Undermining of the Legal and Political Systems

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The Political System and the Criminal.

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"How often have I said that when you have excluded the impossible whatever remains, however improbable, must be the truth."

– Sherlock Holmes, The Sign of Four by Arthur Conan Doyle

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INTRODUCTION

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

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

There is thus a situation of distrust in both the political system and the criminal justice system, which have mutually contributed to generate negative perceptions against the possibility of any reforms.

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

Therefore, understanding the manner in which the problems within the political system undermines criminal justice and also the manner in which the wrongs of the criminal justice system contributes to the undermining of all attempts to reform the political system have become an unavoidable necessity.

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

In terms of Sri Lanka, we have explored the possible ways in which the criminal justice system can be improved, in order to support the attempts to re-strengthen the democratic institutions that have suffered a great setback in the last four decades. The presidential and the parliamentary elections held in 2015 demonstrated a serious protest on the part of the people against this collapse and thus created an opportunity for change. Though the new government that came into power has created a greater space for freedom, measures for genuine reform are still negligible. Particularly in the area of criminal justice reforms, there have virtually been no policy developments to introduce necessary changes in order to undo the damage done over the past few decades.

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

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

1

Consequences of letting a criminal justice system perish

1.1. The loss of deterrence against criminality

Strong deterrence is needed to control criminal actions in any society. This is the experience in all societies. The need to discourage the propensity towards commission of crime by demonstrating that very serious consequences will necessarily follow commission of any criminal action is, so far, the only effective method that human societies have found against crime. That said, even this is not adequate defence against crime, as crimes are committed despite the possibility of facing very serious consequences. However, the global experience is that where there are rationally strong criminal justices institutions, protection against crime is much greater than in those where there is less effective or no criminal justice control.

1.2. Encouragement of "manipulative-ness" within society

Human potential for manipulation is enormous. And, human experience in any society shows the extent to which the good is defeated by those capable of all kinds of schemes that

promote their limited interest, rather than the greater good of the community. It takes a highly developed criminal justice system to convince the society that it is organised enough to defeat any manipulative scheme, however sophisticated the scheme may be. Lack of an effective criminal justice system acts as an encouragement for manipulative-ness, and the society then ends up facing all kinds of unimaginable schemes that stymie movement towards greater good.

1.3. Threat to liberty by the manipulation of arrest, detention, and arbitrary killings

A viable criminal justice system creates the law and the rules to prevent illegal arrest, illegal detention, and arbitrary killing of persons. All the processes of arrest are circumscribed by many rules relating to the protection of persons. When there is a severely weakened criminal justice system, all these rules can be suspended and all the procedures based on such rules can also be suspended or ignored. This can be illustrated in lengthy details if one takes Sri Lanka as an example.

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

A well-functioning criminal justice system depends very much on competent and impartial investigations that seek evidence against allegations. This protects people from false allegations. This is also the case for prosecutions. When the system can create the confidence that only those against whom there is very credible evidence regarding commission of crime will be prosecuted, it is a functioning system. The same is applicable to fair trials and other actions that will take place in court. If these institutions lose credibility, then the population will not take the very idea of criminal justice with any seriousness. Investigators,

prosecutors, and even the judicial system will be seen as predators rather than protectors.

1.5. Encouragement for abuse of power of politicians as well as State bureaucracy

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

1.6. Undermining of the political system

All aspects of a political system from the formation and functioning of political parties down to all the aspects of electoral systems need to be controlled through the mechanisms of the criminal justice system. Of particular importance is the control of finances relating to all political actions. Where this aspect is not controlled through a sophisticated criminal justice framework,

the inevitable consequence is chaos within the political system itself. Naturally, such chaos of the political system spills over into all aspects of society and thus creates societal chaos and confusion. The basic ideals and the values of a political system can be preserved only to the extent that all deviations from such ideals and values could be subject to criminal sanctions.

1.7. Undermining of measures to control corruption

It is an axiom that power corrupts and that absolute power corrupts absolutely. While the use of power is a necessary condition for achieving any societal goal, it is also an undeniable reality that power, when not subject to controls, can be an obstacle to achieve any of those goals. The health of a society requires a fine balance between the use of power and the control of such power. While the achievement of such a balance requires many frontal approaches in an ultimate sense, the ability to impose sanctions and to enforce such sanctions is the final guarantee for the achievement of such a fine and delicate balance. A weakened criminal justice system upends this balance by loosening the controls and as a result power and unfettered corruption become a synonymous and damaging daily reality for those unfortunate enough to be living under such a system.

1.8. Threatening the protection of vulnerable groups

The trampling of the weak by the more powerful is a universal experience. Within human society, the protection of the weak is one of the most difficult tasks to achieve. Mere moral exhortations and education is not adequate to deal with this issue. There needs to be strict criminal sanctions against all such "trampling-downs" of the weaker and vulnerable sections of society. Such a regime of sanctions can only be designed and put into effect through a well-functioning criminal justice system. In this regard, the protection of women and children figures prominently. The possibility of sexual abuse is an over whelming human problem. While solving of this problem requires manifold

approaches and complex strategies, in the final analysis, a system of sanctions against every form of abuse is essential for the protection of all such vulnerable groups from abuse. Failure to develop criminal justice strategies in dealing with this problem invariably leads to many forms of peril not only for the vulnerable groups but also society at large.

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

People need to feel that solidly established frameworks and mechanisms exist for their protection. On one hand, the knowledge and awareness that such a system exists and that the assistance of such a system can be relied upon contributes greatly to the sense of wellbeing of all persons. On the other hand, an absence of such a framework can create many forms of insecurities and people can feel threatened. Such psychological conditions of insecurity can give rise to all kind of psychological ailments and also develop propensity for violence in many forms. Where there are serious problems arising from such insecurities, living there under those conditions can become a veritable hell. A sophisticated criminal justice system is able to create an assurance to all persons that in the event of any danger there are arrangements for obtaining security speedily.

