article 2
of the International Covenant on Civil and Political Rights
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focus

dysfunctional policing & subverted justice in Sri Lanka

any person whose rights or freedoms are violated shall have an effective remedy, determined by competent judicial, administrative or legislative authorities

The meaning of article 2: Implementation of human rights

All over the world extensive programmes are now taking place to educate people on human rights. As a result today there exists a vast number of persons and organisations firmly committed to human rights; more than at any other time in the history of humankind. Yet human rights continue to be monstrously violated.

It is time for the global human rights movement to examine why it may not yet be achieving real improvement in the global human rights situation. One factor hindering honest examination is the belief that improvement of knowledge about human rights will by itself end human rights violations. This is a myth based on the corresponding belief that education is itself capable of improving things.

In reality human rights can only be implemented through a system of justice. If this system is fundamentally flawed, no amount of knowledge—no amount of repetition of human rights concepts—will by itself correct its defects. Rather, these need to be studied and corrected by practical actions. Hence research and intimate knowledge of local issues must become an integral part of human rights education and related work.

article 2 aims to do this by drawing attention to article 2 of the International Covenant on Civil and Political Rights, and make it a key concern of all partners in the global human rights community. This integral article deals with provision of adequate remedies for human rights violations by legislative, administrative and judicial means. It reads in part:

> 3. Each State Party to the present Covenant undertakes:
>
> (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
>
> (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
>
> (c) To ensure that the competent authorities shall enforce such remedies when granted.

Sadly, article 2 is much neglected. One reason for this is that in the 'developed world' the existence of basically functioning judicial systems is taken for granted. Persons from those countries may be unable to grasp what it means to live in a society where 'institutions of justice' are in fact instruments to deny justice. And as these persons guide the global human rights movement, vital problems do not receive necessary attention. For people in many countries, international human rights discourse then loses relevance.

Other difficulties also arise with article 2. One is the fear to meddle in the 'internal affairs' of sovereign countries. Governments are creating more and more many obstacles for those trying to go deep down to learn about the roots of problems. Thus, inadequate knowledge of actual situations may follow. A further and quite recent disturbance is the portrayal of national human rights institutions and their equivalents as surrogate agencies for dealing with article 2 related issues. Some state parties may agree to new national human rights institutions taking on this role because they know that by doing so they may avoid criticisms of a more fundamental nature.

Thus after many years of work, the Asian Legal Resource Centre began publishing *article 2* to draw attention to this vital provision in international law, and to raise awareness of the need to implement human rights standards and provide effective remedies at the local level in Asia.

Relevant submissions by interested persons and organizations are welcome.

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SUBVERTED JUSTICE IN SRI LANKA

Can a dysfunctional policing system be reformed?

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For decades various official commissions that have studied policing in Sri Lanka have reached the same conclusions about what is wrong and what needs to be changed. Independent groups have verified their work. One common finding is that the system is dysfunctional and needs radical reform. No one disagrees that it is failing; however, no government has treated policing as a priority, and even other groups have been reluctant to make a determined push in this direction. Underlying the inaction is a fear that any serious attempt at change may have adverse consequences on the country's political system and social life. The job looks too formidable, so no one wants to try. The problem is not in establishing that there is a problem, but in whether or not it can be addressed, and how, by whom, when? This article takes up this aspect of the problem: that attention needs to be turned from diagnoses of the ailments afflicting policing in Sri Lanka to what can be done about them.

Studies of policing in Sri Lanka

Over the years, former governments have appointed commissions to produce reports on the Sri Lankan policing system and make recommendations. These documents are useful to trace the historical roots of present-day problems.

The first of these reports, the Soertsz Commission Report, chaired by Justice Francis J Soertsz, was submitted to the government in December 1946. It covered topics such as the composition of the force; conditions of the service and selection of officers for promotion and transfer; procedure for investigations of complaints made by the public against the police; powers and duties of the police, especially in relation to preliminary investigations of offences, arrest and custody of the accused and suspected persons; the initiating of prosecutions in court and the expeditious conduct thereof; and amendment of the police ordinance and of other existing legislation for giving effect to the recommendations of the commission.

In October 1970 the Basnayake Commission again addressed the nature and scope of the functions of the police force; measures that should be taken to secure its maximum efficiency for the purpose of maintaining law and order and to secure a greater measure of public cooperation and confidence; measures to reorganise it; structure and composition; recruitment and training; terms and conditions of service and selection of officers for promotion and transfer; procedure that should be adopted for the investigation of complaints made by the public against members of the police force, especially in relation to the preliminary investigation of offences, apprehension and custody of accused or suspected persons, and the initiating of prosecutions in the courts and expeditious conduct thereof; adequacy of security and safeguards provided hitherto to members of the police against risk to life and bodily injury involved in the performance of their duties, and the adequacy of compensation hitherto payable where injuries were sustained, or where death resulted from any injury sustained in the course of their duties; amendments to the Police Ordinance and other existing legislation as necessary to effect its recommendations.

In 1995 the Justice D G Jayalath Commission Report dealt with the structure and composition of the police force; recruitment and training; selection of officers for promotions and transfer; the nature and scope of its functions and measures that should be taken to secure its maximum efficiency for the purpose of maintaining law and order; measures that should be adopted to encourage better relations with the general public; the establishment of a permanent police commission to administer recruitment, promotions and disciplinary control; and amendments to the Police Ordinance and to other existing legislation as necessary to effect the recommendations.

Already by 1946 serious problems had arisen in the policing system; by 1970 these had become much more serious. By 1995 a completely new set of problems had arisen due to the greater politicization of the police and introduction of paramilitary units. None of the recommendations of these commissions were put into effect.

The 17th Amendment to the Constitution

The 17th Amendment to the Constitution of October 2001 was perhaps the most significant attempt made so far to address the serious problems in the Sri Lankan policing system, together with several other public institutions. The amendment was aimed at stopping and reversing the politicisation of public services. It provided for the Constitutional Council, with the obligation to appoint the members of several commissions, including the National Police Commission (NPC).

The NPC in turn was given powers of appointment, promotion, transfer and disciplinary control of all police officers except for the inspector general. It also had the duty to establish a public complaints procedure. The first commission was appointed in November 2002, but by the end of its term the Constitutional

“The 17th Amendment was perhaps the most significant attempt made so far to address the serious problems in the Sri Lankan policing system”

Council had ceased to exist, so it was not possible to appoint new commissioners. Ever since there have been no appointments to the commission by the procedure prescribed in the amendment. In 2006 the executive president himself appointed the commission's members, bypassing the provisions of the constitution. As the NPC derived its authority from the constitution itself, the appointment of its members in this manner has raised serious questions about its legitimacy.

"At the moment there is no agenda to reform the police"

What needs to be done

At the moment there is no agenda to reform the police. However, some senior police officers, international experts and members of the public have identified the major areas that need to be addressed for any serious attempt at reform. These are: eliminating criminal elements within the policing system; reestablishing command responsibility within the police hierarchy; establishing a credible system of criminal investigation; eliminating torture as the most commonly used method of investigation; training police in more sophisticated methodologies of investigation, including forensic science; ensuring police attend courts and comply with court orders; and, establishing a proper system of disciplinary control within the police and a credible public complaints procedure.

Eliminating criminal elements within the policing system

The inspector general of police himself recently identified criminal elements within the police, together with soldiers and deserters, as being among the culprits of some very grave crimes in the country, including abductions, disappearances and murder, all of which increased sharply at the end of 2006 and are continuing into 2007. According to an Agence France Press report of 6 March 2007, "Police Inspector General Victor Perera said a 'large number' of police officers and troops had been arrested on charges of abduction and extortion."

A year almost to the day, local media had reported that the former inspector general had, in response to the auditor general's report on the police department, remarked that in the case of some police stations "if action was to be taken, then most officers would be liable to be sacked" (Daily Mirror, 7 March 2006). In the same article the police chief was quoted as referring to a specific instance of how "certain senior officers had swindled thousands of rupees in the police cash reward scheme" by adding zeros to sums of money actually paid to junior officers.

In the aftermath of a drug dealer's killing of a high court judge, there were public allegations that high-ranking police officers are linked with underworld figures. However, it was perhaps the killing of Inspector of Police Douglas Nimal and his wife that brought the most acute criticism over the police connivance with criminal syndicates. Nimal was investigating several drug-related crimes. He was arrested on false charges and later released by the attorney general. He complained that some

persons, including high-ranking officers, had implicated him in order to obstruct his investigations. He was murdered shortly after his release while going to pursue his complaints.

Police reform must necessarily address the involvement of officers in crime. Reform that neglects this aspect of policing in Sri Lanka will receive very little public attention, support or credibility.

> "The command structure of the police has been greatly damaged by the periods of emergency laws and antiterrorism laws"

Reestablishing command responsibility within the police hierarchy

The loss of command responsibility has been widely discussed. One common agreement is that the police have been politicised, by which it is meant that politicians are playing a direct role in the organisation's management. The 17th Amendment to the Constitution was intended to address this problem. Political influence over the police is perceived to have extended to all aspects of administration and criminal investigation.

Police are recruited and promoted on the basis of connections to individual politicians or political parties. Others are threatened with transfer to far away places or conflict zones as punishment for non-compliance with political demands.

Investigations are directly and indirectly manipulated. There are instances where investigating officers have been transferred mid-inquiry. Over time many learn to read the minds of their political masters. This behaviour becomes so ingrained that they eventually avoid some investigations altogether: for example, into extrajudicial killings, abductions and disappearances.

Due to political interference junior officers become more powerful than their superiors. Politicians may undermine high-ranking officers to get them to toe the line. When their subordinates see that they have acted to serve political interests, their moral authority is lost.

Under departmental orders, superior officers have specific supervisory duties. An officer in charge of a police station has responsibilities for all personnel linked to that station. An assistant superintendent must attend all police stations within a certain area regularly at short intervals to read all the books maintained at the station as well as to be personally present at investigations into serious crimes. But in recent times there has been widespread complaint that such supervision often has not taken place.

The command structure of the police has been greatly damaged by the periods of emergency laws and antiterrorism laws, when the police were most involved in gross human rights abuses. In the first decades after independence such incidents were few and the disciplinary procedure still somewhat intact. However, after the police were used together with the military to eliminate insurgents they learnt the methods of abduction, illegal detention, torture and killing that they continue to use to this day. The police and military together are estimated to have killed around 10,000 persons alone during the time of the first relatively

minor rebellion in 1971. No official inquiries have ever been held into these killings. Official figures have established that during the second phase, from 1987 to 1991, around 30,000 persons disappeared, most in the south.

"In recent years the police have not resolved any of the major violent crimes in the country"

Overall, the standards set for command responsibility have been lowered dramatically, and with them internal guidelines for the maintenance of hierarchical relationships and codes of conduct have been lost. Police morale also has been destroyed.

Establishing a credible system of criminal investigation

One of the most common criticisms of policing in Sri Lanka, including from within the system itself, is that in recent years the police have not resolved any of the major violent crimes in the country. These include killings and abductions by the military and other armed groups throughout the country, including in the capital, Colombo.

