle pertaining to all matters of the economic sphere, that is, that there are some identifiable practices behind all these activities and if they are ignored without identifying them, it could lead to various troubles and disasters. In the same way, there is a consensus among the experts of economics, specialised in various branches of it that wholesome benefits could be accrued if those practices are duly identified and employed for better use. The issues such as how could a system of production be set up in a country, what are the principles to be taken into consideration in changing the system of production, how could the relationship between a country and the outside world be managed in such a situation, fall into this category.

The political arena is also similar to this, which implies that there are certain principles to be followed in governing a country. Identifying those principles are more difficult than identifying a physical substance. Identifying these principles is more difficult than identifying a particular physical substance. But the common principle applicable to every branch of science, i.e. the fact that there exists principles, and attempting to work by ignoring them will lead to great trouble and disaster, equally applies to these subjects.

But the principle that applies to every branch of science that such principles exist, and that abandoning those principles and going to work can cause great trouble and disaster, also applies to these subjects as well. This implies that the governance must be prudent and rational. Otherwise, the consequences of not being rational will have to be faced. The opposite word of rationality is nonsense. The consequences could be devastating when it comes to dealing with a variety of nonsense. This principle is extremely important in the context of Constitutional Law.

When a Constitution is referred to as the supreme law of the land, or the most exquisite law or the greater law, it implies that the Constitution provides the basis for the establishment of the key structures that have a significant impact on the country. The identification of that structure also has to be made, as mentioned above, through the same principles applicable to rationality. If a Constitutional system is developed outside or against this principle, it will invariably lead to various unsolvable problems and entanglements which will gradually plunge the whole society into a state of confusion. Enacting a Constitution which is not rational or logical could lead to have distorting impact on the economy which is a key component of the social system, and the other sectors such as production, import, export, financial system, banking system, etc. which constitute larger components of the economy, as well as the accounting system that oversees the disciplined functioning of the above.

The 1978 Constitution is a document devoid of such wisdom. So said because it has not been formulated taking into account the basic principles applicable for structuring the organisational pattern of the country. In fact, it has been formulated contrary to those principles .So much so, there is a massive confusion of principles here.The constitution of Sri Lanka has been structured in a manner leading to confuse the issues such as how should the overall power centre of the country be established and maintained, how should the decentralisation of power between the overall power centre and various parts of the country be carried out ,

what is the guiding principle on which the country's financial and economic systems must be based and how to ensure that it is regulated on that principle only and thousands of other problems. It's not only an incomprehensible document; but also a completely absurd document.

The people of Sri Lanka have experienced the consequences of this illogical constitution for nearly 50 years. The country has become debt ridden as rational principles conducive to preventing such a situation have not been followed. If the problems that have arisen in all other spheres of the country are analysed, it will certainly reveal that all the current crises have arisen as a result of the great confusion caused by the absurdity, worthlessness and the internal contradictions of the Constitution itself. This does not mean that there are no specific reasons for each issue except that there is no capacity in the overall constitutional framework to address these peculiarities. Those who are cognizant of the dynamics of society know that it is difficult to prevent the occurrence of natural problems in a society inhabited by different communities and people having different opinions. Therefore, the Constitution should be formulated on the basis of this knowledge in order to minimise such differences and gradually eliminate them so that a profound policy of reconciliation is developed for the country.

In view of the above, the entire society today should participate in preventing this catastrophe which has been caused by the Constitution mainly because the ensuing catastrophe is certain to have a profound impact on the lives of all, and the country is facing large scale problems that have never existed before.

Chapter 08

Constitution and the Teacher

In today's world, the teacher is considered to be one of the most important contributors to the building of a nation. Attempts to improve the quality of teachers and enhance the intellectual

quality of the new generation are significant features that can be witnessed in most developed countries in the world today.

The notion of education is changing tremendously all over the world today. A range of questions such as what sort of place a country would become through education, how could the human qualities of children are developed through education apart from mere expansion of their knowledge, how could the teacher who is the main contributor of this process is orientated to achieve these objectives by making a significant paradigm shift in the knowledge and the capabilities of the teacher making him one who has a better knowledge on the environment, broader awareness of psychology and the social dynamics , and through which to make him a catalyst of developing the relationship between the society and the child so that his knowledge will no longer be restricted to a particular subject only ; particularly, how to produce a teacher capable of instructing the children not only about the country of their own but about the whole world thereby improving their relationship with the world ; such issues are being widely discussed and tested around the world today.

In philosophy the meaning of human existence has begun to change drastically over time, particularly after World War II. At one time, producing scientists had become the main theme of education, especially in European culture. At present, apart from contributing to progress in science, the education is expected to transmit mature knowledge transcending the subject's knowledge so that the children could grasp and realise the inalienable relationship that exists between man and the universe. This is not just an exercise that takes into account the well-being of the child only; it also implies the need of producing people who are capable of solving the enormous problems facing the world.

The world today has encountered great threats. Many of these threats are not the ones created daily and intentionally; rather they seem to be an outcome of the attempt taken to avoid the ill effects of the way people have behaved in the world in the past. The resources of the world are in great chaos as they are being exploited

in unlimited ways by a very large population. The world has come to realize that this chaos could have an adverse impact on the very existence of the universe. For example, it is widely acknowledged that global warming is damaging the physical systems that protect the universe and prevention of this damage is vital for the future of mankind. Due to such damages, great changes are taking place in the climatic conditions of the world. The melting of gigantic ice caps in the regions of extreme cold which has contributed greatly to the survival of the planet earth endangered by global warming and the consequential change of the nature of the sheets of oceans upon which the existence of the world largely depends on, and that this situation could have a huge impact on the very existence of mankind are facts that have raised public awareness globally. There is a growing awareness in the world today that this environmental destruction will cause a great deal of extinction of species and extensive damage to the remaining species, and the extinction of them will affect everything in the world, such as plants and vegetable life.

All this can be easily identified by looking at Sri Lanka. Sri Lanka now has a much larger population than the population it had about a hundred years ago. The earth that provided food and other necessities for the populations that lived in it performed that task so easily in the past, but with the increase of population, it has become unbearable for the earth to sustain such a large population.

Thus, the application of artificial fertilizers could alleviate these problems to some extent by increasing the agricultural productivity. But the application of chemical fertilizers over a period of time has greatly affected the fertility of soil. It is not a problem that can be solved in a short time. Therefore, there is a broad dialogue in the country on how to solve this problem in the future and what kind of changes should be made for that. Everyone knows now that if this debate on the protection of the country's agriculture is not tackled prudently and pragmatically, the nation will have to face a massive food shortage and the famine likely to occur and several other major problems.

In the same way, another problem that seems to be on the rise is the huge problems that the deforestation has caused to elephants and other animals, and the big problems that have befallen the farmer as a result. The debate on these issues can often be seen in the newspapers today.

