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VICTIMS: RIGHTS REMEDIES & REALITY

LAW & SOCIETY TRUST

CONTENTS

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Editor's Note ...

Setting the theme for this issue of the LST Review is an article by ***Mr. Sarath Jayamanna*** where he discusses the ***'Victims' Rights and Role of Victims in the Criminal Justice System.'*** The topic which has received relatively less attention and recognition, in the Sri Lankan context in particular, seems a timely issue to discuss at a time when victims, in the writer's words, *"have become passive actors catering to the needs of the system."* The paper examines the various rights and interests of victims within a Criminal Justice System and how they can be balanced with competing interests ie. the rights of the accused etc,. It not only explores the extent to which victims' rights and / or interests can be accommodated or enforced within a criminal justice system, but also discusses the advantages to the system in doing so. The author draws from the experiences of contemporary jurisdictions as well as developments in the international scene, in order to provide a holistic picture as to where Sri Lanka stands in relation to this hitherto 'ignored' yet 'burning' issue.

Moving from the ideal to reality, ***Dr. Alan Keenan*** has also contributed to the issue with an article focusing on the Report of the All-Island Commission of Inquiry into Involuntary Removal and Disappearance of Certain Persons, which was delivered to the President in May, 2000 and was presented to the public in June, 2002. The article begins with a brief review of the contents of the Report - the nature of the problem and what the writer considers as the most important recommendations of the Commission. The writer then goes on to discuss the necessity and the manner in which Sri Lanka should generate the political will to implement the said recommendations of the Commission. The article concludes with a set of personal recommendations of the author which he suggests "might be worth entertaining, if only to clarify the obstacles that it, or another more humble form of democratic challenge to impunity and unaccountable power would face."

A fitting conclusion is provided by ***Ms. Lakmini Seneviratne,*** who looks at how victims are compensated for the injuries they have suffered. Focusing on victims whose Fundamental Rights have been violated, the author analyses the

development of the thinking and reasoning adopted by the Supreme Court of Sri Lanka, in making awards in Fundamental Rights cases. In order to place Sri Lankan jurisprudence in the correct perspective, the author also considers international norms and rules that are relevant in this regard. She notes that non-ratification of international treaties by Sri Lanka, particularly the Rome Statute, could ultimately be detrimental to the country, as it is then *"not in a position to invoke the jurisdiction of the Court."* She observes that, though the Supreme Court has taken the victims' interests into account to a considerable extent when granting remedies for fundamental rights violations, there still exists the need for an appellate body, to which an unsatisfied victim may turn. The author concludes by suggesting that the fundamental rights jurisdiction of the Supreme Court should also be expanded in terms of its scope of granting remedies to victims, with a view to ensuring that justice is not only done but it is seen to be done.

Victims' Rights and Role of Victims in the Criminal Justice System

Sarath Jayamanna[♣]

Introduction

In a criminal justice system, victims play a vital role as they assist the institutions attached to the criminal justice system, in numerous ways to achieve the objectives of such institutions. Nevertheless it is claimed that rights and interests of victims are not adequately protected. Though victims play a central role in the criminal justice system of Sri Lanka, in the 20th century less attention was paid to their needs and concerns. Criminal justice is regarded, in an adversarial system, as a contest between the prosecution and the defense; and as such victims have not been recognised as parties to the case. The professionals attached to the system, in particular judges, need to be sensitive as to what extent the crime has burdened upon the victim. There are sufficient safeguards to protect offenders' rights, which are enforceable, and there are substantial powers vested on prosecuting, investigating authorities and judges to carry out their responsibilities in the process. The role of victims has not been fully recognised with a view to heighten their concerns. They have become passive actors catering to the needs of the system. Once used they are being thrown out, paving the way for frustration.

The objective of this paper is to examine closely, the various rights concerning victims and to suggest possible ways of improving those rights, subject to other competing interests. Thus it has become crucial to examine whether the victims should have rights and if so to what extent they should be enforceable. In this regard, service rights seem to be less debatable, where as providing procedural rights appears to be more controversial. Since this subject has not been a subject of wide discussion in this country, we have necessarily to examine the experiences in the international scene. Over the last two decades, we have experienced that victim-friendly elements have come into effect and we ought to understand as to how other countries have dealt with and responded to this issue. This approach would provide us a more holistic view on the subject.

