

## SRI LANKA: The state of human rights in 2010

### Constitutionally entrenched impunity

Sri Lankan state has abdicated its duty to protect human rights, through its constitution which places the head of state, the executive president of Sri Lanka completely outside the jurisdiction of courts; thus head of state is above the law and judiciary has been reduced to marginal role; the redirect result is that there is no institution with authority to investigate and prosecute human rights violations. The basic principle of Magna Carta, which is that state cannot deprive personal and property rights of individual with due process of law is no longer adhered to by the Sri Lankan state. The constitutional abdication of rule of law, independence of judiciary and the duty to protect human rights, in favor of having a head of state with absolute power has manifested itself in every aspect of life, where complaints of human rights violations are heard from citizens of all parts of the country. However, there is no room for redress or justice. Complaints related to personal liberties as well as to property rights. There includes, allegations of forced disappearances, extra-judicial killings, endemic torture, denial of rights to fair trials, violations of freedom of expression and association, violations of rights to free and fair elections, violations of rights of women even to the extent of failure to investigate and prosecute rape and sexual abuse effectively, abuse of children's rights and in fact abuse of all sections of society. Complaints of violations of minority rights and lack of possibility of finding solution to this issue have remained a major concern. There are also allegations of war crimes, crimes against humanity, which are also prevented from being investigated and prosecuted. In all these areas, even the possibility of seeking a credible solution is absent, with in the present constitutional framework. Willingness as well as the capacity is missing on the part of the Sri Lankan state.

We have in our previous years reports continuously reported on these issues. This year's report is connected to our previous year's reports. Issues we have raised in our past reports have not been resolved. In fact, continuous failure to deal with the problem of constitutionally entrenched impunity, has contributed to the aggravations of the violations and abuses.

This year's report consists of following parts;

- An over view of the situations of rule of law
- Constructional issue and marginalization of judiciary
- A report of extra judicial rights
- A report on torture
- A report on pre-trial detention

## **1. The Breakdown of the Rule of Law in Sri Lanka: An Overview**

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Prepared by the Sri Lanka Campaign on Peace and Justice<sup>1</sup>

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This review analyzes the state and the underlying causes of the current breakdown of the rule of law in Sri Lanka.

The information herein is drawn primarily (but not exclusively) from three sources: Basil Fernando's recently published book entitled *Sri Lanka: Impunity, Criminal Justice & Human Rights* (Hong Kong: Asian Human Rights Commission, 2010); the International Bar Association Human Rights Institute's May 2009 report entitled *Justice in retreat: A report on the independence of the legal profession and the rule of law in Sri Lanka* (hereinafter referred to as 'IBAHRI'); and Kishali Pinto-Jayawardena's *The Rule of Law in Decline in Sri Lanka – Study on the Prevalence, Determinants and Causes of Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment in Sri Lanka*, a 2009 study commissioned by the Rehabilitation and Research Centre for Torture Victims (hereinafter 'Pinto-Jayawardena'). The latter probably provides the most detailed analysis of the causes behind the breakdown of the rule of law in Sri Lanka (with a focus on addressing and preventing torture), while the former provides a conceptual and critical analysis of overarching themes that is extremely useful for understanding the situation in Sri Lanka.

Facts and figures were also drawn from a wealth of other reports and analyses published by other institutions such as, *inter alia*, Amnesty International, Human Rights Watch, Reporters Without Borders, the United Nations High Commissioner for Refugees, and the United States Department of State.

In his book, Basil Fernando describes the current situation in Sri Lanka as one of "abysmal lawlessness." Use of the word "abysmal" is explained as follows:

Lawlessness of this sort differs from simple illegality or disregard for law, which to differing degrees can happen anywhere. Lawlessness is *abysmal* when law ceases to be a reference. What would normally be crime ceases to be thought of as crime and lawlessness becomes routine.

Under circumstances of *abysmal* lawlessness, according to Fernando, the concept of legal redress – which is vital to the proper functioning of any legal system – has in

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<sup>1</sup> This was published as a paper of the Sri Lanka Campaign on 10 September 2010. See details about the Sri Lanka Campaign at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1682133](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1682133)

fact been completely decoupled from whatever may be called law. In Sri Lanka, the primary cause of this decoupling has been the fundamental failure of the institutions ostensibly designed to implement and enforce legal redress. Fernando characterizes the failure of Sri Lanka's human rights justice and accountability apparatus by drawing an analogy to art:

Leo Tolstoy once wrote that the art of his time in Europe was counterfeit. In counterfeit art, the artist believes himself to be creating a work of art but is in fact only creating impressions of art. These impressions are derived from an understanding of some external qualities of art, which the artist tries to recreate. The work produced in this manner appears to have the external characteristics of genuine art. By imitation, artwork was mass-produced to suit the appetites of people willing to pay for it.

Similarly, Sri Lanka's justice and accountability institutions have been eroded to the point that they have become dysfunctional sham institutions which are little more than hollow impressions that merely approximate some of the external characteristics of genuine functional institutions. Sri Lanka does not lack for a constitution, a court system, and other formal mechanisms for legal redress; however, none of these institutions have any more depth or substance to them than a Hollywood film set.

The numerous Commissions of Inquiry that have been appointed over the past several decades to address human rights concerns in Sri Lanka illustrate this phenomenon perfectly. Outwardly, they are designed to resemble other similar institutions around the world that undertake credible investigations and produce meaningful findings, which are then used by the government of the day to achieve tangible results.

However, as incarnated in Sri Lanka they currently serve little more real purpose than to either relieve domestic pressure or to discredit a previous government. Governments frequently are so brazen as to tailor a particular Commission's mandate to specifically restrict its investigations to a time period coinciding with a particular predecessor regime. Evidence is also frequently manipulated, such as in one instance where the government influenced many victims' testimony by making compensation available only where the victims claimed the perpetrator was a non-state actor; when these victims later testified in court that the perpetrators were actually state actors, their accounts were disbelieved on the basis of the prior conflicting statement. Recommendations are usually ignored and preliminary findings of responsibility are rarely followed through with judicial proceedings. Reports are frequently released to the public only after long delays, or in certain cases not at all.

Institutional limitations also abound. The pre-war Commissions of Inquiry Act was envisioned more to enable investigations into individual actions of public officials rather than large-scale systemic human rights violations. There are no built-in safeguards to protect the safety of victims and witnesses. Commissioners can be

removed at the unreviewable discretion of the president, and therefore lack independence.

In 2007, the Commission of Inquiry to Investigate and Inquire into Alleged Serious Violations of Human Rights was established. In response to concerns over the problems associated with past Commissions, the president invited a panel of eleven international experts to supervise the Commission's process and ensure its integrity.

By November 2007, the experts had had enough. Citing persistent interference by the Attorney General, lack of effective victim and witness protection, lack of transparency and timeliness in the proceedings, uncooperative state bodies, and lack of financial independence, they tendered their resignations en masse. Noting further that the recommendations contained in their interim reports had largely gone ignored, they concluded that there was "an absence of political and institutional will on the part of the Government to pursue with vigour the cases under review" – definitively putting to rest any lingering doubts as to the true nature of Sri Lankan Commissions of Inquiry.

The Attorney General's response to the international experts' criticism was to release a statement accusing the international experts of being involved in an international 'sinister plot.'

In his book, Fernando identifies six themes which, in his opinion, lie at the heart of the current situation of abysmal lawlessness in Sri Lanka: the lost meaning of legality; the predominance of the security apparatus; the disappearance of truth through propaganda; the extraordinary concentration of power in the hands of the executive president (termed 'the superman controller'); destroyed public institutions; and the zero status of citizens.

This review will borrow these six themes as a tool to organize the discussion, because they provide a useful analytical lens with which to gain perspective on the breakdown in the rule of law in Sri Lanka today. While other accounts of the present situation in Sri Lanka do not necessarily organize their discussion the same way, they all invoke these themes in some way or another.

## The Lost Meaning of Legality

Fernando describes the law in Sri Lanka today as an "exercise in futility." He traces this problem back to the 1978 Constitution, which, according to him, "destroyed constitutional law" by negating all checks and balances over the executive. This has slowly led to the irrelevance of the supreme law and, gradually, all other law. Public institutions have also accordingly lost all their power and value. As Fernando puts it:

When there is a loss of meaning in legality, terms such as "judge", "lawyer", "state counsel" and "police officer" are superficially used as

in the past; however, their inner meanings are substantially changed. Those who bear such titles no longer have similar authority, power and responsibility as their counterparts had before, when law still had meaning as an organizing principle.

What Fernando means to say here is that while such individuals hold the same nominal office, the manner in which they discharge their official duties has changed. That is, they no longer carry out their duties in conformity with the rule of law. For instance, under standard criminal procedure there is normally an obligation to investigate all crimes. In Sri Lanka, however, such investigations are carried out selectively. This unofficial expansion of investigative discretion has in turn made possible the now-commonplace tactic of harassing an enemy or political opponent by causing completely bogus criminal inquiries to be launched. In this way, the criminal investigation process has been co-opted from a mode of maintaining law and order to a tool through which not only to withhold protection from citizens but also to actively intimidate and victimize them. For instance, when 133 well-known Sri Lankans signed a letter condemning death threats against a civil society activist, the Criminal Investigation Division carried out an investigation not of the death threats but of the propriety of the signatories' actions.

The ineffectiveness of public institutions of law has allowed underground elements to take over the functions of 'law enforcement.' More and more actors, both private and institutional, turn to criminal elements to achieve their ends. This is reflected in the "government policy to abduct and kill... [individuals] to be eliminated for political advantage. The method of killing is, like the collecting of debts, now cheaper, quicker and less risky than going through the courts." (Fernando, 23) As this downward cycle continues and legal redress becomes more the exception than the rule, the meaning of legality becomes corrupted further and further.

### The Predominance of the Security Apparatus

Beginning with the insurgencies in Sri Lanka in 1971, and continuing through the conflict with the Liberation Tigers of Tamil Eelam (LTTE), the country's security apparatus has emerged as a very powerful actor – which status is not expected to diminish notwithstanding the declared end of the conflict. For instance, many of the 'emergency' measures introduced during the course of the conflict have not been repealed, even though fighting officially ended more than a year ago.

The targets of the security apparatus are ordinary citizens. Trade unionists, journalists, members of civil society organizations, officials and activists in opposition political parties, and even citizens engaged in simple protest are all of special concern – but all aspects of Sri Lankan life have now come under its surveillance. It is particularly keen to exert control over the electoral process, and does so by targeting the grassroots activities of opposition parties and even of members of the ruling party where internal competition arises.

Legislative measures such as the Prevention of Terrorism Act (PTA) have given the security apparatus much of the power it now holds. However, it is important to note that the security apparatus is by no means constrained by the legal limits of its statutorily conferred authority and moves beyond even these broad powers without inhibition. With the loss of the meaning of legality there is nothing to prevent it from continuing to do so. Accordingly, extrajudicial disappearances and killings are commonplace. At the same time, there has been no investigation of complaints against the security apparatus in recent years, and a culture has arisen where any calls for accountability are denounced as anti-patriotic and akin to treason, sabotage, or aiding and abetting terrorism.

Meanwhile, to this day, over a year after the purported end of the conflict, 8-10,000 detainees still languish in detention camps accused of being members of the LTTE. However, they have not been formally charged, nor have they been allowed legal representation or access to any procedure to review the legality of their detention. Allegations of mistreatment also abound, but the International Committee of the Red Cross has not been allowed access to the detainees, in flagrant violation of international law.

### The Disappearance of Truth through Propaganda

Years of conflict have exerted a calamitous effect on the propagation and dissemination of truth in Sri Lanka. Equal in strategic importance to the struggle for control over territory during the conflict was the struggle for control over information. The military and the LTTE both vied to cast their polarized propagandistic perspectives as the single version of the truth.

The state has learned to excel at creating and controlling a single, official version of the truth. Society, for its part, has largely accepted the state's self-anointed role as arbiter of truth and falsehood. As Fernando observes, "Those who run the media also usually comply with demands to reproduce and disseminate government propaganda. Those who do not comply are threatened."

IBAHRI notes that the media has reached this point, in part, through years of intimidation and harassment. Journalistic voices critical of the government's security measures are routinely named by the Ministry of Defence as 'Tiger sympathisers', 'LTTE supporters' or 'terrorists'. Frequently, this is a precursor to a threat or physical attack against the journalist or media outlet. At least 14 media workers have been murdered since the beginning of 2006, with many others receiving death threats, being physically assaulted, having their offices burned, and/or being forced to flee the country. The state has also proven adept at using institutional channels to subvert press freedom. For instance, in August 2009, J.S. Tissainayagam, a journalist who had written critically of the government's military campaign, was sentenced to 20 years' hard labour in what was the first conviction of a journalist for his writings under the PTA. So dismal is the situation, in fact, that Reporters Without Borders ranked Sri Lanka 162 of 175 countries in its 2009 Press Freedom Index.

The legal profession has been similarly conditioned through years of intimidation. On 28 January 2009, Amitha Arayatne, who had acted in several prominent human rights cases, received death threats from police officers. Two days later, his house was burned. Such incidents have been effective at reducing the number of lawyers willing to take on human rights cases. In March 2009, for instance, the lawyer representing Sunil Shantha, who was accusing the police of torture, suddenly withdrew from the case on account of threats from police.

As a result of these dynamics, there is a general level of societal disinterest in truth itself. When the truth is so cynically manipulated, Fernando explains, “[p]eople cease expecting to know the truth of anything.” As a result, government spokespeople automatically deny any allegations of human rights violations, knowing that no one will come forward to speak what they know, either out of fear or a sense of sheer futility.

Many observers cite the dwindling critical voices in the media, the legal profession, and Sri Lankan civil society in general as a key factor in the degeneration of the rule of law in Sri Lanka.

## The Concentration of Power in the Hands of the President

Fernando traces the current breakdown of the rule of law in Sri Lanka today in part to the high concentration of power conferred upon the executive president under the 1978 Constitution. Under that document, the president gained absolute immunity from lawsuits of any kind, and all the powers of cabinet, including control over the civil service, were consolidated in the president’s hands. Moreover, the prime minister could be appointed or dismissed at will, and parliament dissolved a year after its election.

According to Fernando, the underlying principle of such a heavy concentration of power in the hands of the presidency is rooted in the belief that such a system is the only effective way to govern the country. However, with all the checks and balances on executive presidential power removed, this system has also exposed the office of president to arbitrariness and abuses of power. Further, the concentration in the executive presidency of responsibilities far greater than one person can possibly manage effectively has led to poor oversight and dysfunction in public institutions, exacerbating the breakdown in the rule of law.

To partially address this problem, Parliament in 2001 passed the 17th Amendment to the Constitution, creating a Constitutional Council with the power to recommend or approve the appointment of a number of senior positions in the public service, including the Attorney General, the Inspector General of Police, and the Chief Justice and other justices of the Court of Appeal and Supreme Court. This was intended to restore a measure of independence to institutions of governance, as the appointment process had by then become extensively politicized, with the executive using its powers of appointments to name party supporters to top posts. However,

the CC has been in abeyance since 2005 when the term of the first CC lapsed and the President, in defiance of his constitutional obligations, refused to appoint the successors duly selected by the various parties constitutionally empowered to make the nominations. Further, the President's failure to do so cannot be directly challenged in court due to his immunity from suit under Article 35 of the Constitution. Nevertheless, litigation has been launched alleging that the non-implementation of the 17th Amendment is a violation of the constitutional right to equality before the law, and it is as yet unresolved whether the Chief Justice has the power to make the appointments if the President refuses to do so himself. Meanwhile, according to the IBAHRI, "[t]he non-implementation of the 17th Amendment represents one of the most critical unresolved rule of law issues in the country."<sup>2</sup>

A culmination of this concentration of unchecked power in the hands of one person is plainly evident in the current initiative of President Rajapaksa to have Parliament adopt an 18<sup>th</sup> Amendment to remove the current constitutional limitations on the number of terms a president – i.e., he – can serve.

## Destroyed Public Institutions

Fernando argues that through the combined effect of the above four elements, Sri Lanka's public institutions for the administration of justice have been effectively destroyed. This topic has been the subject of much of the work of the Asian Human Rights Commission (AHRC) and the Asian Legal Resource Centre (ALRC). In his book, Fernando reviews this work in order to catalogue the descent into disgrace of the police, the Attorney General's department, and the judiciary. In each case, the institution has gradually degenerated to the point where today it appears to serve no other purpose than to provide cover for abuses of power and rights violations perpetrated by the state. As a result of this situation, "there is nothing sacrosanct or predetermined about any institutional practices now, and the citizen who goes before public institutions knows not what to expect."

Pinto-Jayawardena identifies two factors in particular that lie at the root of Sri Lanka's failed public institutions. These are a lack of independence from political interference from the executive, and a lack of public resources.

## Lack of Independence

The key to any successfully functioning judiciary is judicial independence. However, the judiciary in Sri Lanka cannot be said to enjoy judicial independence.

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<sup>2</sup> The situation has not improved since the release of the IBAHRI report in 2009. In fact, the Sri Lankan government recently indicated it would move to abolish the Constitutional Council altogether in a constitutional amendment, and devolve all its powers to the executive presidency.

Institutionally, any judge of the Court of Appeal or Supreme Court can be removed by an order of the President supported by a simple majority in Parliament.

The executive also interferes habitually in the affairs of the judiciary. For instance, the IBAHRI notes that in one speech, the President issued thinly-veiled threats of public lynchings and impeachment to the judges of the Supreme Court.