It is now acknowledged that there are a large number of psychiatric disorders in Sri Lanka. The human beings face a great deal of confusion in the face of the changing environmental conditions, changing environment and growing urbanisation. These confusions have a profound effect on the mind and there are people all over the country who suffer from the resulting stress.

Teachers have a great role to play in helping future generations to cope with this situation and help the people to become creative and positive citizens in such situations. The innate abilities alone are not adequate to perform this task. It requires a great deal of effort to expand their education and provide them the opportunity to broaden their experience. Investing money for that is very important.

Therefore, treating the question of the teacher as a mere question of their pay or the facilities is an underestimation of the role of the teacher. The teacher is really a vital component of a team of professionals that plays a major role among those who build a country.

Therefore, the makers of the Constitution should have a profound understanding of the role of the teacher. This understanding is a huge task that cannot be fixed solely on those who ultimately pass the Constitution. A social dialogue on the role of the teacher is needed. The teachers, parents, children and people with knowledge of different subjects should participate in this social dialogue. The consensus reached in this participatory dialogue should be reflected in the Constitution.

This does not mean that all questions about the teachers should be included in the Constitution at length. What it means is that the necessary background and provisions for resolving such

issues of paramount national importance ought to be built into the framework of the Constitution. By acting within that legal framework, the education system can be maintained in the future under the guidelines of the Constitution. By doing so, instead of formulating policies of national importance such as this, based on the views of different governments or different individuals, it would be possible to incorporate an accepted deep understanding of the issues in the constitution and treat this subject as one which has a great cultural value over time.

Chapter 09

Ending Corruption and the Constitution

Sri Lanka is notorious in the world as a country plagued by rampant corruption. This menace has overwhelmed the entire social system to an extent that the people of Sri Lanka have tended to regard corruption as an insurmountable problem. Everyone suffers from this problem, and it has resulted in a profound crisis in the Sri Lankan economy. It is this menace of corruption that has created a situation where the economic system of Sri Lanka cannot be regulated under the law and order. Under the circumstances, the ultimate goal of any future Constitution of Sri Lanka should be to formulate a constitutional framework that will enable to determine real steps to eradicate corruption and implement the same. Until this is done, no one will believe that the Constitution of Sri Lanka or even the law of the land are real things except that their existence is only nominal.

Some might argue that Sri Lanka currently has adequate laws to deal with corruption and therefore it does not pose a constitutional issue as such. But, there is one thing they all know, that the situation of the country is such that in practice no existing law against corruption can be enforced. It is not a new thing to anyone that the situation has deteriorated to the point where the various institutions have been systematically weakened and distorted, that the desired objectives of them cannot be achieved,

and they are being used to attain completely opposite goals instead of the intended ones.

The next question that one may encounter is whether it is really possible to get rid of this problem. Corruption is rampant and is being carried out on a large scale. It is the people of the highest status and rank in the country who are being suspected largely for corruption. The public opinion is not so naive to expect that these individuals themselves will formulate an effective process to eradicate corruption. Ultimately, a constitution must be passed by the will of the people. Officially, the Parliament of the country has a big role to play in dealing with this issue. But the confidence in Parliament has also largely been lost across the country. In this backdrop, the question as to 'who will bell the cat' will remain a recurring issue.

It is because of the above facts that the question of the Constitution and eradication of corruption have become two inseparable issues. The only real way to combat corruption would be to create a legal framework capable of defeating and eliminating corruption within the Constitution itself, which is considered the supreme law or the highest law of a country. The countries having the best experience in curbing corruption in the world have shown that dealing with corruption cannot be achieved only through anti-corruption laws only; it can be achieved only by incorporating the anti-corruption laws into the overall legal framework itself.

Regrettably the basic concepts: the supremacy of the law and the rule of law have begun to disappear from the legal milieu of Sri Lanka. Although the books of law and judgments issued by Courts deal with the supremacy of the law and the rule of the law , in reality the connection between what is stated in the books and judgments and the practical implementation of the law has completely collapsed . In regard to the overall law, this issue remains one of the most serious matters in the country. Therefore, in formulating a constitution, it is essential that the trend of gradual departure of the concepts of the rule of law and the supremacy of

law from the context of the legal milieu of Sri Lanka is taken into consideration and find remedial measures to arrest the situation.

The purpose of the 1978 Constitution was to allow certain groups a greater opportunity to engage in corruption. As the President, JR Jayewardene wanted to turn the Sri Lankan Parliament into a House that would raise its hand in support of his opinions. At the same time he wanted to keep the government MPs in the parliament rallying round him. The main financial strategy adopted for that was to allow them to engage in any form of corruption and use their positions to their own advantage. Those who opposed it withdrew from active politics voluntarily, and the aim of all those who remained in politics was to use the opportunity given and their position to engage in corruption and for other advantages. Therefore, the large- scale expansion of corruption in Sri Lanka is not a mere accident. It constitutes a part of a political financial strategy. After Mr Jayewardene, corruption spread to such an extent that no one came forward to change this strategy completely, and consequently the process expanded to the point where even the chance of securing a parliamentary seat and even winning an election were severely distorted.

The concept of the supremacy of law and the rule of law was considered a threat to the very existence of the 1978 Constitution. Therefore, the principles based on those concepts and the various functional systems based on those principles suffered an automatic and premature death. It was allowed to be so deliberately. All the doors of relief available for the people burdened with corruption were closed. That also was a part of the above financial strategy. People who are rendered helpless due to a problem used to seek refuge in the framework of the law. When the capacity for accessing the legal framework for a relief is deprived, the people tend to move away from that framework. This creates a large-scale separation between the law and the people. This caused great frustration among all sections of the people. All sections of people do not mean only the general public. It includes Members of the legislature, those engaged in commercial activities, those who

invest in a country, those engaged in various professions, those who rise to high positions in various teaching disciplines, etc. All of them have become deeply frustrated and taken aback having realized their inability to fight against corruption.

Therefore, on the one hand, establishing the rule of law is an essential strategy to curb corruption. In short, it means that all citizens of Sri Lanka, as well as the rulers of Sri Lanka and the persons who hold the office of President or Prime Minister, must be subject to the law. There should be a way to act against them if they are engaged in corruption. Without that there is no rule of law which means there is no rule of law. Thus, the background of the common saying that in Sri Lanka today there is no law in the country implies that the law has been suppressed allowing for corruption. First of all, the path to combating corruption can be reached through the abolition of the structure of the 1978 constitution.

The 1978 Constitution has been established on the basis of some sort of political and legal financial strategy. That political and legal financial strategy has been the subversion of the law allowing the president who holds the highest office in the government, to make a decision or do whatever he desires, and remove all legal barriers that prevent it. The whole constitution has been designed to remove those barriers and obstacles.