1.10. Creating and maintaining mutual distrust among the people

Societies where disorder prevails are also places where mutual trust among the people who live in such circumstances also degenerate and disintegrates. A well-functioning criminal justice system – by building strong barriers against societal disorder and by creating limits within which conflicts can be managed without causing unnecessary harm – creates an environment within which people can live with greater mutual trust. The absence of such trust itself becomes a source of more conflict and friction. A well-functioning criminal justice system,

by creating a healthy environment through limits created against illegal behaviour, contributes to enhancing mutual trust. Such mutual trust, in turn, creates greater cooperation between people, which itself strengthens social bonds and negates the more destructive and negative interactions between individuals.

1.11. Disrupting cooperation and the constructive spirit

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

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

The contribution that a properly functional criminal justice system makes, to create an environment for greater cooperation, generates the possibility of creating and maintaining higher norms and standards within a particular community. On the basis of such higher norms and standards, societies can improve expectations in all aspects of life. Societies where such criminal justice mechanisms do not exist undermine the possibilities for setting higher norms and standards and thereby lower the expectation of the people who live within such societies.

1.13. Disrupting possibilities for greater professionalism

Professionalism depends on maintenance of a set of norms and standards that become the guidelines for activities and

practices of persons within a particular profession. In societies where observers of such norms and standards are being pursued by all professions, the people have the possibilities of obtaining the best services from all these professions. This way, the quality of life in such societies becomes better. To achieve this status, it is essential to lay down the parameters that are essential for the observance of such norms and standards. When norms and standards become only declaratory, and are not followed by strict rules enforced by a robust criminal justice system from which no one will deviate, a chasm manifests between the declared norms and standards and the actual performances. Under such circumstances, various modes of cheating and double dealing spread among the members of professions, thus bringing down the quality of services that they will provide for the society. When professional misconduct becomes widespread, great cynicism will spread throughout the society. It will bring down the quality of all the institutions of such societies. Professionals benefitting from human suffering will become one of the ugliest spectacles of such a society. Naturally, indifference to the sufferings of fellow human beings will become widespread. Sense of powerlessness and hopelessness will spread to every aspect of life. Thus, achieving a higher quality of life, through better services offered and maintained by professionals, will depend on the viability of the criminal justice institutions within a country.

1.14. Disrupting the development of intelligence

When disorder and lawlessness prevail within a society, the scope for human intelligence will degenerate therein. Crudeness and foolishness may be rewarded within such a social context rather than intelligence. Often, intelligence itself becomes so warped under such circumstances that it will be used more for manipulative functions, for instance for profiting by cheating, rather than by way of creative engagements contributing to the greater good. Societies that degenerate into lawlessness show how unscrupulously people can engage in the most despicable means and abhorrent forms of behaviour. For example, it can

degenerate into the creation and maintenance of gas chambers, and other more inhumane forms of human activities that we have witnessed in many societies in recent history. When this happens, many people will be discouraged from the pursuit of greater goals through the use of their intelligence, and thereby the standards of the cultural institutions may sink to their lowest depths. Thus, properly functioning criminal justice institutions, a product of greater human intelligence, create an environment within which human intelligence can find many modes for creative pursuits, which directly or indirectly contribute to the greater good.

1.15. Undermining the authority of all public institutions

The authority of public institutions rests on the possibility of enforcing their decisions if these decisions are ignored or disrespected. If the criminal justice system has become dysfunctional, it is unable to enforce any of the decisions of public institutions in a legitimate manner. This may lead the beneficiaries of some of the decisions made by these public institutions to resort to illegal means to get these decisions enforced. For example, if a decision given by a court, or any other authority, requiring a trespasser into someone else's property to leave such property and ensure the return of the property to the party that the public authority decides to be the lawful owner, then the lawful owner may have to resort to criminal elements to try and expel the trespasser. If there is a general view in a particular community or society that the decisions of a public authority are usually ignored by the law enforcement authorities, then there may develop a general tendency for people not to resort to lawful authorities to resolve their disputes altogether. They may directly resort to criminal elements or attempt to get the law enforcement authorities themselves to act illegally, by way of bribes and other corrupt influences. All conflict dispute resolution attempts may thus drift away from resorting to lawful authorities and instead seek the assistance of criminal or other illegal agencies. The situation may even further degenerate to

the extent that people will try to misuse lawful authorities as well as the law enforcement authorities by bribery or other corrupt means in order to get their demands met, as they no longer trust that they can achieve their aims by lawful means. The result could be the widespread bribery and corruption in the offices of all public authorities and in the institutions themselves.

1.16. Displacing the rule of law

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

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

Something being legal makes sense only to the extent that it is possible to enforce such legality by sanctions. Sanctions become meaningful only to the extent of the capacity of the criminal justice system to be able to enforce its will. In a dysfunctional system, larger and larger areas of public activities begin taking place in grey areas, wiping out distinctions between legal and illegal behaviour.

1.18. Makes the protection of human rights practically impossible

Human rights protection depends on the capacity of the law enforcement agencies to ensure that violations of rights will be prevented through proper enforcement of the law. The enforcement of the law is possible only when the criminal justice

system can ensure such enforcement. When a criminal justice system is allowed to become dysfunctional and fester, protection of human rights via law enforcements becomes impossibility.

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

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

2

Why investigations into mass graves failed so far

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

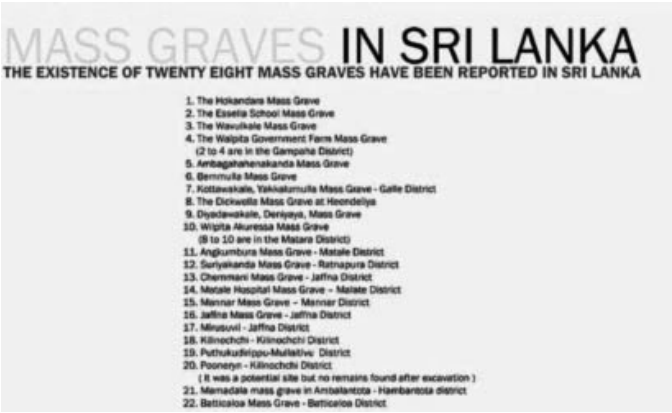
The chronic pattern of impunity still exists in cases of enforced disappearance and sufficient efforts now need to be made to determine the fate or whereabouts of persons who have disappeared, to punish those responsible and to guarantee the right to the truth and reparation."