Overview of Victim's Role

A victim's role is primarily confined to furnish information, and in certain cases to testify in court. What they get back in turn is minimal. Their cooperation is solicited so long as it helps to promote the objective of the institutions attached to the criminal justice system.

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Their only contact point is the Police whom the witnesses meet when lodging a complaint. There is hardly any opportunity for a victim to air his or her concerns other than giving a testimony regarding the incident, which is required by the prosecution with a view to proving its case. Thus victims are left in the lurch with regard to the progress of the investigation and the position of the case, due to lack of information. They are even unaware whether a suspect has been enlarged on bail or he has been convicted or acquitted. At least, victims are not even required to be present when delivering the verdict, let alone seeking their views on the sentence. They are clueless about the sentencing options available and as to whether the courts require knowing the impact of the harm before a sentence is imposed. How the victims feel about the proposed sentence and whether the victim would be happy to receive compensation as a measure of restoration, are regarded as irrelevant. Even after sending the perpetrators of crimes to jail, it has not become an issue whether the authorities should get the views of the respective victims regarding decisions relating to remission and other parole decisions. Even the decisions on dropping of charges and reasons for discontinuance, are not conveyed to victims at all. Further, decisions relating to plea-bargain are not communicated to them; as a result of which they become even more frustrated. The only tangible result the victims come to know through the media, though not in all cases, is about the severity of the sentence that has been imposed in 'their' case. Thus they equate the fairness of the system to the severity of the punishment imposed, even though a lenient punishment may be justified having regard to the facts of the case and the sentencing principles. They would hardly come to know the reasons and the criterion underlying the decision taken by the professionals at various stages of the criminal justice system. Thus, lack of information, consultation and treatment of victims are some of the important issues that need to be seriously considered. Furthermore, one has to examine whether victims are treated with respect and dignity when they come before criminal justice agencies, in particular - the courts. It is often said that when victims come into contact with the agencies of the criminal justice process, they are victimised again, which is popularly known as 'secondary victimisation.' The treatment meted out to victims in courts is the case in point. The treatment meted out at the hands of the professionals has led to 'secondary victimisation', as a result of which victims become more distraught of the system. Their suffering is further aggravated by the fact that there is no proper mechanism to address the post traumatic disorders suffered by the victims as a result of the crimes committed on them.

Similarly one has to be mindful of the other competing and sometimes conflicting interests, in giving more rights to and accommodating the concerns of victims. In administering justice, it is essential to honour the principles of due process and to preserve the fundamental rights of the suspects. However demanding it may be, the rights of suspects ought not to be sacrificed for the benefit of victims. In the same breath, the powers and independence vested on a prosecutor in a country which follows the adversarial system, will be at stake if any

unguided and unstructured rights were to be given to victims. Therefore, it is very important to examine how best the interests of victims could be improved, without encroaching upon the rights of suspects and the responsibilities of prosecutors. Can we improve victim satisfaction genuinely without unduly hampering other rights?

Who is a Victim?

A victim is traditionally defined as a person violated by another person. Victims means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws.[1] However, this definition should be expanded to include a multi-victim perspective. The term 'victim' also includes, where appropriate, the immediate family members or dependents of the direct victim and persons who have suffered harm by intervening to assist victims in distress or to prevent victimisation.

Effects of victimisation can be; Physical – from minor scars to death; Emotional – from fear to suicidal ideation and psychiatric treatment; Financial – from stealing items of economic value leading up to bankruptcy and eventual homelessness.

Legal and Conceptual Framework

As there is hardly any lengthy discussion on this subject in Sri Lanka, there is a need to scrutinise the international movement in this regard and the legal and conceptual basis upon which the recognition of victim's role and rights has been developed. Though there are reservations in relation to legal transplants, we need not hesitate to introduce those that are relevant, after taking the necessary safeguards. However, we ought to be mindful of the legal, social, cultural and political background in our society before implementing these internationally recognised developments locally. Let us briefly examine the international jurisprudence and the current initiatives on the subject.