While there have always been tensions between the executive and the judiciary, many observers point to the 1999 appointment of then-Attorney General Sarath N. Silva – who had close ties to the President – to the office of Chief Justice as a watershed moment in the degeneration of the judiciary, once a credible defender of fundamental rights and an important check on executive power, into its current weakened and docile state. Silva's appointment, which came in the midst of a flurry of executive backlash against a Supreme Court which it saw as unduly intrusive in government affairs, was accompanied almost immediately by a perceptible shift in the Court's attitude towards fundamental rights petitions. According to the IBAHRI, Chief Justice Silva had a domineering personality and wielded enormous influence over his colleagues, which he used to maximum effect by assigning the most politically sensitive cases to himself and the most junior judges. Notably, a petition against his appointment to the Supreme Court was dismissed by a five-judge bench constituted (by his own order) of himself and the four most junior judges. On two other occasions, Parliament attempted to effect his removal with impeachment motions, only to be thwarted by the President's summary dissolution of the legislature.

The lack of judicial independence for the judiciary has led to its politicization, and is just one example of the erosion of public institutions occurring in Sri Lanka.

It is not only the judiciary, however, that suffers from a lack of independence. All institutions which are ostensibly set up to act as checks upon state action lack proper insulation from political interference. The section above has already described how the Constitutional Council, designed to inject a measure of impartiality in the heavily politicized appointments process, has been deliberately (and unconstitutionally) thwarted and undermined by the executive. Further, the various elements of the state security apparatus are not properly insulated from the various institutions that are ostensibly designed to investigate and address complaints against them. For instance, the unit responsible for investigating allegations of torture against police is composed of police officers – who are often transferred in and out of the unit – effectively assigned to investigate their own colleagues. Under such circumstances it is impossible to expect fully independent and impartial investigations. The result, unsurprisingly, has been a near-complete failure to investigate and prosecute allegations of torture against police.

### Lack of Resources

The lack of resources is a major problem that severely compromises the capacity of public institutions to fulfill their roles. Due to lack of resources public institutions are understaffed and under equipped, and their personnel lack the proper education and training for their posts. This impairs the ability of these personnel to perform the functions required of them, and it only adds to the Sisyphean challenge of resurrecting these institutions from their already dysfunctional state.

### The Zero Status of Citizens

As the country's public institutions have fallen to zero, so has the status of its citizens. Where there are no effective public institutions there can be no individual rights. The rights that citizens enjoy under the statute books have no actual relevance, because there is no effective mechanism to guarantee and protect them. Thus, insofar as the nation's public institutions have vanished, so has any conception of Sri Lankans' individual rights.

Perhaps the starkest example of this zero status can be seen in the detention camps discussed above where, at the height of the situation, hundreds of thousands of internally displaced persons were housed and detained. These camps were operated without any lawful authority under either domestic or international law, and in fact contravened a number of fundamental rules of international human rights and humanitarian law. This situation was merely a high-profile manifestation of what is more generally the current reality in Sri Lanka – that its citizens are subject not to the rule of law but to the naked political power of the ruling government.

Although the detention camps provided a dramatic illustration, it is important to reiterate that it is not just internally displaced persons in Sri Lanka that have zero status, but all citizens right up to the members of the privileged elite. For these individuals, even their relative wealth and power cannot afford them access to public institutions that have been destroyed. The rule of law has vanished with respect to all Sri Lankans. Fernando chronicles how from time to time members of the ruling class are surprised to learn that their position in the hierarchy does not make them invulnerable to (legally) arbitrary treatment. Often – as in the case of the prosecution for sedition of General Fonseka (who has not, on the other hand, been tried for what were almost certainly massive violations of the laws of war by the Sri Lankan military during the final stages of the war that he oversaw) – these individuals were themselves active in the repressive state structure before the system turned against them. Of course, they are perhaps on the opposite end of the spectrum from internally displaced persons with respect to the actual magnitude of misfortunes visited upon them and. However, this does not make their treatment any less arbitrary or lawless.

## Summary

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In broad strokes, the collapse of the rule of law in Sri Lanka can be reduced to the following. The effectiveness and legitimacy of Sri Lanka's public institutions has been destroyed through years of undue political interference from the executive and through involvement in the perpetration of repression by some of those institutions. There is a lack of institutional independence as well as a lack of resources. Mechanisms that could partially address deficiencies in institutional independence, such as the Constitutional Council or the courts, have been systematically undermined and sabotaged by the executive. Further, perceived security threats give the government an excuse to maintain much of the power it now holds.

As a result of this situation, Sri Lankans' expectations of their public institutions have fallen to the point that the very notion of legality has been lost; that is, there is no longer an expectation on the part of Sri Lankans that their public institutions will operate according to the rule of law. At the same time, the concept of individual rights itself has also been lost, and Sri Lankans' expectations that they will have anything above and beyond zero status has also gradually been eroded. When this mentality pervades not just the general public but also those who hold office in public institutions, the rule of law is extensively compromised. Meanwhile, because of the disappearance of truth as a public enterprise – effected by years of government propaganda, manipulation and outright intimidation of the media – there is little organized pressure on the government to address the situation, and what little resistance is offered is crushed.

All this is to say that the problem is broadly based: there are problems in how public institutions are set up, there are problems in how public institutions operate in practice, there are problems in how public institutions are supported financially, and the problem even runs as deep as the very mentality of those who staff these institutions as well as Sri Lankans in general.

## Further Reading

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As a final note, it has been impossible here to exhaustively catalogue specific details of all the factors behind the collapse of the rule of law in Sri Lanka. To this end, a brief review of the executive summary and recommendations contained in both the 2009 IBAHRI report as well as the 2009 report of Kishali Pinto-Jayawardena would be very useful reading for anyone wishing to gain some quick insight into the current situation on the rule of law in Sri Lanka and the kinds of problems that need to be addressed. Also recommended is Basil Fernando's online article, "A three-part study on the crisis in institutions for administration of justice in Sri Lanka and its consequences for the realisation of human rights in Asia", which summarizes the analysis in a trilogy of books – the above-mentioned *Sri Lanka: Impunity, Criminal Justice & Human Rights* as well as two preceding works published in 2009, *The Phantom Limb* and *Recovering the Authority of Public Institutions*; this article was prepared for Article2.org in June 2010.

## **2. SRI LANKA : The politics of habeas corpus and the marginal role of the Sri Lankan courts under the 1978 Constitution<sup>3</sup>**

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*“LIBERTY RIGHTS AT STAKE: THE VIRTUAL ECLIPSE OF THE HABEAS CORPUS REMEDY IN SRI LANKA”* is a study of 880 judgements of various courts of Sri Lanka on habeas corpus applications from independence (1948) up to present period (2009). It studies all the important judgments on habeas corpus during this period.<sup>4</sup> Kishali Pinto-Jayawardene and Dr. Jayantha Almeida Gunaratne conducted the study. This article is based on their findings.

The basic conclusion that the study arrives at is that Sri Lankan courts in recent decades have failed to give effect to habeas corpus as a judicial remedy. Their decisions are markedly different from the way that habeas corpus was dealt with in the pre-independence period, as evidenced, for example, by the famous Bracegirdle case, which demonstrated the will of the Supreme Court at the time to defend the freedom of the individual as against the arbitrary actions of the state. It also demonstrated the court’s power to stand against the state to protect the freedom of the individual. This study concludes that in recent decades the approach of the courts has changed substantially. In almost all cases studied, with a few exceptions, courts have dismissed cases rather casually and shown little sympathy for the applicants.<sup>5</sup> The basic conclusion is that habeas corpus as a judicial remedy for the protection of the freedom of the individual has failed in Sri Lanka, and as the title of the study suggests this important writ may disappear altogether from the country. This failure is not due only to factors such as scandalous and shocking delays but also due to much more important changes of attitudes towards the remedy itself.

The failure of the remedy of habeas corpus in Sri Lanka as evidenced by this study needs to be examined against the background of the political changes that have

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3 This section is written by Basil Fernando as a chapter for a book to be published in Sri Lanka.

4. According to the two authors, the cases for the study were not selected from various sources but taken from a book that was bound and is maintained at the Sri Lankan Court of Appeal.

5. According to the two authors, in a taped interview at the Asian Human Rights Commission, Hong Kong, “The analysis combines a very academic, in-depth analysis, arriving at particular conclusions which show indisputably and deliberately that the courts’ response has been marked by a distinct lack of judicial sympathy for the petitioner... Now the most alarming factor in this particular study in that segment is the cursory manner in which the court dismisses applications of petitioners across the board for various reasons—and all the reasons are looked at in the study—ranging from failing to name a respondent correctly in the petition, failure to put a surname of the respondent in the petition”.

come about in the country since the 1978 Constitution in particular. Most persons on whose behalf these cases have been filed in this period fall within the category of disappeared persons. The important judgements come from the Court of Appeal from 1994 to 2002. Out of a total of 844 cases for this period there were 368 applications for 1994; 127 applications for 1995; 142 applications for 1996; 137 applications in 1997; 31 applications in 1998; 6 applications in 1999; 11 applications in 2000; 7 applications in 2001, and 15 applications in 2002.<sup>6</sup>

The study of habeas corpus in Sri Lanka cannot be delinked from a political understanding of the forced disappearances that took place during this time, and the approach of the state in dealing with certain issues of perceived security in which the use of forced disappearances was an approved practice for curbing insurgency. On the one hand mass disappearances were a result of a political approach to national security during which the use of forced disappearances was an approved practice. On the other hand, the courts, which are also a branch of the state, were called upon to examine this phenomenon from a legal and judicial perspective. The study finds that in the application of legal principles the courts have tended to favour the state over the liberty of the citizen when determining these cases. This seeming legal problem, if seen within the political atmosphere in which the disappearances were carried out seems less of a surprise, as the courts would have had to go against this approved policy of causing disappearances if they were to protect the rights of the individual as against the interests of the state.

In a classical sense the remedy of habeas corpus is meant to protect the individual against the abuse of authority by the state. If there is a failure in this regard it is a failure of the very concept of the protection of the individual. However, the assumption that the courts could have protected the rights of the individual in a situation where there was an approved policy of the state relating to causing forced disappearances is to expect the courts to be at loggerheads with the state on a very important issue of policy at a time that it is impossible for them to be in this position.

Here we see a fundamental contradiction. On the one hand if the country was a liberal democracy and if its constitution was based on the principles of the rule of law then it was the obligation of the courts to uphold the rights of the individual even against an approved policy of the state to the contrary. Within a liberal democracy where the law and the policy contradict one another it is the duty of the courts to uphold the law as against policy. This is possible only if we assume that

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6. From 1987 to 1991, the south of Sri Lanka suffered extreme political violence. According to the reports from a number of presidential commissions of inquiry, the total number of involuntary disappearances during this period was around 30,000 persons. From 1978 up to May 2009, there was military action in the north and east, where there was a continuous insurgency. Arrests, detentions and other forms of repression were commonplace throughout that time. From 1994 to 2002 the orders in habeas corpus cases were primarily concerning Sinhalese caught up in the southern insurrection, but there were a fair number also from the ongoing conflict in the north-east as well. From that point onwards, probably from about 1998 onwards, the majority of the cases were from the north-east.

the 1978 Constitution was that of a democracy and that Sri Lankan democracy was, even during this period, based on the rule of law. However, is this assumption itself correct? This is the issue that we should first examine relating to the 1978 Constitution.

## Article 35 and its impact on the entire constitutional structure

For almost 32 years there has not been a discussion of the impact of article 35 on the Constitution of Sri Lanka on the constitutional law as a whole. Much of the discussion has been confined to the issue of the immunity from prosecution of the president without consideration of the very impact of this immunity.

Article 35 reads as follows:

*“35. (1) While any person holds office as President, no proceedings shall be instituted or continued against him in any court or tribunal in respect of anything done or omitted to be done by him either in his official or private capacity.”*

The executive president is head of the state, the head of the executive, of the government, and is commander in chief of the armed forces. Under the earlier constitutions, though the president was head of state, the prime minister was head of the cabinet. The prime minister was answerable to court. Under the 1978 Constitution the head of the executive, who is also the head of the government, is not answerable to court.

All decisions relating to national security are those of the head of the executive. All policy decisions relating to national security are also those of the head of the executive. Under article 35, the executive president as head of the executive is not answerable to the courts.

The executive president of Sri Lanka is not subjected to any controls by cabinet or any other constitutional body. In fact, the executive president controls the ministers and all public authorities. The entire aim of the 1978 Constitution was to place the president in charge of everything. He has the right to place the ministers and to control the ministries themselves. In view of this, the public institutions that are run by the ministries are under his direct control. When article 35 made the president unanswerable to the courts of Sri Lanka it placed all decisions on the governance of the country attributable to him outside the control of the judiciary.

Within a rule of law-based system, a nation functions through its public institutions and the manner in which they are subjected to control is the discipline that controls the lives of the people. The laws that govern these institutions, the laws that are developed and the commands that are given by those who are responsible to these authorities are the aspects that govern the people of the country and the institutions. The internal running of the country and the institutions must have an independent life of its own based on a legal process that is not subjected to the control of those in political power. The running of this internal structure of public institutions needs the supervision of the public to ensure that basic notions of

protection of peoples' liberties and freedoms are superior, while governance is carried out from day to day.

The protection of the freedoms of individuals and the functioning of public institutions are therefore deeply linked. The public institutions, if they are run for the achievement of various goals of the government, such as development, national security and the like, should at all times protect the freedoms of individuals. Therefore in the running of public institutions there are two factors to consider. On the one hand there are the objectives of the government, which tries to achieve various targets at a particular time. It may be a particular development target in relation to various public institutions such as the speedy recovery of taxes, or projects such as roads or markets or housing projects. Or it may be national security objectives such as ensuring that political sabotage or insurgent activities are not interfering with or obstructing the smooth functioning of the institutions to achieve their normal objectives.

On the other hand, at the same time the institutions must protect the liberties and the freedoms of individuals, who have certain entitlements and expectations. The public institutions at all times should respect these entitlements, even in a conflict over the performance of a public institution working towards any development or security objective. If there is a conflict between the freedoms of the individual by way of denial of entitlements then it is the function of the courts to intervene and to deal with this problem in order to safeguard the freedom of the individual. The executive pursues various objectives, such as national security. It is the judiciary that protects the freedoms of individuals so that the objectives of the state will not crush the entitlements of the people.

In Sri Lanka, by placing the executive president, who is the controller of public life under the 1978 Constitution, outside the jurisdiction of courts what was in fact achieved was the removal of the judicial function to protect individual liberties. The idea was that the president, as the driver of national objectives through various development and security projects, like anti-terrorism activities, is not under the control of the judiciary.

Therefore, the protection of the individual, as opposed to the pursuit of objectives of the government, has been removed through article 35. What can be construed from this article is that if an attack on the freedom and liberties of an individual can be attributed to the decisions of the executive president, such actions are outside the jurisdiction of courts. In such instances, the courts are functionless.

The 1978 Constitution itself removed from the jurisdiction of the courts the bases for the protection of the freedom of the individual. It is the character of this fundamental attack on the idea of constitutionalism under liberal democratic government, in which the protection of the individual is a primary objective of the constitution, which has been lost sight of amid public debates relating to the 1978 Constitution.

Article 35 was a profound deviation from the notion of constitutionalism as understood within the liberal democratic discourse. In the liberal democratic discourse, protection of the liberties of the individual is a primary objective. Whatever other objectives the executive may aim to achieve in a particular context and at a particular time, it cannot infringe on the liberties of the individual in the manner made possible under this section of the 1978 Constitution.

Consequently, the role of the Sri Lankan courts on constitutional matters, including those relating to the protection of individuals, is marginal. The courts no longer have the position they enjoyed under the 1948 and 1972 constitutions. The role of the executive president has been enlarged and the role of the courts reduced. Many Sri Lankans still are imagining a situation in which the courts enjoy similar powers, authority and prestige as in the past. However the actual situation has changed substantially. In an earlier publication entitled *The Phantom Limb: Failing Judicial Systems, Torture and Human Rights Work in Sri Lanka*,<sup>7</sup> I have explained this situation. The protective power of the judiciary over the freedoms and the rights of the individual has diminished, while the power of executive to encroach on their rights has increased enormously through the constitutional invention of the executive president.

## Limited jurisdiction on fundamental rights relating to human rights violations is not binding to the executive president

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Article 126 of the 1978 Constitution was a new creation:

*“126. (1) The Supreme Court shall have sole and exclusive jurisdiction to hear and determine any question relating to the infringement or imminent infringement by executive or administrative action of any fundamental right or language right declared and recognized by Chapter III or Chapter IV.”*

This jurisdiction does not extend to executive and administrative actions attributable to the executive president as the head of the executive, since article 35 covers such actions.

The addition of judicial remedies such as the fundamental rights jurisdiction under article 126 was no substitute for the removal of liberties by article 35. The fundamental rights jurisdiction does not extend to the executive president. Its jurisdiction is limited to certain rights that are called fundamental and therefore it is binding on certain acts of the administration, which may affect those rights. However, this jurisdiction does not extend to the acts of the executive president, who is the total controller of the entire apparatus of the government without any kind of limitations to his power and without checks and balances.

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7. By Basil Fernando and Morten Koch Andersen, published in 2009 jointly by the Asian Human Rights Commission, Hong Kong and the Rehabilitation and Research Centre for Torture Victims, Denmark.

### If the Bracegirdle case were heard under the 1978 Constitution

M.A.L. Bracegirdle was young Australian planter in Sri Lanka who became an activist in a leftist party, the Lanka Samasamaja Party, because he supported workers' struggles. The colonial government issued an order of deportation on him in 1937, which required that he leave the country in 48 hours. He resisted and went into hiding. A writ of habeas corpus was filed before the Supreme Court and the court quashed the governor's order. It established habeas corpus as prestigious remedy for the protection of the individual against the state.