[Preliminary Observations of the UN Working Group on Enforced or Involuntary Disappearances at the conclusion of its visit to Sri Lanka, November 2015]

"The existence of a mass grave may come to the notice of the public by many different ways; a statement by a witness made during a court hearing - as in the case of Chemmani Mass Graves: discoveries of some scattered remains of bones by workers when digging a site for constructions purposes, as in the case of the Matale mass grave; or by surfacing of some remains of human bodies as a result of heavy rains or due to any other accidental reasons."

However, what happens after such a revelation does not depend on accidental reasons alone but on very objective factors

such as the political will of the government in power in a particular time to uncover the mystery behind such surfacing of a mass grave with the view to ensure that the law is enforced irrespective of whatever political circumstances, the corporation of the law enforcement agencies to do their duties in the investigation into all the circumstances which has led to the making of such a mass grave with the view to prosecute the offenders, and the technical capacities that exists within a particular country to engage in a scientific inquiry into the discovery of the secrets contained in the materials that have been discovered from a mass grave and many other factors.



Sri Lanka is a place where very many mass graves have been discovered as shown in the illustration which mentions 22 sites where mass graves have been discovered. Since the publication of this map, few more places have been added to this list.

Chemmani Mass and the Matale mass grave are the only two instances in which some progress was made in terms of a judicial inquiry to discover their backgrounds, however even in those two instances after the beginning of some initial steps mainly due to expressions of public opinion from local as well as international sources, the entire process has been stopped. Many excuses have been given for such stoppages, which are basically of technical nature.

However, close scrutiny of these circumstances clearly indicate that there are far more serious objections to inquiries

into mass graves than those which are merely technical. Those serious objections are based on political considerations which should not have entered into considerations relating to inquiries of those considerations about serious crimes which are possibly involved in the burial of many human bodies in a mass grave.

Thus there are more serious considerations for the failure to investigate into mass graves should be looked into from the perspectives of the nature of the criminal justice that exists in a particular country. Therefore, probing into a mass grave is in fact, scrutiny into the very nature of criminal justice which in the first place made the possibility of the creation of mass graves followed by a prolonged resistance to uncovering the truth which lies behind such mass graves.

When thus, a criminal justice system allows for measures to be approved by a government and carried out by law enforcement agencies, which result in the creation of mass graves. When very detailed micro studies are needed into the uncovering of political and legal measures that has gradually led to the protections written into a criminal justice system, in terms of arrest interrogations and carrying out punishments for alleged offenders. There is thus much more to be discovered, through studies in the legal process that enables the creation of mass graves, than what the remains of dead bodies and other materials that may be discovered in a mass grave.

A close scrutiny is likely to reveal that a very political process that made the possibilities for circumventing the protections of individuals contained in a criminal justice system that also later prevents the proper inquiries into the mass graves.

What this implies is that the study of the mass graves must be considered only as a sub-branch, of the studies into enforced disappearances. What made a government directly or indirectly approve the removal of measures for the protection of individuals which are contained in any legitimate criminal justice system, in order to enable enforced disappearances of persons? This question is much wider than a study into merely a particular mass grave. The factors that enable the possibilities of enforced disappearances need to be studied in the first place when trying

to understand what is in a mass grave and the reasons for serious obstacles being created for engaging in any real judicial and forensic inquiry into the remains that are found in a mass grave.

There were many occasions at which large scale disappearances took place in Sri Lanka; a rough sketch of such disappearances is indicated in the box given below: for more details please see Phenomenon of disappearances in Sri Lanka by Mr M C M Iqbal.

1971	-	In supressing the JVP, over 10,000 persons were made to disappear
1984 -1987	-	North and east, over 680 persons disappeared reported by Amnesty International
1987 - 1990	-	Indo Lanka Accord, the Indian Peace Keeping Force (IPKF) involvement, North and East disappearance of large number of persons
1987-1991	-	Suppression of the 2nd JVP rebellion, approximately 30,000 persons disappeared
1990	-	Hostilities between the LTTE and the Government, disappearance of around 3000 people reported by Amnesty international
2004 - 2009	-	Since the breakdown of the ceasefire; in the North and East, a large number of persons disappeared

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

the "Introduction to the study of the law of the constitution" (All Souls College, Oxford, 1885) as follows;

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

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

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

1. Introduction to the study of the law of the Constitution, 10h edition, London, Macmillan, 1959, with an introduction by E C S Wade Q.C., pp. 207-08

A security officer who thus abducts a person had no duty to justify his actions. Thus the burden of proving legitimacy of an arrest by any person acting on behalf of the state was thus removed. Once the duty of justifying an arrest was virtually removed, there was no legal technique by which the state could supervise the legality or illegality of an arrest.

Thus what really took place by way of allowing abductions in the place of arrests was to legitimise arbitrary arrests.

Once the arrest could be made outside the law then the doors are closed to monitor the detentions of persons so 'arrested'. In normal circumstances a person who is arrested needs to be produced before a court, within 24 hours which later extended to 48 hours. However, there is no possibility for ensuring any such production of persons before a Magistrate when the arrest is in fact denied. Thus in terms of arrests and detention the abducted person becomes a legal non-entity.

Under the normal law the purpose of arrest is to conduct investigations into an alleged crime. However, obligation for investigations is removed when the person is treated as a legal non-entity, and thus a person could be detained for whatever reason and no further investigations need to be conducted.

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

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

However, all such powers are being transmitted through security officers when the aim of the 'arrest' is to commit an enforced disappearance. The security officers are thereby given judicial functions and judicial powers. What is more is that such functions could be exercised without keeping any kind of official record.

Under the normal law, even when a judicial officer exercises the right to judge on the guilt or innocence of a person such judicial officer is obligated to conduct the inquiry into the guilt or the innocence of the person by way of a fair trial . One of the basic rules of fair trial is that such a trial should be conducted in open court. Thus, the inquiry into the guilt or the innocence of the person is done with full transparency and the public have a right to watch such a trial. This way any kind of secrecy is denied even to a judicial officer who is conducting an inquiry into the guilt or the innocence of a person. However, when security officers are conducting the 'trial', they are allowed to do that in complete secrecy. Whatever that transpires will be known only to the victim and the security officers involved. In this way, security officers could exercise judicial powers without having any obligation to observe the legal procedures that even a judicial officer is expected to follow.