It is meaningless to talk about curbing corruption without completely eradicating the idea that the President stands above the law. In this regard, curtailment of the powers of the judiciary is another attempt to perpetuate corruption. The 1972 Constitution disabled the 'right to review'; one of the strongest powers of the judiciary, and later it was completely removed by the 1978 Constitution. This implies that once a thing that is illegal is declared legal, it deprives the ability to go before a court at any time, challenge it and have it invalidated. Apart from this, by creating the impression that, according to the Constitution, the President could not be prosecuted led to deprive the capacity of

investigating and remedying any of his wrong actions. Therefore, the increase in corruption in Sri Lanka is not a mere accident. The b background for corruption has been deliberately created. This practice extended up to the capacity of being able to appoint any corrupt person to any important position.

Therefore, the notion that corruption cannot be eradicated is not a valid concept. The complete abolition of the structure of the 1978 Constitution, Sri Lanka possesses the capacity for developing an anti - corruption mechanism easily as well as enforcing the law.

Considering the issue of attracting investment to Sri Lanka and the economic problems that have arisen internationally, the problems encountered could be resolved by abolishing the structure of the 1978 Constitution altogether and formulating a new constitution based on a democratic constitutional structure founded on supremacy of the law and the rule of law.

Chapter 10

Presidential system turning into an enervated entity

One of the major constitutional issues in Sri Lanka is that the system of current Executive Presidency has evolved into a completely enervated entity, one which has lost its spirit. Despite being nominally all powerful, the system of executive presidency has become like an invalid coin which is no longer capable of doing anything practical.

That's not really surprising. Shortly after the 1978 Constitution came into force, it became evident that it could not be implemented. It was a concept based on the myth that one can work more efficiently by retaining all the powers in one person. J.R. Jayewardene, the inventor of this concept was not unaware of this problem. It is reasonable to assume that he appointed himself as the executive president within one year of his being appointed the Prime Minister and formulated a constitution to suit his ambition because he knew that there was no other way to retain

his power for a longer period. At that time a tradition had set in the country where the governments were changed every five years by an election. He knew that even the power of two-thirds majority was likely to be melted and waned like that. He had witnessed Bandaranaike's victory in '56 and the coming to power of the 1970 coalition government. He had a profound understanding based on experience that in a short period of time how the popularity of those governments had waned and found it impossible to stay in power.

Several people have stated that he has discussed with his close confidantes and associates about his intention of not letting the power slip to anyone else once it is in his hands. By then he had been in politics for about 40 years. He was not simply (scraping coconut) or rather idling in politics during this long period, and was determined that he would not bequeath the system to anyone once it fell into his hands.

Within a few years after he had gained power, the issues began to emerge in the political atmosphere that prevailed at that time making it almost impossible for him to achieve his ambition. Even though Neville Samarakoon, a close friend of him, was appointed Chief Justice, soon a large-scale dispute arose between the President and the Chief Justice when the latter realized that what the former wanted him was to plunge the country's legal system into a major crisis. This issue became a harbinger of the future of the country. Since then there has been a great deal of literature published about the evolution of the executive presidency; so there is no need for me to include a critique of it.

The abolition of executive presidency was one of the major demands since the mass intervention of the people that brought Chandrika Bandaranaike into power. But the literacy of legal intelligence of the society had not developed to a level capable of deepening the debate on the abolition of the executive presidency and socialised the idea adequately .The question that was often raised was about the alternative to the executive presidency.

The lack of a clear alternative eventually paved the way for the continuance of the system which ostensibly everyone disliked.

After 2005, the executive presidency was able to survive on the basis of the escalating ethnic war. But following the ending of the internal war in 2009, the question arose as to how the system of governance could be shaped to face the problems of the ensuing stage. So much so, it was largely retained until 2015 by means of heavy repressive measures. Since these measures have been reported extensively, reiterating them is not relevant here.

Many see the crisis in the government that came to power in 2015 was due to a rivalry that arose between the President and the Prime Minister. But there is something more to it. By 2015, the system of governance of the country had shattered and disintegrated to a level that it was no longer possible to be governed not only on the system of executive presidency but also on the 1978 constitution as well. By that time the capacity of managing various branches of the state mechanism, uniting and merging them had been completely destroyed. In this void sphere of power, the Prime Minister's attempt to gain executive power may have contributed to create more problems. But those were not the main points. The regime they took over in 2015 was one that lacked the potential to have been put into action; and also it was not in a position to be orientated practically towards achieving the desired objectives.

It is not surprising that a government that has come to power in an atmosphere in which the overall system of governance mechanism had reached such a depth to lose its popularity in relatively a short period of time. In general, criticisms against the government were barrage at various levels superficially, but there was a deeper crisis within the system of the regime itself. The structure created by the 1978 constitution has become no longer possible to be continued with; at the same time, it had become an entity which has perpetuated inefficiency and intensified the entire problem.

Both the presidential and parliamentary elections held subsequently relied heavily on the strict implementation of the power structure of the 1978 constitution. The issues such as the need of having a two-thirds majority in Parliament and the revoking of 19th Amendment and the need for enacting the 20th Amendment in its place were vigorously discussed. The presumption on which the present government has acted upon was that the 1978 Constitution was still powerful and its drawbacks were largely due to not having a two-thirds majority in Parliament. Their dream was to energise the structure of 1978 constitution and the executive presidency by building a structure similar to what Jayewardene had established in 1978, or even more so in Parliament.

But in a very short period of time, this has been proved to be a myth; the presidency of Gotabaya Rajapaksa can be described as a period in which it has become very clear that the constitutional structure of 1978 could no longer be implemented for the progress of the country except causing a drastic decline in it . In fact, this experience, no doubt, will add to the existing examples of world experience of complete breakdown of a state mechanism.

The only solution now available would be to discard the defunct constitutional structure and replace it with a new state structure capable of running the state mechanism efficiently. Apart from that, there is no other alternative that could bring positive results.

Therefore, the attempt should not be to talk about the merits or demerits of the '78 constitution or to enter into a dialogue on various issues related to it, but to address directly the question of how a different state mechanism could be built based on a different constitutional structure. This is a task that needs to be performed through interventions of different sectors and streams of thoughts as well as practical interventions.

The demise of the 1978 Constitution is a reality today. Yet, nominally it remains the constitution of the country. This nominal

constitution has created a situation where large scale problems in the country cannot be resolved.

If solving the problems facing Sri Lanka is the main need of the country, the 1978 constitution which has become an impediment to do that, certainly it should be removed from its nominal status as well, and a new constitution based on principles capable of revitalizing and rejuvenating the country, encouraging a creative and positive relationship between the state mechanism and the people and making a progress in the country's economy and all other sectors should be adopted. It has become not only a challenge facing Sri Lankans today but also a major issue that must be addressed forthwith.

Section 15: For a Change-Making 21st Amendment

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The key objective of the 21st Amendment is to undo the undemocratic powers of the executive president and to expand the space for better governance. This would imply that no attempt will be made to place in the hands of the prime minister any powers that are undemocratic. The ultimate purpose of bringing about the amendment is to achieve systemic change that will prevent future mismanagement of the economy and the political system and also to establish social stability. If properly done, the 21stAmendment could pave the way for future change as a genuine attempt to establish democracy, the rule of law and the people's participation, as well as to bring much needed dollars to Sri Lanka.