The weakened capacity of the police to conduct credible investigations into crimes is attributed to: the lack of protection for investigating officers, arising from the politicization as well as from internal divisions within the system itself; increased violence by the military and its opponents, which hinders or altogether prevents investigations; stronger links between criminals and the police; overwhelming corruption throughout the country, including within the political establishment; the breakdown of judicial supervision over the investigating process; the lack of demand from persons high up for credible criminal investigations maintained by the judiciary; disruption of the system of command responsibility; the lack of forensic facilities and training; and, the burgeoning of nationalist sentiments that undermine legal norms and standards with regard to crime. Added to these problems is the abandonment of the 17th Amendment, by which some limited interventions were made possible through the office of the National Police Commission

Eliminating torture as the most commonly-used method of investigation

In its shadow report to the second periodic report of Sri Lanka to the Committee against Torture in September 2005, the Asian Legal Resource Centre quoted Dr Radhika Coomaraswarmy, then chairperson of the Human Rights Commission of Sri Lanka, as having said with regards to torture by the police in Sri Lanka that, "We are not talking about isolated cases of rogue policemen: we are talking about the routine use of torture as a method of investigation." She added that it would require "fundamental structural changes to the police force to eradicate these practices".

Similarly, Jayakumar Thangavelu, a deputy inspector general of police, has written that on occasion of asking some one hundred inspectors of police about the use of torture, "their observations were that they had to resort to the use of force to solve cases" for reasons of loss of face if they fail to solve them; lack of resources; 24 hours of custody being insufficient; and

pressure from superiors. He continues, "And when I asked them whether I was incorrect in saying that in almost all the instances of torture in police custody, the victims were the poor, the destitute and the defenceless, they sheepishly admitted it was so." ('Equal access to justice', *An x-ray of the Sri Lankan policing system and torture of the poor*, AHRC, 2005, pp. 52–59).

In 1994 Sri Lanka enacted the Convention against Torture and Cruel or Inhuman Treatment Act (Act No. 22 of 1994), which has a mandatory sentence of seven years rigorous imprisonment and a fine of not less than 10,000 Rupees for convicted persons. Over 50 cases have been filed under the act and there have been two convictions. However, due to the long delays in filing cases followed by long delays in the courts, many victims come under severe pressure and abandon their cases. The delays in adjudication and absence of a witness protection programme defeat the purpose of the act. Other features of the country's dysfunctional policing system negate the possibilities that exist on paper.

> "The failure of police to attend court when ordered is one of the major reasons for delays"

Training police in more sophisticated methodologies of investigation, including forensic science

There have in recent times been some small advances in the education of some officers on forensic science. However, there has not been any systematic attempt to replace the earlier model of obtaining oral evidence through torture with the introduction of new methodologies for investigation. Training and introduction of some new knowledge and technology is of little use within the current set up. More education on forensic science will only be a solution when accompanied by measures to address bigger and even more serious problems afflicting the entire police force.

On the matter of improved investigating methodologies, the Committee Appointed to Recommend Amendments to the Practice and Procedure in Investigation and Courts, headed by the solicitor general, observed in its April 2004 report that "the primitive nature of investigative techniques presently used by the Police, i.e. outdated fingerprinting technology and the lack of rudimentary investigative equipment such as Polygraph machines (lie detectors) in Sri Lanka, highlights the urgent need to invest in equipment relating to IT and forensics".

Ensuring police attend courts and comply with court orders

The Committee Appointed to Recommend Amendments to the Practice and Procedure in Investigation and Courts identified the failure of police to attend court when ordered as one of the major reasons for delays, and thus recommended introducing "administrative measures requiring Police Officers to attend Court on a compulsory basis, in view of the frequency with which Police Officers obtain leave and abstaining from Court sighting inappropriate grounds". It also called on the Ministry of Justice to advise the Judicial Service Commission and the judges'

institute "to educate Judicial Officers on the necessity to take prompt and appropriate action against Police Officers who default on appearances on inappropriate grounds".

"Police reform must concentrate on the factors making the system dysfunctional, rather than minor changes"

This is significant as it points to the disjuncture between the courts and police which began with the killings in 1971. Ever since, the police have excused themselves from court on grounds of having to attend to other duties of higher consideration, such as providing security for politicians. The police hierarchy has done very little to correct this situation, despite the committee having recognized this as one of the serious problems in administration of justice. Under the present circumstances it is difficult for magistrates to give orders to the police on investigations and matters relating to the basic rights of citizens.

Establishing proper disciplinary control within the police and a credible public complaints procedure

The National Police Commission has itself pointed out that despite large numbers of complaints received against police officers, disciplinary action is rare. The 17th Amendment under which the commission was established recognised the need for a public complaint procedure and obliged that it be implemented (article 155G). In January 2007 the commission announced that such a procedure had been set up; however, the conduct of investigations has not changed.

Ultimately, discipline cannot be divorced from the larger problems caused by the dysfunctional policing system; it cannot be dealt with in isolation, purely on instructions to improve discipline.

Is police reform possible in Sri Lanka?

A question that has been raised by many persons during the last decade—including senior lawyers, judges and even some police—is whether or not the system that exists in Sri Lanka can be reformed at all. When speaking privately, most police admit that there is something gravely wrong with the system and that there is no serious discussion about putting it right.

Police reform must concentrate on the factors making the system dysfunctional, rather than on minor changes, for instance, the simple introduction of forensic science or similar training of police. Such work will contribute little to understanding of the magnitude of the problem or the finding of meaningful solutions.

The crisis in Sri Lankan policing is part of a larger political and social crisis. The real question is what type of policing do we want? If the state fears and opposes the development of an efficient policing system because it may threaten how the country is run then this is what must be addressed. If state and society cannot agree on how to eliminate the obstacles deliberately put in the way of reform then any talk about change will be of little practical value. What role is dysfunctional policing expected to play in the larger dysfunctional state in Sri Lanka today?

Subverted justice & the breakdown of the rule of law in Sri Lanka

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At each historical juncture, the framers of Sri Lanka's post-independence constitutional documents have suffered from a deep-rooted reluctance to give practical effect to the rule of law and the idea of justice; the 1972 'autochthonous' constitution subordinated the judiciary and only superficially embodied a bill of rights while declining to grant the Supreme Court explicit jurisdiction over the determination of violations.[1] Thereafter, the 1978 Constitution (which remains in effect) entrenched the concept of the all-powerful executive president, whose actions were virtually above the law, while (absurdly) omitting the right to life and including a chapter on constitutional rights with procedural restrictions that diminished the protection of those very rights.[2]

This same deviously subversive rationale formed the basis of each and every grudging measure ostensibly agreed to in the name of constitutional democracy, whether the enactment of laws to monitor abuse of human rights, curbing of police indiscipline or implementing of a constitutional amendment that was meant to restore public confidence in government. The old adage about giving with one hand and taking with the other took on terrible proportions in the gradual but relentless deterioration of Sri Lanka's political, constitutional and legal systems.

From this core political objective to subvert the rule of law sprang a rabidly intolerant response to legitimate dissent; the constitutional documents of 1972 and 1978 were used to deny justice to both the majority Sinhalese and the minority Tamils and Muslims. The failure of the justice system and breakdown of ordinary law enforcement has resulted in three decades of deaths, enforced disappearances, and physical and mental torture of thousands, not only during active conflict but also in relatively normal times. Protection of human rights, independence of the judiciary, a democratic electoral system and the separation of

powers were instead used to strike at the public's understanding of the rule of law and have constitutional process suit political exigencies.

"The ongoing conflict in the north and east is an effect rather than the cause of cyclic violence"

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

This paper departs from the above premise in unequivocal terms; it identifies the profound failure of democratic process and examines how the justice system has broken down. The point, albeit controversial, is that the ongoing conflict in the north and east is an effect rather than the cause of the cyclic coercive violence in the country. The periodic brutality of the Sri Lankan state against the majority community in fact formed a useful base for a pattern of abuse where ethnicity was the determining factor in perpetuating violence when the conflict in the north and east intensified. Thus, the paper critically questions past thinking that the failure of constitutionalism was in not providing for the needs of ethnic minorities and ensuring the multiethnic character of the polity. While conceding the importance of these concerns, it contends strongly that the struggle should have been on the failure of justice and human rights in general, and the failure of law enforcement in particular. In doing so, the paper acknowledges that

> A discourse on justice is separate from a discourse on politics. This does not mean that the two are unrelated—only that they are distinct. And for the discourse in justice to influence the political discourse in a country, thereby breaking its tautological nature, there must first exist something akin to a discourse on justice. However, sadly such a discourse is quite absent in Sri Lanka.[3]

Limiting attention to minority rights and the 'ethnic conflict', this paper will contend, has detracted from a more profound exploration of fundamental problems in protecting life and liberty that confront all Sri Lankans today. This is of direct relevance to the peace process, as, for example, it has resulted in the downplaying of the critical question about human rights protection for civilians consequent to the 2002 Oslo ceasefire agreement with the putting in place of credible monitors rather than 'political facilitators/mediators', which deprived the entire exercise of vital public ownership and legitimacy. As a result the Nordic-backed Sri Lanka Monitoring Mission has by now lost most public support.

The research does not focus exclusively on theory but instead takes a 'praxis' approach, exploring its premise through the diverse findings that have emerged from sustained and pro-active campaigns against endemic torture carried out by the Asian Human Rights Commission (AHRC) and associate organizations

during the past several years. Informed and driven by the determination of the victims and grassroots activists, this has been a singularly successful approach to learning that has distinguished itself by turning on the felt needs of the people, as opposed to arid theories.

> "Profound despair arose from the appalling disparity between constitutional theory and practice"

The 'schizophrenic' Sri Lankan state

A common assumption in South Asia is that traditional democratic legacies carry with them all the formulae for building equitable and just societies. This is underpinned by the perception that the state is the key to ensuring the rights of citizens and also that its role is non-confrontational and benevolent, as are its institutions.

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

However, this faith was misplaced. As communities fragmented, a search began for ways to reconstruct the state and its institutions. But subsequent discourse continued within the old parameters that defined the state as being central to any reform. Focus shifted to a justicable bill of rights, an independent judiciary, a multiparty system and competitive electoral processes. But this shift was accompanied by profound despair arising from the failure of many constitutions to uphold human rights or democratic values, and the appalling disparity between constitutional theory and practice.

In Sri Lanka, a number of instruments from this time, both constitutional and statutory, purport to protect the rights of its citizens. The Supreme Court has exclusive jurisdiction to hear and determine complaints of violation of fundamental rights (except the right to life) by executive or administrative action. Article 13(1) stipulates arrest only according to "procedure established by law" and the giving of reasons for the arrest. Article 13(2) states that every detained person must be subjected to judicial supervision and that further detention must only be upon judicial order. Article 13(3) is to the effect that "any person charged with an offence shall be entitled to be heard in person or by an attorney-at-law, at a fair trial by a competent court" while Article 13(4) prohibits the punishment of death except by order of a

competent court. Article 11 states that, "No person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." Sri Lanka has also enacted domestic legislation to give effect to the UN Convention against Torture. Section 2 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Act, No. 22 of 1994 (hereafter the Convention against Torture Act) makes torture, the attempt to commit torture, or the aiding and abetting in committing or conspiring to commit torture, an offence. A person found guilty after trial by a high court is punishable to imprisonment for a term of seven to ten years and a fine of 10,000 to 50,000 Rupees.