The UN Resolution[2] stresses, among other measures, that victims should be provided with a channel through which their views and interests can be considered and be provided with information. The Commonwealth Nations Guidelines on Victims of Crime emphasise that Commonwealth countries should include in their constitutions or legislation, measures for the protection of victims. These may include; the introduction of a Charter on victims rights;

[1] 1985 UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power and Victims of Crime; Best Practices Guidelines for the Commonwealth Nations
[2] 1985 UN resolution on Declaration of Basic Principles of Justice for Victims of Crime

observing the rights of victims by criminal justice agencies; the development of a statement of victims rights; implementing an effective victim support programme and taking steps to avoid secondary victimisation. The Council of Europe[3] and the European Convention on Human Rights (ECHR) recognises the rights of victims within the right to have a family and a private life; though the scope of the article has not yet fully developed to attract all the rights of the victim. Similarly the Victim Charter of UK[4], the Attorney General's Guidelines on Prosecutorial Decisions in UK and legislation in countries like the USA and Australia has also dealt with this subject.

Role of the State in a Criminal Justice System;

1. The Traditional, Conventional Model and Its Relation to the Adversarial System

A State's duty is to protect its people, prevent crimes, conduct prosecutions and impose sentences on perpetrators in the public interest. A Trial is considered as a contest between the prosecution and the defence and the duty of the judge is to determine the result. As such, the duty of the prosecution is to prove rather than seek the truth. The Victim's interest is only a part of the wider public interest. Thus, priority is placed on state interest, which places no reliance on individual interests such as the forgiving or revengeful nature of victims. Public policy considerations outweigh private or individual preferences. Fairness of the process is measured by the application or not of consistent treatment to offenders. Every effort is made to launch prosecutions provided that there is sufficient merit and public interest that warrants a prosecution. In Japan, however, where the adversarial system is followed, only very few cases are prosecuted and various diversionary mechanisms are adopted to dispose of cases. Unlike other jurisdictions, cases are not initiated on mere prima facie evidence; on the contrary cases are initiated only when there is a guarantee of securing a conviction. As a result, the conviction rates reach a high standard of 90%, which phenomenon cannot be compared with other countries in the world that follow the adversarial system.

Sentencing is primarily dependent on culpability (*mens rea*) and the physical act that is committed (not the harm suffered or the consequence of the act). Its primary objective is to achieve institutional goals such as improving the economy, effectiveness and efficiency. The role of the Attorney General and the state prosecutor is regarded as equivalent to that of the Minister of Justice. Their duty is to present a case in an unbiased manner and to divulge to the defence, even though unfavourable to the prosecution, in the interest of justice.

Countries like the USA, Australia, UK, South Africa and Sri Lanka follow this model.

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[3] 1985 Resolution on "The Position of Victims in the Framework of Criminal Law and Procedure"
[4] 1990 as amended in 1996 " A Statement of the Rights of Victims of Crime"

2. Restitutive Model and Its Relation to the Inquisitorial System (Restorative Integration)

A crime, is primarily regarded as an act against an individual who would have a say in setting the amount of compensation or in forgiving the offender by not imposing a sentence. Therefore, the harm actually suffered by the victim is taken into very serious consideration. For example, the psychological effect on a rape victim is considered when imposing the sentence on the offender. But what is the position if the offender cannot foresee such effect and in cases where the victim has recovered fully as a result of proper psychological treatment. These are some of the drawbacks in adopting such a procedure. Fairness of the system is measured by the satisfaction of the victim. It would be vital to secure the truth in a manner that does not let the technicalities, rules of procedure and evidence undermine the truth that is so ascertained. In many instances there are investigative judges who have the powers to investigate certain offences. There is no obligation to prosecute and a wide discretion is vested in authorities in order to use diversionary methods, rather than proceeding on a trial with a view to address the needs of victims. For instance, in France, 80% of cases are not prosecuted. Nevertheless, victims have a right to launch a prosecution through a procedure called '*action civile*' before an examining judge. In certain jurisdictions, the prosecution has the responsibility of conducting a prosecution as well, e.g. France, Netherlands, Belgium, Germany, Italy, Russia etc., However, it is wrong to simplify the mechanisms adopted in an inquisitorial system; because there are many and varied practices that are adopted in such jurisdictions.

Though we have considered the distinctions between the two models in detail, in the modern context, it is hard to see a system which is either purely adversarial or inquisitorial; as nowadays the conventional model has been modified to accommodate some elements of the restitutive model. The best example is, how compensation is allowed to be paid to a victim in a system based on the traditional model. Technically, in a system where sentencing is primarily grounded on the seriousness of the crime, punishments other than those relating to the treatment of offenders should not be allowed. However, international jurisprudence shows that the world community has drifted away from such a compartmentalised approach. The pertinent question, therefore, is the basis upon which such deviation should be allowed and whether there are any structured and justified criteria governing such a procedure.