When it is said that the country is facing its worst manmade economic disaster, who is the man referred to? It is the executive president. Strategies to prevent the president from having unfettered powers and to prevent the executive from engaging in the mismanagement of economy and society should be included in the 21st Amendment.

There should be provisions to empower the participation of people, including those in parliament, so that the government is not be answerable to the president as it is now. Officers of the bureaucracies in branches of governance and all citizens should have a say about matters that they are interested in.

The constitutional technique by which this could be done is to change several limitations placed on people's sovereignty in chapter 3 of the constitution. The limitation of the present articulation of the people's sovereignty is that what is given with one hand is taken away by the other. While recognizing the principles of people's sovereignty as a foundation of the state,

limitations are placed through various provisions in that chapter itself for the exercise of people's sovereignty.

A sub-paragraph should be added at a relevant place stating that the supremacy of law and the people's sovereignty are inseparably linked and therefore any provision of the constitution that violates the principles of the supremacy of the law violates the sovereignty of the people. Any such provisions contained in the present constitution or in its amendment or any other legislation would be treated as without any effect law.

This has to be combined with the amendment within the same chapter regarding the nature and the power of the judiciary. Instead of stating that the judiciary derives its power from the supremacy of the parliament, it should clearly be stated that the judicial power is derived from people's sovereignty. This will bring in the principle of separation of powers back into the constitution.

To this it should be added that the judiciary has the power of judicial review so that any law that violates the sovereignty of people exercised through the supremacy of law can be declared null and void by the judiciary. This is not new innovation. This power was recognized under the Soulbury Constitution; it was the 1972 and the 1978 constitutions that abolished that power, thus helping what is normally illegal to be legal by merely passing of a law or by gazettes or other notifications by the president.

If basic principles are brought in within the 21st Amendment, this will pave the way for diminishing the possibilities of interference in the democratic system and the legal system.

The legal system today remains severely condemned. The main criticism is that it has become subservient to many forces, including the executive, and also to illegal manipulation by parliament. Even high ranking police officers failed to stop nationwide violence on May 9 and on several days afterwards.

It has also brought the Attorney General's Department into disrepute and prevented the administration of law in the most scandalous manner.

The power of the executive has been used to weaken the judiciary and the legal systems. Reducing the power of the president implies measures to re-strengthen the enforcement of law within the framework of law and democracy. Otherwise whatever measures are taken to reduce the power of the president can remain purely theoretical while failures of the law enforcement will ensure violation of law by the executive. This is what happened with the Easter Sunday bomb attacks, which could easily have been prevented if the law enforcement agencies did their basic duties.

When law enforcement fails, the country enters into the situation of paralysis and this paralysis spreads to institutions that control the regulatory system of finance. This is one of the major causes of the economic collapse that resulted in the country defaulting on its international debt payments for the first time in its history and it will continue to cause shortages of gas, petrol and power supply, high inflation and skyrocketing prices.

The 21st Amendment can contribute to recovery from this economic catastrophe. The Governor of the Central Bank has said that the restoration of law and order is an essential condition for expediting this recovery. Political stability is a pre-condition for overcoming the present economic crisis but this cannot be achieved without effective law enforcement. All politicians, not only the President, must be brought under the control of the law. If the 21st Amendment helps to do this, then one of the major demands of the protesting citizens that the 225 MPs should go will be addressed. People who break the law, even if they happen to be holding high positions, would be sent to jail.

A narrow minded idea of 21st Amendment to limit the changes only to disempower the executive presidential system and empower the prime minister will not suffice to deal with the challenges.

An opportune moment exists to make significant changes to the political and social cultural through the 21st Amendment.

The prime minister is talking about bringing new political culture. Instead of superficial changes, what is needed is the law to be implemented in a way that those who break laws will be punished.

The cry is now is for citizens to have greater control over the political culture. The empowerment of the citizens is the only way through which people's sovereignty can become real. It is hoped that the 21st Amendment will be a serious attempt in that direction.

SRI LANKTwo big lies told about the 1978 Constitution

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Two great lies have been propagated about the 1978 Constitution. When a lie is repeated many times by many persons, often such a lie begins to be treated as a conventional truth.

The first of these lies is that the 1978 Constitution was created on the model of the French Constitution and the American Constitutional tradition. This was first propagated by Professor A.J. Wilson who called it a Gaullist Constitution. At the time, he was the advisor to President J.R. Jayewardene, a role which he publicly lamented about later, after the 1983 riots when the President could offer him only the safe passage to the airport to leave Sri Lanka. However, the false statement stuck. Later, others added the American model also. The mention of the similarity between the French and American Constitutions was constantly used by others and it is being repeated even now.

In recent debates about the proposed 21st Amendment to the Constitution, even the present Minister of Justice, President's Counsel Dr. Wijeyadasa Rajapakshe in public interviews has repeated the same false position and even President Gotabaya Rajapaksa has also been repeating this position.

Therefore, a short explanation about this is necessary. One of the reasons for such an explanation is not merely to expose a false position but to reveal the dangerous consequences of this position not only since 1978 but also for the future.

The Constitution of 1978 negated the supreme fundamental principle of the rule of law

The most basic falsehood in stating that the French and American model of the Presidential system is similar to the one that was created under the 1978 Constitution is that both the French and American Constitutional model is based on the supreme fundamental premise of the rule of law. The 1978 Constitution of Sri Lanka was created for the very purpose of neglecting the principle of the rule of law.

The following statement by Judge John Michael Luttig made during the third session of the Inquiry at the House Select Committee to Inquire into the January 6th Attack on the Capitol highlights the central importance of the rule of law to the American Constitution:

"The most foundational concept in America is the rule of law. Thus, as I interpret your question, you are asking about that foundational truth of these United States (US), which we call America. The foundational truth is the rule of law. That foundational truth is, for the United States of America (USA), the profound truth, but it's not merely the profound truth for the US, it's also the simple truth, the simple foundational truth of the American Republic. Thus, in my view, the hearings being conducted by this Select Committee are examining that profound truth, namely the rule of law, in the USA."

The most fundamental premise on which a republic is created is the notion that the law is the supreme principle on which the entire republic is created. Thus, the State and the people are all bound by and are entitled to the benefits of the law which is publicly made.

The central purpose of the 1978 Constitution was to displace the most basic elements of the principle of the rule of law. Such displaced principles within the 1978 Constitution virtually makes the law an unimportant aspect concerning the manner in which the Sri Lankan State was to function, and the experience under that

Constitution for several decades now has clearly demonstrated the extent to which legality has been undermined in Sri Lanka. This displacement of the rule of law was not an accident - it was part of a design. The design was to create a State which is completely dissimilar to both the Presidential systems as understood in France and England as well as parliamentary systems of governance as understood in Britain and elsewhere. Thus, on the most supreme principle of constitutional law, the Sri Lankan Constitution does not belong or have any kind of a similarity to the great constitutional traditions in the world.