"The constitution has not become living law and the dream of constructing equality and social justice remains unrealised"

However, the state itself remains the chief violator of these rights, either by commission or omission. The constitution has not become living law and the dream of constructing equality and social justice remains unrealised. The modern Sri Lankan state therefore possesses a schizophrenic personality as far as the protection of human rights is concerned. It unleashes violence and executes an internal war while superficially affirming its commitment to democratic process.

A culture of violence

Sri Lanka has a long record of violent conflict. Social and political violence, including the ongoing war in the north and east and two earlier youth insurrections, has brought the country's development during the past three decades to a standstill.

When the United National Party (UNP) entered government in 1977 and powers were centralised in an elected executive president a new culture of political violence set in. It was used systematically to wipe out all opposition to the government. Not only did the UNP reorganise its trade unions to act as thugs to incite and carry out violence, but certain politicians were allowed to have their own private armies and mobilize large crowds and mobs to wreak havoc with impunity. Paramilitary organisations set up during this period, supposedly to help the armed forces and police fight the Liberation Tigers of Tamil Eelam (LTTE), also expanded the UNP's armed strength.

The violent politics of this era culminated in the late 1980s with the reemergence of the Janatha Vimukthi Peramuna (JVP), which had been methodically crushed by the United Front Government in the decade before. The JVP intended to capture state power and establish a socialist state, but was suppressed with the same violence as before. The conflict only subsided in 1991 when its leader was arrested and summarily executed by the army.

The People's Alliance (PA) government came to power in 1994 promising to usher in a new political ethos. But the resumption of the war against the LTTE and the defensiveness caused by constant efforts to maintain the moral high ground against the "dushanaya" and "beeshanaya" (corrupt and violent) record of its

predecessor, the UNP, quickly pushed the PA into a morass of its own making. With much of the earlier apparatus still intact, its politicians renewed practices of political violence, which have continued to this day.

> "The gradual politicisation of Sri Lanka's judiciary is an important but neglected human rights issue"

The law itself has been a commonly used instrument of repression. The Public Security Ordinance (No. 25 of 1947) as amended and the Prevention of Terrorism Act (PTA) of 1979 as amended have been enforced for the better part of the last decades and have virtually eclipsed the ordinary penal laws and criminal procedure and evidence statutes. Emergency laws have given wide powers of arrest and detention to the police and armed forces. They have denied minimum safeguards on conditions of detention, made confessions to senior police officers admissible, and relaxed normal procedure concerning inquests, postmortem examinations, disposal of bodies and judicial inquiries where there are deaths in custody. The Criminal Procedure Code, which required a suspect to be produced before a magistrate within 24 hours of arrest; and the Evidence Ordinance, which prohibited the making of confessions to police officers, were completely overridden. The consequences have included thousands of extrajudicial killings, enforced disappearances and the further brutalising of Sri Lankan society.

Subversion of the justice system and defeat of constitutional oversight of government

A specific feature of the pervasive breakdown of the rule of law in Sri Lanka has been the failure of the justice system to bring to book those perpetrators that commit abuses, whether in times of ordinary law and order or in periods of emergency. This failure is evident at all levels, from the highest to the lowest courts, and deserves close scrutiny as a factor in the deterioration of constitutional government, including proper law enforcement, resulting in pervasive violence.

Subordination of the rule of law to 'rule by politics'

The gradual politicisation of Sri Lanka's judiciary and subordination of the rule of law to 'rule by politics' is an important but neglected human rights issue. The failure of non-governmental organisations based in Colombo to mount a vigorous campaign against the blatant politicisation of the Supreme Court from 1999 onwards has been particularly indicative of their failure to place justice as central to their work and in some measure also points to the political choices that these organisations have made.

Threats to the independence of Sri Lanka's judiciary are not new. Attempts soon after independence to reduce it were valiantly resisted by judges. When legislation was introduced that would undermine the separation of powers in the constitution by giving the minister of justice authority in the appointment of judicial officers, the Supreme Court declared it invalid.[4] Further attempts

at fettering the judiciary were outlawed.[5] The court was, in these early stages, conscious of the need to safeguard the rights of all persons, including minorities.[6]

"The 1972 constitution abolished judicial review and allowed for a state of emergency to be declared without parliamentary debate"

Predictably, political outrage at the rebuff of parliamentary authority resulted in the constitution being changed in 1972. The new constitution abolished judicial review, established a Constitutional Court with the limited power to scrutinize bills, and this too within 24 hours if the bill was declared urgent and in the national interest, and allowed for a state of emergency to be declared without parliamentary debate. In the place of the earlier independent Judicial Service Commission the politically subverted Judicial Services Advisory Board and an ineffective Judicial Services Disciplinary Board were established. The latter had no right to appoint minor judges but only to recommend their appointment to the cabinet (articles 126 & 127). Fundamental rights included in the constitution were made meaningless by open-ended restrictions and the lack of a specific enforcement procedure.[7]

The change in political leadership in 1977 brought about the current second republican constitution, in 1978, which theoretically protected the role of the Supreme Court as the highest and final superior court. The court was given special jurisdiction in respect of election petitions, appeals, constitutional matters, fundamental rights (now made justicable) and breach of the privileges of parliament. The appointment of judges of the superior courts was by an elected president "by warrant under his hand" (article 107). As in the two previous constitutions, the security and tenure of the judges were guaranteed and judges of the superior courts could be removed only after address of parliament on grounds of proved misbehaviour or incapacity in which the full particulars of such allegations should be set out (article 107[2]). The earlier judicial services boards were replaced by the Judicial Service Commission, vested with the same powers, consisting of the chief justice and two other judges of the Supreme Court named by the president, who could be removed only for cause assigned (article 112).

In practice, however, the spirit of authoritarian disregard for the independence of the judiciary continued. The president used a constitutional clause specifying that all judges of the appellate courts would cease to hold office on commencement of the new constitution to "reconstitute" the higher courts. Seven out of the 19 judges holding office were not reappointed, thus deeply damaging guarantees of tenure.

Meanwhile, police officers found responsible for violations of fundamental rights were not only promoted but awards of compensation and costs of actions judicially imposed upon them were paid by the government. Procedural difficulties in judicial officers taking the oath of allegiance under the Sixth Amendment resulted in the police locking and barring the Supreme Court and the Court of Appeal, and refusing entry to judges who reported

for work. Following unpopular decisions, thugs stoned judges' houses and hurled vulgar abuse at them. There was also an attempt to impeach Chief Justice Neville Samarakoon over alleged criticism of the government during a speech at a school prize-giving day. A select committee appointed to investigate found no "proved misbehaviour" which could justify his removal, but saw his conduct as a serious breach of convention.

In the wake of this sustained political barrage, it is not surprising that the judiciary decreased its efforts to protect the rights of the people. In 1982, when the UNP government flouted honoured electoral traditions and substituted the general election that was then due with a referendum, the Supreme Court upheld its decision. When questions over the 13th Amendment came before it, the court again refused to engage in a debate on the substantive merits and demerits of devolution while approving the changes on technical grounds that they did not violate the unitary nature of the state.[8]

"In the wake of the sustained political barrage it is not surprising that the judiciary decreased its efforts to protect the rights of the people"

In the 1990s the judiciary sought to regain some of its lost authority over politicians and state agents, particularly officers with custodial authority, such as police and prisons officers. This was in part due to widespread public acknowledgement that the abuses of the past could not be tolerated further and in part due to the efforts of some liberal judges. The judiciary did as much as it could within the confines of a constitutional document that does not include the right to life, permit public interest litigation, allow challenges of legislative acts, or permit judicial review even of unconstitutional laws enacted before 1978.[9] Importantly, the vicarious liability of officers in authority who do not intervene when their subordinates violate rights was specifically affirmed.[10]

Insofar as abuses of power under emergency laws were concerned, the Supreme Court responded far more sensitively than in the past; it relaxed procedural rules that prescribed strict compliance with the manner in which a petition must be filed in court and thus allowed hundreds of persons detained under emergency to file fundamental rights petitions.[11] The power of authorities to arrest and detain using emergency regulations and provisions of the PTA was also restrained, and the court went on to disregard an ouster clause in the Public Security Ordinance (under which emergency regulations are issued) to strike down the validity of a regulation itself.[12]

This judicial 'activism' caused a hostile reaction from the political regime; the Supreme Court and judges perceived to be 'liberal' came under scathing criticism from government ministers and the then-president, Chandrika Kumaratunge, herself. In 1999, with the appointment of Chief Justice S N Silva, who had close personal connections to President Kumaratunge, the court ceased to restrain government actions and indeed arbitrarily upheld the powers of government against citizens.[13] Benches were constituted without any consideration for seniority but with a view to 'packing' them with favourites of the chief justice who would be amenable to whatever decision was desired

by the political establishment.[14] The flood of fundamental rights applications progressively decreased; isolated 'rights friendly' judgments awarded only small amounts of compensation, and lawyers and petitioners were judicially coerced into reaching settlements.[15] The court declared itself not bound by views of monitoring bodies established under international human rights treaties that had been ratified by the executive, thus formally approving the government's years of ignoring the views of the UN Human Rights Committee.[16]

"Public confidence in the ability of judges to act as a last measure against authoritarianism has inevitably decreased"

Predictably, the capacity of the lower courts to function independently from government was also affected. Transfers, disciplinary control and dismissal of lower court judges, which are handled by the Judicial Services Commission, were effected at its whim and fancy, most often at a single nod from the chief justice.[17] The negative impact that this has had on the credibility and internal discipline of the judicial service is incalculable.[18]

Public confidence in the ability of judges to act as a last measure against government authoritarianism has also inevitably decreased. Yet all of this took place without any significant protest from Colombo-based non-governmental groups, excepting at a few seminars held by one or two organizations.

Failure of civilian oversight mechanisms

Any effort to remedy rule by politics in Sri Lanka has been short-lived or thoroughly ineffective. The fate of two important commissions—the Bribery and Corruption Commission and the Human Rights Commission—evidenced this in no uncertain terms.

The Bribery and Corruption Commission was set up through Act No. 19 of 1994, which was passed unanimously; however, only insignificant and lower-ranking public officials have been caught in its net, while stupendous fraud and corrupt acts by heads of institutions and politicians have been bypassed. It has for long periods all but ceased to function due to infighting among its officials and efforts by successive governments to use it for their own political ends.

The Human Rights Commission (HRC) was established under Act No. 21 of 1996, a flawed law that allows it to engage only in conciliation and mediation, with the end result that its directions are substantively ignored not only by the police hierarchy but also by other government departments and officials.[19] Its members are not stipulated to be full time, thus resulting in their giving only part-time commitment to the work. Section 31 of the act confers powers on a minister to make regulations, including those over the conducting of investigations, which violates the Paris Principles on national human rights institutions, that "[a]n effective national institution will have drafted its own rules of procedure and these rules should not be subject to external modification". The commission also is not empowered to approach courts directly as a petitioner in instances of grave human rights violations or

even refer such cases to the appropriate court, as relevant rules that would allow it to do so under section 14(3)(b) have not yet been prescribed by the Supreme Court. So although some commission officers have been engaged in useful work in at least documenting human rights violations, particularly in conflict areas, and in bringing their persuasive efforts to bear on illegal arrests and detentions, the efficacy of the body as a whole has never been great due to the inherent limitations in its mandate.