In this system, sentencing primarily rests on the harm suffered (the impact) and not solely on the physical act committed. France, Germany and Italy are some of the countries that follow this model.

Why is the Victim Important?

If the administration of justice is to be successful, it is nothing but fair to consider victims' satisfaction instead of ignoring them; because the contribution made by them is of paramount importance to the system. In modern political debates, especially in Europe, authorities endeavor to allay the fears of victims by introducing victim friendly procedures and laws, regardless of whether they achieve the desired objective or not. In the absence of the cooperation of the victim, there is a great danger of the system collapsing.

Goals of Victims in a Criminal Justice System

In enhancing the recognition of victims' rights, we need to understand the goals of victims, which can be summarised as follows:

1. Giving victims a voice for therapeutic purposes;
2. Enabling the interests and views of victims to be taken into account in the decision making process;
3. Ensuring that victims are treated with respect by criminal justice agencies;
4. Reducing the stress for victims in criminal proceedings;
5. Increasing victim satisfaction towards the criminal justice system;
6. Increasing victim co-operation, as a result of any of the above being fulfilled.

In order to achieve these goals, the following areas of interest have to be addressed and enhanced;

1. Facilitating increased participation;
2. Providing facilities and support;
3. Having consultations with victims;
4. Providing and seeking information from victims;
5. Allowing victims to express their opinions;
6. Protecting victims;
7. Ensuring them due respect, their dignity and acting with sensitivity towards victims;
8. Promoting restitution and compensation;
9. Providing treatment for post traumatic disorders of victims.

Is there a Distinction between Procedural Rights and Substantive Rights?

Of the numerous interests of victims, one needs to examine whether it is prudent to accommodate every right mentioned above without having due regard to the interests of the

accused and the objectives of criminal justice. If so it might lead to more complications and ultimately to anarchy. Can the rights of an accused be balanced with the right of a victim and if so, to what extent can it be balanced without causing prejudice to the accused? The necessary safeguards have also to be studied. Certainly, victims' rights do not operate in an abstract. It will now be discussed whether there is any distinction between service rights and procedural rights, and the consequent effect of such distinction(s).

Procedural Rights

Rights that have the effect of influencing a decision-making process are termed as procedural rights. These rights can be exercised by participating, consulting and expressing opinions (right of allocution). Whether a Victim Impact Statement (VIS) should be extended to a Victim Opinion Statement (VOS) as practiced in 33 out of 36 states in USA, has to be carefully considered. In the light of counter argument against victims' rights, one needs to study how the rights of victims can be balanced against the rights of the accuseds. If we were to upgrade the victims' interests, we have to be alive to other competing interests. Then only these rights become tangible and enforceable rather than being mere expressions of rhetoric. The procedural rights may have the effect of influencing the decision-making process at the following stages in the criminal justice system.

1. Investigation
2. Bail
3. Prosecutorial decisions
4. Discontinuance and dropping of charges

   In England, in the landmark case of ***R*** v ***DPP, Ex parte C***[5] the Divisional Court held that there was no duty to consult the victim and that it was not violative of article 8 of the ECHR, which recognises the right to have a private as well as a family life. It was held that article 8 was not applicable. Although the court observed that there was a failure on the part of the Prosecution to consult the victim which was 'regrettable, there was no right on the victims' part to obtain information. However, following this case, the Attorney General's new Guidelines were issued, requiring the prosecution to speak with the victim before making a final decision.
5. Plea bargaining
6. Sentencing: Victim Impact Statement and Victim Opinion Statement
7. Compensation and restoration
   Restorative objectives- to provide reparation for the harm done to victims and to promote a sense of responsibility in offenders and acknowledgement of the harm done to victims
8. Parole decisions

[5] March 3, 2000, DC (Crown Office list) Co/1450/99

The Impact of Victim Impact Statement and Victim Opinion Statement

A Victim Impact Statement (VIS) informs a court of the physical and emotional harm done to or the loss suffered by the victim, at the time of sentencing. The victim can read out a statement or submit a written statement to the police, prosecutors or judges.[6] In USA written as well as oral statements are allowed. In about 7 states in the USA, Victim Opinion Statements (VOS) are also allowed. When VIS are allowed, victims can be cross-examined if requested by the defence, in order to verify the assertion of the victims. But generally, the defence refrains from challenging this, as it would be detrimental to the accused. If the victim is incapable of making such a statement, then his spouse or dependents could make the statement on his/ her behalf. Right of allocution on sentence is available in 33 out of 37 states in the USA. In the USA, in 4/5 cases information supplied by the victims were very effective since they related to the harm caused. The position in the UK is not yet settled. However, the UK made a reservation to the UN Declaration on Victim Impact Statements and VOS are very rarely used. With the introduction of the Victim's Charter in UK, now there is a greater debate over VIS.