If the Bracegirdle case were heard before a court under the 1978 Constitution, the state would raise an objection under article 35. As the executive president now occupies the place that the governor once took, it would be argued that the courts have no power to hear the case. The courts would uphold the objection as it has upheld similar objections when they have been raised.

The Bracegirdle judgment was based on the principles of the Magna Carta. As stated by Abraham CJ,

*"There can be no doubt that in British territory there is the fundamental principle of law enshrined in Magna Carta that no person can be deprived of his liberty except by judicial process. The following passage from The Government of the British Empire by Professor Berriedale Keith, is illuminating and instructive. In Chapter VII of Part I, he discusses 'The Rule of Law and the Rights of the Subject' p. 234. He says: -*

*'Throughout the Empire the system of Government is distinguished by the predominance of the rule of law. The most obvious side of this conception is afforded by the principles that no man can be made to suffer in person or property save through the action of the ordinary Courts after a public trial by established legal rules, and that there is a definite body of well known legal principles, excluding arbitrary executive action. The value of the principles was made obvious enough during the war when vast powers were necessarily conferred on the executive by statute, under which rights of individual liberty were severely curtailed both in the United Kingdom and in the oversea territories. Persons both British and alien were deprived legally but more or less arbitrarily of liberty on grounds of suspicion of enemy connections or inclinations, and the movements of aliens were severely-restricted and supervised; the courts of the Empire recognized the validity of such powers under war conditions, but it is clear that a complete change would be effected in the security of personal rights if executive officers in time of peace were permitted the discretion they exercised during the war, and which in foreign countries they often exercise even in time of peace.'*"<sup>8</sup>

What is disturbed by article 35 is the basic principle underpinning habeas corpus that is contained in the Magna Carta itself, which is the rule of law that "*no man can*

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8. From the judgement of the Supreme Court, reproduced in The Bracegirdle Affair: An episode in the history of the Lanka Samasamaja Party, edited by Wesley S. Muthiah and Sysdney Wanasinghe, Young Socialist Publication, 1998.

*be made to suffer in person or property save through the action of the ordinary Courts after a public trial by established legal rules, and that there is a definite body of well known legal principles, excluding arbitrary executive action.”* By the operation of article 35, the executive president has arbitrarily removed the rights of subjects and deprived them also of recourse to court.

Under a rule of law system deprivation of personal and property rights can be done only through courts, which are obliged to adhere to due process. Under the 1978 Constitution this very principle has been rejected. There are things that the executive president can do which also include the deprivation of life and liberty of subjects without any legal process and the judiciary can be deprived of the right to intervene on such matters by excluding its jurisdiction via article 35. The 1978 Constitution thus violates the basic principles underpinning habeas corpus in the Magna Carta.

The design of the executive presidential system is such that government objectives, for example, those for the achievement of various development projects or national security, could infringe on the liberties of the individual by the removal of the possibilities of judicial intervention into these areas. The very notion of the centrality of the liberties of the individual as a primary aspect of the national life and a primary aspect of constitutionalism was removed from the Constitution of Sri Lanka in 1978.

## Structural contradictions

The judicial failure to protect the remedy of habeas corpus in Sri Lanka is the result of the structural contradictions in the 1978 Constitution, which removed the idea of the freedom of the individual as a fundamental aspect of the constitution while claiming to do the opposite. The protection of rights has been confined to a minor area with enormous limitations and the judiciary can operate only within that limited area for the protection of rights. Therefore, within the 1978 Constitution the judiciary has only a marginal role in the protection of individual liberties. The executive president is at liberty to pursue whatever objectives and policies he thinks fit without the burden of having to be concerned with the freedoms of the individual, which would otherwise be protected by the judiciary. The judiciary is granted the power to interfere in only a marginal way.

It is these structural contradictions in the 1978 Constitution that have not been brought into constitutional discourse in any meaningful way and since the constitution was passed this discourse has in fact been greatly diminished. This is despite the fact that in recent times the structural contradictions whereby fundamental rights are ostensibly protected but judicial intervention is denied in many important matters affecting personal and property rights have been glaringly obvious. Witness the whole issue of displaced persons in the North and East, who were placed outside jurisdiction of courts after the end of the military intervention in May 2009; the government’s refusal to investigate alleged forced disappearances, extra-judicial killings, torture and alleged crimes against humanity and war crimes;

forced evacuations of persons from properties without any legal process in many parts of the country; the manifest failure to investigate crimes in many parts of the country accompanied by a program to kill rather than prosecute alleged offenders; and, failure to implement constitutional provisions as demonstrated by way of the non-operation of the 13th and 17th Amendments to the constitution.

The 880 cases in the *Liberty Rights at Stake* study that were pursued by way of habeas corpus applications fall into this same category, as enforced disappearance was approved and pursued as policy for perceived security reasons. Forced disappearances constitute the worse form of deprivation of the liberties of individuals without any intervention of courts and without any reference to legal process. International law considers causing of such disappearances as a most heinous crime and a crime against humanity. However, such acts are not against the “legal order” established under the 1978 Constitution, which excludes the jurisdiction of courts on such matters by way of the operation of article 35.

## The executive president’s role as the policy maker

Under the 1978 Constitution the executive president, as the head of the state as well as the head of the political ruling party, is also the chief policy maker. All matters of public security are policies that are developed by the president himself. Perceived insurgencies and all other matters of national security are under the purview of the executive president. The whole period from 1978 is marked by the extensive use of emergency and national security regulations together with legal and constitutional amendments to suit the policies that the head of state insists are necessary for the nation. This vast body of regulations by way of emergency or national security laws has imposed heavy limitations on the power of the judiciary to deal with matters concerning freedoms of the individual. A large body of rules depriving the judiciary power to interfere in matters of arrest and detention, and also even to enable the creation of various extraordinary places of detention and to put entire areas of the country outside the jurisdiction of the courts was built up through government policy decisions.

A vast number of forced disappearances took place during the time since the 1978 Constitution was passed into law, within the spaces created by the national security laws that follow from the executive president’s role as policy maker. These laws removed the courts’ supervisory role. Thus, the abductions of persons by various secret agencies with no regard for the law and normal regulations; the interrogation of these persons in detention centres with no records as required by the law; the conduct of these interrogations without any kind of supervision which gave room for torture as well as cruel and inhuman treatment; and, the final killing and disposal of the person all happened within a policy framework that the executive president approved, and were enabled by security laws and regulations which were also designed and approved by the executive president. The courts of Sri Lanka have no jurisdiction to challenge any of these policies whatever the consequences for individual liberties. Thus even completely immoral decisions that could shock the conscience of any civilised nation can be made by the executive

president of Sri Lanka without the possibility of these being reviewed or scrutinised by the courts. This is the basis for the incapacity of the courts to deal with various illegalities that result from arrest and detention and other actions that are supposed to be addressed by habeas corpus applications.

## The limitations on law-making processes and the role of the executive president

Prior to the 1978 Constitution, the 1972 Constitution already removed the powers of judicial review from the ordinary courts of Sri Lanka. It established a new Constitutional Court to deal with matters relating to the constitution. The 1978 Constitution removed the Constitutional Court and removed the limits on judicial review created by the 1972 Constitution. Under the 1978 Constitution a bill to be passed by the parliament had to be submitted to the Supreme Court, which in turn had to look into the constitutionality of the bill within a short period. Other than this it gave no scope for the Supreme Court to look into the legality or otherwise of a bill. Under its article 122(1) the 1978 Constitution put further limits on the power of the Supreme Court to look into a constitutional bill where the president submits a letter to the court asking for the review to be done within one to three days, if the president considers the bill important enough to be introduced through an emergency process.

When J. R. Jayawardene needed to remove the civil rights of his chief rival, Sirimao Bandaranaike, and there were certain limits due to the law relating to this in Sri Lanka, he referred to this section to introduce a bill in parliament for the amendment of the constitution, known as the 3rd Amendment, on an emergency basis. The same procedure was later followed in 2010 when the 18th Amendment was introduced to the parliament. Thus the passing of laws to amend the constitution itself has been brought under the ambit of emergency procedure, giving the Supreme Court no more than three days to conduct judicial review. Thus, the law making process was changed to deny possibilities of consultation on legal change with the people as well as so as to limit the powers of the courts to the review the possible implications of new laws.

The fundamental notion of the rule of law is that laws are made with the consent of the people. The consent of the people is given by way of public discussions within which the public express their considered views on whatever law is to be passed. This consent of lawmaking is at the heart of the notion of the sovereignty of the people. The people cannot be sovereign when they cannot give consent to the laws by which they will be bound in the future. Thus, more than any other aspect of lawmaking in a democracy it is the consent of the people that makes or destroys democracy. The 1978 Constitution took away this process of lawmaking, and with it, Sri Lankan democracy and the rule of law.

## Differences between countries with courts having a marginal role and those with no effective judicial power at all

As against Sri Lanka, contemporary Cambodia and Burma are countries where the courts have no effective judicial power at all. These countries arrived at this situation through different historical factors, which are instructive for the purposes of comparison with countries where the courts have a marginal role.

From 1975 to 1979 Cambodian society went through one of the worst tragedies that humanity faced in modern times, when the Khmer Rouge was in power. The entirety of the urban Cambodian population was ordered to vacate the cities and move to the countryside. In the years and months that followed the Khmer Rouge pursued a ruthless collectivisation programme according to socialist ideas. The use of money was abolished, as were private kitchens. Children were separated from their parents and brought up by others. This experiment killed at least two million Cambodians out of a population of seven million.

Those who were pursued most ruthlessly were the educated classes as well as those who had any connection with the military. Although the arrival of the Vietnamese by the end of 1979 brought this catastrophe to an end, by that time the entire population was impoverished and in the coming ten years or so a large number of people lived in refugee camps along the Thai-Cambodian border. Many who belonged to the more educated sections that had survived also fled to other countries. Doctors, lawyers, judges and all types of professionals were lost to the country.

This process also destroyed what system of justice had existed in the country. The previous system was a short-lived one introduced by the French. The Vietnamese who took control of Cambodia assisted in the reorganisation of Cambodian society through their experts, who planned all aspects of Cambodian life at that time. The organized courts according to a socialist model which was introduced to Vietnam from the communist bloc.<sup>9</sup> Under their system, the interests of the government and those of the public were presumed to be in alignment. In these circumstances, the concept of the judiciary as a defender of rights against the intrusiveness of other parts of the state apparatus was an absurdity. As the architect of Soviet justice, Andrei Vyshinsky, put it,

*“Under socialism the interests of the state and those of the vast majority of citizens are not, as they are in exploiter countries, mutually contradictory... Safeguarding the interests of the socialist state, the court thereby safeguards also the interests of citizens for whom the might of the state is the primary conditions essential for their individual well-being. Safeguarding the interests of separate citizens, the court*

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9. For an overview of the transplantation of Soviet law into Vietnam, see *Borrowing Court Systems: The experience of Socialist Vietnam*, by Penelope Nicholson, Leiden; Boston: Martinus Nijhoff Publishers, c2007.

*thereby safeguards also the interests of the socialist state wherein the development of the material and cultural level of the life of the citizens is the state's most important task."*<sup>10</sup>

The system that was established was aimed at ensuring some form of stability for the state, and within this system the idea of the protection of the individual from the state was a totally alien concept. The interests of the individual were protected, it was presumed, when those of the state were protected. Thus, the system of courts that was introduced by the Vietnamese from around 1980 to 1993 was a system that was meant to carry out administrative functions on behalf of the state, and the very concept of the protection of the individual against the state was missing.

In May 1993 an election was held under the UN Transitional Authority for Cambodia, which created a new government. A new constitution was adopted based on liberal democratic principles. However, the basic infrastructure of the administration remained the same and remains so even up to now. Some training was given to judges and some new laws introduced. However, almost all human rights organisations in Cambodia have observed and have mentioned in their reports that the ground reality did not change at all. Basically the Cambodian court system as it exists today cannot protect individual freedoms against the state. In fact, it is an instrumentality through which the political regime enforces its will against its opponents as seen by the prosecution of the opposition political leaders through various cases filed in these courts.<sup>11</sup> Thus the system as it stands in Cambodia today is unable to realise the protection of the individual against the executive in any manner.

The story of the Burmese system of courts and justice as it exists today began with the coup that brought General Ne Win into power in 1962. Prior to this, the superior courts that emerged at time of independence in 1948 struggled hard to establish liberal democratic principles, including through the writ jurisdiction of the Supreme Court, established under the 1947 Constitution, and the appellate criminal jurisdiction of the High Court, under section 491 of the Criminal Procedure Code. The situation is described in a recent article by a researcher of the Burmese criminal justice system:

*"In the two years immediately after independence... the courts interpreted their role liberally. Justice E Maung in the definitive 1948 G. N. Banerji ruling described the authority of the Supreme Court in issuing habeas corpus writs to be 'whole and unimpaired in extent but shorn of antiquated technicalities in procedure' (pp. 203–04). In 1950 as chief justice he stressed in the Tinsa Maw Naing case that, 'The personal liberty of a citizen, guaranteed to him by the Constitution, is not lightly to be*

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10. Andrei Y. Vyshinsky, *The Law of the Soviet State*, translated by Hugh W. Babb, Westport, Cn.: Greenwood Press, 1948, pages 497–98.

11. The views of successive UN Special Representatives on human rights in Cambodia that support this statement are available on the website of the Office of the High Commissioner for Human Rights: <http://www.ohchr.org/EN/countries/AsiaRegion/Pages/KHIndex.aspx>

*interfered with and the conditions and circumstances under which the legislature allows such interference must be clearly satisfied and present' (p. 37). He and other senior judges ruled to release many detainees on various grounds, including that orders for arrest had been improperly prepared or implemented, that indefinitely detaining someone was illegal, and that police or prison officers were without grounds to justify arrest, be it of an alleged insurgent sympathizer or notorious criminal.”<sup>12</sup>*

After the coup, the new regime did not remove the established laws but restructured the judicial system according to ostensibly socialist principles based on the same notions as were used in Cambodia, but according to a conservative rather than a radical agenda, so that the earlier protections for individual rights were no longer operative in the courts. Ne Win's chief jurist, Dr. Maung Maung, provided ideological justifications for the defeat of judicial independence and the supremacy of the executive powers. The superior judiciary's writ jurisdiction fell into disuse, and was completely removed from the 1974 Constitution that established a one-party authoritarian state under military control.<sup>13</sup> While the courts maintained a façade of socialist legality on the one hand and continue to apply many of the same laws as before the coup, the structural rearrangement of the political and legal systems by the regime eliminated the possibility of protecting individual rights against intrusion by the state.

Although the military regime that took over from its predecessor in 1988 demolished the one-party system and made changes to the courts that were purported to bring them back into line with what existed at the time of Ne Win's takeover, in fact the system that exists today is functionally a continuation of what existed in Ne Win's time, since its purpose is to incarcerate political opponents or perceived opponents of military rule and maintain social order through the threat of sanctions against persons who do not enjoy the privileges and protections of executive authority. Internally there is no capacity for the courts to protect the individual against the state, since the courts are no more than bureaucratic arms of the state and judges are also legally mere public servants under the same authorities as departmental officers. Nor will this situation change with the creation of another façade in the form of a semi-elected parliament in the near future.

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12. Citation from, “The incongruous return of habeas corpus to Myanmar”, by Nick Cheesman, in *Ruling Myanmar: from Cyclone Nargis to national elections*, Singapore: ISEAS, 2010.

13. For a discussion see “Ne Win, Maung Maung and how to drive a legal system crazy in two short decades”, article 2, vol. 7, no. 3, September 2008, available online at <http://www.article2.org/mainfile.php/0703/>

Differences in situation between systems where judicial power is non-existent as against systems where judicial power is marginal

In systems like those operative in Cambodia and Burma today, the memory of a functioning justice system in the liberal democratic tradition does not exist. Law is not equated with the protection of individual rights but with transgression of any kind from any order by anyone representing authority, irrespective of the contents of that order or its degree of rationality. They are aware that any such transgression can lead to punishment, with or without judicial sanction. State authorities have full power to decide on punishment as they wish, and although there are superficially rules, procedures and structures for deciding punishment, how all these things operate in essence is completely arbitrary. There is no serious attempt to prevent arbitrariness, and in fact the systems in these countries are dependent on it, as people are forced to adjust their habitual behaviour to respond to official whims on short notice. Why somebody in authority does something one way today and a different way tomorrow is not questioned. It is just the usual form of behaviour. Thus there is not even a conceptual basis for making a distinction between what is arbitrary and what is not. The whole notion of constancy through legality has departed from the way that the state operates.

In contrast to systems where judicial power is non-existent, the system in Sri Lanka today is one where judicial power is marginal, in that people still have memories of times when courts had greater influence than in the present. This memory often creates expectations that the system can still operate in certain ways that are in fact beyond it. People with such memories may get confused when courts act arbitrarily. The idea of law still exists, yet it is not operative to the extent or in the manner as it was in the past. Students may be educated to believe that laws are present and working. External references to law and legal habits based on various practices that had validity in former times may be repeated. This also often confuses participants in the system, who may be unable to comprehend whether law still really exists or not.

In countries where courts have no judicial power, the executive authorities have no fear of the courts at all. They consider courts as part of the same unitary system to which they belong. They are aware that they are highly unlikely to have to face contest in courts from the citizens asserting their rights, and certainly not as equals. In contrast, in courts with marginal power persons representing state authorities do fear the prospect of contests from citizens in courts, since they cannot be completely sure of the outcome of such contests.