Jean-Bédel Bokassa

Dr. Colvin R. de Silva did perceive this position at the very start when the 1978 Constitution was put into debate. In an essay written by him and later reproduced in many publications, he said that the proposed Sri Lankan Constitution does not belong to any great tradition but perhaps it has been derived from the ideas of Jean-Bédel Bokassa of Central Africa. Bokassa is known as one of the craziest rulers in Africa where he came to power by way of a coup and thereafter declared himself to be the emperor. Thereafter, he held a coronation in which he claimed to be similar to that of the coronation of Napoleon Bonaparte. He was overthrown within a very short time by the people. His Constitution is known as one of the craziest pieces of legislation ever known in history. That is what Dr. Colvin R. de Silva who in his time was a top most constitutional lawyer declared the 1978 Constitution to be. In this instance, he was quite accurate despite the fact that his own contribution to Sri Lanka's law, also has many elements which are lamentable.

Thus, repeating this idea that the 1978 Constitution is made in the same model as the French or American Constitutions provide it a legitimacy that it does not deserve at all. What should have been declared as the work of a crazy, power hungry President who was deluded by the huge majority he had in the Parliament due to accidental reasons, wanting to acquire a position possessing of

power which cannot in any way be justified within a system based on the principle of the rule of law thus gets to be recognized as just a piece of legislation which only differs from it not belonging to the British tradition.

When the rule of law is displaced from a constitution's very core of the republican nature of the constitution, the democratic nature of the constitution is thereby completely removed. The 1978 Constitution is a primitive piece of legislation that should never have been allowed to be adopted and should have been discarded as early as possible. Due to many extraneous reasons, the discourse on actions was not followed in Sri Lanka. One of the consequences of this failure to reject the 1978 Constitution is now being experienced by the entirety of the nation when its economy itself has catastrophically collapsed. There is a direct relationship between the 1978 Constitution and the present economic catastrophe. It is essentially in the same area of the removal of the principle of the rule of law. It was that removal which made it possible for widespread indiscipline and corruption within all sectors of the State including the Central Bank itself. That chain of actions would not have happened if the rule of law was enforced rigourously within Sri Lanka. An illustration of this is the fact that when US President Donald Trump tried to retain his power after the loss he suffered in the 2019 Election, by ordering and thereafter trying to pressurize his own Vice President to violate the Constitution of the US, the Vice President himself disobeyed that order on the basis of legal advice from his legal advisors that to do so amounts to violating the most fundamental principle on which America's Constitutional tradition is based. That is the position that is now explained in detail in the House Committee Proceedings into the January 6th Attack on the Capitol which is being exposed by media coverage to the whole world.

Thus, the American Constitution does not allow the President to do whatever he wishes to do. The validity of his actions are measured through the compliance or non-compliance with the rule of law.

This also explains as to why all these attempted Amendments like the 17th, 18th, 19th and 20th Amendments to the Constitution and now the proposed 21st Amendment to the Constitution are all false positions. None of these Amendments have attempted to restore the rule of law as a supreme principle on which the entire fabric of Sri Lanka's Constitutional law is rooted. While in the US, the rule of law is being treated as the foundational principle, in Sri Lanka, it is discarded as a matter of no significance. Such constitutions which reject the fundamental nature of the rule of law cannot be amended. Such a Constitution needs to be rejected altogether and a new constitution needs to be created by reinstating the principle of the rule of law as the core principle of Constitutional law in Sri Lanka. Instead of doing that, attempting to amend the constitution while the rule of law remains an unimportant issue or insignificant issue, is to merely bluff or bring about a deception.

Second lie

The second lie that is being told about the 1978 Constitution is question what is wrong about that Constitution which has given excessive powers to the Executive President. While it is true that the Executive President has powers that no ruler of any democracy should have, that is not the core issue. The core issue is that the removal of the rule of law has created the position of not only the Executive President but also even of Ministers and others to rule without being bound by the rule of law. Without reinstating the principle of the rule of law, it is not possible by this or that amendment to remove this creature called the Executive President which is created only through an illegitimate methodology of trying to create a constitution in the absence of the rule of law. Therefore, the real removal of the excessive powers of the Executive President is possible only when the constitution will be based on the fundamental notion of the rule of law. That will bring everyone within a framework where their functions and powers will be determined and also limited by the operation of this fundamental principle of the rule of law. Without doing that, engaging in all

kinds of tricks could only contribute to the existence of this same principle which has brought only catastrophic consequences to Sri Lanka in all areas of life like the economy, the society and the legal system itself.

Here, it is worth quoting the definition of the rule of law so that what is involved in this definition could be compared with what is absent in the 1978 Constitution. This definition is as follows:

Tom Bingham's definition of the rule of law:

"The core of the existing principle is… that all persons and authorities within the State, whether public or private, should be bound by and entitled to the benefit of the law publicly made, taking effect (generally) in the future and publicly administered in the courts."

Section 16: List of relevant Youtube presentations

Links of list of presentations presented to youtube is as follows:

1. Nature of police in Sri Lanka

   https://www.youtube.com/watch?v=tJGT5CYB770

2. Future of protest movement in Sri Lanka

   https://www.youtube.com/watch?v=EkFduFa3TkE

   https://www.youtube.com/watch?v=3gTvgrYSRzI

The transcribed text of these youtube presentations are also available.

Section 17: A questionnaire – As a review on the themes covered in this handbook

1. Are you able to explain the link between the causation of an economic collapse and the legal system?

    a. What do you understand by the words, Legal Systems?
    b. What is the link between legislation and the implementation of laws?
    c. Are there in Sri Lanka bad laws that have been held to encourage abuse of power, corruption, and violations of Human Rights and impunity?
    d. Are there laws that have weakened law enforcement and enabled lawlessness?
    e. How have such defects as mentioned above affected good governance, that is transparency and accountability in governance?
    f. How have bad laws and bad practices in Law enforcement agencies negatively affected good governance?

2. The Constitution

    a. Is the constitution of Sri Lanka (1978 Constitution) a good law or a bad law?
    b. Has the 21st amendment to the constitution contributed in any way to correct the fundamental errors and false of the 1978 constitution?
    c. What do you think are the main errors and falsas of the 1978 constitution?

3. The criminal law and practice in Sri Lanka

    a. Do you think that Sri Lanka has basically a well-functioning system of criminal justice?
    b. What are some of the bad aspects of the existing criminal laws in the country?
    c. What are the defects of the policing system both as a protector of people and also an investigator of crimes?
    d. To what extent the people see the criminal nexus between organized crimes, the existing forms of corruption, and the Mannering, in which the policing system function?

e. Does the police protect local small entrepreneurs from extortion and help to create an environment for the conduct of normal businesses in a healthy environment?