The HRC's legitimacy has been further undermined in recent times by the manner in which its sitting members were appointed: by presidential fiat that ignored a constitutional amendment specifying that they be approved by a 10-member Constitutional Council (CC). This 17th Amendment also established two new monitoring bodies, namely the Elections Commission and the National Police Commission (NPC), which should be filled by the CC. The Elections Commission was never even constituted due to the refusal of President Kumaratunge to appoint the CC's nominee as its chairperson. The CC was in existence only from March 2002 to March 2005, when the terms of office of its six members expired. The vacancies were not filled, resulting in the CC itself ceasing to function.[20] The incumbent president, Mahinda Rajapakse, then made his own appointments to the commissions, including the HRC and NPC, predominately consisting of his supporters and personal friends. Meanwhile, a parliamentary select committee that has been appointed to examine as how the 17th Amendment may be 'rectified' in its substance has been sitting for many months with no visible result.

The constitutional 'experimentation' with the 17th Amendment illustrates the huge resistance from the political establishment to any attempts to depoliticise institutions. Early on, relatively feeble attempts by the NPC to discipline police and restore some measure of independent functioning to the service met with palpable antagonism from politicians. Frontline ministers remarked that the 'independence of the NPC' was not needed and went so far as to maintain that the Inspector General of Police (IGP) should be involved in the decision-making of the NPC. The IGP was openly hostile to the NPC, considering it an unwarranted fetter on his powers.

The response from the non-governmental community regarding the political subversion of the constitutional process was again muted. Though there were some protests at the start, including the refusal of some former members of the HRC to be reappointed by an unconstitutional process, these protests did not gather momentum and were, moreover, confined only to the time that the unconstitutional appointments took place.

"The constitutional 'experimentation' with the 17th Amendment illustrates the huge resistance from the political establishment to any attempts to depoliticise institutions"

The work of the AHRC and its partners

"The 'safe' assumption of most Sri Lankans that the victims of torture are confined to particular segments of the society has been comprehensively debunked"

The AHRC and its partners have approached the failure of the rule of law in Sri Lanka with a frontal critique of the justice system, and by working on individual cases to give victims not only legal help but also physical protection and counseling for their rehabilitation. A significant factor was that these cases were from parts of the country not affected by the war. This was a deliberate choice, in order to examine the pervasive nature of the problems while de-linking them from the conflict.

Two positive consequences of the work have been that victims of torture have gone from being 'powerless' to 'powerful' by articulating their grievances together, and that the normally unresponsive media has become part of the campaign, via daily reporting of torture on television, radio and in newspapers and other media. Public actions against torturers have followed. Heavy pressure has been placed upon defective state institutions. The judiciary is under attack for its failure to deal effectively with the problem.

Endemic police abuse

> The vast majority of custodial deaths in Sri Lanka are caused not by rogue police but by ordinary officers taking part in an established routine.
>
> *—UN Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston*[21]

The 'safe' assumption of most Sri Lankans that the victims of torture are confined to particular segments of the society—undesirables, terrorists or hardcore criminals—has been comprehensively debunked. Police brutality has been practiced against all types of persons: the cleaner of a van assaulted after being blindfolded;[22] an attorney-at-law pulled out of his car and assaulted;[23] another attorney, a bystander at a protest, shot at close range;[24] an alleged army deserter tortured to death.[25] However, as the case studies by the AHRC indicate, torture is most often used against the poor. Often the most gruesome torture is practiced against teenagers accused of petty theft, such as stealing a bunch of bananas.[26] Actual criminals and underworld characters are allowed to escape, with the nexus between them, police and politicians being too strong to allow for their apprehension. The studies also reveal that torture is not the work of a few 'rogue' policemen but is widespread. This is due to many factors: a lack of good investigative training; public pressure to apprehend suspects, and the general feeling that torture is implicitly allowed and even may be expressly ordered by senior police officials, despite laws and regulations prescribing otherwise.

One case taken up by the AHRC involved Koralaliyanage Palitha Tissa Kumara from Halawala, Mathugama, a respected local painter and carver, who had been awarded a gold medal by the Hotels Corporation as well as certificates from the Housing Development Authority and the National Apprentice Board. This

31-year-old father of two sons had been returning home from the southern city of Galle where had had undertaken carving work in early February when he was suddenly arrested by the Wellipenna Police simply because he had given food to a person who had allegedly committed some serious crimes. After his arrest, Tissa Kumara was severely assaulted by a sub-inspector who then brought a tuberculosis patient held at the same police station to spit into his mouth, telling him that he too would die of the disease. After that, he was remanded on fabricated charges of possessing a grenade and robbery. After Tissa Kumara developed a severe cough and found blood in his saliva he was put in a solitary cell; food was passed to him through a narrow opening in the door, as the prison authorities were nervous of contamination. His wife made frenzied appeals to the various monitoring bodies in Colombo, including the NPC and HRC, but her husband did not get proper medical treatment until the AHRC and its partners intervened later.

"The failure of the law enforcement process has been a persistent and central feature of Sri Lanka's failed justice system"

Militarisation of law-enforcement agencies

The failure of the law enforcement process has been a persistent and central feature of Sri Lanka's failed justice system. It is clear that police are corrupt, brutal, lacking in investigative skills, inefficient in dealing with complaints of torture and militarised due to the decades-long customary use of emergency powers.[27]

There are two discernible patterns of torture by the Sri Lankan police: firstly, where it is used for interrogation purposes and secondly, where it is simple abuse of power.

In the first, what police officers do is to produce substitutes for crimes that they have not resolved. Palitha Tissa Kumara was one such victim. Another was Lalith Rajapakse, who was severely beaten on 19 and 20 April 2002 by officers from the Kandana Police Station, resulting in him being in a coma for three weeks. In some instances, the police may be aware of the identities of the real culprits, who have been allowed to escape because of undue influence. In these cases, it is even more essential for the police to find substitutes. Producing substitutes creates the impression—in the department as well as among the public—that the police are efficient and crimes are being solved. This paves the way to financial rewards and promotions.

Numerous judgments of the Supreme Court have held that even a hardened criminal cannot be tortured with impunity. In the *Wewelage Rani Fernando Case* (where it was contended that the deceased had stolen two bunches of bananas), the court observed that an allegation of theft should not have detracted from the duty to afford to the deceased the protection of his constitutional right of personal liberty. Thus,

> [T]he petitioner may be a hard-core criminal whose tribe deserve no sympathy but if constitutional guarantees are to have any meaning or value in our democratic set-up, it is essential that he be not denied the protection guaranteed by our Constitution.[28]

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

"The lack of basic investigation skills and training is replaced with brute force"

The absence of due process at all stages of investigation was well illustrated in the *Madiliyawatte Jayalathge Thilakarathna Jayalath Case*, which concerned the first conviction under the Convention against Torture Act. The case involved the alleged theft of four gems from the office of a dealer who alleged that the victim, a business acquaintance and broker, was responsible. The victim stoutly denied that he had stolen the gems but was threatened by the gem dealer that if the gems were not handed over then he would get the police to assault him. Some time later, while travelling to Colombo by bus, the victim was arrested and taken to the Wellawatte police station where he was mercilessly assaulted with a pipe by the accused police officer, then attached to the crime division as an acting officer in charge. Thereafter, the victim was kept in the police station for two days. Only after members of his family protested that he was not produced in court was he taken before a magistrate. But he did not make any complaint of assault to the magistrate or the officer in charge of the Wellawatte police station. When later asked why, he said that there had been no point in doing so. The medical evidence showed that he had suffered injuries caused by a blunt weapon, including a fractured hand.

The accused police officer contended that the victim had been arrested on suspicion of involvement in the theft of gems and had hurt himself while attempting to run away at time of arrest. However, the gem dealer who had lodged the complaint later found the gems and informed the police that his allegations against the victim had been unfounded. In assessing these facts, the Colombo High Court determined that the prosecution had established beyond reasonable doubt that the accused had assaulted the victim in order to obtain a confession, and had done this in his official capacity as a police officer. The accused, who by this time had absconded, was convicted to the minimum seven years' rigorous imprisonment and ordered to pay a fine of 10,000 Rupees, in default of which a further two years' rigorous imprisonment was ordered.[29]

The case illustrates how the investigative system fails to work in Sri Lanka. In law enforcement, the lack of basic investigation skills and training is replaced with brute force on the part of not only junior but also senior police officials. This is buttressed by the impunity that law enforcement officers enjoy for their actions, a continuing legacy of extraordinary emergency laws that at one point gave them powers of life and death over persons in custody. The supervision that should normally be operative in the chain of command is also rendered nugatory by this breakdown in other elements of policing.

In the second category of cases torture is inflicted as a sheer abuse of power. There are many examples. Saman Priyankara was illegally detained on 5 January 2004 and tortured by officers attached to the Matale police station. Boiling water was poured

from his right hip downwards, causing severe burns. The perpetrator, a sub-inspector of police (acting on the instigation of Priyankara's neighbour), told Priyankara that he would make sure that he would not be able to have a normal sex life anymore. Afterwards he was given some ointment to apply to his wounds but warned not to report the incident to anyone and not to seek treatment at hospital.

In many cases citizens with legitimate queries end up being tortured. For example, Saman Jayasuriya was driving a van with two others when two policemen in civilian clothes stopped him to ask for his license and insurance papers. When he asked them to prove their identities he was pulled out and assaulted. He managed to escape, but a contingent of policemen from the Kadugannawa police station visited his residence and mercilessly beat him up in the presence of his wife. He was then arrested and taken to the police station with his son.

> "Even when fundamental rights litigation was at its zenith, the gap between judgments and their implementation was immense"

Maintaining a culture of impunity

Even when fundamental rights litigation was at its zenith, the gap between judgments and their implementation was immense. Judgment upon judgment delivered by the Supreme Court found torture to have been committed by officers in custodial authority, but none were implemented. Police officers identified in courts of law as personally responsible for acts of torture have not had so much as internal departmental action taken against them. Directions of the Supreme Court to the police hierarchy to initiate disciplinary action against erring police officers have been blatantly ignored.[30] Official resistance to these pronouncements has always been high and the police department has arranged for lawyers to appear for the accused police and to pay compensation that should be due from the implicated officers themselves.

The failure to interdict or remove identified torturers from their positions had a catastrophic effect in the case of Gerald Perera, a law-abiding employee of the Ceylon dockyard who was arrested due to mistaken identity. He was tortured so severely that he suffered renal failure. The Supreme Court upheld his fundamental rights petition. However, its recommendations on disciplinary action against the responsible police officers were not followed; they continued at their posts. A year later, as he was due to testify against the police in a high court case under the Convention against Torture Act he was shot and killed at point blank range. The alleged torture perpetrators were also identified as being behind the killing. The murder trial is ongoing.