Likewise, where courts only have administrative functions, the authorities are more secure and do not need great use of force to control persons, except in very exceptional situations, since they can rely upon the judiciary to carry out their bidding against individuals who threaten the established order. On the other hand, where courts have even marginal power, authorities are less secure, since they cannot be certain of compliance. This causes those authorities to resort to more extralegal actions than might be the case as in the other situation, since they feel the

need to take care of things themselves than rely upon judges to cover up crimes on their behalf. In such cases, forced disappearances in particular are more likely to occur, as the state officers are obliged to commit crimes rather than resort to judicial measures to remove threats to their authority, and then must also take a certain number of steps to cover up such crimes.

On the other hand, where courts have no effective power, the use of the judiciary for bargaining and negotiating is likely to be greater than in places where their authority is marginal. Bribery becomes the customary way of dealing with accusations in courts, other than in high-profile cases that have political qualities. Citizens, either directly or through intermediaries such as lawyers, engage in such bargains routinely and without thought to any alternative. There are no genuine legal impediments to such bargains, and on the contrary, such bargains are essential for success. In contrast, in countries where courts still have marginal power bargaining takes place less and with less certainty of outcome. However, people do realize that space for bargaining is wide and there will be more and experiment in that direction as courts' power wanes. Consequently, political influence extends to the courts through indirect methods, rather than through direct control of the courts as in the first category of cases.

### **3. Extrajudicial killings**

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Arbitrary arrests and extrajudicial killings are almost daily occurrence in Sri Lanka today. The police system and additional institutions expected to be the protectors of law have become so dysfunctional and politicized that illegalities predominantly are carried out in their names.

Extrajudicial killings are marked illustrations of how lawlessness reigns in the country after the rule of law system has broken down. The killings are symbols of the exceptional lack of respect for legal procedures and the rights of the citizens to such within the security agencies.

When essential mechanisms in what was supposed to be a rule of law system have ceased to function, the police do not have options or resources to conduct proper investigations. However, they are still required to clear up the cases. Killing as a solution is thereby a simple rationale.

In some cases death occurs due to 'the heat of the moment' where police officers might not have had the intention to kill, but violence and frustrations get out of hand. However, as just a quick overview of the cases AHRC has reported in 2010 shows, most killings are clearly intended as a pattern of characteristic police procedure becomes visible.

### Extrajudicial killings under the pretext of eliminating organized crimes

Legislative measures such as the Prevention of Terrorism Act (PTA) have given the security agencies much of the power, they now hold. These legislatures were introduced during the conflict with LTTE as emergency measures under which a countless number of people disappeared and were extrajudicially killed. Despite the conflict officially ending more than a year ago, they have not been repealed. Many cases of extrajudicial killings are justified by these acts and the danger the suspect poses as a part of a bigger group of organized criminals and potential terrorists.

One of the most dreadful parts of the police's use of the measures is the story presented by them to the Magistrate. The stories are coincidentally enough almost always similar. Either the suspect was shot while trying to escape or the police were taking him to a location, where he was supposed to convey a weapon shelter, when he turned on them with a weapon of some description, often something as remarkable as a hand grenade. The police never provide explanations of how the suspect could disguise the weapon and why he was not guarded more carefully. The victim is presented as a hardcore criminal with weapon shelters available all over the country, but he is neither supervised properly nor handcuffed.

The story's aspect of organized crime is constructed so the police likely will avoid further investigations into the case. Questioning abolitions of potential terrorists has often led to accusations of anti-patriotisms or traitorous business; labels used by state officials when civilian Sri Lankans make claims of violations by governmental institutions or forces.

### The detainee with a hand grenade in handy

An example, which illustrates the absurdity and atrociousness of the situation and reveals the pattern of the police procedure, is the case of Dhammala Arachchige Lakshman from Dematagoda, Colombo. He was arrested by a Special Unit of the Hanwella Police Station without a warrant on September 20, 2010. His time in custody was spent at the Hanwella Police Station. Lakshman was not produced before a Magistrate at any time during his detention and neither was his arrest informed to one.

On September 22 he was brought to a location at Diddeniya in Hanwella by the police officers under the supervision of the Officer in Charge (OIC), R. Pushpakumara. The OIC was furthermore under the supervision of Inspector General (DIG), Daya Samaraweera and the Superintendent (SP), Deshabandu Tenneko. According to the police version of the incident, they tried to uncover a weapons shelter, which Lakshman allegedly had connections to. During the journey to the shelter Lakshman tried to escape by throwing a hand grenade at the officers whereupon the officers shot him. Lakshman was rushed to the Avissawella hospital but he was dead on admission.

This case covers many of the key indicators and problems in the exertion of extrajudicial killings by the police in Sri Lanka.

First of all, according to the Criminal Procedure Code the police are supposed to produce a suspect arrested on suspicion of committing a crime before a Magistrate within 24 hours. In Lakshmans' case, his arrest was not even reported to one. While a suspect is in police custody, the officers are legally bound to report details on all developments of the detainee including his movements and wellbeing. They do not hold the authority to take a suspect out of the police station without permission from the Magistrate.

The police have not provided any information on how Lakshman was able to get his hands on a hand grenade while supervised by three well-trained police officers and why he was not handcuffed. Furthermore, there is no explanation of how the officers could all escape without injuries from the explosion that the hand grenade must have caused.

As described, this is not an isolated case. The same explanation has been used by the police in countless other cases. If the precise same situation keeps occurring, one would think that the police had learned by now to keep the suspect under better supervision. In the case of Laksman even a high-ranking OIC, a SP and a DIG were present. If the explanations were true, it should be regarded as a huge embarrassment for the police as it shows the continuously lack of professionalism.

Please note the following cases:

**SRI LANKA: A man is shot dead by officers attached to the Pitigala Police Station**

October 11, 2010, [AHRC-UAC-164-2010](#)

When police officers tried to arrest Mr. Chathurathantri Viraj Tharanga (25) on August 27, 2010, he was shot dead as he allegedly attempted to throw a bomb at them. The police never revealed any injuries to any of the officers.

**SRI LANKA: A man is shot dead while in the police custody of Special Task Force**

September 29, 2010, [AHRC-UAC-154-2010](#)

Mr. Jayakody Arachchilage Oman Perera was arrested 31 August 2010 by police officers attached to the Special Task Force (STF) and taken by jeep to Colombo. During the journey one of the officers shot Jayakody because of an allegedly attempted escape. He died in hospital the same day.

**SRI LANKA: A man is shot dead while in the police custody of Embilipitiya Police**

September 27, 2010, [AHRC-UAC-150-2010](#)

Mr. Ranmukage Ajith Prasanna (30) was arrested by police officers on 17 September 2010. While in police custody he was according to the police taken to uncover a weapons shelter. The police claim that on the way Ajith tried to snap a

weapon from an officer whereupon the officer shot him. Soon after he succumbed to his injuries in hospital.

## **SRI LANKA: A man is shot dead while in the police custody of Sapugaskanda Police**

September 22, 2010, [AHRC-UAC-147-2010](#)

Mr. Suresh Kumar (24) was arrested by police officers on 4 September 2010 and taken to uncover an alleged weapon shelter. According to the police he attempted to throw a hand grenade in direction of the police officers during the journey. Later he was found dead on the roadside.

### **Killing of beggars**

([AHRC-STM-136-2010](#)) The suspicious death of a significant number of beggars also suggest that scapegoats are invented under the pretext of preventing terrorism.

A news report from Colombo published on June 11, 2010 presents the following statement by Sri Lanka's Prime Minister D.M. Jayaratne: "Members of the vanquished Tamil Tiger terrorist organization, Liberation Tigers of Tamil Eelam (LTTE) are posing as beggars in the cities throughout the country to gather information". At a ceremony to launch welfare loan schemes for the families of war heroes some weeks later, he further stated that the government intelligence services had identified that these beggars had been trained and deployed by the LTTE. Jayaratne stressed that the intelligence units should be constantly vigilant on such movements.

In late June 2010 a disabled person who moved on a wheelchair was found dead in Colombo with severe head injuries. Five other similar deaths of beggars were also reported in previous months. No accidental circumstances have surfaced in any of the cases and the injuries on their bodies strongly suggest they were cases of murder.

### Custodial deaths

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Another common used explanation to cover killings carried out by the police is to state that the suspected committed suicide in custody.

([AHRC-UAC-155-2010](#)) Mr. Pattiyage Komako Lalan Peiris (34) was arrested by police officers attached to Kottawa Police Station in the evening of May 23, 2010. His arrest was allegedly a case of mistaken identity, which is common occurrence in Sri Lanka. At the time of his arrest, he was with his friend Ruwan, who the police asked for identity papers, but he failed to submit them. The officers asked Lalan, who was able to produce his identity card and the officers brought both of them to the station. Lalan's relatives came to the station later to inquire about him, but the police denied his arrest. However, he was found dead in a cell the following morning handcuffed to a table. The body was brought to South Colombo Teaching Hospital, where the police tried to prevent a post mortem and explained the death

to the media as a heart attack. Nevertheless Lalan's family insisted upon an autopsy to be carried out by the Colombo Judicial Medical Officer at the National Hospital, which revealed that the death was due to torture.

A similar story is the one of Mr. Appuhandhi Kotahewage Nayanajith Prasanna (AHRC-UAC-152-2010), who was arrested without charges by police officers attached to the Moratuwa Police Station on September 22, 2010. He was never produced before a magistrate and neither was his arrest reported. On September 25 he was found in his cell with severe cuts to the abdomen. He was admitted to the Kalubowila Teaching Hospital where he succumbed to his injuries the day after. The police claim he committed suicide while in custody by slashing his stomach with a shard of glass, which was on the table in the cell.

According to the Departmental Orders of the Sri Lankan Police Department it is the duty of the Officer-in-Charge (OIC) of the relevant station to provide protection to the detainee under his custody. Any article or item, which may be used to harm either the detainee himself or used by the detainee to attack an officer, should have been removed. If the case unlikely was a case of suicide, it then clearly illustrates the police's neglect of their responsibilities with very little or no supervision of the detainee.

Please note the following cases:

**SRI LANKA: A man is killed after being tortured by the Kiribathgoda police**  
September 20, [AHRC-UAC-144-2010](#)

Jayasekara Arachchige Roshan Jayasekara (35) was arrested by police officers on August 25, 2010. On August 26 an officer brought Jayasekara's body to the hospital. The post mortem examination revealed marks of numerous blunt force trauma injuries.

**SRI LANKA: A man succumbs to his injuries of torture by the Kirindiwela police**

September 16, 2010, [AHRC-UAC-140-2010](#)

Amarasinghe Arachchige David was arrested on August 12, 2010 by police officers. On the way to the station the police stopped to search some villagers. David left the car to watch whereupon the police officer gave him a brutal beating. The incident was witnessed by a large group of people. He later succumbed to his injuries at the hospital

### The simple logic behind complex killings

The prevailing mentality at the police stations accepts torture as a method of interrogation. Many times it is regarded a necessity to eliminate the crimes the detainee is suspected of. Ghastly enough, in cases of deliberate, fabricated charges, torture is in fact a necessity. It is simple logic that it might be the only mean to obtain a confession from an innocent person.

Fabricated charges are common practise in Sri Lanka. The police often produce a false statement and force the detainee to sign or set his fingerprint on it. While torture can get you far in confessions, killings will obviously speed up the process even more.

Many times the Sri Lankan police might know the identity of the culprit, but are not interested in identifying them. It regularly results in arrests of utterly random people, although it may also come in handy for the police or other parties involved to get rid of someone they planned to eliminate anyway as an act of revenge or out of political interest. Killing is convenient as further investigation into the case is unlikely to happen after the death of the accused. Basically you kill two birds with one stone; the case will have a culprit plus the wanted person gets eliminated.

Furthermore extrajudicial killings set an example and function as clear warnings to people likely to follow in the killed person's footsteps. It is a common tool for security agencies and politicians to silence opposition politicians or journalists.

It is important to note, that the police not only practise arbitrary arrests of innocent persons, but obviously also detain persons guilty of murder, rape and other serious crimes. However the problem is that these atrocities are used by the police as justifications for torture and even killings.

As the degree of the crime increases, the vindication of torture or killings does not. According to the law of evidence any statement taken by the use of torture cannot be used in court. The use of torture and extrajudicial killings can never be compromised. They are nothing more than symbols of a dysfunctional and corrupted police system with no check and balances available.

The killings happens because the security agencies have a fear of the case being taken to court receiving an impartial trial, that neither the police nor other parties involved hold the power to influence. The killings happen because a degree of judicial power still exists in Sri Lanka. Even though it is declining, the memory of it is strong. In a country where it is common acknowledged that the courts hold no power at all, but only function as a part of the administrative system, the security agencies will not have to kill continuously to cover up their crimes. The amount of extrajudicial killings in Sri Lanka today is a symbol of the conceptual trust in the marginal judicial power, which is now in the state of transforming to no judicial power.

#### [A constitution with room for extrajudicial acts](#)

The last attempt for a reform of the police system to de-politicize it was taken with the 17<sup>th</sup> Amendment in 2001. It provided checks on the powers of the President, providing for high-level appointments like the Chief Justice, the National Police Commission, Public Service Commission and the National Human Rights Commission under the supervision of the Constitutional Council. The Constitutional

Council was also expected to deal with promotions and dismissals of police officers to secure independence between the governing institutions.

However, President Rajapakse blocked the implementation of the Amendment as he refused to appoint the Council's successors, when their first term lapsed in 2005 although the members had already been selected by various parties constitutionally empowered to make the nominations. Despite Rajapakse's constitutional obligations to appoint the nominee's, his immunity made it impossible to challenge the negligence in court and the Council has been in abeyance ever since.

There are no platforms for complaints against the police system today. It is the officers themselves or their colleagues, who occupy the desks for complaints at the police stations. The sections work as a part of the police system and not as an impartial, controlling division. There are countless examples of the police officers ignoring their statutory duty and refuse to file the complaint. Neither is it uncommon, that the few who dare to try their luck, experience harassment and threats from the officers. Maintenance of the official records is further neglected and there is no assurance that a person, who successes in filing a complaint, will ever encounter any legal action being taken.

While the initial steps for a victim and witness protection bill were taken in 2007, the reading of the draft bill has been at a standstill ever since. The introduction of the bill came most likely as a reaction of the international pressure on the Sri Lankan government for a piece of legislation on victim and witness protection. As soon as the attention subsided, no further action has been taken to pass the bill and the government has been exceptionally silent about the undue delay.

Even the limited inquiries that were conducted by the Human Rights Commission of Sri Lanka have almost ended. With a stop to the Commission's fundings and the power to appoint the members given to Rajapakse himself, the Commission still exist in name, but its content and intended function are gone. The only purpose it holds today is symbolizing the function, which it should have had.

Rajapakse saw the Constitutional Council as an obstacle to his absolute power as an executive president. The passing of the 18<sup>th</sup> Amendment on September 8, 2010 has only exceeded the Presidential power by removing the Presidential term limits and given the President the power to regularly attend and address Parliament. Consequently, any hope of a revival of the Constitutional Council or any such monitoring bodies has died.

Sri Lanka is a Constitutional state, which for many people is identical with a rule of law system. But in Sri Lanka today it is the Constitution itself that has eroded the rule of law and left room for the police and politicians' extraordinary practise of torture and extrajudicial killings.

### Undermining judicial reservations

When security agencies carry out executions as a part of their practice, they have taken on the power reserved the Judiciary. The police hand out death sentences without any legal process and take authorization to judge on the detained person right to life. The killings are mostly carried out in secrecy and information of the circumstances of the killings is deliberately hidden and the detainee and the relatives right to truth through a legal process is denied. The security agencies have hereby sat themselves above the judicial sector including Chief Justice and High Court and made judgments on capital punishments a political and regulatory matter and not a legal reservation.

The matter is further taken to civilian grounds as lawlessness gets canalised to the Sri Lankan civil society. When there is no legal defence to serious crimes, many people take the law into their own hands. It is cheaper, faster and more “efficient” than the struggle of starting legal procedures; the lack of accountability and impartiality within the police and the possible prospects of proceedings running for years or even decades. This has resulted in underground groups taking over certain parts of law enforcement in public life and a so-called judicial mafia is slowly emerging offering quick gateways to justice.

It is a fundamental concept in all civilized societies that deprivation of life can be effected only by a competent judicial body, and through due process of law. Death sentences are still handed out by the courts in Sri Lanka and as the abolition of capital punishment in Sri Lanka of course should be pursued by all means, no legal execution has actually taken place since the 1970's as the sentences always are commuted to life imprisonments. This has been an official policy by the state.

However by not pursuing enquiries or official investigations into the frequent custodial deaths and suspicious killings by the police or other state agencies, the state has declared its approval of these illegal executions. It is extremely unsettling that this has become an accepted, common practice denying the victim the right to a fair trial, which is the basic norm of justice, on which all others norms depend on.

One of the basic ideas in a rule of law system is the separation of powers. When the separation is not respected, the system breaks down. The practice of extrajudicial killings as is an exceptional threat to the fundamental believes of justice, equality and human responsibility whereupon a civilized society is build. It influences the understanding and perception of the Sri Lankan society and the Sri Lankan identity.

To understand the profound impact this development will have, the issue has to be closely analyzed, exposed and debated widely.

Additional cases:

**SRI LANKA: A seven year old child gunned down by Maharagama Police**  
September 30, 2010, [AHRC-UAC-156-2010](#)

On September 15, 2010, police officers opened fire in a crowded market place and shot dead Sudil Nilupul Silva (7). The officers, who were wearing civilian clothes and drove in a private car, were apparently chasing a gang of theft suspects. They belonged to a police station from another area and had no jurisdictional right to be in Beruwala town. Nilupul's father was also injured in the shooting.

### **SRI LANKA: A man is shot dead by Trincomalee police during a botched arrest**

May 12, 2010, [AHRC-UAC-060-2010](#)

Living in a conflict area Balage Rusiru Reggie Vijaya Bandula fired a warning shot out of the window of his house in response to sustained and unidentified banging on his door and around his house on 3 March 2010. Shortly after police officers broke down the door and shot Reggie. He died soon after at the hospital.