Why VIS Fail in Courts

Though in principle VIS are welcome, they are inconsistent with working practice. In reality, these statements will have only little effect.

- They are incapable of meeting the standards of Courts and the Court very often requires reports from independent experts;
- It is not certain whether they are used in the decision making process;
- The victim is subject to the risk of retaliation because of the impact of the VIS on the outcome of the sentence;
- If the courts are already possessed with the information, the effect of the VIS would be minimal.

One criticism is that victims are unaware of the range of sentencing options and sentencing restrictions that are available.

VIS or VOS should not be allowed to be used by scrupulous offenders, to buy over the prosecution case. This is one of the dangers that could entail if VIS or VOS are to be considered in a haphazard manner and it would certainly thwart the course of justice. For a country like Sri Lanka, this can be a very real threat, where a certain amount of crimes are either committed or influenced by powerful, influential and moneyed offenders. In politically

[6] This procedure is practiced in New Zealand, Australia, Canada and New South Wales

sensitive cases where there is imbalance, VIS should not be entertained. Victims may succumb to the pressure exerted by the offenders, as we have often witnessed in our criminal justice system.

Why VIS are Made

Considering a study carried out in Australia, Professor Erez says that VIS have substantially reduced the suffering; because it facilitates the healing process especially in cases where the victims were offered compensation as a method of reparation. She recommends that, not only VIS but also information regarding the progress of the case and the criterion upon which various decisions have been arrived at, must be communicated to the victim. Victim's perception of the fairness of the system is tied up to the severity of the sentence, which is the only tangible fact that they come to know of the case. If they can be sensitised of the criterion as well, their dissatisfaction can be reduced to a certain extent. Even if a lighter sentence was imposed, the victim would be content if he/ she is provided with an in-sight into the case. This approach would also apply to decisions in the other stages of the criminal justice system. Let us now consider a number of counter arguments that can be advanced against VIS.

- It is not certain whether judges take these into account in their deliberations, as they often rely on verifiable, concrete forms of evidence. They prefer to receive reports and recorded versions from doctors, other experts and probation officers in a presentable manner in this regard.

- The defence is likely to challenge VIS and as a compromise, the prosecution and the defence agree to exclude certain material in advance.

- Concern has been expressed as to whether it is proper to sentence a person for unforeseen or unexpected consequences of crimes. Similarly, great criticism is leveled on the premise that concern over the victim might adversely affect the rights of the accused. There is merit in this argument due to the danger that the victims' views may impinge upon the principles and rationale behind sentencing. It is obligatory of any criminal justice process to foresee the sentence in advance rather than leaving it to the whims and fancies of victims. In complying with the principles of due process, it is essential that: the decision be transparent and foreseeable-especially in the case of sentencing; there exists properly laid down guidelines; and there be equality of treatment of offenders according to the seriousness of the offence. Though preservation of victims' rights should also be given priority, victims should not be allowed to blacken the character of the accused by allowing them to provide more information. Similarly, in the event that the expectations of victims are not realised as expected by the victims in making VIS, their hopes would be dashed again.

As a result, there is a danger that victims could become more distressed. Therefore steps must be taken to advocate victim satisfaction through more effective means. Therefore, one needs to examine the exact needs of victims rather than merely giving into all the publicised needs. As discussed earlier, victims become marginalised as a consequence of not being informed, at least, of 'their' case. **Ashworth** claims that, providing procedural rights, therefore, is high in profile but low in improving genuine respect.

Substantive (Service) Rights;

When victims come into contact with the criminal justice agencies, it has been observed that they are being victimised in various forms. As such, they should be provided with emotional support and necessary information; be treated with sympathy and respect; their dignity should not be impinged upon especially during cross examination; their right to receive compensation, after care and treatment-areas which have been fully neglected over the years-should be ensured. It is regrettable to note that even primary and mundane information is not provided to victims let alone their concerns being addressed by the criminal justice system. Various services can be offered to a victim without making an impact on the final decision of the case. However, even jurisdictions that claim to have protected these rights, hardly provide a remedy in the event of any infringement of these rights. Enacting new laws would be futile unless professionals and the authorities are also sensitised of the new strides made in the field. Otherwise, traditional arguments that are raised in opposition would again see the light of day preventing any right from being recognised or implemented. Let us examine some of the service rights.