A specific feature of the culture of impunity is the blatant falsifying of official documents, including information books. In one case where a court found that the Grave Crimes Information Book and the Register/Investigation Book had been altered with utter disregard for the law the view was taken that it was unsafe for the court to accept a certified copy of any statement or notes recorded by the police without comparing it with the original.[31]

"The rate of conviction in torture cases has been extremely unsatisfactory"

The NPC, comprising seven commissioners with security of tenure established under article 155A of the 17th Amendment, was the first serious legislative attempt to restore discipline to the police force. Its powers were twofold. Firstly, it was vested with powers of appointment, promotion, transfer, disciplinary control and dismissal of all officers other than the IGP (article 155G[1][a]). Secondly, and vitally, the 17th Amendment stipulated that it was mandatory for the NPC to "establish procedures to entertain and investigate public complaints and complaints from any aggrieved person made against a police officer or the police service" (article 155G[2]).

However, the NPC did not to any great extent fulfill its constitutional obligations during its first term, though it does deserve credit for its decision to interdict police officers under the Convention against Torture Act and its prevention of police officers from being arbitrarily transferred during the pre-election period. Nonetheless, it failed to go beyond a few preliminary discussions with members of civil society on how to implement the public complaints procedure in the manner for which it had been made constitutionally liable: the legitimacy of the procedure that was finally put in place has been negated by the fact that the persons establishing it were appointed unconstitutionally.

Ineffective prosecutions

The politicisation of the judiciary was accompanied by a corresponding decrease in public confidence in the chief law officer of the land, the attorney general. He does not have a marked record of strong prosecutions of grievous human rights abuses; indeed, in all the decades of enforced disappearances and extrajudicial killings there have been only two successful prosecutions, namely for the rape and killing of a Tamil schoolgirl and thereafter the murder of her mother, brother and friend by Sinhalese soldiers in the north in 1996 (the *Krishanthi Kumaraswamy Case*) and the enforced disappearance of twenty-five Sinhalese schoolchildren (though the numbers abducted and never found were much larger) again by Sinhalese soldiers in 1990 (the *Embilipitiya Case*). The failure to prosecute successfully, outside of these two cases, illustrates the failure of the prosecution in respect to extraordinary crimes, irrespective of ethnicity.

The rate of successful prosecution in torture cases has also been extremely unsatisfactory.[32] There were no convictions under the Convention against Torture Act from the time it was enacted in 1994 up to 2004. Thereafter, there were two convictions, but most complainants are put off by long delays in filing indictments, faulty indictments and delays in the substantive trial proceedings.

According to the attorney general's department, only five cases indicted under the Convention against Torture Act have resulted in acquittals and the vast majority is pending. Some indictments have been at the relevant high courts for almost two years but

have yet to be served on the accused purportedly due to the severe backlog of cases. The department, which is responsible for the issuance of indictments, is also accused of causing delays.

> "With the gradual politicisation of the Supreme Court some judges have behaved increasingly aribtrarily in response to fundamental rights petitions"

However, in many cases it has been found that despite evidence of grievous torture prosecutions have not followed. For example, in the *Nandini Herath Case*, an indictment was not filed under the Convention against Torture Act but the police were merely charged with causing simple hurt.[33] In *Jagath Kumara's Case* (arrested, detained and tortured by Payagala police station officers in June 2000 and died at the Welikada prison thereafter), though information and files were handed over to the Attorney General, no prosecution ensured.[34] In *Yogalingam Vijitha's Case* the Supreme Court ordered compensation and costs to be paid to a Tamil woman who had been arrested, detained and sexually tortured.[35] The court stated,

> As observed the facts of this case have revealed disturbing features regarding third degree methods adopted by certain police officers on suspects held in police custody. Such methods can only be described as barbaric, savage and inhuman. They are most revolting and offend one's sense of human decency and dignity particularly at the present time when every endeavor is being made to promote and protect human rights.[36]

The culpable officers were not prosecuted despite the court's order that this be done.[37]

Exposing deficiencies in litigation at the Supreme Court

With the gradual politicisation of the Supreme Court, some judges have behaved increasingly arbitrarily in response to fundamental rights petitions. For example, the court itself has taken the view that strictures passed on police officers found to be implicated in acts of torture should not have any effect on their promotion.

In one case, the chief justice sentenced a lay litigant to one year's rigorous imprisonment on the basis that he had talked too loudly in court and filed numerous motions in support of his application. Despite the manifest injustice of this sentencing, no perceptible outrage was shown by non-governmental organizations, including those specifically working with the legal system. It was left to a few domestic lawyers to take up the cause of the arbitrarily sentenced litigant, Tony Fernando, with the sole support of the AHRC. The UN Human Rights Committee later found Fernando's rights against arbitrary detention to have been violated.[38]

Another distinct feature in recent times has been judicial inconsistency in granting compensation to victims of torture in fundamental rights cases. Earlier, such sums had been considerable, indicating that the court wished them to serve as a deterrent. In *Silva vs. Iddamalgoda*, an alleged army deserter arrested by the police died while in remand custody. The court gave relief to his widow on the basis that she and her young

child were entitled to the compensation that the deceased would have received. The state was directed to pay 700,000 Rupees (USD 6400) and the two errant police officers 50,000 Rupees each.

"In recent cases compensation awarded has been very little"

In one case where death was due to assault by prison officials rather than by the police, the state was directed to pay 925,000 Rupees (USD 8500) while each of the three prison officials were directed to pay 25,000 Rupees.[39] In awarding this considerable sum as compensation and costs, the court took into account the fact that the deceased was a father of three minors. The treatment meted out to him while he was at the Negombo prison, which "painted a gruesome picture where a hapless prisoner was brutally tortured and left alone, tied to an iron door, to draw his least breath", contributed to the high award.

While each of these cases ended in the death of the victim, in *Gerald Perera's Case* the court granted 800,000 Rupees (USD 7300) as compensation and costs for severe torture, payable both by the police officers found to be responsible for the violations and the state.[40] Additionally, it granted the petitioner's claim to reimbursement of his medical expenses by the state, including treatment obtained at a private hospital due to the gross torture that he suffered, despite the contention of the respondents that the charges were exorbitant and treatment could have been obtained at a state hospital. When he was later killed before testifying in the high court against the police officers responsible for torturing him, a major portion of the medical reimbursement had not yet been paid to him.

As contrasted to these awards, in recent cases compensation awarded has been very little. In the case of B A Surange Wijewardene, the amount awarded was a paltry 15,000 Rupees split between the three respondents, while in *D A Nimal Silva Gunaratne vs. Kodituwakku* the petitioner was given only a nominal sum of 50,000 Rupees and 20,000 Rupees as costs despite the loss of one eye due to torture as well as the finding of the court that his right to freedom had been violated by arbitrary arrest and detention.[41] In *Erandaka and Anor vs. Halwela, OIC, Police Station, Hakmana* the petitioners were assaulted while in prison, as evidenced by medical records, but the state alone was ordered to pay each only 25,000 Rupees, as the petitioners could not identify the particular prison officers responsible.[42]

Inadequate magisterial supervision

In *Madiliyawatte Jayalathge Thilakarathna Jayalath* (cited above), the high court remarked upon the paucity of magisterial supervision of the torture victim when produced before the judicial officer and specifically, the failure to question as to whether or not he had been tortured. This is a common problem in Sri Lanka.

A recent judgment illustrates this failure of magisterial supervision over detention. In *Weerawansa vs. Attorney General* remand orders under ordinary law by the magistrate at the Harbour Court were held to be in violation of the petitioner's rights in that several such orders had been made even though

the magistrate or acting magistrate did not visit or communicate with him.[43] This was ruled to offend a basic constitutional safeguard in article 13(2), that judge and suspect must be brought face to face before liberty is curtailed, a safeguard that could not be circumvented by producing reports from the police. The court upheld an earlier view that remand orders, where they concern a patent want of jurisdiction, cannot be immune from fundamental rights challenge by virtue of the fact that they are 'judicial acts'.[44]

> "Supreme Court directions have had no practical value in bringing about disciplinary action against culpable police officers"

Corruption of medical officers and collusion of HRC officers with police torturers

The AHRC has documented thoroughly how Chamila Bandara, a minor, was tortured from 20 to 28 July 2003 at Ankumbura police station ostensibly on grounds that he had committed a petty crime. The police hung him by his thumbs and the officer in charge hit him on his legs and the soles of his feet with stumps used for cricket.

This young boy was not produced before a judicial medical officer for examination despite being admitted to the Kandy hospital for treatment. It was only after being readmitted to the Peradeniya hospital that Chamila was given a proper medical examination, as a result of which doctors declared that his left arm had been seriously injured.

When the case was reported to the district area coordinator of the HRC he went only by the police version and concluded that there had been no mistreatment. The family appealed to the AHRC and its local partners. As a result, the HRC reopened investigations into the case and the matter was handed over to a one-man inquiry committee, which concluded that the young boy had in fact been tortured, as a result of which his fundamental rights under articles 11, 12(1) and 13(1)(2) had been violated. Meanwhile, the AHRC took the case before the UN Human Rights Committee at its 79th session, when it considered Sri Lanka's combined fourth and fifth periodic reports under the International Covenant on Civil and Political Rights. Chamila himself gave testimony before the committee, where the state denied that torture had occurred and implied that his allegations were fabricated.

The officer in charge of the Ankumbura police and his subordinates were found to be responsible for the offence. The final recommendation of the inquiry committee was that a copy of the inquiry report be sent to the IGP, who should warn the individual police officers that any further instances of abuse would result in termination. As with similar directions by the Supreme Court, it had no practical value in bringing about disciplinary action against the culpable police officers.

This case also entails a further problematic development in fundamental rights litigation. Some Supreme Court judges now prefer to postpone fundamental rights hearings where parallel high court hearings are taking place, ostensibly on the basis that the finding of the court might influence the outcome of the

other case. In Chamila Bandara's case this is precisely what happened; the matter is now pending indefinitely.[45] The court persists with this attitude despite the protestations of lawyers appearing for the victims that the inevitable delays in trial will render the Supreme Court remedy redundant and that, in any event, the two judicial proceedings are different and should be proceeded with differently.

"The crisis in Sri Lanka persists due to the non-existence of the rule of law"

Conclusion

The recent intensification of conflict and increasing breakdown of law and order in all parts of Sri Lanka have led to renewed incidents of disappearance and extrajudicial killing, fostering a climate that is highly conducive to further human rights abuses. This has been enabled by the return of rule by emergency regulations, conferring extraordinary powers of arrest and detention on security forces, with an inimical effect on work to control and prevent torture.

The crisis in Sri Lanka persists due to the non-existence of the rule of law. The shift from concentrating on this question to nebulous (though highly profitable) ventures in peace and conflict resolution on the part of the country's non-governmental community has been unfortunate; it has wasted time and effort in activities that were doomed from the start. More importantly, it has allowed both insidious and direct attacks on constitutional institutions and indeed the very constitution itself to take place with scarcely a murmur of protest; as a result, the work of government has broken down even further. In this situation, talk of constitutional solutions to solve the 'ethnic problem' is mere rhetoric and a part of political maneuvering. If the political establishment blatantly abuses constitutional provisions in governing the south, can there be any hope for a solution to the intractable war in the north and east?