### **SRI LANKA: The murder of a witness by police must be independently investigated**

April 26, 2010, [AHRC-UAC-052-2010](#)

In 2008 Saman Thialakasiri had reported cases of illegal logging in his neighbourhood with suspected connections to the local police. Ever since he was harassed and receiving death threat. On a few occasions he was arrested by police officers on fabricated charges, which they tried to bribe him to plea guilty of. At night on February 21, 2010 two police officers picked up Saman. His body was found near a lake the next morning. A post mortem by a Judicial Medical Officer reveals that the victim was drowned and suffered severe blows to his head.

## Police Torture

Sri Lankan citizens are protected against torture and arbitrary arrest in sections 11, 12 and 13 of the Constitution of Sri Lanka. According to Article 11 "No person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." Article 12 (1) of the Constitution of Sri Lanka states that, "All persons are equal before the law and are entitled to the equal protection of the law". Moreover Article 13 (1) declares, "No person shall be arrested except according to procedure established by law. Any person arrested shall be informed of the reason for his arrest." In addition Sri Lanka also ratified the United Nations Convention against Torture and Cruel and Inhuman Treatment in 1994.

While the legislation is there, the effectuation is not. The gap between the rights set out on paper and the daily practice at the police stations is tremendous. As the previous parts of this report demonstrates the systematically use of torture and extrajudicial killings in the politicized police system deprive from a constitution which leave room for these misconducts to occur and offers impunity to the prosecutors. While the core of the problems is to find in legislative measures many structural and social factors contribute to the extent and intensity of such procedures and their expansion and development.

### The hierarchy within the police

There is strong hierarchy within the police. The hierarchy is one of the contributing factors to the officers' power abuse exercised on the public. It is common practise that senior officers exercise violence and verbal harassment on the lower ranking officers.

A retired Woman Police Constable (WPC), who does not want to be named, but who served the Police Department of Sri Lanka for 28 years in different areas like Kegalle, Kandy, Matale, Serunuara and Kanthale, blames the polices' use of arbitrary power and their violent attitude on the pecking order within the police and the lack of resources, which particularly affects the lower ranking officers.

As she explains, "Although we are suppose to work only an 8 hours shift it is usually extended for up to 12 hours most of the time due to the heavy work load and the lack of officers in service. No additional allowance is allocated to the officers. Under these kinds of situations, it is usual for the officers to get deep frustrations and mental traumas. We are not allowed to communicate with higher-ranking officers regarding our situation or to make claims for relief. The senior officers in service treat the lower ranking officers with no sense of humanity or kindness. Most of the times they treat us like slaves."

The WPC stresses that when violence and punishment are the lessons given among the officers, naturally the methods will be exposed in their work as well. The frustration and anger the lower ranking officers encounter subsequently get directed at the people they feel superior to, which in this case is the public. Citizens coming to the police stations are many times already victims and therefore already vulnerable and easy targets.

As discussed in the section on education of officers, the officer school do provide classes in proper methods of interrogation and investigation. However, after years with harassment from higher ranking officers, when the lower ranks become senior themselves, the methods will be so deeply rooted and regarded as the only means to uphold their position. Consequentially the system keeps reproducing itself.

The politicization of the institution further destroys any possibilities for independent and qualified investigations. The politicians have a huge interest in controlling the police system and prevent investigation of cases concerning crimes against opposition politician or critical journalists. In the same way police officers have interest in good relations to the politicians, who can see to their promotions or provide convenient supplements to their salaries. Naturally, when there are no bodies to control the system and uphold the separation of powers, the system will design itself, so these exchanges become easier.

### Lack of training and education

([AHRC-ETC-027-2010](#)) Mrs. Rmar is a retired police sergeant. According to her view, one of the dominant problems within the police system is the lack of proper education and continuous training of the officers. She believes the core to the use of torture lies as a fundamental error in the methods and procedures of interrogation and investigation.

Mrs. Ramar emphasizes that instead of trying to get all possible facts from the suspected, the officers should work to investigate the surrounding facts and reasons for the arrest and collect the necessary evidence. According to her there is a strong need for a systematic technique in the investigation procedure and for a discipline to follow that procedure.

She explains that, "The officers need to have much patience and a scientific approach. They should collect information without breaking the chains of evidence. For that they have to develop their research skills and be able to analyse facts. (..) If they do not pay attention at the very beginning of a crime scene investigation evidence can easily be destroyed."

Mrs. Ramar notes that training in use of DNA evidence or rudimentary techniques as the taking footprints or fingerprints are included in the basic training of police officers, but with time many of the techniques are forgotten. Without a continuously training of the officers, they will go for the easier method of torturing the suspect in order to conclude the investigation.

(The training period for an officer is six month. For a sub-inspector it is 9 months. To put it in a perspective most police education in Europe is at least 3 years with a mix of schooling and trainee service. )

### Lack of resources

Many public institutions are undermanned and under equipped due to the lack of resources. The police might get training in advanced equipment for investigations at the officer school, but many stations do not provide the gear.

The lack of personnel results in heavy workload and continuously overtime. The pressure creates frustration and anger within the police force and is a causative factor to the senior officers exploitation of the lower ranks. As a consequence, many times the officers are not able to perform the functions required of them, which contributes to the practice of neglecting mandatory procedures and measures such as maintaining the records of complaints or filing mandatory papers during an arrest.

It has long been a requirement that police stations contain a separate union for women and children with female officers attached, but with lack of resources the

maintenance of the units is not prioritized. This obviously makes the women more vulnerable to harassment and physical and mental abuse by the officers.

While overtime is an almost daily occurrence and there is nothing as overtime pay, corruption become normal practise. Taking bribes is considered a supplement to their salary and as justification of their bad working conditions. It is not uncommon that influential people or politicians can bribe their way to the torture of an opponent or an enemy to “teach a person a lesson”.

### Methods of torture

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The physical torture, which takes place at the stations, does not only involve beatings, but “advanced” methods of torture, which requires tools and detailed knowledge of techniques.

The most prevalent form is beatings with blunt weapons like batons or poles. Sometimes the victim is hanged with rope from the roof in either arms or legs or handcuffed to a furniture, or a tree if outside, while they suffer beatings. The so-called ‘Palestinian hanging’ is also commonly used, which describes a method where the whole shoulder joint is rotated backwards so the nerves going through the arms to the hands are rotated and the limbs paralyzed. Another common method is the so-called Dharma Chakra technique, where the handcuffed person is suspended on a pole inserted into the crooks of the bound knees and elbows. Furthermore there are reports of waterboarding, sexual molestation etc.

Most of the times the police do not wish to cause permanent damage to the detainee, as it can be used as a proof for prosecution of the officers, so they often use tools or methods, which only cause injuries to the surface of the body, noting that often the mental scars from the torture are deeper than the physical ones. If the person is remanded for a longer period of time, it is also common for the police to use severe physical torture in the beginning of the period, while shifting to mental torture in the end giving the injuries time to heal before the person will see a magistrate or a Judicial Medical Officer (JMO).

These kind of well-developed techniques do not just appear in the “heat of the moment”. They are being deliberately performed with tools being present at the stations. The methods are passed down from senior officers as a part of their teachings and regular practises.

### The role of the medical system

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The police often deny the detainee medical treatment as a punishment and an extension of the torture. However in cases where the detainee is brought to hospital, the doctors in many cases merely do more than give treatment to the victim. The detainee has the right to see a JMO and the doctors are also obliged to report any suspicious injuries. But neither are the hospitals independent

institutions nor are the doctors and JMO's immune to threats and bribing. Furthermore, there is a lack of JMO's and especially in rural areas where hospitals cannot provide a fulltime JMO, which mean there might not even be one available when the detainee is admitted to hospital.

If the hospitalization is due to ill treatment by the police, the officers will most likely try to prevent the detainee to see a JMO or at least they will guard the consultation. Even if the JMO compiles a Medico-Legal Examination Form (MLEF) there is no assurance that the document will get further than the hospital. The police can force doctors and JMO's to file a false MLEF or the officer can dictate the form himself. There are even examples of detainee's trying to convey torture and as a result being denied medical treatment by the doctors.

### When every part of the system fail to perform their duty

A case, which illustrates the very deliberate and continuously use of torture at the police stations is the one of Wannu Athapaththu Mudiyansele Nilantha Saman Kumara (31) from Galgamuwa. It also clearly confirm, how all the stages from the arrest to the court work as a chain of entwined events with everyone involved complicit in the failure of performing anything that could even claim to get near an official requisite procedure for an arrest. The case demonstrates that these failures shall not be looked upon as secluded, exceptionable incidents, but instead regarded as a part of a system in favour of the people in charge, but configures to fail legal functioning.

([AHRC-UAC-166-2009](#)) On October 26, 2009, Nilantha and a big group of villagers were helping the police and the village chief searching the jungle near the city for stolen goods from a shop, which had been robbed the previous day. At night Nilantha was stopped by police officers and taken to the police station, where he was jailed without an official arrest and with no charges read to him.

For two days he suffered brutal methods of torture conducted by Inspector (IP) Atapattu, Police Constable Wijeratne and two other police constables all in civilian clothes. They were trying to make him confess the robbery of the shop and a water pump. Under the direction of IP Atapattu, he was allegedly tortured in a manner known as the Palestinian Hanging. He was tied up and hung from a ceiling beam suspended from his hands in the air. The officers told him he would hang there until he confessed. About two hours later, he was taken down, but the hanging was repeated later the same day and after he was beat and kicked for around three hours. Nilantha believes that the officers were drunk.

The next day he was told that if he gave back the stolen goods, he would not have to go to court the following day, as he had been told he would and could go home instead. Nilantha kept denying. Then he was subjected to the Dharma Chakra method, where his hands were laid over his knees, a metal pipe was put through the crooks of knees and elbows, and the pipe suspended and balanced on two tables

with his head hanging close to the floor. Meanwhile a bottle of petrol was being poured into his anus.

Nilantha was admitted to Galgamuwa hospital on October 28 and provided some treatment, but the JMO filled out the MLEF without even seeing him. Nilantha was then taken to Magistrate's Court in Galgamuwa, but kept outside the Magistrates office and denied his right of speaking to one. Because of his critical condition he was again admitted to hospital on October 29. This time Nilantha told the doctor about the torture he had suffered, but the doctor accused him of lying and refused to examine him even though his body was covered with evidence

Furthermore during his detention Nilantha was denied proper food and only provided with a few bread lumps. He was released on bail November 6 and warded in hospital for six days but he still suffers great complications. Nilantha has furthermore reported that one of the officers involved has shown up at his house and is apparently monitoring him.

Nilantha's case clearly illustrates how torture is deliberately used at police stations with the involvement of many officers confident of their impunity with magistrates and doctors complicit in the misconduct. In this case they might have been threatened by the police, they might have had "no choice" if they wanted to keep their jobs or their families to stay safe, they might have been bribed or done it out of own interest in the case. Whatever the reasons, the fact is that these are the bodies supposed to monitor the police, but as a result of the institutional room for this lawlessness, they have become deeply implicated with the horrendous police procedure.

First of all, 13.1 of the Sri Lankan Constitution notes that, "No person shall be arrested except according to procedure established by law. Any person arrested shall be informed of the reason for his arrest". In 13.2 one finds that, "Every person held in custody, detained or otherwise deprived of personal liberty shall be brought before the judge of the nearest competent court according to procedure established by law, and shall not be further held in custody, detained or deprived of personal liberty except upon and in terms of the order of such judge made in accordance with procedure established by law."

The Code of Criminal Procedure Act, section 37 states, that an arrested person shall be produced before a magistrate within 24-hours from his arrest.

The responsibility of officers to provide adequate food to detainees is noted in the Ceylon Police Departmental Order.

Moreover, denying an injured person medical treatment is also considered a form of torture. Principle 24 in The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment adopted by General Assembly resolution 43/173 in 1988, states that, "A proper medical examination shall be offered to a detained or imprisoned person as promptly as possible after his admission to the place of detention or imprisonment, and thereafter medical care

and treatment shall be provided whenever necessary. This care and treatment shall be provided free of charge.” This is further enshrined in the Ceylon Police Departmental Order No. A. 20, including section 5 g. As the doctor neglected her duty to examine and treat Nilantha, she may also be criminally liable for torture and grave misconduct.

## Torture as a symbol of the institutional nuisance

As Nilantha's case illustrates the failure of the system, do not only lie within the police, but at almost every stage leading up to a legal process. Claiming that the deficient and corrupt security system is only caused by the insufficient education and lack of resources in the police would be to distort the problems. The training could in fact be very professional, but if the realities at the stations do not correspond with the ethics in the books, no newly minted officers will have the slightest chance to implement it.

The core of the problems lies in the breakdown of essential institutional structures. As the police system's fundamental check and balances have been removed, there are no safeguards of the laws and therefore no common responsibility. The political design of the institution prevents independent investigations by any law enforcement agencies and repress the will to carry out such investigations within the police. While people in the police system might regard themselves as guardians of the law, when there is no law to protect, they become the guardians of their own interests.

As faith is lost in the administration of justice, the morality within the police also seems to thin out. While the politicians or the judiciary even encourage officers to the use of criminal methods, one would be naïve to believe even a well-trained officer would be able to uphold a responsible and accountable practise.

Please note the following cases:

### **SRI LANKA: A man was illegally arrested, detained, tortured and refused medical treatment by the Ahangama Police**

October 6, 2010, [AHRC-UAC-160-2010](#)

Due to a family dispute Mr. Ganegoda Sinhage Haritha Lakmal (30) was arrested by police officers on May 26, 2010. He was brutally tortured, denied proper treatment and forced to sign a document. Later he was admitted to hospital in a very critical condition and warded for 13 days. The police released him without bail. The Sri Lanka Human Rights Commission has taken up the case for inquiry, but the agreed compensation has not yet been paid and Lakmal and his family keep receiving threats from the police not to proceed with the case. Lakmal suffers from great complication due to the torture and goes to the hospital regularly.

### **SRI LANKA: A complainant was illegally arrested, detained and tortured by officers of the Ma Oya Police Post**

October 4, 2010, [AHRC-UAC-158-2010](#)

On April 26, 2010, Mr. Henayaka Arachchilage Parackrama Karunaratne (28) went to the police station to make a complaint about a gambling den close to his house. Since no action was taken he returned the following day, which provoked the constables on duty. They cuffed Parackrama to a tree and assaulted him severely. He was brought to hospital, but the doctor denied him proper treatment after talking to the sergeant. Later the Headquarters Inspector of Police sent him to hospital where he was warded until April 28. A fabricated charge has been filed against him by the officers while released on bail April 30.

**SRI LANKA: A man died in the custody of the Kottawa police**

September 30, 2010, [AHRC-UAC-155-2010](#)

Mr. Pattiyage Komako Lalan Peiris (34) was arrested by the police officers on 23 May 2010. His arrest was allegedly a case of mistaken identity. He was found dead the following morning while handcuffed to a table in a police cell. The police explain the death as a heart attack but an autopsy carried out later at the insistence of the family reveals signs of torture.

**SRI LANKA: A man severely tortured by the Urubokka police**

September 21, 2010, [AHRC-UAC-145-2010](#)

Mr. Jayasuriyage Samira Desapriya (24) was arrested by police officers on June 1, 2010. Illegal goods were planted with him in the police car and at the station he was tortured severely. He was released on June 2 and warded in hospital until June 5. The police keep following and threaten him. He has never been charged and no statement was ever taken from him.

**SRI LANKA: A man is killed after being tortured by the Kiribathgoda police**

September 20, [AHRC-UAC-144-2010](#)

Jayasekara Arachchige Roshan Jayasekara (35) was arrested by police officers on August 25, 2010. On August 26 an officer brought Jayasekara's body to the hospital. The post mortem examination revealed marks of numerous blunt force trauma injuries.

**SRI LANKA: Criminal Investigation Department officers torture a man then attempt to kill him**

September 17, 2010, [AHRC-UAC-143-2010](#)

W.A. Lasantha Pradeep Wijerathna was arrested by Navy officers on August 14, 2010 and handed over to the criminal Investigation Department (CID). He was in critical condition due to severe torture, but was not admitted to hospital before August 31 when his relatives got an Attorney-at-Law to appear on his behalf. No legal steps to investigate the case have yet been taken.

**SRI LANKA: A man succumbs to his injuries of torture by the Kirindiwela police**

September 16, 2010, [AHRC-UAC-140-2010](#)

Amarasinghe Arachchige David was arrested on August 12, 2010 by police officers. On the way to the station the police stopped to search some villagers. David left the car to watch whereupon the police officer gave him a brutal beating. The

incident was witnessed by a large group of people. He later succumbed to his injuries at the hospital.

**SRI LANKA: A man was severely tortured, illegally arrested and detained by the Welipenna police who then filed fabricated charges against him**

September 15, 2010, [AHRC-UAC-139-2010](#)

On August 9, 2010, Mr. Hewawasam Sarukkalige Rathnasiri Fernando (50) was looked up by police in civil clothes at his workplace. One officer tried to grab Rathnasiri's working knife and accidentally received a minor cut on his hand. The officers thereupon cut Rathnasiri severely with the knife and beat him up. He was later warded in hospital. The police filed a fabricated charge against him and remanded him until August 17, where he was released on bail.

**SRI LANKA: Criminal Investigation Department officers illegally arrested, detained and tortured a man and denied him the right to medical treatment**

September 9, 2010, [AHRC-UAC-134-2010](#)

Balapuwaduge Suresh Sumith Kumar Mendis was arrested by officers of the Sri Lankan Navy on August 14, 2010 and handed over to the CID allegedly due to a failed attempt to seek asylum in Australia. During his present detention he has been critically tortured, denied medical treatment and meetings with his lawyer.