4. Investigation into financial crime

   a. What is the capacity of the police to investigate big financial crimes, which affect the entire economic system?
   b. What has the record of a police investigation into crimes relating to obtaining commissions and other illegal rewards relating to business transactions?
   c. Is there successful attempts to control such vital departments as that Customs control, Immigration, Excise department, inland revenue-related crimes, and other crimes, which are relating to vital businesses?
   d. Is there specialized police units that have competence, training, and necessary resources for investigations into commercial and financial crimes?

5. Prosecution

   a. What is the reputation of the Attorney General's Department's Impartiality, integrity, and competence of the Attorney General's department as the chief prosecutor's office in the country?
   b. What is the reputation of this department on prosecutions relating to commercial and financial crimes?
   c. Has the department acquired the type of independence and capacity to deal with such large-scale financial crimes?
   d. Is the accusation of political byes attributed to the department in recent times justified?

6. Judiciary

   a. Has the 1978 constitution weakened the position and the powers of the judiciary as an institution?
   b. Is the judiciary treated as one of the three branches of governance in the country enjoying equal status and having the capacity to keep the other two branches within the rule of law parameters in their actions?
   c. Has the Sri Lankan judiciary to impellent laws, which substantially, oppose the principles of supremacy of law and Rule of Law?

d. Are the time limits imposed on the judiciary by setting extremely short time spaces available to examine the legality of proposed legislation which may contain provisions contrary to legality not violate the principle of independence of the judiciary?
e. Is judging of the legality of law the same as judging the constitutionality of a law? What if a particular provision of the constitution itself is contrary to the norms of legality that is considered a part of any civilized legal system?
f. Can the judiciary be made powerless in the face of what is barrenly wrong like for example in the face of the commission of murder, enforced disappearances, selective investigations, and prosecutions, arbitrary decisions to prosecute or not to prosecute, and actions of the legislature or executive that could virtually lead to commissions of major economic crimes?

7. Interference with Justice

a. If there is a widespread belief and criticisms that often there are obstructions to justice taking place in the country at various levels; what is your own knowledge and observation about this?
b. In all functioning justice systems, obstruction to justice is considered one of the most serious crimes. Is that case in Sri Lanka also? If not what are the reasons for that?
c. Who has the duty to receive the complains of obstruction to justice? Is there a process of inquiries into such obstructions and has there been reason times any serious actions taken by anyone about this issue?
d. How the space left does for obstructions to justice affects the people's confidence in the judicial system.

8. Justice Delays

a. How do enormous delays from the time of making a complaint to the final ending of a case many years later affect the system of justice?
b. Is there power-related objections and obstructions to ensuring speedy justice?
c. Is there a possibility of a dramatic change in economic relationships, political relationships, social relationships, and the morale of the people if speedy justice is ensured?

d. Are adequate funding for institutions' administration of justice – police, prosecutions, Judiciary, prisons, and correction services provided with adequate funding to enable a proper system of administration of justice?
e. Is justice reforms included in any of the political programs of any of the political parties?
f. Is speeding of justice processors and improvement of the justice system a prominent demand of civil society? If not why?

9. Rule of Law

a. In the light of discussions on the above questions how do you understand the meaning of the terms Supremacy of Law and Rule of Law
b. If you ask to explain what the Rule of Law means to a group of civil society activists or participants do you think you know the subject adequately enough to explain what it means?
c. What do you think are the most important elements of the Rule of Law?
d. Do these elements exist within the Sri Lankan justice system?
e. What are the efforts made by those who are representing the legal community in Sri Lanka to expose the denial of the Rule of Law and the attempts to restore the Rule of Law as the foundation of Sri Lanka's legal system?
f. How does the absence of or the defects of the Rule of Law system if Sri Lanka affects the capacity of Sri Lankan Lawyers to engage professionals to assist their client's search for justice?
g. What are the defects of civic education in Sri Lanka in relation to this issue?
h. Is not quality of legal education in Sri Lanka deeply adversely affected by the absence of or defects of the practice of the Rule of Law in Sri Lanka?
i. Is not the displacement of the 1978 constitution and enactment of a new constitution founded on the principles of the Rule of Law, Democracy, and Human Rights essential to bring about the economic, social, and political stability of Sri Lanka?

10. Human Rights

a. What are the most batten forms of Human Rights violations that have taken place in Sri Lanka in the reason decades?

b. Has the killings of persons after they have been arrested remained one of the major Human Rights problems in Sri Lanka?
c. Is not the Prevention of Detention Act and the power of the secretary to the Defense to detain persons through detention orders signed by him one of the most batten Human Rights violations in Sri Lanka? Is not this law weaken the power of the judiciary to protect fundamental rights, particularly the rights against illegal arrest, illegal detention, protection against torture and ill-treatment, and the right to fair trial mention a few?
d. Is not PTA providing for maintaining detention centers that have characteristics of concentration camps?
e. Is PTA also directed towards the suppression of political opponents, physiologically disintegrating personalities, the practice of torture and ill-treatment, and spreading fear in society? Can this be justified by any moral or legal justifications?
f. Is there any real effective remedy against violations of Human Rights in Sri Lanka?
g. Is fundamental rights junctions (Article 126 of the Constitution) or records to the national human rights commission of Sri Lanka adequate remedies in terms of the UN Convention on article 2 of ICCPR?
h. Are laws to protect Human Rights like CAT Act number 22 of 1994 and other laws for protecting women and children effective remedies, when in fact these laws are not really implemented?

11. Civil Society Response

a. On all these matters raised in these questions and other similar questions what are the civil society's understanding of these problems and educational efforts made by civil society to improve knowledge on these matters among the people?
b. Have any of these matters become major political demands in the country and if not why?
c. Is not civic education, legal education, and Human Rights Education in Sri Lanka suffer from very serious defects in terms of it awareness-building programs and reform programs, and Human Rights programs?

d. How do the protection and promotion of Women's rights get affected by the defects mentioned above?
e. The same questions can be asked about children's rights and minority rights and the like?

12. Future

a. How to incorporate legal reforms for a better system of justice into the package for resolving the existing economic crisis, political crisis, and all the societal crises like for example the food crisis?
b. How to improve civil society knowledge and strategies in order to incorporate this approach the good governance, Rule of Law, and Human Rights?
c. How to bring these ideas to various mass movements that prevails in the country and in particular to the movements of new generation of activists and interactively who are being engaged in activities relating to social change?

Section 18: Questionnaires to be used during discussions

Warming up

A review — At the beginning of the session for participants' reflections and comments.

1. How have recent months, particularly after February, 2022, been for you?

   Very good

   Not much of a difference from the past

   Not so good

   Quite bad

2. What aspects of life were affected badly - work/ability to buy necessary things/being unable to carry out obligations for children, elders, family and friends?