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

Under the normal law, the manner in which a punishment prescribed by a judicial officer is to be carried out is also determined by written legal provisions if the death sentence is prescribed by the judicial officer, the manner in which such an execution can be conducted is laid down by other laws and regulations. The prison authorities and the executioner merely follow those rules. Further every act that they conduct is also recorded and such

records are official records. The security officers that carries out a 'death sentence' which they themselves have prescribed are not under obligation to follow any legal procedures or to maintain a record of what they do and the manner in which they carry out their own orders to themselves.

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

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

Under the normal law, when arrests, interrogations and trials, are being conducted all who are involved are under an absolute obligation to prevent torture or ill-treatment on the suspects. It is an absolute prohibition, which is guaranteed by the constitution. Further, constitutional and penal laws have prescribed serious

punishments for those who violate the prohibition against torture and ill treatment. However, when the security officers carry out 'the arrests, interrogations and punishments' themselves, they are not obliged to prevent the use of torture and ill treatment. In fact the secrecy with which they conduct their activities assures them that they could resort to any kind of torture and ill treatment.

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

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

The question that arises is as to whether the state can arrogate to itself any activity without at the same time subjecting itself to the requirement of serving laws and procedures relating to justice. Can the state under any circumstances declare that it considers justice as an irrelevant concept. The obvious answer is that the state is always under obligation to act justly.

Having considered how legal principles relating to criminal justice is completely displaced by way of enforced disappearances we may ask ourselves as to the principles of which the states act when it authorises causing of enforced disappearances?

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

Thus we have two philosophical and jurisprudential positions one is as prescribed by A V Dicey, above, the fundamental principles of criminal justice where every interference into the liberty of a person has to be legally justified by the state. On the assumption that if no such legal justification is possible, the state is acting illegally. The opposite principle is that of the Cheka, where the state can authorise its agent to act without any reference to law. The issue of legality is completely irrelevant when looked at from the 'Cheka perspectives'.

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

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

Implications of the above considerations on investigations into mass graves

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

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

The result of not wanting to face this fundamental issue is that of looking for an escape from facing this situation by considering the enforced disappearances as acts of some officers who acted against the law and against the wishes of the governments in power during the time when such occurrences took place. Thus the real circumstances under which such disappearances took place is being overlooked and another 'reality' is being created with the hope of rapidly forgetting these incidents with some excuse that something was done anyway.

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

There has not even been a discussion on that fundamental issue. Therefore, finding a solution is not possible when the problem that is to be resolved is itself acknowledged or understood. The result of continuing in this situation is to allow even the loss of memory of a criminal justice system that existed once. As the memory is, itself being lost there is lesser chance of taking any real initiative to restore the principles of criminal justice once again.

When mass graves are looked into as only a part of the overall problem of enforced disappearances then it is not difficult to understand why so much of obstacles are placed against any genuine investigations into a mass grave when it is discovered. The reactions to such discoveries is to find ways to supress curiosity about the actual meaning of such a discovery and to sabotage all attempts at a proper investigation into such mass graves. It is this that happened in Chemmani and it is also that which was repeated when the Matale mass grave was discovered.

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

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

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

3

Inability to Mourn - THE SRI LANKAN EXPERIENCE

IN A FAMOUS BOOK entitled "Inability to Mourn", husband and wife team, Alexander Mitscherlich and Margarete Mitscherlich, wrote about the experience of post-war Germany. Their patients complained of all kinds of illnesses, which the two authors traced to a common phenomenon of the inability of the Germans to mourn for their past, particularly as the atrocities committed by the German soldiers across various warfronts were being revealed.

A somewhat similar experience can be seen in Sri Lanka after the extraordinary measures taken by the Sri Lankan security agencies in 1971 in order to crush what was in fact a relatively minor rebellion led by Janatha Vimukthi Peramuna (JVP). According to the statistics revealed by the Criminal Justice Commission, which was created to hear the case against the JVP, the number of deaths resulting from the JVP atrocities was 63 persons, with several hundred wounded. On the other hand, many sources have given the figure of over 10,000 deaths being caused by the security forces in retaliation. This 63:10000 ratio demonstrates the extent of the disproportionality of the violence used.

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

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

A question that has not been the subject of any study so far is why the Sri Lankan security forces were allowed to kill suspects after securing their arrest. The procedure required by law when making arrests, as well as in dealing with those who had been arrested, was quite well-observed at the time. The criminal procedure code that prevailed in 1971 Sri Lanka was based on the same principles that were adopted by the British colonial power in India, as well as in other South Asian nations. This criminal procedure law prescribed the rules relating to arrest, as well as investigations leading up to the filing of indictments, and the conduct of trials, as well as the manner in which the punishments could be meted out in courts.

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

In the absence of any explanation by the government at the time of these changes, the only possibility is to speculate on what may have been the reasonings of the government in allowing the security forces to act in the manner described above. The simplest explanation seems to be that the government did not think that merely securing of the arrest of insurgents was an adequate counter-insurgency measure. The government appears to have

acted on the basis that highly visible and immediate actions that communicated their decision to kill anyone connected with the insurgency was a necessary measure for crushing the insurgency. We may speculate as to what might have happened if the government had kept arrested persons in detention and let the law take its own course about what punishment should be meted out against them. This would have put the security forces in a situation where they could only arrest those against whom there was adequate evidence to demonstrate connection with the insurgency. It may have been the government's view that doing that would have retarded the ability of the security forces to quickly retaliate in an effective manner to crush the insurgency. It may have been argued that such a process of arresting persons only where there were reasonable grounds would have required considerable resources on the part of the government when dealing with a situation of mass arrests, as it was assumed that a very large group of insurgents were involved in an attempt to overthrow the government.When comparing this situation with the attempted coup of 1962, when some leading members of the security forces, such as the army, navy and police, planned a coup to overthrow the government of Sirimavo Bandaranayake, we see that all the suspected leaders of the coup were arrested and thereafter detained in special premises, where there were better facilities than in the normal prisons, and then brought before the courts. The courts dealt with them within the normal process of law. A trial was conducted and they were found guilty, with the opportunity to appeal to the Privy Council in the United Kingdom, which acquitted them on the technical grounds that they were tried under retrospective law. If the arrestees in the 1971 insurgency were given the same chance to utilise the law of the land and have the recourse to court for their defence, would it have made a difference to the counter-insurgency measures necessary to crush a rebellion? Safeguarding the rights of the arrested persons did not deprive the government of the right to kill persons in combat, as for example the instances where attacks on some police stations were dealt with by direct confrontation by the security forces. What then were the disadvantages that could

have been thought of as insurmountable difficulties in crushing an insurgency while dealing with the arrested under the normal process of law?