**SRI LANKA: Ganemulla police illegally arrested, detained, tortured and filed fabricated charges against a civilian**

September 8, 2010, [AHRC-UAC-131-2010](#)

Balapu Waduge Lakshman Mendis (39) was beaten up severely by police officers in public and charged with a fabricated case on April 25, 2010 due to a small inquiry with the OIC's son earlier the same day. He was discharged to the hospital April 29 and released on bail May 4. The state authorities have failed to launch an investigation. An application to the Supreme Court was supported August 7 and next hearing set to December 6. The long interim period poses a great threat to the victim and witnesses who do not receive any state protection.

**SRI LANKA: Pussellawa Police illegally arrested, detained, tortured, and filed fabricated charges against an estate labourer**

September 7, 2010, [AHRC-UAC-129-2010](#)

Manivel Saundrarasau (46) was arrested and tortured by police officers on August 10 2010 on fabricated charges with illegal goods planted as evidence at the police station. Later he was released on bail. While waiting for delayed court proceedings, he and his family members are being harassed and threatened by police officers.

**SRI LANKA: Panwila Police illegally arrested, detained and tortured an innocent civilian**

September 1, 2010, [AHRC-UAC-126-2010](#)

Mr. Jesu Andrew (28) was arrested by police officers on August 23, 2010 on a fabricated charge. He was tortured severely, forced to sign a document in Sinhalese, which he cannot read or write, and kept illegally detained until released on bail on August 25.

**SRI LANKA: Anamaduwa Police illegally arrested, detained and tortured a school-boy and filed fabricated criminal charges**

September 1, 2010, [AHRC-UAC-125-2010](#)

On June 4, 2010 Koronchilage Sujith Aruna Shantha (17) had an inquiry with an older schoolmate, which father, Stanley Joseph, is a well-known businessman. Later he was arrested by six policemen in civilian clothes and brought to the police station, where he was tortured. He was produced before court with fabricated charges on June 5 and released on bail on June 10. Due to his critical condition he was warded in hospital until June 14. Stanley's family has openly admitted to be behind the arrest.

**SRI LANKA: A man is arbitrarily detained and assaulted by Urubokka Police**

August 3, 2010, [AHRC-UAC-115-2010](#)

Upon a request from a police officer on May 16, 2010 Samarasinghage Koranelis reported at the station on May 21, 2010 on a complaint filed by his brother, who used to work at the station. He was assaulted severely during questioning but released soon after by the OIC. Koranelis has since been suffering great damage to his hearings and requires regularly treatment at the hospital.

**SRI LANKA: Balagolla police officers beat, humiliate and arbitrarily arrest another civilian**

August 3, 2010, [AHRC-UAC-114-2010](#)

Mr. Alhaj Farook Mohomad Ikram was violently and arbitrary arrested on June 17, 2010 by officers and two civilians. He was released the next day without charge or bail, but because of the assault he has afterwards suffered severe damages to his ears and spend days in hospitals.

**SRI LANKA: Baduraliya police illegally arrest and torture a man**

July 28, 2010, [AHRC-UAC-111-2010](#)

Seelawansa Hitihamilage Don Samantha Priyalal (38) was arrested on June 29, 2010 by police officers including a constable in plain clothes. At the station he was exposed to brutal torture and afterwards denied medical treatment despite his critical condition. He was released the next day pleading not guilty and warded in hospital until July 2.

**SRI LANKA: Two men are beaten and tortured with leeches by Matugama police; one faces fabricated charges**

July 15, 2010, [AHRC-UAC-105-2010](#)

Mr. Anthoni Ayiya Devaraj (44) and Mr. Mannikkam Sandana were arrested by policemen in plain clothes on June 7, 2010 and taken to a rural pit, where they were handcuffed, badly beaten and pushed into the leech-infested pit. As a result of intervention by a police friend, Sandana was later released without charges. Devaraj was forced to plead guilty to fabricated charges and later released on bail.

**SRI LANKA: A man is badly beaten by Saliyawewa police during an illegal arrest and is denied medical treatment**

July 15, 2010, [AHRC-UAC-103-2010](#)

On May 11, 2010 police officers in plain cloth arrived at Undiya Ralalage Premaratne's house, where they arrested him, beat him up and rob of his jewellery before taking him to the station. Later a doctor saw him, but allegedly filled a false Medico Legal form dictated by the police. On May 12 he was released on bail and admitted to hospital for 3 days. The doctors were reluctant to report the police's treatment and he was not seen by a Judicial Medical Officer.

### **SRI LANKA: Stop the torture of detainees at Rajangana Police Station**

July 8, 2010, [AHRC-UAC-098-2010](#)

At least four cases of torture and illegal arrest took place at Rajangana police station between in April and May 2010. On May 8, 2010, Suba Hewage Samantha Bandara (23) was arrested, brutally tortured and released on bail May 11. On April 21, 2010, Dissanayake Mudiyansele Nishantha Dissanayake (27) was arrested, tortured and detained until May 27. Mannikawasagar Thawadan (27) was arrested on April 21, 2010 and remains in prison, where reports of torture. Mangala Prabat was also remanded in this period and suffered severe torture. All have been seen by a judicial medical officer and despite lodging complaints no inquiries have been launched in any of their cases.

### **SRI LANKA: An officer assaults a witness to police violence outside his home; no investigation is taken up**

July 2, 2010, [AHRC-UAC-095-2010](#)

On April 24, 2010, Mallawa Arachchige Gamini Sisira Kumara (47) witnessed police officers beating two handcuffed persons in front of his house. The officers attacked Kumara with a pole breaking his left hand, which now disables him from his work. He was discharged from hospital April 29. After filing a complaint at the office Deputy Inspector General, he has regularly received threats by the police.

### **SRI LANKA: The trial of a three-wheeler driver lags; his allegations of torture are not investigated**

June 30, 2010, [AHRC-UAU-028-2010](#)

An update on [AHRC-UAC-022-2010](#) published on March 5, 2010.

A three-wheel taxi driver, Upul Palitha Mawalag, was arrested along with his two passengers in May 2009 during a police routine search. The passengers were found possessing drugs, but were released after allegedly paying a bribe. Mawalag suffered severe torture by the police. The case has been routinely postponed by the request of the prosecution and his bail took until January 2010 to be awarded. Neither has any legal steps been taken to investigate the torture of Mawalag by the police.

### **SRI LANKA: A man is badly beaten by Kolonna police officers but denied a judicial remedy**

June 11, 2010, [AHRC-UAC-085-2010](#)

Karasinghe Arachchilage Kumarasinghe Appuhamy (55) was arrested on April 30, 2010. During questioning he was badly beaten and threatened with fabricated charges. He was brought to hospital, but denied medical treatment after police interfered with the doctors. He was released in the evening after being forced to

sign a statement and stayed in hospital from May 2 to 5. His complaint has been accepted by the relevant authorities, but no action has been taken.

**SRI LANKA: A man is beaten by Panadura police but denied a judicial remedy**

May 13, 2010, [AHRC-UAC-063-2010](#)

Malawiarachchige Mahinda (32) was picked up on April 2, 2010 by police officers. They refused to give him any information of the charges against him and beat him unconscious. He was taken to hospital under police guard but denied to collect his prescribed medicine. He was released on bail April 5 after seeing a magistrate, who however, denied taking his statement or launching an investigation. He has not received any official response to the complaint made to the relevant authorities.

**SRI LANKA: A group of officers brutally assault a visitor to Polpithigama police station**

May 13, 2010, [AHRC-UAC-061-2010](#)

Gamage Sarath Gamini went to the police station after an arrest of his cousins on March 1, 2010. Upon Sarath's request to see them, the police officers started threaten him and brutally beat him up. He was warded in hospital until March 4 and again from March 10 to 12. Only The Human Rights Commission of Sri Lanka has launched an investigation and Sarath has received various threats from the police to settle the case.

**SRI LANKA: A man is tortured by police and held without bail for two years**

April 20, 2010, [AHRC-UAC-049-2010](#)

Gayana Thusitha Kumar (30) was arrested by police officers on September 17, 2010. He was accused of theft and forced to confess by severe torture. Following an intervention by the Human Rights Commission of Sri Lanka to secure him treatment or release, the officers obtained a detention order for by planting the victim's fingerprints on explosives. He was detained for 40 days at the station. On October 30, 2007 he was produced at court and sent to prison, where he spent more than 2 years waiting for trial. He was released on bail November 10, 2009.

**SRI LANKA: Police torture and fabricate charges against a young man for revenge**

April 1, 2010, [AHRC-UAC-039-2010](#)

On March 28, 2009, Tharidu Nishan (21) and his friend Nuwan Madusanka were taken to the police station and interrogated by a sergeant about an earlier incident where Tharidu had slapped his girlfriend; the daughter of the sergeant. They were both accused on theft and tortured severely. After being illegally detained for two days and receiving threats of fabricated charges, they were forced to sign a document before going to court. They were released on bail May 19. In November 2009, Tharidu faced further fabricated charges and was remanded, but again released on bail December 8. He continues to be subject to harassment by police officers.

## **SRI LANKA: Police strip and sexually torture man in custody to force confession**

March 31, 2010, [AHRC-UAC-037-2010](#)

Mudugamuwa Manage Piyal (20) was arrested on August 2, 2009 accused of theft. He was kept in custody at the station, where he allegedly suffered brutal beatings and sexual molestation until he was released without bail August 4. Upon his release a police officer forced him to give him his bicycle.

## **SRI LANKA: An inspector assaults a fisheries union leader**

March 24, 2010, [AHRC-UAC-030-2010](#)

Naidappulage Aruna Roshantha Fernando (39), a president of the fisheries union was active in the reveal of a case of illegal fishing in November 2009. He faced a complaint of theft from a claimed owner of some of the nets and was taken into police custody on November 21 and beaten by an officer. He was taken to hospital and kept in remand chained to the hospital bed until granting bail on November 26.

## **SRI LANKA: Two men are abused by police for carrying opposition posters during the presidential election; one is arbitrarily arrested**

March 4, 2010, [AHRC-UAC-021-2010](#)

On December 19, 2009, Mr. Kankonana Arachchige Hemasiri, manager of the United National Party in Hakmana constituency, and partymembers Mr. Somadasa Jayasuriya and Mr. Jayatissa Palagasinghe were stopped by the police because of the party posters, the carried. According to the 17'th Amendment posters with symbols of political parties or photos of their candidates cannot be shown publicly between the time of nomination and voting. The police beat up Hemasiri and Palagasinghe and arrested Palagasinghe charging him with possession of illegal posters. He was released on bail December 20.

## **SRI LANKA: Police, doctors and magistrates are complicit in a man's torture**

December 2, 2010, [AHRC-UAC-166-2009](#)

On October 26, 2009, Wannu Athapaththu Mudiyanseelage Nilantha Saman Kumara (31) was jailed by police officers without charges or an official arrest. For two days he suffered brutal methods of torture conducted by officers in civilian clothes trying to make him confess a theft case. He was admitted to hospital on October 29, but when Nilantha told the doctor about the torture, she accused him of lying and refused to treat him. He was released on bail November 6 and warded in hospital for six days but still suffers complications. The officers involved are monitoring him.

## 5. Gender-related violence

### 5.a. Rape

#### A decriminalization of rape: Court delays and impunity of perpetrators

While there are heard countless allegations of rape and violence against women, this high number is not reflected in the cases reported. The rape cases AHRC have reported on are of course a marginal amount of the rape incidents that are doubtless taking place every day.

The patriarchal traditions of the Sri Lankan society are deep-rooted and prevalent in all aspects of society. Marital and domestic rapes are everyday life for many married women and hardly ever reported, as they are not even considered rapes, but the right of a married man. Rapes outside the marriage are also rarely reported. Mostly the women will give in to fate and trust her life being better not revealing it.

As with the victims of all forms of violence and abuse, the persons most exposed to be victims of rape are the ones already victimized by being regarded as societies lowest; in Sri Lanka this group is especially young women from a low caste and ethnic minority. While they are already afflicted by a low social status they are further vulnerable to the social ostracism relating to victims of sexual abuses. They are many times not considered victims but instead blamed for the incident.

While rape is in itself a horrible and degrading experience, the traumas and complications that follow are often at least as eminent. One aspect is that by depriving young girls their virginity, the perpetrators also deprive them of their future. In Sri Lanka a girl's virginity has a crucial impact on her future in terms of her social status and reputation and thereby her options of marriage. Education and the virginity are for many girls the two qualities that can secure them a reasonable future. The rapes and the endless court proceedings deprive them of both as well as general wellbeing, reserves of energy, and self-esteem.

#### Impunity as a remnant of the past

During Sri Lanka's civil war rape was used in a massive scale as a weapon to spread fear and terror and to humiliate and demoralize especially the Tamil communities. Soldiers in the Sri Lankan army were even encouraged using rape as a tool during the conflict by its military leaders not to forget government officials. This has resulted in the use of rape a deeply rooted method inside the security forces, which is further canalized to the civil society. The impunity the soldiers previously

enjoyed as a part of the military remains in the legal system today and encourages potential new perpetrators and facilitates the perception of rape not being a crime.

### Delayed remedy

One of the cases AHRC has followed and reported on is the case of Sandamalee from Pallekele, Kandy. The case is a success as it is finally concluded delivering some reconciliation and justice to the implicated, but at the same time shows problems relating to the prolonged court delays.

Sandamalee (13) was raped by her father (37) 6 times in the period between on September 2 and September 26, 2002. Sandamalee's father used to beat up the mother when he got drunk and Sandamelee had often overseen these incidents. Before he raped Sandamalee, he threatened her with a knife. The rape incidents were revealed after the mother (34) witnessed it on September 26 and she reported it to the police on September 27. The father was arrested on October 2, 2002 by the Kandy police and handed to the Manikhinna police, who remanded him and he was produced in court on October 11, 2002. Sandamalee was admitted to Kandy hospital for a medical examination and stayed there for four days.

At the time of the rape Sandamalee was in 8<sup>th</sup> grade in a college near Kandy where the family lived. Out fear that the father would harm or even kill Sandamalee or herself, the mother removed her from school and sought protection at The Kandy Human Right Office, who helped to provide them shelter for a period of time. The Kandy Human Rights Office is the only refugee for victims in Sri Lanka and was established by Father Nandana Manatunga in 2001 after frustration over lack of state initiatives to provide shelter for victim protection

After many delays Sandamalee's trial was brought to High Court in 2005, where it was called 23 times. Sandamalee and her mother have been regularly threatened and harassed by acquaintances of the father, who want them to settle things outside court. On these grounds a new judge finally decided to conclude the case on November 17, 2009. The perpetrator had already spent four years in remand and was further sentenced to ten years' imprisonment and fined Rs. 20,000.

While it is a decent achievement that the case has finally come to a conclusion, the fact that it has taken more than 7 years is not adequate. At the time of the rape Sandamalee was 13 years old. At the time of the courts verdict, she was 20. Her teenage years have been spent in and out of hiding and courts and consequently she has missed a great amount of school. Both Sandamalee and her mother have lived in constant fear, not to mention the social stigma they have experienced, which is greatly attached to cases of this character.

### The unlucky combination of being a female, a minor and a Tamil

To let a case of this character run for 7 years is to bring undue suffering and humiliation to the people concerned and not least to make a mockery of the rule of law system. However the distressing fact is that Sandamalee's case is actually a relative success compared to the amount of similar cases still pending.

Jesudasa Rita from Talawakelle in Central Province has waited almost a decade for a verdict to be delivered in her case and she is still waiting. While her patience is incredible so is the absurdity of the case, which illustrates the tremendous impact the continuously court proceedings have on the life of the implicated and the lack of sensibility in the legal system.

Rita, who was 16-years old at the time of the incident, was raped on her way home from confirmation class on August 12, 2001 by two young men. She was dragged into a car and the men took turns to rape her.

Afterwards Rita, who is a Tamil, managed to get to the police station, but even though the police stations are required to provide Tamil speaking personnel, the station in Talakawelle did not. As a result Rita had to make her statement with an unauthorized interpreter and sign a Sinhalese complaint. Nevertheless the culprits were quickly identified (as Rameez and Piyal Nalaka) and arrested by the police. Rita was taken to the hospital, where the case of rape was confirmed.

It took the Magistrate Court 4 years to conclude, in the not to complicated case, that there was evidence enough to charge the perpetrators. As a result the case was finally given to the Attorney General in 2005 to draft the indictment. However this took another three years. In 2008 the Attorney General charged the suspected in the Kandy High Court, but to date their has been no progress and the case is still pending.

The incident changed all aspects of Rita's life. At the time of the incident Rita had to move far away from her family and hometown to hide at shelters, again provided by The Kandy Human Rights Office. Rita has been living in hiding shelters including convents ever since. The perpetrators, who quickly were released on bail, are affluent men who are using their wealth and rank to delay the case. Her family has been looked up on several occasions and is experiencing threats and harassment from the perpetrators and acquaintances, who are also pressuring them to reveal Rita's place of hiding.

At the time of the incident Rita was about to finish 10th grade. Over the next 1,5 month the case was periodically heard by court with Rita spending days travelling to and from court, which meant she missed her final examinations and consequently did not graduate that year.

As Rita's case illustrates the legal system is neither minority, gender nor child sensitive. The police station did not provide Tamil speaking personnel, but at many times the court procedure also only took place in Sinhalese and not everything have been

translated to Rita. The 16-year old Rita would had to repeat the description of the traumatic experience again and again as the defence lawyer would question her in a humiliating and sometimes degrading manner. The case is public and attracts a big audience, which intensify the social stigma Rita experiences.