1. Information about the progress and position of various stages of the case.

   In the common law system, satisfaction and perception of fairness is linked to the severity of the sentence. There is no requirement for the presence of the victim even at the stage of sentencing. The most basic information, which cannot be regarded as controversial, is not supplied, e.g. how decisions are reached, what reasons underlie the decision.

2. Providing more facilities

   As witnesses are not acclimatised with the court environment, they become distressed therefore, it has become crucial to establish victim support services. A strong allegation against this is that, such a procedure would vindicate the rights of the accused since personnel handling the prosecution and investigations would try to coach and train the witnesses. Coaching is prohibited and to sensitise the victims of the court procedure and their role in the system is a different matter. Very often these two segments are mixed up and the victims are thereby deprived of their most essential needs.

3. Enhancing respect and dignity

The treatment meted out to victims is largely visible at the stage of cross-examination, where the veracity of the victim's version is assessed. Therefore, the pertinent issue is whether it would be fair to refresh the memory of witness and if allowed, would it seriously create a dent as to their reliability. This is because, it would provide an opportunity for an unreliable witness to repeat what (s)he had told to the police rather than what exactly transpired in the crime. This is an area wherein most victims become vulnerable as their credibility is linked up with the test of memory. Especially in cases involving sexual offences, repetitive and abusive forms of cross-examination can be seen. In certain cases, previous conduct and socio-economic background of the victim are used for the benefit of the defence's case. Therefore, unless we develop a mechanism that promotes the concerns of victims whilst preventing the danger of unnecessarily implicating the accused, this problem is bound to recur. A great deal of tact and care has to be administered in maintaining justice both to victims and offenders. The popular allegation that police concoct a story and witness narrates what the police had recorded can be avoided, if we can make use of the services of judges at the very commencement of the investigating stage, so that any opportunity of concoction or introduction of evidence can be minimised. As a result, testing of credibility by using derogatory and stressful tactics can be avoided. This should not mean that an accused should not have the right of cross-examination; but it must be properly monitored and regulated. However this is a subject that needs deep attention and arbitrary conclusions should not be arrived at. Making arrangements to have a congenial climate and a victim friendly atmosphere is of paramount importance. In cases of vulnerable witnesses, leading video-taped evidence and allowing a victim support person to accompany should be permitted.

4. Ensuring the safety and security of victims to avoid secondary victimisation
   e.g. bail; abstain from any direct or indirect communication with the suspect
5. Compensation, Restoration
6. Victim service
7. Emotional, psychological and financial support.

Arguments in Favour of Greater Victim Participation (Procedural Rights)

State has 'stolen' conflict from victim so that victim is claiming what is theirs (Christie, 1977). Prosecution often have organization interests in opposition to those of victims (Erez 1999)

A victim suffers special harm over and above the rest of the community and is thus entitled to a role in the criminal justice system

It helps a victim to come to terms with what happened

A criminal justice system depends on the co-operation of victims; so it ought to make them feel that they have a contribution to make in the sentencing process (reciprocity)

To encourage potential victims to take the responsibility in preventing crimes and in assisting the authorities (Fenwick 1997, Shapland 2000)

Victims want to reduce the power imbalance particularly where the offender pleads guilty and the victim never gets a chance to get involved in the process before (Sharpio and Weinstein 1995)

Criminal Justice Systems should be alive to the tangible as well as the emotional damage that crime does to the social fabric e.g., fear of crime (Pollard)

Arguments Against Greater Victim Participation (Procedural Rights)

1. Sentencing is a public concern within which victim has no particular right to be heard. 'The provisions of the criminal law set out to penalise those forms of wrong doing which touch the public rather than merely private interests. Punishment is a function of the state, to be exercised in the public interest' (Ashworth)

2. Procedural rights contradict principles of proportionality. The sentence should be commensurate with the seriousness of the offence rather than with the vengeance or the leniency of the victim. Infliction of comparable penalties for comparable crimes should be the norm whereas reparation rests on the interests of victims. Thus principles of consistency and uniformity are challenged. These are threats to the rule of law and due process as they impinge upon openness and transparency. Sentencing should be based on structured guidelines rather than on arbitrariness.