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

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

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

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

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

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

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

In counter-insurgencies, the target is often not merely the insurgents, but also the general population of a country. The aim of the counter-insurgency is to prevent any kind of popular support for the insurgents. The way this is achieved is often by terrorising the population into submission. There is no better method of terror than to exhibit dead bodies on the roads, canals and other public places. Thus the persons who have been arrested on suspicion of connections to the JVP would have been regarded as useful fodder for such exhibitions. In fact, after certain JVP attacks on security personnel, there were immediate counter-attacks with many alleged JVP members killed and their bodies exhibited on the roads. Besides the bodies, charred remains were left on display, the remnants of those burned to death with flaming tyres around their necks and other such methods. Thus, dealing with the arrested persons at the time was a more complicated matter than dealing with criminals under the law of the land. In a sense, insurgencies and counter-insurgencies generate a kind of public theatre, where dead bodies become dramatised objects for achieving the ends of such insurgencies and counter-Insurgencies.

Therefore, when we look into the 63:10000 ratio and see the disproportionate response of the government against the JVP, we see something which is far bigger than the issue of dealing with a crime. The whole episode of arrests, interrogations, killings and the disposal of bodies becomes the language of the politics of a counter-insurgency. In the heat created by the imaginary battle, reason plays a very small

role. A new kind of logic emerges in which one-time neighbours, friends, fellow citizens, begin to think of each other — or are made to think of each other — as enemies. People

become imaginary warriors of a war that is in fact created by clever strategists. This short reflection on the 1971 counter-insurgency shows the difficulties involved in mourning about the tragedies that took place within a community. It becomes painful to probe into what actually happened. Long years of discourse on the subject have been conducted on imaginary terms. For example, if one were to probe into the 63:10000 ratio of killings by the JVP and the counter-insurgency against the JVP, which exposes the myths about the "insurgency" and the extent of the actual capacities of the parties involved, one would necessarily have to contradict popular imagination and long-entrenched discourse.

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

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

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

But in a political experience, such as the cruelties that people commit against each other under the pretext of various conflicts,

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

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

4

PREVENTING THE IMPROPER USE OF - Force & Violence

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

In the context of industrialised western countries the struggle to eliminate the improper use of force and violence has a long history. Michel Foucault[2] illustrates how, before the 19th century, physical violence was used as part of a spectacle in the punishment of culprits. In the 19th century this approach was abandoned and replaced by imprisonment as the mode of punishment. Thus, for those who grew up in these western countries, the use of direct force on the body of a human being by an agent of the state has now become unfamiliar.

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

The answer as to why this remains so should be sought, not from officers of the security apparatus (police and military) as the agents of the state, but from the state itself. If not for the approval from the state, the police officers, military and others are unlikely

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2. Michel Foucault, Discipline & Punish: The Birth of the Prison.

to use such force and violence. In the event that any agent of the state on their own exercises such improper force on anyone, s/he would incur disapproval and consequent punishments by the state. What is usually called 'impunity' following the improper use of force and violence is a demonstration of the state's approval of the use of such methods.

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

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

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

The Asian Human Rights Commission (AHRC) based in Hong Kong has placed a high priority on the documentation of torture. Together with its sister organisation, the Asian Legal Resource Centre (ALRC), it has produced numerous reports and publications in which the problems relating to the implementation of the UN CAT have been very lengthily documented. The AHRC's Urgent Appeals system has concentrated on assisting

victims of torture in many Asian countries. As a result, a large body of information has been gathered in the Urgent Appeals archives. These are reports of individual complaints, which give vivid details on the practice of torture, as well as the limitations on the possibilities of the victims obtaining redress.

The following are some of the reports published by the AHRC/ALRC in the bi-monthly publication, Article 2:

AHRC_ALRC Documentation:

ALRC has published following reports of torture through its quarterly publication Article2; On SRI LANKA, Volume 1 no 4,i Volume 3 No 1ii,Volume 4 No 4iii, Volume 4 No 5iv, Volume 6 No 2,v Volume 8 No 4, vi and Volume 10 No.4vii; INDIA Volume 1 No 3viii,Volume 2 No.1ix,Volume 2 No 4 , x Volume 2 No 5,xi Volume 3 No 4xii,Volume 5 No 6xiii,Volume 7 No 2xiv, Volume 9 Nos 3 and 4xv, Volume 10 No 3xvi; BURMA, Volume 2 No 2xvii, Volume 2 No 6xviii, 5Volume 6 nos 5 and 6xix, Volume 7 No 3xx, Volume 11 No.1xxi; THAILAND , Volume 2 No 3xxii, Volume 4 No 2xxiii,Volume 4 No.3xxiv, Volume 5 No 3xxv,Volume 6 No 3xxvi; PHILIPINES Volume 5 No 5xxvii,Volume 6 No 4xxviii, CAMBODIA Volume 1 No 1xxix, Volume 1 No 2xxx, Volume 5 No 1xxxi, BANGLADESH Volume 5 No 4xxxii, Volume 10 No 2xxxiii, NEPAL Volume 3 No 2xxxiv, Volume 3 No 6xxxv, Volume 4 No 1xxxvi, Volume 7 No 1xxxvii; INDONESIA Volume 5 No 2xxxviii,Volume 9 No 1xxxix, PAKISTAN Volume 1 No 5xl, Volume 3 No 3xli, Volume 3 No 5xlii, Volume 8 no 2xliii and Volume 8 No 3xliv.