The AHRC has outlined a number of measures that should be taken to address the failure in law enforcement in Sri Lanka. These include revision of the prosecutorial and investigative processes, and initiation of an effective witness protection system. A special police unit empowered to entertain complaints and immediately commence investigations is a necessity, not only in 'special cases' of torture (where international pressure is brought to bear on state authorities) but rather, in all cases. Reforms should also include the establishing of an office of an independent prosecutor with legislative safeguards to ensure separation from other parts of government and with its own investigative staff. (In fact, such an office existed from 1973 to 1978, although it was not free from political interference.) There should be special procedures for investigating and prosecuting complaints where women are the victims, and streamlined procedures to examine urgent complaints by victims of torture, instead of the committees of government officials that exist at present. The AHRC has also urged the application of the doctrine of command responsibility, the use of developed forensic investigations, and made detailed specific suggestions relating

to arrest and production in court,[46] speedy investigations and the filing of indictments under the Convention against Torture Act and initiation of community protection mechanisms.

The studies of the AHRC and its partners in Sri Lanka show the overriding importance of returning discussion on reform back to the basics of restoring the legitimacy of the justice system and in particular, the law enforcement process. This should be the focus of our work.

"The studies of the AHRC and its partners show the overriding importance of returning discussion to restoring the legitimacy of the justice system"

Endnotes

[1] The constitution at independence in 1947 established the judicature as a body separate from the executive and legislature, and safeguarded minority rights in section 29(2). But affronted by what it saw as an unwarranted bridling of its authority, the leftist United Front government in 1970 decided on an autochthonous or disastrous 'home grown' formula, specifying that the legislature was the sole and supreme repository of power. All other institutions, including the judiciary, had to give way. Regardless of whichever government came into power, political expediency was thereafter to determine the course of constitutional and political events in Sri Lanka.

[2] These developments were in sharp contrast to those in neighbouring India where a receptive constitutional environment ensured commitment to democratic norms, public interest litigation, and the fashioning of the right to life to include not only physical existence but also all ingredients that go into making quality of life.

[3] Basil Fernando, 'The Tale of Two Massacres: The Relevance of Embilipitiya and Bindunuwewa to Conflict Resolution in Sri Lanka', *Law and Society Trust Review*, vol. 15, no. 212, June 2005.

[4] *Senadheera vs. Bribery Commissioner,* 63 NLR 313.

[5] *Queen vs. Liyanage,* (1966) 68 NLR 265; *Bribery Commissioner vs. Ranasinghe,* (1964) 66 NLR 73.

[6] In *Bribery Commissioner vs. Ranasinghe,* which was later affirmed by the Privy Council, (*Kodeeswaran vs. Attorney General,* [1969] 72 NLR 337), it was pointed out that section 29(2) of the 1947 Constitution represented the solemn balance of rights between the citizens of Ceylon and the fundamental conditions on which *inter se* they accepted the constitution, and which are therefore unalterable.

[7] Only one case alleging a violation of fundamental rights was filed during this time, in the District Court: *Ariyapala Guneratne vs. People's Bank,* (1986) SLR 338.

[8] SC Application Nos 7-47/87 (Spl) and SD 1&2/87 (Presidential Reference).

[9] Article 126(2) gives the right to move court only to a person alleging the infringement of any right "relating to such person", or an attorney at law on his behalf. Unlike in India, bona fide public interest groups cannot come before court on behalf of a victim. Article 16(1) denies judicial review of pre-1978 laws. Article 121 states that bills must be challenged within one week of their being placed on the Order Paper of Parliament. Even though there is a constitutional requirement to publish the bills in the gazette at least seven days before it is placed on the Order Paper of Parliament, (article 78[1]), the gazettes are not easily obtainable and

offensive bills go unchallenged. In any event, this scrutiny is also brushed aside when the Cabinet certifies a bill as urgent and in the national interest: then the bill is referred directly by the president to the Supreme Court for its constitutionality and citizens have no formal right of challenge (article 122). As for the right to life, it was only in 2003 that the Supreme Court inferred a positive right to life from the constitutional right not to be punished with death or imprisonment except by court order (article 13[4]), in *Perera vs. Iddamalgoda* (2003) 2 SLR 63, per judgment of Justice Mark Fernando and the *Wewalage Rani Fernando Case*, SC (FR) No. 700/2002, SCM 26.7.2004, per judgment of Justice Shiranee A. Bandaranayake. These also give authority to the proposition that a dependant has the right to come before court on a rights petition when a family member dies as a result of police torture. It took the court more than 25 years to affirm these core rights as implied from the constitutional provisions.

[10] Per Justice Mark Fernando in *Perera vs. Iddamalgoda*; *Sanjeewa vs. Suraweera*, (2003) 1 SLR 317; the *Wewelage Rani Fernando Case*; *Banda v. Gajanayake* (in the context of emergency regulations) (2002) 1 SLR 365, *A M Vijitha Alagiawannawe vs. L P G Lalith Prema, Reserve Police Constable and Others* SC (FR) No. 33/2003, SCM 30.11.2004; *Deshapriya vs. Weerakoon*, SC 42/2002, SCM 8.8.2003. The principle asserted was that participation, authorisation, complicity and/or knowledge is not compulsory for responsibility to be found on the part of a superior officer. This could arise purely on dereliction of duties. This principle was judicially stretched to encompass even an instance where an officer-in-charge of a police station fails to record promptly the statement of a petitioner regarding assault, and to embark on an investigation in respect of the same.

[11] In *re. Perera*, SC 1/90, SCM 18.9.1990.

[12] *Joseph Perera vs. Attorney General*, (1992) 1 SLR 199, 230; *Shanthi Chandrasekeram vs. D B Wijetunge and Others*, (1992) 2 SLR 293; *Channa Peiris vs. Attorney General*, (1994) 1 SLR 1 at 51; *Sunil Rodrigo vs. De Silva*, (1997) 3 SLR 265, where the court upheld the right of a detainee under emergency regulations to be speedily produced before a magistrate and to have legal representation.

[13] See report by the UN Special Rapporteur on the Independence of Judges and Lawyers in April 2003 to the UN Commission on Human Rights, (E/CN.4/2003/65/Add.1, 25 February 2003), and press releases of the Special Rapporteur of 27 February and 28 May 2003. See also the report of the International Bar Association, *Sri Lanka: Failing to protect the Rule of Law and the Independence of the Judiciary* (2001).

[14] One notable casualty of this practice was the then senior-most judge, Justice Mark Fernando, who had been bypassed for promotion in 1999 by President Chandrika Kumaratunge in favour of the Attorney General, S N de Silva. Thereafter Justice Fernando was not assigned to sit on any bench hearing important constitutional matters, despite court tradition preferring seniority. In one case involving three fundamental rights petitions against his own appointment, the chief justice constituted a divisional bench consisting of the most junior rather than the most senior judges available, showing his contempt for both convention and precedent. Justice Fernando retired two years prematurely on the basis that he could no longer fulfill the expectations on which he had assumed judicial office.

[15] See the *State of Human Rights in Eleven Asian Nations, 2006,* Asian Human Rights Commission, Hong Kong, 2007, p. 288. See also among others the case of *B A S Surange Wiijewarded,* SC (FR) 533/2002, SCM 27.5.2005, where compensation given was only 15,000 Rupees divided between three respondents, and the case of *Palitha Tissa Kumara,* SC (FR) 211/2004, where despite a finding of extensive torture, the compensation awarded was only 25,000 Rupees.

[16] See the highly critiqued judgment of the chief justice heading a divisional bench in the *Singarasa Case,* SCM 15.09.2006, ruling that Sri Lanka's accession to the Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR) was unconstitutional. This has posed a direct obstacle to ongoing campaigns for the Sri Lankan government to ratify the Optional Protocol to the UN Convention against Torture. Meanwhile, the UN Human Rights Committee has so far delivered six communications against the Sri Lankan state in terms of the Optional Protocol to the ICCPR (see *article 2*, vol. 4, no. 4, August 2005 for case details and full text of these communications). However, there has been no implementation of these views to date. In some cases, such as *Fernando vs. Sri Lanka* (Case No 189/2003, Adoption of Views on 31, March, 2005), which involved a violation of article 9(1) of the ICCPR as a result of arbitrary sentencing by the Supreme Court, the government has replied to the Committee that it cannot implement the views since it would be construed as interference with the judiciary.

[17] International Bar Association, 2001.

[18] See interview with former Supreme Court Justice C V Wigneswaran, one of the most respected judges of the court, 'Top judge hits out at judicial process', *Daily Mirror,* 20 October 2004.

[19] The requirement, for example, that the HRC be informed of any arrest and detention under the Prevention of Terrorism Act, No. 49 of 1979 (section 28[1] of the HRC Act) is not adhered to. The requirement that any person with the authority of the commission be allowed into any place of detention (section 28[2]) is also defeated. The police in practice allow officials of the HRC to inspect (with prior notice) only the cells of police stations themselves, not the entire precincts of a station, including the toilets and kitchen.

[20] Though five nominees were agreed upon by the prime minister and the opposition leader and communicated to the president for appointment in late 2005, the appointments were not made, ostensibly due to a deliberate delay by smaller political parties to agree by majority vote on the one remaining member of the CC. The many representations made to the president by civil society groups that the one vacancy should not prevent the appointment of the other five members and that the functioning of the body was essential to the good administration of the country were to no avail.

[21] Mission to Sri Lanka, 28 November–6 December 2005, *Law and Society Trust Review*, vol. 16, no. 221, March 2006.

[22] *Shanmugarajah vs. Dilruk, SI, Vavuniya*, SC (FR) No. 47/2002, SCM 10.2.2003.

[23] *Adhikary and Adhikary vs. Amerasinghe and Others*, SC (FR) No. 251/2002, SCM 14.2.2003.

[24] *Senasinghe vs. Karunatilleke and Others*, SC (FR) No. 431/2000, SCM 17.3.2003.

[25] *Silva vs. Iddamalgoda*, (2003) 2 SLR 63.

[26] Both in the Chamila Bandara case (AHRC UA-35-2003) and the *Wewelage Rani Fernando Case* (SC [FR] No. 700/2002, SCM 26.7.2004) the police made the arrest alleging theft of some bunches of bananas. The first petitioner, a minor, was brutally tortured by the police; prison officials tortured the second, resulting in his death.

[27] Complaints of torture recorded at police stations are first referred to the Assistant Superintendent of Police or Superintendent of Police of the relevant area. If entertained, the legal division of the police refers them to the IGP who refers them thereafter to the Special Investigations Unit (SIU). The SIU (which is in charge of investigating all complaints against police officers, including fraud, and is currently seriously understaffed) is under the direct command of the IGP. The IGP may also instruct the Criminal Investigations Department or another special unit of the police to conduct further investigations, but this is exceptional. For years, domestic and international activist groups have been calling for an independent investigative and prosecutorial office to inquire into complaints that involve law enforcement officers, which cannot be effectively inquired into by their fellow police officers, particularly as postings at the SIU are transferable.