3. Criminal law judges in terms of culpability rather than in terms of the harm suffered.

4. Introduces subjectivity and arbitrariness rather than objectivity into the process (Ashworth 1993)

5. Victims lack legal knowledge to have a significant effect on the process, as they are not aware of the range of available sentences and the legal limitations.

6. Victim participation in key decisions may render them more vulnerable to intimidation and may place a burden on their shoulders, which is particularly hard to bear during recovery period.

7. The impact on victimless crimes cannot be gauged.

8. Victim in the service of severity would entail victim prostitution in sentencing and further it would lead to political manipulation of crime victims.

9. Victims may not be mindful of the potential for rehabilitation of the offender.

What is the Remedy?

Ashworth claims service rights are as effective as procedural rights in satisfying victims but do not have the disadvantages of procedural rights. **Hoyle** articulates that providing service rights is not sufficient as it marginalises the victim. If victims were made to understand that the process was fair, it is likely that dissatisfaction regarding unpalatable out comes could be reduced.

Alternatives:

1. It is claimed that the recognition of Auxiliary prosecutor (paritie approach) where victims can choose to become 'subsidiary' prosecutors and make submissions based on evidence, prefer charges and express views and concerns, would remedy the problem, e.g. France, German and Italy. This has the potential to provide victims with an insight into the decision-making process. However, a procedure that might work in an inquisitorial system may not provide a solid foundation to work in an adversarial system, where the victim, in particular, is not regarded as a party.

2. Restorative justice process:

   Victims participating in restorative justice seems to be more satisfying than the role of victims in the conventional common or civil law systems (Braithwaite). The more participatory the process, the more satisfied would be the victims (Morris). Victim's perception of the fairness of the criminal justice process is linked to the severity of the sentence. Victims need to participate in order to judge the process favourably and to be greatly satisfied.

3. Prosecuting counsel having direct communication with the victim:

   Following the highly publicised Stephen Lawrence murder case in UK, a committee chaired by Macperson in their report strongly recommended that it is essential that the prosecutors ought to communicate to victims the reasons and decisions relating to altering and dropping of charges.

We need to consider how suitable it would be in Sri Lanka where principles of the adversarial justice system are deeply rooted, to accommodate such a procedure without affecting the

rights of the accused and the responsibilities of the prosecutor. We need to examine the possible counter arguments that could be raised in adopting such a procedure. Would it compromise the prosecutorial rights? One should consider whether the advantages that would accrue to society, would outweigh the criticisms that are leveled against this. Is there any alternative that can be suggested, without the prosecutor being directly involved with the victim? If there is a solid victim support legal service which can consult the Attorney General when it relates to an important decision, that would be a solution to a certain extent. It is a fact that, in cases where victims have the necessary means to retain counsel, they do make use of this facility. So then, there should not be a prohibition and even the poorest victim in society should be provided with a mechanism to make use of this right. Therefore, there is duty cast upon everyone to establish a strong and viable victim support service, which does not encroach into the rights of accused.

Position in Sri Lanka

There is an absence of specific legislation governing victims' rights in Sri Lanka, as a result of which there is hardly any voice in respect of victims. However, certain references have been made directly and indirectly regarding this subject, in a number of statutes. Except in a few isolated cases, the scope of the rights of victims has not been fully tested in our courts of law. We shall now endeavor to identify these provisions and the pronouncements made by the courts.

1. Right of Representation:

   Section 260 of the Code of Criminal Procedure Act No of 15 of 1979, contemplates that;

   > *"Subject to the provisions of this code and any written law, every person accused before any criminal court may of right be defended by an Attorney-at-law, and every aggrieved party shall have the right to be represented in court by an Attorney-at-law."*

In ***Jagathsena*** v. ***Bandaranaike***[7] it was held that 'Representation' is to make statements on behalf of another or to make submissions to another orally or in writing in regard to any matter or thing with a view to influencing action or conduct of another. It does not merely connote a silent and an inarticulate presence. This right given to an aggrieved party is one that has been given for the first time in the history of criminal procedure in this country. Clearly the intention of the Legislature is to give the aggrieved party also an opportunity of

[7] 1992 (1) Sri L.R 371 at 408 (Court of Appeal)

placing before court any relevant matters, which such party desires to bring to the notice of Court. This right extends to representation even before the Court of Appeal.