3. How has it affected the usual food/travel arrangements?

4. How has it affected the feeling of security, when travelling and walking on roads, and at home?

5. How about the change in the mood of the people?

   Usual

   More tensions

   Less friendly

6. What are your hopes for the future?

   More hopeful

   Less hopeful

   Very hopeless

7. If things continue the way it is, how can you cope?

8. Have any of your savings been affected?
9. Have you thought about leaving the country?
10. On what do you pin your hopes for the future?
11. If you are asked what suggestions you would give to the people to make things better collectively, what would you say?
12. Have you seen malnourished children in your neighbourhood or in areas known to you?

You may answer with illustrations and add your own questions

How to resolve these problems;

1. A law is passed which is contradictory to the supremacy of the law and the rule of law.
2. If the Constitution itself is designed and constructed on principles opposed to the supremacy of the law and the rule of law.
3. If the Police are not bound by the principles of the supremacy of the law and the rule of law, how can they perform their functions for the prevention of crime, murder, rape, fraud or any other crime (the same may be asked about the performance of other functions by State agencies)?
4. Does this same contradiction also not undermine the Judiciary?
5. Under these circumstances where the supremacy of the law is displaced, does the advice "go to court and get your problem solved" mean much?
6. If the questions point to the core problem that has caused havoc in Sri Lanka, what is the way out?

First Draft - Questions

You may answer any four of these questions

2. Can there be good governance without the strict enforcement of the rule of law? Can human rights be protected, if there is a serious breakdown of good governance and the rule of law? Explain your answers shortly (10 Marks)

2. Can laws be made secretly or partially secretly? - (Yes/No)

Can the ruler or public officers be above the law? – (Yes/No)

Can a public officer in his/her official capacity do any act that violates any of the country's laws, or fail to do what the law has tasked him/her to do? – (Yes/No)

Can the Police, the military, the intelligence of other security officers or officers of the AG's Department be allowed to violate any of the human rights of any person? - (Yes/No)

(20 Marks)

3. Some officers of the Dungama Police Station inquiring into a serious crime are looking for a suspect named Sirisena. They arrest an innocent man who is also named Sirisena. Officers take him to the Police Station and assault him, asking for details of the crime, despite the man saying that he knows nothing about the crime. Sirisena gets very seriously injured and suffers kidney failure. Officers fail to take him to the hospital. Only the day after the arrest, when a politician intervenes, is he taken to a hospital. About this incident, a complaint is made to a high ranking Police office. However, they fail to conduct an investigation.

Explain what human rights of Sirisena were violated by the acts of the Police. (20 Marks)

4. The economy of country X, suffers a great fall due to the inefficiency of the system of governance in that country. As a result, there is a severe shortage of foreign exchange which results

in the inability to pay for essential goods. There is very high inflation, as a result of which, food prices skyrocket. Low income groups cannot have their normal meals and severe malnutrition affects over one per cent of the children.

Can you analyse this from the point of view of the violation of the right to life. (20 Marks)

5. A young foreign woman comes to do business in Sri Lanka. She has an arrangement for the conduct of a restaurant with her local partner. She puts the money but the partner cheats her and runs away with the money. She approaches a local politician to get some assistance to get a visa extension. The politician and some of his friends' gang rape her. She complains to the Police but they do not take any action to investigate and bring the culprits to justice. After much effort and her country's embassy's involvement, the AG orders an inquiry. Sometime later, the culprits are arrested. Since then, several years have passed. No prosecution is done. And her business partner who cheated her money has not even been arrested.

Based on the facts of this case, kindly write short notes on the following;

E. A woman's right to protection.
F. Sexual attacks by a politician.
G. Delays in Police investigations.
H. Delays in justice in courts.

(20 marks)

6. Write short notes on the following rights and how they are violated or respected in Sri Lanka. You may refer to any known violations.

D. Right to the freedom of expression.
E. Right to the freedom of assembly.

(30 Marks)

F. Right to association. (20 Marks)

Section 19: Draft statement to initiate public discussion

People's declaration on strengthening the rule of law in Sri Lanka

2022

Having witnessed the serious collapse of the rule of law based system in Sri Lanka, we, as a group of concerned Sri Lankan citizens, invite all citizens to participate in an urgent demand for resolving the crisis of the rule of law in Sri Lanka as this crisis has seriously threatened the economic system of Sri Lanka, bringing it to near bankruptcy, reduced the political system's capacity to function, caused unprecedented social instability and threatened the security of all people living in Sri Lanka in a catastrophic manner. To achieve the above, we propose the following urgent reforms of a systemic nature to be undertaken urgently by the State and for that purpose, civil society movements and individuals should give priority for demanding speedy reforms to be brought about. In all future activities of mass movements, in all protest activities, in all electoral manifestos and civil society initiatives, these demands for reforms must be given expression to in the strongest manner. For this purpose, nationwide educational campaigns should be initiated in every possible way including through print, electronic, and social media in order to improve the capacity of the people to understand and participate in the process of bringing about these vital reforms.

1. That the foundational principle of the legal system and social foundation should be declared as the principle of the rule of law and that this should be unambiguously and clearly stated in all legislations and that a commitment must be publicly made to uphold the rule of law in every area of life in the country.

2. For the purpose of this declaration, the rule of law expresses the following meaning: 'The core of the principle of the rule of law is as follows: that all persons and authorities of the State, whether public or private, should be bound by and entitled to the benefit of laws that are publicly made, taking effect in the future and publicly administered in the courts'.

   This definition could be further broken down to the following elements:

a) The law must be accessible and so far as possible, be intelligible, clear and predictable.

b) Questions of legal rights and liabilities should ordinarily be resolved by the application of the law and not the exercise of discretion.

c) The laws of the land should apply equally to all, save to the extent that objective differences justify differentiation.

d) Ministers and public officers at all levels must exercise the powers conferred on them in good faith, fairly, for the purpose for which the powers were conferred, without exceeding the limits of such powers and not unreasonably.

e) The law must afford adequate protection for fundamental human rights.

f) Means must be provided for resolving, without prohibitive cost or inordinate delay, bona fide civil disputes which the parties themselves are unable to resolve.

g) The adjudicative procedures provided by the State should be fair.

h) The rule of law requires compliance by the State with its obligations in international law as in national law.

3. To achieve this end, the 1978 Constitution of the Democratic Socialist Republic of Sri Lanka should be totally abolished as this Constitution is fundamentally opposed to the notion

and principles of the rule of law. The 1978 Constitution places the Executive above the law, therefore violating the principle of the supremacy of the law, the principle of the rule of law and the principle of equality before the law. The Constitution also obstructs the functioning of other branches of the Government, the Parliament and the Judiciary. It also destroys the functioning of an independent system of public administration. It particularly disrupts and disturbs the functioning of the system of the administration of justice by undermining the system of policing, the system of criminal investigations and criminal justice and the capacity of the prosecutor's office (the AG's Department) to function with professional integrity and without interference from outside on the administration of justice, and deprives and limits the legal powers of the Judiciary to act independently, speedily, and efficiently in the exercise of its functions. By the above means, nurturing and developing a competent, impartial, and professionally independent system of administration is prevented and obstructed, which in turn threatens the entire society in every area of a nation's life including the possibility of good governance based on transparency and accountability.