All these volumes are available at www. article2.org.

The State of Human Rights in Ten Asian Countries, published annually since 2005, devotes a chapter to each of these countries.[3]

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

A Table on the Improper Use of Force and Violence by the States in Asia

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

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

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

Approaches to the improper use of force and violence

The general approach to the improper use of force and violence is to attribute such abuse to the security agencies, such as the police, military and intelligence agencies. Some attribute such abusive practices to individual security officers and demand action against these individuals only. This approach has not proved adequate for the prevention of such improper use of force and violence. A more comprehensive approach is required in

examining the root causes for the prevalence of such abuses, rather than merely attributing it either to the individual officers, or even to the security apparatus as a whole.

The widespread practice of abuse that prevails indicates that the state, as the ultimate political authority in the country, bears the responsibility for its prevalence. Without the direct or overt approval of the state the individual officers of the security apparatus, or the security apparatus as a whole, cannot engage in such widespread necessary in order to keep the citizens under its control. The use of torture and ill-treatment as a spectacle in order to create a culture of fear and intimidation is a political strategy of social control. In the same way, enforced disappearances are also approved under certain circumstances, such as in a situation of rebellion or insurgency, as a method of instilling fear and to intimidate anyone who dares to rebel against the state. In this sense the example given by Michel Foucault in his book, 'Discipline and Punish – the Birth of the Prison' of the case of Damiens the regicide is quite relevant to the Asian context. This chart points to a broader number of factors that create situations where there is widespread abuse of power.

abuses. State responsibility is two-fold: that is, a positive responsibility, through its approval for the improper use of force and violence; and a negative responsibility, when it fails to take the necessary steps to eliminate such practices.

The general approach is to attribute only responsibility in the negative sense to the state; the failure on the part of the state to take the necessary steps to punish the perpetrators of

such abuses, and further the failure to take the necessary steps to ensure internal controls within the security apparatus in order to prevent the individual officers from committing such abuses.

However, this negative attribution is inadequate in explaining the widespread nature of such abuses, which are committed all the time. The positive attribution of responsibility to the political authority is justified on the basis that it is the overarching idea of discipline that the political authority holds and insist on enforcing which creates the space for such widespread abuses by individual officers and the security apparatus as a whole.

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

The political authority may consider that the widespread use of torture and ill-treatment is

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

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

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

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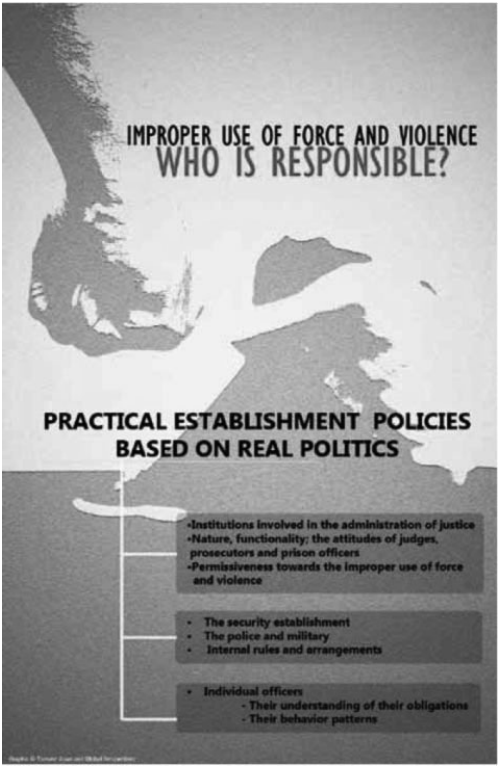
The need for a fresh approach to understand the improper use of force and violence in Asia (and, in general, for countries other than developed democracies)



This chart points to a broader number of factors that create situations where there is widespread abuse of power.

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

The approach that has become quite common in the human rights field in particular, and in the discourse on state violence generally, is to attribute it either to individual officers or to some of the defects of the security apparatuses in particular countries.

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

A similar distinction made in this paper relating to developed democracies and others is found in a recently published article by Dr. Nick Cheesman who is attached to the Australian National University. It is a useful reference and may be found in: The Hague Journal on the Rule of Law[4]. He makes the distinction between the rule of law and law and order. He further states that the two concepts are asymmetrical. The present paper is also based on that premise.

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The approach needed for prevention

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

4. http://journals.cambridge.org/ORL

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

The mere recommendations to investigate abuses and to prosecute them, as often demanded by human rights groups when violations are reported, do not go far enough to address the root causes of these problems. The capacity for investigations requires the freedom and independence to conduct such investigations. They also require the necessary resources, such as professional

training, forensic facilities and other material resources for effective transport, communications and the like. Granting such independence and freedom, as well as providing the necessary resources, is in the hands of the political authorities. When the political authorities lay down, directly or indirectly, the parameters within which the person working in these institutions should operate, these parameters ultimately control the manner in which the work of these institutions takes place. In any case, the political authority can determine what these other institutions may be able to achieve by the control of resources. Also, the political authority can also decide who to recruit or dismiss.

Thus, the concept of change from inside, meaning the change from within the institutional framework of the security apparatus, may not be a realistic possibility within a context where a political authority creates limitations on what the security apparatus is allowed to do. Thus, the change from inside concept must start with the change from within the political authority itself. It is only when the political authority internalises

norms and standards of justice that the rules which could operate within a particular society, including the rules governing the security agencies, could come into being. When the internalised conception of the political authority on modes of social control involves suppressing freedoms of individuals, the rules which are formulated by such political authorities will necessarily create a culture of repression. When the political authority creates a culture of repression, it is not within the capacity of the security apparatus to ignore or go against such rules.

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The rule-making function of the political authorities

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

In saying that an institution, and therefore the basic structure of society, is a public system of rules, I mean that everyone engaged in it knows that he would know if these rules and his participation in the activity they define were the result of an agreement. A person taking part in an institution knows what the rules demand of him and of the others. He also knows that the others know this and that they know that he knows this and so on.[5]

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

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5. A Theory of Justice, John Rawls, Harvard University Press, revised edition 1971, Page 48.