[28] The case law is specific on this: see *Amal Sudath Silva vs. Kodituwakku,* (1987) 2 SLR 119; *Senthilnayagam vs. Seneviratne,* (1981) 2 SLR 187; *Dissanayake vs. Superintendent, Mahara Prisons,* (1990) 2 SLR 247; *Premalal de Silva vs. Inspector Rodrigo,* (1991) 2 SLR 307; *Pellawattage (AAL) for Piyasena vs. OIC, Wadduwa,* SC No. 433/93, SCM 31.8.1994. In *Silva vs. Iddamalgoda,* ([2003] 2 SLR 63), the court dismissed the argument that the alleged bad record of the petitioner should be held against him, pointing not only to the presumption of innocence but also that by the respondent depriving the petitioner of his life he lost the opportunity to redeem that alleged bad record.

[29] HC 9775/99, order of S Sriskandarajah J.

[30] See for instance, *Sanjeewa vs. Suraweera,* (2003) 1 SLR 317; *Silva vs. Iddamalgoda*; *Dayaratne's Case,* SC (FR) 337/2003, SCM 17.5.2004.

[31] *Kemasiri Kumara Caldera's Case,* SC (FR) No. 343/99, SCM 6.11.2001.

[32] In its reports to the UN Human Rights Committee (CCPR/CO/79/LKA, November 2003) and Committee against Torture (CAT/C/LKA/CO/1/CRP.2, November 2005), the state referred to a special unit, the Prosecution of Torture Perpetrators Unit, in the Attorney General's department with responsibility for this work. But closer scrutiny has revealed that there is no separate unit dealing with torture cases and this body is only an administrative convenience with neither specially assigned staff nor separate premises. Torture cases are distributed among around five state counsels, who also handle other criminal cases. The Attorney General does not seem to monitor investigations conducted by the unit. Neither is the progress of an investigation reported to him.

[33] 'Torture committed by the police in Sri Lanka,' *article 2*, vol. 1, no. 4, August 2002, pp. 14–15.

[34] 'Torture committed by the police', p. 18.

[35] SC (FR) No. 186/2001, SCM 23.8.2002.

[36] Citing Athukorala J. in *Sudath Silva vs. Kodituwakku,* (1987) 2 SLR 119, with approval.

[37] 'Torture committed by the police', p. 52, citing letter written by the AHRC to the then minister of interior dated 9 September 2002.

[38] *Fernando vs. Sri Lanka.*

[39] *Wewelage Rani Fernando Case.*

[40] *Sanjeewa vs. Suraweera.*

[41] *State of Human Rights in Eleven Asian Nations*, p. 288.

[42] (2004) 1 SLR 268. Also in *Adhikary and Adhikary vs. Amarasinghe and Others* the court ordered 20,000 Rupees as compensation for police assault and 5000 Rupees as costs to be paid by the state.

[43] (2000) 1 SLR 387.

[44] *Farook vs. Raymond,* (1996) 1 SLR 217.

[45] SC (FR) 484/2003.

[46] *An x-ray of the Sri Lankan policing system and torture of the poor*, Basil Fernando & Shyamali Puvimanasinghe (eds), AHRC, Hong Kong, 2005, p. 12.

Comprehensive torture prevention in Sri Lanka

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Maintaining very close links with torture victims is the starting point for any serious work on torture. In Sri Lanka, the Asian Human Rights Commission (AHRC) works with six groups in different parts of the country. These groups receive victims, record complaints, assist in lodging complaints, help with physical and psychological treatment, provide solidarity and community-based witness protection and humanitarian assistance, and assist these persons in numerous other ways.

When a victim visits one of these groups the first thing that happens is that their story is taken down by a person who has been trained to look for the details and check the veracity of the story. Statements are also recorded from witnesses or other persons with information to support the allegations. The statements are put in writing and authenticated. Either immediately or within a short time these statements are put into affidavits, which are written and signed according to the requirements of the law, with the assistance or advice of lawyers. This work both assists victims in the legal process and also to build a body of documentation on torture and related issues for purposes of larger studies.

Thereafter, within the shortest possible time, the initial information about the torture is also communicated to our Urgent Appeals desk in Hong Kong. When the desk is satisfied with the authenticity, accuracy and adequacy of the information, the case is prepared in writing and is used for interventions both locally and internationally. This activity is carried out routinely and around the clock.

Intimate contact with victims has been maintained from one to six years. But in terms of documentation a case never ends. Early documentation consists of factual details; later it turns on the institutions with which the victim has had contact and how these institutions have handled the case. In this way enormous

amounts of information have been obtained on what happens at police stations, courts, national institutions and other places where victims have gone to seek redress.

"An indictment is a rich source of information about alleged torture"

The Special Investigation Unit

One of the positive institutional developments to which we have contributed is the creation of a Special Investigation Unit (SIU) within the Criminal Investigation Department to investigate torture. The creation of this unit followed inquiries by the UN Special Rapporteur on the question of torture, following cases that were mostly submitted by the AHRC since 2002. The special unit has been charged with investigating allegations of torture under the Convention against Torture Act (No. 22 of 1994); officially, over 60 cases of torture have been filed in the high courts against about 100 officers.

When a charge is lodged in a high court it must be done through an indictment, which consists of all the documentation that the prosecutor will rely upon during the trial. Thus, an indictment is a rich source of information about alleged torture. It includes statements collected from victims and witnesses, from alleged perpetrators and from witnesses; medical reports from doctors; notes from police books; sketches by police investigators, and their investigative notes. In special cases there are also DNA reports and other forensic reports. The AHRC and its partners have collected the documentation from indictments for further studies on the practice of torture in Sri Lanka.

The work of the SIU has been done by a very limited number of senior officers and subordinates. Their experiences need to be documented in order to understand how these investigations take place and what difficulties they have faced. We are obtaining information about their work through questionnaires with the help of a specialised research team, including a retired senior police officer.

Outside of the SIU, senior police officers with regional command responsibilities also conduct inquiries into torture allegations. Victims are given assistance to attend these inquiries and from these interventions also we are able to collect information about what is happening. We study not only the individual cases but also the procedures followed during these inquiries. This way we obtain further documentation, including details of police circulars and instructions on discipline and disciplinary process.

The Department of Attorney General

The prosecuting branch in Sri Lanka is the Department of the Attorney General. The department does not exercise any supervisory power over investigations into torture or other criminal investigations by the police, which has been a matter of some criticism. However, the department decides whether or not to prosecute alleged offenders on the basis of files submitted

for its attention. If the decision is to prosecute then the department drafts the charge sheets and also prepares the indictment.

"Delay in trials is one of the major obstacles to remedies for victims of all human rights abuses in Sri Lanka"

The attorney general's powers have so far not been used to prosecute any officer for torture above the rank of inspector of police. Higher-ranked officers have been accused of engaging in acts of torture but have not had any indictments filed against them. The department has also not yet filed any indictment on the basis of command responsibility. Command liability is usually not treated as a criminal matter. In the case of Gerald Perera, the Supreme Court found that the inspector general of police had violated the complainant's rights by virtue of the torture he suffered at a police station. His name was at first included in the subsequent criminal indictment filed at the high court by the department. However, later senior counsel representing the department withdrew his name on the basis that his liability was vicarious: falling under civil law only.

AHRC partners in Sri Lanka pursue cases with the Department of Attorney General both through Hong Kong and through direct communications from lawyers. They also lobby the department publicly when it appears that it is not taking action in certain cases, with some success. Again, as a result we are able to gather detailed information on the manner in which the department deals with indictments and prosecutions, which is documented and analysed as part of the overall work to prevent torture.

The courts

Judicial activities against torture take place at magistrate's courts; high courts, under Act No. 22 of 1994; and the Supreme Court, where fundamental rights issues are taken up and matters of compensation are usually decided. Some actions for compensation also take place in civil courts. Besides these, sometimes writ applications are made to the Court of Appeal. Around a hundred cases are pending before the courts on cases in which the AHRC and its partners have direct interest.

Cases invariably take several years. Delay in trials is one of the major obstacles to remedies for victims of all human rights abuses in Sri Lanka, including torture. By attending cases we again obtain information upon which we can develop commentary on this problem. One of the causes of delays is repeated postponement of cases in the high courts and magistrate's courts.

Parties to cases typically have to appear at least six times during a year. If related cases are before both a high court and magistrate's court, it means at least 12 appearances. Two cases run concurrently when the Department of Attorney General files a case against the police under Act No. 22 of 1994 while the police meanwhile file a criminal case in the lower court against the victim. In the high court the torture victim appears on behalf of the prosecution to give evidence against the police. In the lower court the police are meanwhile leading a case against the victim. The victim is compelled to fight the case in the lower

court while supporting the prosecution of the police in the higher court. At the same time, a fundamental rights case may also be heard before the Supreme Court over a period of up to six years.

By attending court proceedings we obtain two types of information. On the one hand, there is knowledge gained about the nature of the proceedings in each of these courts in cases of torture, including trial procedures, use of evidence and forensic science, and matters of adjudication. On the other hand, these proceedings also give insight into delays, needs for witness protection, the work of legal professionals and problems that members of the legal profession taking cases of torture face in court. Besides the observations from being in court, we obtain certified copies of court proceedings, including the files from the beginning to end of trials, applications and replies, and other documents in fundamental rights cases as well as the judgments delivered by the courts.

> "Since 2006 the commissioners of the NPC have been appointed in contravention of the constitution, which has severely undermined the commission's legitimacy"

National institutions

The two national institutions of greatest relevance are the Human Rights Commission (HRC) and National Police Commission (NPC). Torture victims make complaints to both of these, and partners of the AHRC as well as its Urgent Appeals desk in Hong Kong send letters on behalf of the victims to both of these institutions almost daily.

The HRC conducts inquiries into torture cases about which we have obtained detailed information from direct involvement. The AHRC has released several commentaries and statements on these inquiries, pointing to their inherent flaws in law and practice, the latter including in terms of administration and staff competency.

The AHRC and partners worked closely with the NPC during the time that it functioned in accordance with its constitutional mandate, from 2003 to the end of 2005. The AHRC also submitted a detailed proposal for the creation of a public complaints procedure under the NPC as required by the constitution, which was partially adopted in January 2007. However, since the beginning of 2006 the commissioners of the NPC have been appointed in contravention of the constitution, which has severely undermined the commission's legitimacy.

International agencies

We communicate with United Nations mechanisms, including the UN Special Rapporteur on torture about cases in Sri Lanka almost daily. Detailed letters sent to the rapporteur give case information upon which to enable him to request a response from the government. Since 2002 the rapporteur has sought explanations from the government over more than 30 cases submitted by the AHRC each year. In fact, the number of cases submitted by AHRC on torture in Sri Lanka is much larger than anyone else. And in many instances the government has

acknowledged that the allegations are accurate and that actions are being taken to investigate and possibly prosecute the offenders.

"The Supreme Court has observed that superior officers' conduct infers that they condone torture"

We have also made related shadow reports to the UN Committee against Torture and the Human Rights Committee. In the recommendations of these committees one can find that they have pursued and used the information provided through the shadow reports and reached similar conclusions. Besides these reports, we have sent representatives of partners and victims to meet these committees during their consultations and have had occasion to meet in private and lobby members on the basis of the information we have submitted.