Rita has now spent almost a decade in hiding and in constant fear. The incident of the rape was a nightmare, but with no conclusion coming to the case, she is still living in the middle of it.

### Memories cease as proceedings are prolonged

A huge problem with the prolonged court proceedings is the dissolve of details of the case. Many of the victims have a hard time remembering the incident clearly as it is painful reliving it and the mind naturally starts to suppress traumatic experiences. The details further starts to blur with time and the victim may find it hard to remember what actually happen or what the dim memory might have constructed over time. Especially children and young people will start to confuse details, as they are even more susceptible and sensitive to the development of memory and the distress of going through a trauma.

This means that in many cases it happens that the victim will give statements that differ from previous ones and make the judges doubt her claims. This is of course an effect the perpetrators wish for and is a contributing factor for them pushing for delays.

### Reporting rape

Generally there is very little general trust in the police in Sri Lanka and as the stations are mostly male-dominated, it requires tremendous courage and strength from a women to decide to report a rape incident while she do not have any insurance that her statement will be taken seriously or that she will not be harassed. There have been many reports of police officers refusing the rape victim to file her complaint and verbally or physically harassing her claiming that the rape was self-induced or blaming her for being a prostitute.

(( The AHRC has even reported the case of Iresha Sandamali Ariyaratne, a 15-year old rape victim, who was refused entry to her school by the school Principal after the rape incident became publicly known. The principal stated that she was a disgrace and a bad example for other students (see [UA-187-2007](#): SRI LANKA: Denial of right to education to 15-year-old rape victim). ))

Furthermore, with no official victim or witness protection, the women expose herself to great danger of further violence from the perpetrator or his acquaintances by reporting the case. She has to be sure that she either has relatives, who can hide her or provide shelter far away or she has to rely on the very limited support from the existences of only a few NGO's providing refugee for victims.

### The security system deeply implicit perpetrators impunity

An 18-year-old resident of Thumba Kara Vila Yaya village in Central Province, for security reason named Ms. X, got to feel the very unfortunate and absurd logic regarding rape cases at a police station. On November 16, 2008 she was abducted by Mr. Sanjit, a staff member of the Civil Defense. He followed Ms. X on the street, etherized her and brought her to his house where he raped her and kept her to the next day trying to convince her to marry him. He eventually let her go to the police station, but the officer present at the station refused to take her complaint, scolding her of making such allegation about Mr. Sanjit. Later she filed one, but got Ms. X to sign it without letting her read it. Later other officers joined in and started treating her with 20 years imprisonment and even killing her if she did not withdrew her complaint. By pressure from the relatives she was nevertheless taken to hospital, where rape was certified and she stayed for treatment for 9 days.

The police have since failed to take any legal steps to investigate the case and the police keep insisting that Ms. X should withdraw her complaint and marry Mr. Sanjit. Despite petitions have been written by Ms. X to several official authorities, no action has been taken.

The case demonstrates the highly politicized security system, where corruption is obviously prevalent. It further exemplifies how violence against women is encouraged by the legal system as well as the security system.

### Decriminalizing rape

The denial of the victims to seek redress and the extensive court delays entirely undermines the rule of law and the victims right to an effective remedy stated in Article 2 of the ICCPR. The incongruous court delays and the impunity enjoyed by the perpetrators illustrates a tremendous gender and minority discrimination in the Sri Lankan society, promotes a continuing practise of rape as a method of practising power and spreading terror as well as corruption and lawlessness. They are all contributing factors in decriminalizing rape in Sri Lanka and depriving people their sense of legality in what was supposed to be a rule of law system.

**SRI LANKA: A rape victim was intimidated and harassed by the police to marry her abductor and rapist**

[AHRC-UAC-263-2008](#), December 11, 2008

**SRI LANKA: SRI LANKA: A 13-year-old girl was raped by her father**

[UA-51-2002](#), October 25, 2002

**SRI LANKA: A man is sentenced for the rape of his daughter after a five-year trial**

[AHRC-UAU-036-2009](#), December 8, 2009

**SRI LANKA: A thorough investigation is required in the case of the rape of a minor**

[AHRC-UAC-210-2008](#), September 18, 2008

**SRI LANKA: Police refused to take action on rape of girls**

[AHRC-UAC-111-2008](#), May 23, 2008

**SRI LANKA: Police officer reportedly rapes a woman while conducting inquiry**

[AHRC-UAC-095-2008](#), May 13, 2008

**SRI LANKA: Protection urgently needed for the family of a rape victim**

[AHRC-UAC-059-2008](#), March 27, 2010

**SRI LANKA: Rattota police mishandle case of child rape victim**

[UA-330-2007](#), November 26, 2007

**SRI LANKA: Police's inaction to investigate abduction of a rape victim**

[UP-112-2007](#), August 21, 2007

**SRI LANKA: 15 year-old girl allegedly raped and forgotten by the courts**

[UA-376-2006](#), November 22, 2006

## 5.b. Domestic Violence

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### The right without remedy: The Prevention of Domestic Violence Act

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In Sri Lanka as globally, the most prevalent form of violence against women is domestic violence. According to a survey from 2006 by the Ministry of Child Development and Women's Empowerment more than 60 percent of women across Sri Lanka are victims of domestic violence while 44 per cent of pregnant women are also subjected to harassment. Commonly perpetrated forms of domestic violence include physical and sexual violence, threats and intimidation, emotional and social abuse and economic deprivation.

In Sri Lanka a new law on domestic violence, The Prevention of Domestic Violence Act came into operation on 3 October 2005. The Act is an outcome of years struggle of different women's group throughout the country.

The Act provides for the issue of Protection Orders by the Magistrate's Court to prevent an aggressor from inflicting harm to persons within defined relationships

inside the household as well as outside. Any person, irrespective of gender, who is subjected to or likely to be subjected to domestic violence, may seek a Protection Order. On behalf of a child, a parent, a guardian, a person with whom the child resides or a person authorized by the National Child Protection Authority can also seek a PO. In addition a police officer holds the authority to intervene on behalf of an aggrieved person.

While the legislation is there, the effectuation is not. The gap between the rights set out on paper and the daily life in the household is tremendous.

The problem is not a lack of legal instruments to protect women and girls from violence including the domestic sphere. Gender equality and non-discrimination of women are key principles of the Amendment to the Sri Lankan Constitution from 1978. In 1981, Sri Lanka ratified the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). Sri Lanka is also signatory to the International Covenant on Civil and Political Rights; the Universal Declaration of Human Rights; the International Covenant on Economic, Social and Cultural Rights; the Vienna Declaration on the Elimination of Violence Against Women (1993). Further, Sri Lanka has subscribed to the Beijing Declaration and Platform for Action (1995).

Neither is it a problem of lack of institutions to ensure the enforcement of the declarations. Many state institutions and private organizations have been established to work on the matter, including The Women's Bureau of Sri Lanka (1978); The Sri Lankan Women's Charter (1993); the National Committee on Women (1994), the provision of Ministry Status to Women's Affairs in 1997 (from 2005 a part of the Ministry for Child Development and Women's Empowerment), the Centre for Gender Complaints at the National Committee on Women (1999) and Women and Children's Bureaus in Police Stations.

## Gender and culture

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However, the framework does not correspond with society. Culturally Sri Lanka is a male-centred society and although women in larger cities have become more educated and independent, especially families in rural areas, from cultural minorities or lower castes are still very male dominated with domestic violence being more prevalent. The courts are by no means minority, gender or child sensitive and discrimination and harassment are daily fares in the legal system. Even though Tamil is recognized as an official language, there is still a lack of Tamil speakers in official institutions and translators are rarely provided in police stations.

Sandamani Munasinghe is a Sri Lankan Attorney-at-Law, who has worked as an advisor to the Human Rights Commission of Sri Lanka (HRCSL), several human rights organisations and assisted many human rights cases with senior lawyers. She has also worked in the Women in Need organisation, which particularly deals with the problems of women and children.

According to Munasinghe there is a great need for awareness about the Act, not only its existence, but also a proper understanding of its functions. Traditionally, family matters would never be dealt with publicly, women are expected to protect the family under any circumstances and it is considered a great failure and humiliation if they do not manage to. "When we intervene on behalf of women the objection that has been brought is, are you not hurting the institution of the family through this law? Is it not better to settle these things privately and amicably? It is necessary to bring the matter to court? So if even the lawyers take this kind of view, then we can see that within society there cannot be that much appreciation of this law", Munasinghe emphasize.

### Policing system

This perception of women and their family roles penetrates most of the Sri Lankan society including police stations, which are often very male-dominated. Generally there is a little trust in the police system and many people fear to go to the stations to make any kind of complaints. It has long been a requirement that police stations contain a separate union for women and children with female officers attached, but while most stations are undermanned there are no resources to maintain the units.

The police do not consider domestic violence a serious matter and especially in undermanned stations they are likely to neglect cases of domestic violence or put them low on the priority list. The husband might have connections in the station or he is an influential person in the area. As a result, the enforcement of a PO is a major challenge. Even though a police officer has the authority to issue a PO on an aggrieved person it is very unlikely he will do so.

As Munasinghe points out, "This law gives power to the police to intervene in women's complaints. However, problems arise because of the nature of the policing system in Sri Lanka. The organizations that try to help women experience a lot of difficulties from the police who sometimes even refuse to give copies of the complaints made by the victims. This is because the alleged perpetrators influence the police and build relationships with them so that the police harass the victim."

Tamara, a mother, is one of these victims. She went to the police station to report a case of domestic violence. She was told that the officer who was dealing with cases on the matter was not there. The police made some inquiries, but afterwards nothing happened. While she was at the station she saw another woman who was talking about an incident where her husband got drunk and beat her. The police went to arrest the man but returned, saying that they could not find him. Later the woman returned to the police station to complain that her husband was threatening to hurt her. According to Tamara the police officer said, "So you haven't actually been beaten up yet, you are only afraid that you will be beaten up? So come back after he beats you up".

The example clearly states how the prevention element of the Act finds no

sympathy within the police. Tamara concludes, “This is obviously not the right attitude. If the woman gets beaten up, or perhaps even killed, then what is the use of the police taking action then? A woman does not go to a police station just for fun. She goes because things are very bad and even desperate.”

### Victim protection

Another big challenge of the effectiveness of the Act is the lack of victim protection. Most women depend almost solely on their partner economically. They have no means to provide housing for themselves and their children or to sustain their livelihood, which means the alternative to a violent husband is homelessness.

No shelter or housing is offered by law enforcers or by the legal system itself. The law stipulates that the court may order, if the aggrieved person requests, that she can be placed in a shelter or provided with temporary accommodation. However only private organizations such as Welcome House, Women’s Development centre in Kandy, Women In Need and the Salvation Army run shelters for abused women and children.

The NGO sector cannot be expected to take sole responsibility for the provision of such services. Magistrates are reluctant to refer abused women and their children to privately run shelters, who they do not always find accountable. The judiciary would be more likely to refer women to state run shelters. Besides, the rights of a woman for adequate housing should not only focus on shelter options for her, but also the possibility of removing the violent partner.

It is nevertheless an extremely hard choice for a woman to choose to live her life in shelter, even for those who can afford it, due to fear of harassment, loss of status, social stigma or concerns of the children’s future. In many cases the need is for family counselling and advising and if the woman choose to stay with her husband, she should be referred to these avenues by the police and the courts. An efficient system will in itself generate prevention, but major steps also have to be taken to push forward for campaigns on prevention

### Recognizing rights

The Prevention of Domestic Violence Act is a great step forward for the recognition of the rights of women and the problems within the perception of the social hierarchy of families. However, cultural patterns that have existed for centuries do not transform overnight.

For a woman to get the courage to go to the police station and file a complaint, she needs assurance that she will be met with respect and a patient hearing. She needs assurance that her case is taken seriously and inquiries will be taken. Furthermore she needs a guarantee of protection through shelter or housing to her and her children as well as proper counselling and support during the court case.

As with so many other pieces of legislations in Sri Lanka like the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ratified in 1980, the Act itself does not change a society's perception. The changes come with the implementation of the Act in actual practice. It is an obligation of the state to support and protect the rights of women, establish and upgrade facilities and secure proper remedies for the victims of domestic violence in Sri Lanka.

## **6. Major Problems Relating to pre-trial detention**

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The purpose of this article is to discuss the issue of pre-trial detention conditions in Sri Lanka and explain the major problems relating to free trial detentions

I believe that such a discussion could provide the background to answering other questions, namely, the question of the major problems relating to pre-trial detention in Sri Lanka, as compared to other neighbouring countries. I will discuss this issue under two topics, the facts of the problems and the causes of these problems.

The major problems relating to pre-trial detention in Sri Lanka?

**(A). The power of the magistrates in the control of pre-trial detention has diminished enormously.** In a common law system, detention was kept within the framework of the law through control exercised by magistrates. The magistrate was known as the kingpin of the system. However, this is no longer the case. Over the past several decades, the magistrates have faced enormous professional limitations which has altered the understanding of magistrates in the eyes of lawyers, litigants and for the magistrates themselves.

These limitations arose due to emergency regulations, anti-terrorism regulations and other limitations created in the name of separating special crimes which needed to be handled differently to other crimes specified in the criminal procedure code. These emergency laws, anti-terrorism laws and special laws, particularly in drafts control and other special crimes, created limitations on the power of magistrates to give bail. Before these limitations were created, a magistrate should allow a suspect to be released on bail as a matter of rule; this was restricted only under special circumstances. Magistrates, effectively, had control. This centuries-old tradition allowed magistrates to exercise the necessary discretion in a liberal manner.

These limitations mentioned above created restrictions on bail and magistrates were either forbidden from giving bail or were given powers of bail which were subject to serious limitations. In many of these cases, the power to give bail was removed from almost all court, not just magistrate courts. Instead, the power was

vested in the ministry of defence and detention letters issued by the ministry of defence had a binding nature on magistrates and on other courts. Due to emergency regulations and anti-terrorism laws, this factor was extensively used and many suspects brought before magistrates were characterized as coming under national security or special laws. As such, the magistrates did not have the right to interfere in these cases.

Along with the emergency laws were special laws where people were charged under offences such as a drugs ordinance or for serious crimes like murder. Other offences they could be charged under included forest ordinances or control of the transport of materials and other such matters where the magistrate did not have power to give bail. Instead, bail had to be obtained from superior court; a high court or a court of appeal.

These special laws as well as emergency laws and anti-terrorism laws provided an avenue for the police to extensively abuse their power. They could easily term a suspect to fall under a special category after arrest. To sort out disputes on these charges required the intervention of the ministry of defence or a higher court. Thus on these matters, magistrates became functionless.

## **(B).The second issue relating to detentions in Sri Lanka is the breakdown of the supervisory function of higher police officers.**

In other words, this refers to a serious breakdown of commander responsibility within the policing system. This system has been maintained under departmental orders which have remained for over a century within the Sri Lankan policing department, and have been renewed to meet changing circumstances. Arrest and early detention takes place at a police station. Here, the Officer in Charge of a police station is responsible for the goings-on in his station; they are the the main controller of the police station. Above the Officer in Charge (OIC) is the ASP (Assistant Superintendent of Police) who is the immediate supervisor of each Officer in Charge of the stations in his area. The duties of the ASP include regular visits at short intervals to the police stations, inspection of all documents maintained by the police stations, (such as complaint books,) examination of all arrangements within the station, (such as weapons) and the supervision of detainees. The ASP is supposed to inspect all police cells and to examine the manner in which the regulations relating to the inmates of these cells are being met. The ASP is also required to supervise games and other arrangements of the station. As such, the ASP is a vital component in the smooth functioning of a local police station. If the ASP conducts his role in the proper manner, there would be adherence to all regulations and basic maintenance of the law within stations.

Above the ASP is the SP (Superintendent of Police) who is in control of the ASP and deals with issues which are brought to their attention. The job of the SP is to ensure that the system functions smoothly. The SP also has a direct supervisory function over arrest and detention. Above these officers are the DIG, Deputy Inspector General of Police, and the IGP, Inspector General of Police. They are the ultimate

superiors of the organization, and their job is to deal with problematic matters so as to ensure that the system functions according to regulations and the law.

It is a well researched and widely admitted fact that this entire system has been in shambles since 1978. This process of breaking down is due to the politicization of police. The overall higher superiors, such as the IGP virtually function under political control of the country's president of country. By extension, the lower officers function under members of parliament of the ruling party. They also come under the influence of other political figures. Their lives and the wellbeing of their families could face serious harm if they do not comply with orders coming from political authorities, who under normal circumstances are outsiders to the policing system.

As a result of this politicization, if a person is arrested and detained and a problem arises, there is no effective mechanism for lawyers or for the affected person to complain to a higher authority. Complaints are treated frivolously. If the person is arrested for wrong reasons, is badly treated in detention, is subjected to false charges which could jeopardize their chances of getting bail or is implicated under anti-terrorism, emergency or special laws where the magistrate cannot give bail, there is little possibility of immediate intervention from superior officers in resolving this matter.

Before 1978, under such circumstances, lawyers would resort to the highest officer, the ASP and others by meeting them or writing to them and asking them to immediately intervene. If the ASP is to look into allegations of illegal arrest, detention or harassments while they are in jail, then the ASP would be able to take steps to stop this problem at an early stage. Now, this possibility does not exist. In hundreds of instances known to the AHRC, complaints have been made to higher authorities, but they are ignored or delayed and people languish in detention for long periods of time when they are innocent of the crimes they have been accused of.