Political authorities as the shapers of criminal justice

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

Political authorities create the kind of criminal justice that safeguards the type of political system that they have created.

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

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

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

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

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Caution that should be exercised in reading international literature about the

This is particularly important in applying systems and rules which emerge in what may be called the developed democracies. Over several centuries, vast political changes have taken place in those countries. Particular types of political control have been *u*prooted and different forms of control have developed. Both the

political system and the criminal justice system have assimilated these principles and the principles are held in common in both the political sphere and the legal sphere. And the people, including those who are functionaries in the security apparatus, have internalised these principles. Thus, a person who is subjected to interrogation has the right to expect that he will be examined under the rules that are commonly held within his society.

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

prevention of the improper use of force and violence

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

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

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

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

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

The problem with this approach is that the perpetrators who are required to be investigated act on the basis of the policies and overall strategies designed by the political authorities represented by the government. The investigating authorities are also bound by the same policies and strategies that are authorised by the political authorities regarding the use of force and

violence. Besides this, the same political authorities control both the perpetrators and those who are supposed to investigate such abuses.

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

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

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

Whatever education that the personnel of the security forces may receive, they are duty-bound to carry out the policies and strategies that come from the political authorities who stand above them. When the same political authorities who have conditioned their behaviour also allow human rights agencies to carry out such educational programmes, it only creates cynicism. People from human rights agencies who have worked to impart such education have often heard remarks from security agency participants about how naive such efforts are in light of 'the real situation' in which they have to work.

c. Efforts to improve legislation without reference to problems obstructing the implementation of legislation once passed.

One of the primary areas of human rights work is to lobby for the improvement of legislation to incorporate remedies for violations of human rights. Thus, the campaigns for the criminalisation of torture and enforced disappearances, for example, receive top priority. The same applies

about every other aspect of the UN conventions. However, where there has been some success in bringing about such

legislation, the problem that has surfaced thereafter is that the law remains in the books and is hardly ever implemented. Any search for reasons for the government's failure to implement the legislation would reveal that if such law is implemented there would be serious political repercussions, including serious conflicts between the security agencies and the government.

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

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

Human rights groups work hard and assign considerable resources to assist victims in order to bring their cases to courts. However, once the cases are brought to court the course of justice is in many ways subverted by various problems, such as extraordinary delays in the adjudication process, insecurity caused by insufficient/ineffective victim protection laws and programmes, bribery at all levels of the adjudication process, and all sorts of manipulations which are allowed to take place to subvert justice. Thus, despite enormous efforts made by the victims and the human rights organisations, the results are some

very rare and occasional successes, and an overwhelming amount of failures and losses. With regard to the improper use of force and violence, where this is widespread it is not only the security forces that are responsible; it is the judicial branch as well.

The judicial branch also works within the overarching scheme of policies and strategies of a particular state. They are not in a position to ignore these strategies and schemes without causing serious disturbances to the usual management of the state. Often the human rights community works on the assumption that the separation of powers is a part of the state structure. Superficial observations of the external aspects of the courts are used to try to buttress the idea of the existence of the separation of powers. However, what often exists is well-entrenched unification of power in the hands of the executive, and the executive also manipulates the judiciary. One of the most common forms of manipulation is directly selecting judicial officers that act in compliance with the executive. To ensure compliance, any judge who even

slightly deviates from the expectations of the executive is subjected to punishment. On the other hand, those who comply are given many forms of rewards, including the engagement in corrupt practices. Human rights victims who reach court in search of remedies for the violations of their rights also get caught up in this web of manipulation.

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

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

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

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

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

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

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

There are several graduate and post¬graduate courses being introduced in an attempt to create a greater understanding on human rights. However, many of these courses conducted in countries outside developed democracies tend to follow the same syllabus as those followed in the developed democracies. Addressing the specific problems which exist within the framework of a specific context has not been a priority in designing these syllabuses. The

result is that the domestic obstructions to the implementation of human rights do not receive any attention. Often the education is more concentrated on international remedies for human rights, such as the International Criminal Court and other international tribunals, and matters such as transitional justice receive top priority in these syllabuses.

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

A further comment on the strategies mentioned above

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

can be educated and empowered through the motivation to see the meaning of their protests in terms of addressing root causes.

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

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Theory of change

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

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

should be developed by taking into consideration all the complexities that have made such widespread abuses possible.

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

The basic concept behind the theory of change could be formulated within the framework of Article 2 of the International Covenant on Civil and Political Rights (ICCPR). Article 2 obligates the state parties to ensure an effective remedy for violations of human rights. For this purpose, it obligates the governments to take legislative, judicial and administrative measures to ensure an effective remedy. Most commentators on Article 2 concentrate on legislative changes, such as, for example, the criminalization of acts which amount to improper use of force and violence - the criminalization of torture, forced disappearances, sexual abuse, and the like. However, what is often ignored is the obligation of

the state to take judicial and administrative measures to ensure an effective remedy. A holistic view of change from the law and order approach to the rule of law approach for the elimination of improper use of force and violence requires legislative, judicial and administrative measures. In short, the legislation must be in terms of the normative framework of the rule of law. The judicial framework should also be within such a normative framework, and the government should also ensure that administrative measures, such as budgetary provisions that enable the proper functioning of the judicial process through ensuring the necessary resources, both by way of personnel and other technical resources, are also within such a framework. The whole approach must conform to the normative framework of the rule of law. Issues such as the training of the security officers and their internal discipline could be satisfactorily addressed only within a legal system which is constructed on the basis of such a normative framework.[6]

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

5

Absurdities arising out of delays in litigation

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

- It changes the way litigation is conducted and encourages exchanging favors, as well as lying.
- It encourages using criminals and other third parties to settle disputes.
- Many judges preside over the same trial before its completion.
- It has caused the development of serious political and social tensions.
- The parties to the litigation suffer considerable financial losses.
- It increases the possibility of destroying evidence and harassment, and even the assassination of witnesses.
- It causes people to lose faith in the judiciary and the law.
- Women encounter particular pressures, including sexual harassment from various agents involved in the process.
- Serious criminals are allowed to move freely among the people.
- The witnesses gradually become discouraged and fail to be present at trials.
- There are ever-increasing loads of files, which gradually worsens the situation of delay.
- The inability to form reasonable expectations about when decisions will be made about matters in dispute.