4. The above mentioned circumstances prevent the development of a just, fair and functional system of taxation. The inability of the taxation system to function properly cannot be corrected without fundamental reforms in favour of establishing the rule of law.

5. The overwhelming feeling of the spread of corruption having a deadly effect on the economy will not be there only when the rule of law based system takes control of the administration of both the public and private sectors of Sri Lanka.

6. The absence of an environment on multifaceted initiatives to develop the country's economy, the people's entrepreneurship and the confidence of the people to invest,

all depends on the consolidation of the rule of law based system that is able to sustain such an environment. The development of the public as well as the private sectors will depend on the healthy economic environment that could be guaranteed only through a functional rule of law based system.

7. There is lamentation everywhere or the breakdown of discipline in every area of life in the country: The demand for the reestablishment of discipline cannot be fulfilled without the just and efficient enforcement of the laws within the framework of the rule of law.
8. The protection of people from crime has suffered a great setback. Every form of lawlessness and crime thrives everywhere. Organized crime has reached its peak. There is a common saying that criminals have taken over the country.
9. There is an accusation that the electoral system itself has succumbed to the control of criminals. The demand for a criminal justice system is essential if this situation is to be averted.
10. As the first and most important step in order to make a change in the rule of law, we are of the view that the reform of the institutions that deal with the implementation of the law, that is the institutions for the administration of justice, should be taken as the most primary and transitional demand for the consolidation of the rule of law based system of administration. These institutions as mentioned above are the institutions of policing and criminal justice, the prosecutor's office, and the Judiciary at all levels. Without taking this very first step, it is not possible to overcome the challenges caused by the collapse of the economy and the political system, the disorder in the social system, and the demoralization and impoverishment of all the people living in the country.
11. The most urgent reform for Sri Lanka to become a rule of law based democracy is fundamental and comprehensive

Police reforms. This is the key to every other reform. For this purpose, we suggest the following immediate steps:

a) That people's movements and professional groups should give expression to the demand for Police reforms as a first step towards the progress, development, stability, and prosperity of the country.

b) That the people's initiative must be taken for a comprehensive national consultation to detail all the reforms needed in order to create a national Police service that is based on civilian policing principles as against military and paramilitary types as it prevails now: Such a consultation can create a national consensus on all the defects of the existing systems and make suggestions for a policing system that is suitable for a democracy and is rooted in the rule of law tradition. A list of such defects has already been mentioned in public forums and the media. All these could be researched and brought together in order to provide the starting point for this discussion as it is unlikely in the immediate future. The State must be willing to undertake such a comprehensive consultation and reform initiative and the people's initiative should be undertaken with the participation of professionals and other experts. Once such a people's initiative gathers momentum, the State and political establishment will respond positively to such a move.

c) The present practice of using the Police to carry out unlawful acts such as politically directed arrests, attacks on peaceful demonstrations, the fabrication of charges, and the justification of all such acts on the basis of orders from above should be brought under close scrutiny and publicly condemned.

d) Torture and cruel and inhumane treatment including extra-judicial killing and enforced disappearances have become a part of the normal practices of bad policing in

Sri Lanka. These practices are however serious crimes in terms in the Sri Lankan law but no criminal investigation or prosecution takes place regarding these serious crimes. The lack of criminal investigations and prosecutions has become a part of the institutional practice within the Police and is directly or indirectly supported by the AG's Department. So long as the crimes done by the Police are not thoroughly investigated through a competent and impartial investigation unit, it is not possible to transform the policing system through a genuine law enforcement agency. A bad law enforcement agency undermines the rule of law and encourages crimes. The whole aspect should be brought to public and judicial scrutiny if confidence on the administration of justice is to be restored in Sri Lanka. The Police function is to protect human rights and not to be violators of human rights.

e) The Police harassment of media personnel including illegal arrests, detention, brutal attacks, and calling for questioning without any legal basis are among the most frequent practices which are publicized constantly in Sri Lanka. These practices have created the impression that the Police and intelligence services are being manipulated for political and other extraneous purposes. This also requires public and judicial scrutiny.

f) There are many more serious problems of the failures relating to policing in Sri Lanka which require public interventions with the view to achieving the required reforms.

g) The AG's Department which exercises the prosecutor's function among other things has enjoyed a prestigious position some decades back. Since the introduction of the 1978 Constitution, there has been a gradual decline of this important public institution and by now, it is mostly seen publicly by most persons as having lost its independence. The weakening of the public prosecutor's position has

contributed to the weakening of social stability, the increase of crime, the weakening of public administration and the catastrophic fall of the economic and political system. Only public scrutiny and the public demand for change can bring about significant reforms for the better.

h) The Judiciary has been weakened by the Constitution and by other legislations, particularly Public Security legislations. It has also suffered external and internal pressures for nearly four decades now and all these have affected the capacity of the Judiciary to function as an independent branch of Government and as the most important guardian of the people's rights. Often, judicial functions have been undertaken or handed over even to the Police and security agencies like for example the decisions on arrests and detentions and over even life and death. In cases of extra-judicial killings, the Police and other security officers decide on the guilt of the person and also the execution of the person, and even the disposal of the body of the person without judicial authorization. At times, there appears to be an unwritten law that dangerous criminals can be arrested and executed by the Police. In these instances, the Police story becomes the narrative of the crime and the judicial inquiry is obstructed. Above all, delays in adjudication which could often take two decades or more, virtually negates the objectives of justice. Many people give up their rights despite having suffered serious crimes or civil wrongs due to such delays. Such a situation itself contributes to the decline of the society and civilization itself. A fundamental reform of the judicial system is essential in order for the proper functioning of the economic and political system, the social order, and the survival of the civilized character of the society in Sri Lanka.

i) While everyone living in Sri Lanka is affected by this collapse of the rule of law, women in particular are the worse affected due to the economic, political, social and

civilizational crises mentioned above. Violence against women including domestic violence has spread in the country to frightful proportions. Women who seek justice are prone to greater violence. Even walking on the road has become dangerous for women as street theft has become widespread. Equally affected are children due to the massive collapse of every aspect of society that affects their health, food, education, and security from sexual abuse and physical violence.

We, as concerned citizens, see no future in our country unless an initial and most serious attempt is made to recover from the massive collapse of our social order by the citizens' own interventions in order to create and strengthen the rule of law that could sustain our democracy and protect our lives.

This draft declaration is to encourage a discussion on the fundamental issue of the rule of law and after discussions with many, it could be developed into a public declaration and be used as a rallying cry for the needed changes.

Draft / ALRC Research Team

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Delays in Justice
நீதிமன்றத் தாமதம்

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A country becomes anarchic due to a delay in justice

நீதி கிடைப்பதில் ஏற்படும் தாமதத்தின் காரணமாக நாடே சட்டமில்லா நிலைக்கு மாறுகின்றது

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