The AHRC and its partners in Sri Lanka are also involved in an international project to promote the Optional Protocol to the Convention against Torture in four countries of Asia.

Some findings

Through long years of work on torture in Sri Lanka we have found the following:

I. Police torture

a. Police torture is endemic and routine. Torture is often not done to extract information but for other reasons, such as to find substitutes for unresolved crimes, show results to superiors, or for statistical purposes. It also occurs with frequency due to habits that encourage the use of force on anyone arrested, due to feelings of the arresting officer that he is not being paid proper respect, or for reasons of extracting money and favours. In almost all cases the victims are poor, with very few influential social connections.

b. Officers in charge of police stations condone torture and often engage in it themselves. Almost always they try to cover up incidents of torture when complaints emerge. The departmental orders for police have extensive rules to prevent torture but these are largely ignored. They also provide for visits by superior officers; however, these visits do not take place as and when required. Few senior officers have strong views against torture.

c. Command responsibility in the police is weak. Comments from the courts and police and direct observation have it that the head of police and other high-ranking officers have done little to prevent torture. The Supreme Court has observed that superior officers' conduct infers that they ignore or condone torture.

II. Investigations

a. Investigations invariably only follow from heavy outside pressure, particularly from the UN Special Rapporteur on torture and other international channels. Complaints that are not accompanied by such pressure are usually ignored.

b. When investigations are referred to the SIU the evidence suggests that investigations are conducted competently and impartially. When assigned and left to do its work, the SIU does

have the capacity to conduct thorough investigations, even against police officers. However, its inquiries also are beset by delays, as they begin only months after a complaint is first made. Thereafter it may take over a year before submitting a final report to the attorney general. The number of cases it is handling also is very small relative to the number of complaints made.

"HRC inquiries lack competence and adequate powers"

c. Investigations by higher-ranking police officers in the regions where incidents are alleged to have taken place do not show the same type of competence and impartiality as the SIU inquiries. In many instances these have been accompanied by attempts to discourage victims from pursuing complaints.

d. HRC inquiries for the most part lack competence and adequate powers. The commission itself admits that its inquiries "do not amount to proper criminal investigations into torture". Its inquiries also entail delays, during which time various methods are used to discourage victims from pursuing complaints. In many instances inquiring officers from the commission do not show an understanding of international norms and standards relating to torture, to the detriment of their work.

e. The NPC is mandated to inquire into allegations of torture from a disciplinary point of view. Its inquiries should be conducted through its local representatives; however, in practice it refers them to senior police and asks them to submit reports. In January 2007 the NPC published a gazette extraordinary regarding the public complaints procedure against police officers. How this will operate is yet to be seen.

III. Prosecutions

a. There are considerable delays in prosecuting cases of torture, sometimes of over two years, from the receipt of investigation files by the Department of Attorney General to the time that indictments are filed. The department attributes delays to a shortage of staff. However, it is apparent that the department does not make torture cases a priority, and nor does it see any reason to do so. Rather, prosecutions follow only from external pressure rather than by way of normal practice and legal obligation. According to official figures, the success rate in prosecutions is a mere four per cent. This may be even less in torture cases due to this behaviour by the department, as well as the official position held by the accused and social prejudices in his favour.

b. The department also does not make applications in court for speedy hearing of torture cases. Sometimes the explanation given unofficially is that such applications often fail and that the better course is to be prudent and not to press the court. In one case, even after the UN Human Rights Committee requested the state party to ensure that the trial be speeded up in a specific case, counsel from the department did not make any application to court to do so.

"The filing of charges on torture has shown a lack of understanding of international law"

c. Delays in filing prosecutions seriously affect victims and witnesses. This is one reason that victims are discouraged from pursuing cases. The department in fact encourages victims and witnesses to withdraw. It creates the impression that it has done its duty to prosecute and indirectly blames the victims and witnesses for failing to achieve a successful result.

d. From experience and interviews departmental officials we have concluded that the department is not strongly interested to prosecute torturers as a matter of policy to prevent recurrence of the practice. On the contrary, as a matter of policy it does not want to prosecute any officers above the rank of inspector of police, even if there is evidence of direct involvement in torture, let alone on the basis of command responsibility.

e. In several instances the filing of charges on torture has shown a lack of understanding of the international law on torture by the department, even though the domestic law came as a result of Sri Lanka ratifying the international convention. There is a disparity in the way the department distinguishes vicarious liability of higher officers as a matter of civil law and Sri Lanka's obligations under the UN Convention against Torture and the International Covenant on Civil and Political Rights (ICCPR).

f. Notwithstanding, in several cases counsellors representing the department have shown exceptional competence and integrity when prosecuting torture cases, despite the many difficulties institutional and judicial obstacles put before them.

IV. High court trials

a. There have so far been two successful prosecutions of torturers in separate high courts. Both took two to three years to complete. In one case the accused officer reportedly fled abroad before the verdict was given. Other cases have been unsuccessful. In many the victims have come forward to state that they do not wish to proceed with the case, due to serious threats coupled with inducements. Some victims have tried to resist but have been pressured by their families and peers after they also have been approached and coerced by the accused or their colleagues. In one well-known torture case the accused was killed about a week before he was to give his testimony in court. Investigations revealed that the alleged perpetrators of the torture were behind the killing.

b. In the high courts there is now a habit of postponing trials after taking evidence for a short time, which results in cases dragging on unnecessarily. Each day many cases are included in the trial roll and only a very short time can be devoted to each case. The earlier practice was for trials on serious offenses to be taken from start to finish. Often trials would end within three or four days. This practice has now been abandoned, which has brought considerable difficulties to victims.

c. Some judgments show that judges are confused about the law against torture. Some have held that police officers injuring persons in their custody have not committed torture, as the

purpose was not to obtain confessions. One judge held that though the accused police officer used excessive and unnecessary force and caused extensive injuries this did not amount to torture. Judges may also be reluctant to convict due to the mandatory seven years' imprisonment as punishment for torture.

d. Overall, the high courts discourage pursuit of complaints against torture rather than encourage attempts to ensure liability of the offenders.

V. Supreme Court fundamental rights cases

a. While complaints of torture are increasing, fundamental rights cases filed at the Supreme Court are in steep decline. This decline is attributed mostly to lawyers (and even some human rights activists) advising victims that the likelihood of success in such applications is less now than before. Cases are frequently rejected without issuing notice, and usually no reasons are given.

b. The compensation granted to successful applicants in fundamental rights cases for torture has steadily diminished. Some attempts were made earlier to set high standards for compensation; for example, the equivalent of around USD 8000 in serious cases, Nowadays, the amount may be from the equivalent of USD 100 to 250. There has not been any explanation for this decline. Although the purpose of filing a fundamental rights case is not to obtain compensation alone, low amounts discourage victims from trying.

c. The Supreme Court a few years ago made some attempts to incorporate international norms on human rights into domestic law through its judgments. However, in recent years it has taken the view that even though Sri Lanka ratified the ICCPR, the covenant is not binding in the courts and even that the signing of the Optional Protocol may have been beyond the authority of the government. There is a vast and widening gap between the law as expressed in the Supreme Court judgments and the international norms and standards. The views of the UN Human Rights Committee on violations of rights by judgments in Sri Lankan courts, including the Supreme Court, have not been respected.

Some conclusions

a. There are deep flaws in all parts of investigation, prosecution and the judicial process in Sri Lanka that inhibit work to eliminate torture. Many defects serve to encourage and enable torturers. At the moment no reforms are envisaged. Emergency and antiterrorism laws introduced due to civil conflict have exacerbated problems and hampered discussion about the need for reform.

b. Currently, the burden of prevention rests heavily on civil society. Our support for victims is the only means available to keep interest alive and obtain some redress through prolonged actions in courts, under severe harassment. The only form of witness protection is that offered through the community. Still,

"Deep flaws in all parts of investigation, prosecution and the judicial process in Sri Lanka inhibit work to eliminate torture"

many individuals and groups have willingly faced all the difficulties involved in providing support for torture victims and maintained public discussion on the prevention of torture.

"Recommendations of UN committees have not been detailed enough to address the deep institutional problems enabling torture"

c. The public is interested to participate in discussion on torture and related problems. However, both state and private media are actively discouraged from giving serious attention to this problem. Human rights groups and others working with victims have had to work out how to communicate efficiently and keep debate alive. Our experience shows that this is possible despite many limitations.

A note on studies on torture

Our first report on torture was published as an issue of *article 2* in August 2002 (vol. 1, no. 4). This report consisted of 22 cases and analysis of the causes of torture in Sri Lanka. It was followed in February 2004 by another volume, in which 33 cases were accompanied by commentary on prevention of torture (vol. 3, no. 1). Thereafter we published *An x-ray of the Sri Lankan policing system and torture of the poor*, in which there are about 65 cases and also many related articles (AHRC, 2005). Two shadow reports to the UN Human Rights Committee and Committee against Torture in 2003 and 2005 contained a large amount of details on torture in Sri Lanka together with analyses and recommendations for its prevention. Besides these, several articles have been published in journals and books have been published in Sinhala, and relevant chapters have been included in the AHRC's regional roundup reports for 2005 and 2006. AHRC staff and partners have also written literally hundreds of articles for national newspapers.

In the course of our work we have tried to find relevant material from international publications to guide us. We have been able to find some. However, we have also found a vacuum in the literature on torture. There is especially a dearth of material on institutional causes for torture. It is difficult to find studies on endemic routine torture in police stations as a consequence of the criminal justice system itself. On the contrary, many studies tend to assume that there exist minimum-functioning institutions to investigate, prosecute and try torture perpetrators. As a result, they are of limited relevance to most Asian countries, including Sri Lanka.

We have also noted that the recommendations and observations of United Nations committees dealing with torture, while welcome, have not been detailed enough to address the deep institutional problems enabling torture. The government has anyhow ignored their recommendations and decisions. If their recommendations are to be made effective and worthy of effort to see implemented, these UN bodies must obtain a much better understanding of the nature of violations and how they grow from institutional roots.

Some other editions of *article 2* on Sri Lanka

‘Contempt of the constitution: Reaching the zenith of disregard for the rule of law in Sri Lanka’
Kishali Pinto-Jayawardena
in vol. 5, no. 2, April 2006

Focus
An x-ray of the Sri Lankan policing system & torture of the poor
vol. 4, no. 5, October 2005

Special edition
UN Human Rights Committee decisions on communications from Sri Lanka
vol. 4, no. 4, August 2005

‘Tales of two Sri Lankan massacres: The relevance of Embilipitiya to Bindunuwewa’
Basil Fernando
in vol. 4, no. 3, June 2005

‘Victims of crime & the judiciary’
K C Kamalasabesan
in vol. 3, no. 4, August 2004

‘Urgent Appeals file: Tissa Kumara—Incomprehensible cruelty & systemic neglect in Sri Lanka’
Asian Human Rights Commission
in vol. 3, no. 3, June 2004

Special report
Endemic torture & the collapse of policing in Sri Lanka
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