- The corruption of the legal profession.
- The spread of corruption among the all the staff at the courts, and even the creation of opportunities for corruption by some judges.
- The spread of cynical attitudes regarding courts and the litigation process among the people, thus creating demoralization.
- The undermining of democracy and the rule of law.
- A significant loss of time for experts and government employees who are called upon to give evidence only to have the case repeatedly postponed.
- Good governance principles being undermined as a result of the loss of expectation of justice.
- The failure to deter crimes through effective punishment of criminals.
- A greater possibility of witnesses dying and thereby the loss of important evidence.
- The family disputes arising out of prolonged litigation.
- The serious undermining of institutional integrity.
- The devaluation of the very idea of justice.

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

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

often find it difficult to repeatedly come to the courts for many years. As a result, criminals can slowly get to being acquitted due to discouragement among the complainants or other witnesses.

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

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

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

that basis, acquitted the accused. The case has now been pending before the appeal court for several years.

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

6

A basic proposal to stop the collapse of the criminal justice system of Sri Lanka

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

I. Short Term Measure

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

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

As there are 20 criminal High Courts existing at present, increasing this number will not create a great burden on the government's finances.

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

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

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

The most significant achievement that could take place through this change is a major reduction in serious crime in Sri Lanka. This is based on the view that delay in the adjudication in criminal trials is the major cause for the increase in crimes in Sri Lanka. It is also is based on how the theory of deterrence works in terms of crimes. Speedy adjudication ensures that there would be speedy punishment of cases where the accused are found guilty. It is a universally accepted norm in criminal justice that certainty of punishment is the greatest deterrence against crimes. Delays in criminal trials mean the absence of such certainty. And it also means creating the hope for criminals to escape from punishment due to various extraneous factors that may result from such delays. In any event, even if a person is found guilty after such a delayed trial, the impact of the punishment will be much less than the impact of punishment meted out within a reasonable time. One reason for this is that by the time the accused is found guilty of committing a particular crime the memory of that crime would have already been lost due to the prolonged delay. This is what invariably happens in Sri Lanka. The social impact of punishment depends much on the impression that such a punishment would make on the people who have heard about such crime and who would expect such crime not to go unpunished. However, the memory of the crime itself and even such expectations are forgotten as a result of prolonged delay.

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

Naturally, the greatest impact would be on the criminals themselves. The prolonged delays, as it exists in Sri Lanka now, has created an impression among the criminals that they have a greater likelihood of escaping punishment, and that in any case their liberty will not be in jeopardy for a long time to come. Naturally, the knowledge of such delays will bring quite a lot of joy to the minds of criminals who are contemplating commission of serious crimes. Such hopes can be dashed by creating the possibilities of speedy trials within Sri Lanka.

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

Among the beneficiaries of speedy trials are the vulnerable groups, such as women and children, in particular. It is a daily complaint heard that rape and sexual abuse have increased in great proportions in Sri Lanka. Delays in criminal trials have contributed to this insecurity. Due to this insecurity, in a great many instances, women and parents often do not even make complaints to lawful authorities about being victims of crime. The people who suffer in silence are many. This culture of silence can be broken if a measure such as the increase of High Courts is taken, and this results in speedy trials.

Such a measure will also have a great impact on the Attorney General's Department and the Department of the Police Services. Both these departments are considered in low esteem, mainly due to the fact that they are unable to convince the people that they have the will and capacity to bring criminals to book. The result is a great demoralisation among the staff of these institutions. Speeding up of trials into serious crimes will encourage the better elements of these institutions to emerge and thus create an attitudinal change among the staff of these institutions.

If a change is achieved in the performance of High Courts, it will have a definite impact on other courts. It will create an

impetus for working with greater energy and for achieving better results. In fact, the entire engine of criminal justice may receive a great push towards improvement if this singular measure of the increase of the number of High Courts were to take place soon.

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

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

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

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

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

II. Long Term Measures

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

Some of the more significant ones are reiterated as follows:

- **Increase the funding for all institutions relating to the administration of justice**, such as the courts, the policing system, the Attorney General's Department, institutions for the control of corruption, and penal institutions. All these institutions are poorly funded, as examination of any annual budget allocations would easily demonstrate. The result of poor funding is the poor performance of all these institutions, which, in turn, has created the kind of crisis that everyone is well aware of today.

- **Reform the Police, Prosecution and Judiciary** in order to make them viable institutions that can make a useful contribution in contemporary circumstances. Again, there is consensus on this issue: how backward and irrelevant these institutions are and how negative their impact is on all the aspects of life in Sri Lanka.

- **Improve the legal education** for all involved in the institutions of justice: judges, policemen, prosecutors, and the lawyers. Special measures for education are required in order to raise the standards of performance of all concerned in terms of realising a modern system of justice in Sri Lanka.

  What is required is none other than a radical change in the legal education of all legal educational institutions, such as the faculties of law in the universities and at the Law College. The quality of teaching in all these institutions

has been adversely influenced by the present state of the justice system and therefore is likely to contribute to reproduction of similar backwardness even in the future. A radical discourse on law education is a dire requirement.

- **Improve the quality of mass media** so that media institutions can contribute positively towards creating a better discourse on the improvement of the institutions of justice. It is unfortunate that despite the calamitous situation of justice institutions, public exposure of these problems and the public discourse remains so poor. The editors of newspapers and other publications should take measures to improve the quality of the services they provide by the recruitment of competent staff that could contribute constructively towards creative development of justice and political institutions in Sri Lanka.

- The **quality of the civil society contribution towards the improvement of the institutions of justice should be greatly improved**. In fact, it can be said that the contribution of the civil society to the reform of the justice institutions is quite negligible. The civil society seems not to have understood how much human liberty depends on the availability of properly functioning system of justice. While the civil society makes a critique of the political institutions, it has failed to see the link between the political institutions and the institutions of justice. It is not possible to improve the performance of the political institutions when the contribution of the justice institutions has not improved. Civil society organisations should see the challenge that lies in this direction, and develop to face up-to this challenge.