This also applies to torture cases where higher police authorities do not act and carry out necessary obligations relating to the prevention of torture. Torture happens on a routine basis throughout all police stations. Due to false allegations, people go to courts under false charges where bail is forbidden and they also languish in jail. There is also the abuse of corruption and bribery. These are matters that superiors beginning with the ASP should address directly, but this does not happen. The capacity of these officers to prevent illegal arrest, detention and torture using the criminal procedure code under normal circumstances is greatly limited. This virtual collapse of the traditional command of responsibility allows for illegal arrest, detention, fabricated charges, bribery, corruption, rampant torture and engenders abuse of the entire criminal process.

### **(C). Limitations to the role of lawyers**

In Sri Lanka, lawyers do not have statutory rights to represent a client until he is produced before a court of law; in other words, after arrest and detention. During the time when the person is under arrest and is being held in a police station or another place of detention, lawyers do not have statutory rights to represent this person. The arresting authority is not under obligation to inform the arrested person of their right to representation by a lawyer. The Bar Association of Sri Lanka argues that although there is no statutory right, there is right of representation by way of convention, since the tradition has been for lawyers to represent an arrested person after arrest and detention.

However, the actual situation follows that even when the family of the arrested person tries to get a lawyer to go to the police station to represent their relative, the lawyer's capacity to represent their relative depends upon the discretion of the police. The study of many cases shows that the police can adapt numerous methodologies so as to prevent lawyers from representing clients during detention at the police station. The various methodologies are adapted to defeat the possibility of lawyers' representation whenever the police do not want such representation. In some cases, the police officers will talk to the lawyer for a short while and thereafter proceed with the interrogation in the way that they wish after the lawyer leaves. Alternatively, the relevant officers can absent themselves and say that they are busy and are unable to meet with the lawyer.

Even when a lawyer is allowed to go to the police station, she/he would have no right to represent their client during an interrogation or when a statement is being recorded. This means that even when the lawyer is able to inform the police of her/his interest in a particular case, the police are not under obligation to allow them to do their necessary work, other than to state why the person has been arrested. Thereafter, the police will proceed with an interrogation on their own without the presence of legal representation on behalf of the arrested person.

As the use of torture is frequent at police stations, allowing lawyers to be present will stem this practice. Indeed, the police's resistance of allowing a lawyer is not a mere legality but is inextricably intertwined with the methodologies of interrogations that are normally practiced at police stations. The use of interrogation under duress, (and often using torture) and the presence of a lawyer to represent the arrested person are two practices which are incompatible with each other. The resistance of the police and the authorities to allow lawyers to represent clients at detention centers is directly associated with the implicit approval of practices of torture and other forms of cruel, inhuman treatment and other coercive methods during interrogation.

Any real discussion on the right of representation must to be associated with the issue of methods of interrogation which relate to torture and other cruel, inhuman, degrading treatment and punishment. So long as these methods remain normal practices, there will not be any real possibility of allowing legal representation for detainees.

**(D). The approved practice of extrajudicial killings of certain categories of alleged suspects**

In recent years in Sri Lanka, the killing of certain suspects after arrest has become an approved practice. Even though the practice is not allowed by statutory provisions of written regulation, the practice is approved by way of its routine happening. It is frequently reported that someone who was arrested for criminal activities tried to escape while he was taken to identify some object, and that in the course of struggle, the officers who were in charge of him shot him dead. Often, the newspaper publications on such cases are accompanied by statements that the person was a notorious criminal who was wanted by the police for a number of crimes. There are, of course, no further investigations. Thus, whether the person was in fact wanted for any earlier crimes, what these crimes were and why there is certainty that this is the person who committed them, are never fully examined.

One category of people who have been killed in this manner are suspects who are arrested after a crime has taken place. For example, there are cases of child abduction for ransom. This causes serious concern among the public, and the media widely publicizes these cases. Thereafter, a new report appears that an alleged suspect of the crime has been arrested and the suspect in his statement has said that there are weapons hidden in a particular locale, and that several police officers have taken the suspect to the scene in order to find these weapons. At that point, the suspect is said to have attacked the officers and the officers in retaliation shot them dead. As such, the public is satisfied that something has been done regarding the initial incident which caused public scandal. Then the matter is forgotten until the next incident takes place, the next suspect is arrested and the arrested suspect is dealt with in the same way.

The cases come before magistrates with only the version about the incident given by police officers. In a few instances, there were relatives of suspects who wanted to give evidence, but they were prevented by the police from doing so. Either the police would not give them the correct date of the hearing, or they would create some other excuse which would prevent the magistrate from hearing the evidence of these people. Therefore, on the basis of the evidence presented to them, magistrates make an order that a suspect has been killed in a lawful manner and no further investigation are necessary. As a result, no enquiry takes place and the actual circumstances under which people are killed are never revealed. The actual circumstances are only known to small circles of people engaged in these killings. This practice has become regular, and there is no way to know whether suspects were the actual people who were involved in these crimes or not. There is public suspicion that the police accept bribes from the actual suspect, and then charge an innocent person with the crime, and then dispose of this innocent person.

The entire exercise of killings and subsequent publications take place to satisfy the public that something has been done about a crime. There is a vast area of extrajudicial killings that do not get examined. As such, people who are arrested and detained do not have any kind of lawful protection. Sometimes after incidents, families give different versions of arrests and lawyers claim they have surrendered

the person to the police. However, as the state has given tacit approval to this practice, none of these cases are subjected to scrutiny.

## **7. People in the north and east as people outside the law**

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After a prolonged and devastating military conflict, people in the north and east remain now as a people outside law. Their situation has arisen due to the following reasons. As shown above, Sri Lanka as a whole faces a crisis of law due to the constitution itself. Further, a long period of undermining institutions has also contributed to this situation. People in the north and east, while sharing this common condition with the rest of the nation, are facing this problem in a more aggravated manner due to the consequences of the internal conflict. As a result of the military conflict, there has been displacement.

There is no likelihood of returning to the *status quo* in any near future. Large numbers of persons are still in detention camps. How long they will continue to be there and what kind of resettlement there will be thereafter has not been revealed. In fact, there is nothing to indicate that there is any kind of worked out plans for a resettlement which would bring the lives of the people into some kind of normalcy within which they could return to their livelihoods and other normal activities of living, such as education for the children. Inside the camps themselves, judging by the reports, the conditions are harsh in terms of housing and food as well as facilities for sanitation, and the situation is worse for the children. As a former Chief Justice pointed out, people in the camps are not under the jurisdiction of any law except various rules that are being imposed by the military. In fact, the people in the camps have life regimented by the military.

There is no judicial apparatus within the camps to deal with the problems of the inhabitants within any legal framework. They also have no real access to the ordinary courts of the country. There have been very few cases in which persons outside the camps have gone to courts on behalf of persons in the camps to plead for some remedies to bring their relatives in the camps back home. The government has not provided any services of lawyers for any persons within the camps who may wish to get legal advice on various matters that are affecting them.

For example, many of these persons are reported to have lost many of their belongings. Some have deposited their cash or valuable items with the LTTE at one time when they were held hostage by them. Some of these items like their gold ornaments could be among the items that the government has recovered from LTTE held areas earlier. If any of the persons within the camps want to make appeals for judicial recourse in order to deal with matters such as these, they need the assistance of lawyers. Naturally in their condition it is not possible for them to get the private services of lawyers. Access to lawyers is not provided and restrictions exist for anyone who wishes to visit the camps. There may also be many persons who may want recourse to the courts for various violations they may have suffered

in the course of their detention in the camps. It is also known that there are many who have lost their title deeds and other documents relating to their personal properties. In all these matters, legal advice could play a significant role if the people are to have access to courts. Such a possibility does not exist.

Then there are those persons who have been resettled. In the media, many complaints have been heard about the conditions of such resettlements. There are particularly complaints about the housing conditions of the returnees. Some representatives of the Tamil people have complained that the conditions are often not suitable for human living. Then there are other complaints, like the damage that has been done to their former properties, some of which were occupied by the military. There are many other complaints which the people would have brought to the attention of judicial authorities if they had access to the courts. However, the access of these persons is mostly limited to the public authorities, which often means military authorities. The kind of security needed for the persons to pursue their claims does not exist. Under these circumstances, these returnees too do not have any possibilities of any kind of legal redress.

Both in the north and the east, the basic administrative facilities such as policing and civil service have not been established to any adequate level. While there are plans for the establishment of courts, what exists at the moment is only of a rudimentary nature. Reports often appear of armed gangs who still dominate these areas. The type of political compromises that have been arrived at in the government has brought some former rebel groups into powerful political positions in these areas. There are many cadres of these groups who have had arms training and who still possess weapons. This results in complaints of many crimes and other situations which suggest the existence of widespread lawlessness.

There were several instances in which there were shocking reports of kidnapping small girls for ransom. In two famous instances, the girls were found dead several days after their kidnapping while the kidnappers were conducting various kinds of negotiations with their families for ransom. The fear of kidnapping prevails among many groups, including the business community. There were times when there were strikes by shop owners and other businessmen in order to protest against various kinds of extortionist demands that had been made to them. There were also complaints from the lawyers in some areas of similar threats. People with any means often live within a context of heavy intimidation in which they have to make various compromises with the armed gangs and other powerful persons for their protection. Often, young children are sent away by their families to places outside the north and east for their security. Families are thus separated and the kind of psychological conditions that exist are those of persons struggling hard to survive as they have no option on the one hand of leaving these areas due to various reasons, and on the other hand, living in the area has become a nightmare.

What makes life most difficult for most of the inhabitants of the north and east is the absence of an opportunity to speak out about the conditions they have lived in for a long period now and being subject to extremely harsh problems, such as the killings of their family members, the injuries that have been suffered by many

survivors and various kinds of abuses they have suffered at the hands of the former militant groups including the LTTE, as well as from the military, under whose control they have come to be after the war.

It is most natural for persons who live under these tragic circumstances to want to speak out the stories of their sufferings and to make some collective sense out of their prolonged tragedy. Such a process is essential for the development of the psychological conditions necessary to rebuild their lives and return to some kind of normalcy. This situation has been denied to them.

The military occupation creates an overall intimidating atmosphere within which people remain afraid to speak out the truth of their lives. Suppression of their memories, their emotions, their sense of loss, and their grievances have now become necessary conditions for survival. The fear that anything that they say even in their private circles may lead to great suspicions which may bring them new harm is the kind of psychological ethos that prevails. The few studies on the conditions of these people reveal an extremely sad and pathetic situation. If there was free access to observers, these conditions would have gotten to be better known to the world. However, even such access to observers and sympathetic humanists is being denied. Those who keep some kind of relationship in order to deliver services for religious purposes are doing so on the condition that they maintain silence on what they see and what they hear. Thus, the basic humanist relationships are being denied to the people of the north and east.

The government's basic approach to the area is governed by an enormous fear of the possible revelation of information that may lead to war crime investigations about the period of conflict, particularly the last part of the conflict. The government fears that any information gathered in the areas may be used against the government and the military regarding the alleged war crimes. The silence imposed on the people is primarily motivated by this factor. Thus, preventing a return to normal conditions and the prevention of the possibility of people having access to justice is overall strategic considerations of the state in dealing with these areas. As such, a harsh form of militarism and intimidation of the persons are likely to continue over a long period of time.

The people of the north and east are not only people who are living outside the law, but they are also people who are likely to be kept outside the law for a long time until the threats of the demand for justice may disappear. As the memory of such events do not disappear so soon, it is quite likely that the present repression against the people of the north and east will continue for a long time.

## **8. Review of the Recommendations made to Sri Lanka Report at the UN Universal Periodic Review in June 2008**

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Going through the recommendations it becomes stark clear that Sri Lanka has not only refused to implement any of the important recommendations but also it has developed an overall approach within which none of these recommendations can ever be realised. As shown in this report an overall development towards the rejection of the rule of law and the human rights frameworks has already taken place in Sri Lanka. The completion of this took place by way of the 18<sup>th</sup> Amendment to the Constitution. The impunity entrenched by the constitution has now displaced the possible arrangement within the system through institutional balances to protect the citizens from arbitrary deprivations of the personal liberties and property rights.

We may go through some of the main recommendations to illustrate this.

Sri Lanka was recommended to:

- enhance the capacity building of the national human rights institutions with the international community including OCHR;
- empower various institutional and human rights infrastructures;
- cooperate actively with international mechanisms to implement human rights at all levels and consider participation in core human rights treaties;
- take into account recommendations of the Human Rights Committee and to incorporate all substantive elements of the ICCPR into national regulation;
- ensure compliance with the CAT, the Convention on the Rights of the Child and the full implementation of international human rights instruments;
- ensure that all civil society organisations including those from the conflict affected areas to be involved in the implementation process of the UPR;
- take measures to access humanitarian assistance to vulnerable populations;
- ensure the adequate completion of the investigation into the killings of the aid workers;
- implement the recommendations of the Special Rapporteur on the question of torture;
- ensure a safe environment for human rights defenders and investigate and punish perpetrators of the murders, attacks, threats and harassment of human rights defenders;
- make efforts to prevent cases of kidnapping, forced disappearances, extrajudicial killings and to bring all perpetrators to justice;
- prevent ill treatment and torture of persons in detention centres;
- take steps to rehabilitate all former child soldiers;
- adopt measures to investigate, prosecute and punish those involved in serious human rights crimes such as the recruitment of child soldiers;

- investigate and prosecute all allegations of extrajudicial killings, summary or arbitrary killings and forced disappearances and bring perpetrators to justice;
- adopt measures to ensure effective implementation of witness and victim protection;
- take necessary measures to prosecute violators of international human rights law and humanitarian law;
- enter into agreements with countries hosting migrant workers;
- ensure the return and restitution of housing and lands in conformity with international standards for internally displaced persons;
- take measures to protect the rights of IDPs including measures to ensure their voluntary and safe return with adequate restitution;
- give special attention to the rights of women and promote education and development and their representation in politics and public life;
- pursue programmes in the former conflict zones and bring the afflicted communities in par with others;
- ensure that there is no discrimination against ethnic minorities;
- take measures to ensure freedom of expression and effectively investigate allegations of attacks on journalists, media personnel and human rights defenders;
- ensure the freedom of the press;
- work with the international community to ensure disaster management, HIV/AIDS and capacity building;
- work closely with OCHR to build the capacity of national institutions and seek the state's assistance on counter-terrorism strategies.

As mentioned above, none of the recommendations were given any serious consideration and the recent development (the 18<sup>th</sup> Amendment) has made it impossible for the realisation of any of these until a fundamental constitutional reform for the protection of the rule of law and democracy takes place.

## 9. Some considerations for international and local advocacy on human rights

For several decades, Sri Lanka has attracted international attention due to the intensity of the violence that has prevailed in the south as well as in the north and east. Massive violence relating to the conflict with the JVP in the south and the military conflict with the LTTE in the north and east was caused during these decades. One unfortunate consequence of this violence was that the international community for the most part understood the problem of Sri Lanka as one resulting from an ethnic conflict. Violence camouflaged the situation and was able to hide the internal dynamics of a vast change that was taking place in the entire country, in which the whole structure of the rule of law and democracy was being destroyed throughout. The development of authoritarianism within the country went unnoticed. The radical nature of the 1978 constitution in dismantling the

parliamentary democracy and the independence of judiciary went unnoticed. The international community mostly thought that if some kind of solution could be brought to 'the ethnic conflict', the country may return to the 'paradise' from before.

This misunderstanding of the overall crisis of Sri Lanka prevented any strong intervention to resist the authoritarianism that was taking root in Sri Lanka. Thus, the 1978 Constitution was able to make its devastating and destabilizing impact on the country, resulting in drastically undermining the limited democratic tradition that had been introduced through the political reforms in the early part of the twentieth century. By the time the military conflict was over, the 1978 Constitution had achieved its goals of closing the electoral map of Sri Lanka and dismantling its rule of law structure through displacement of all its public institutions (such as the court system, the policing system, the system of civil administration and the system of the election commissioner, which has been built over decades of hard work to make free and fair elections possible in Sri Lanka).

By the time the war was over, the judicial power had been reduced to a marginal power, and it was not able to resist the executive to any significant degree; policing had become one of the most corrupt and inefficient institutions in the country; the civil service had come extremely destabilized and politicized; and the election commissioner's system was made incapable of ensuring a free and fair election. The condition of Sri Lanka's system has not yet been understood by the international community. Thus, in dealing with Sri Lanka, a paradigm shift is required if democracy and rule of law and the respect of human rights is to have any chance within Sri Lanka. In the international discourse, this paradigm shift is essential for any meaningful discourse to be developed that will be able to address the problems of the north and east effectively. If, for whatever reason, the totality of the crisis is not understood, no benefit will arise for any section of Sri Lanka and the authoritarian system will survive and cause further devastation in the country.

Sri Lanka was once considered by the international community as a model for development of rule of law and democracy. It was also seen as a successful development model in which infant mortality was reduced, lifespan was increased with better healthcare, educational facilities were better developed and basic infrastructure for human development was established. However, today all these achievements are at risk. The free healthcare system has been abandoned and the capacity of the country to fight disease has been reduced despite of development of local talent through medical education. The free education system is also under challenge and grave economic problems are threatening the livelihoods of the people. Mass migrations of the poorer sections of society, including women, for work as domestic helpers in the Middle East is one of the clearest indications of the acute conditions of poverty that is developing in Sri Lanka.

There is no internal organization capacity to resist such developments as the very constitution on which the political system is organized is the source of disorganizing and source of displacing the very legal foundations of the country. Constitutionally caused lawlessness can, in the next stage of development, cause tragic economic crises and other disasters in Sri Lanka.

Once a model for development, Sri Lanka is now nearing the same conditions as those of Burma and Cambodia, which are results of disasters within those countries. This vast change cries for understanding, both at international and local levels. Human rights advocacy, if it is to bring any benefits to Sri Lanka, must be based on a deep understanding of these conditions.