In ***Jagathsena*** v. ***Bandaranaike***[8] whilst endorsing the pronouncements made by the Court of Appeal, the Supreme Court observed that an Attorney-at-law is entitled not only to assist and advise his clients but also to appear, plead or act on behalf of them in every Court. What can an Attorney plead on behalf of a victim if there is no provision giving them specific rights? Can his or her lawyer plead matters beyond what has already been pleaded? It is interesting to consider whether victims, in the absence of counsel, could also make submissions. It may be that they lack the professional expertise to make submissions; but it is a different matter to accept it as a right irrespective of whether they properly make use of the opportunity or not. On the other hand, if the Attorney-at law representing the victim can plead on the sentence and other decisions, should not the views of the victims also be permitted? Just because it is allowed, can a court take into account and make use of such opinion in the decision making process? If a victim wants to make a statement at the time of sentencing, the defence ought to have the right of cross-examination. Therefore, this remains a gray area because apart from the above case, these issues have not been tested in our court system. We are yet to see the interpretation of this section, in terms of international jurisprudence. Has our legislature given such wide powers to victims? Though the victims' movement in Sri Lanka is yet to gain ground, we have hardly exercised the existing legislative provision in promoting the rights of victims. In the next few years, there will be more discussion on the subject, at which point the legislature and the judiciary should become actively involved in recognising these rights.

2. Opportunity for Prosecution:

   - Section 191 of the Code of Criminal Procedure Act No: 15 of 1979
     In summary trials, in the absence of the Attorney general, counsel for the complainant or the complainant himself may conduct the prosecution, with the leave of Court.

   - Sec 400 of the Code of Criminal Procedure Act No: 15 of 1979
     In non-summary inquiries, in the absence of the Attorney General, counsel for the complainant may prosecute with the leave of court.

3. Remedy to Enforce the Interests of Victims:

   a. Invocation of the fundamental rights jurisdiction and obtaining a declaration compelling the authorities to prevent crimes, investigate crimes, arrest, prosecute and punish offenders – Article 12 of the Constitution of Sri Lanka (1978)

[8] 1984 (2) Sri L.R 397 at 404 (Supreme Court)

b. Invocation of the writ jurisdiction (*Mandamus*) compelling the authorities to prevent crimes, investigate crimes, arrest, prosecute and punish offenders

4. Restoration:

Compensation;

- Sec 17(4) of the Code of Criminal Procedure Act provides for unlimited payment of compensation to an aggrieved party. However, in the Magistrate Court, the maximum amount is Rs. 500.00.

- According to Act No: 22 of 1995, in cases of rape, sexual assault, grave sexual abuse, unnatural offences and indecent offences compensation can be ordered. Further in offences relating to cruelty to children and offences under the Torture Act, compensation can be ordered.

  In cases relating to violations of Fundamental rights by public officials compensation could be ordered to the petitioner, from the public officer. It could further be directed that the compensation should not be paid from public funds. In addition to this, the State could also be held responsible for the acts done by its officers if they were performing an official function and the State can be directed to pay compensation to the petitioner.

5. Protection, Safety, Integrity and Respect for Victims. (Victim Friendly Environment)

- Article 106(2) of the Constitution
  Though every sitting of Court should be held in public, in proceedings relating to sexual offences, they can be held *in camera* by excluding persons who do not have a direct interest therein.

- Sec 365 (c) of the Penal Code (Amendment Act No 29 of 1998)
  Publishing or printing the names or the identity of a victim in cases of sexual abuse, child abuse and rape is punishable unless written consent has been obtained. Publishing court proceedings in such cases is also prohibited without the approval of Court.

- Sec 124 of the Code of Criminal Procedure Act (as amended by Act No 11 of 1988)
  A witness can take part in an Identification Parade from a hidden position.

- Sec 151 of the Evidence Ordinance
  Prohibits indecent or scandalous questions
- Sec 152 of the Evidence Ordinance
  Prohibits insulting or annoying questions
- Sec 153 of the Evidence Ordinance
  No cross-examination of character is permitted unless it is relevant. No evidence can be led contradicting the character of a witness
- Sec 150 of the Evidence Ordinance
  There must be a sufficient basis for asking questions; otherwise the Attorney-at-law can be reported to the Supreme Court.
- Judicature Act (Amendment Act No 27 of 1988)
  Provides for direct indictment in cases of statutory rape (below 16 years) in order to reduce secondary victimisation.

Future of the Victims' Movement

It is not fair to raise victims' hopes and dash them when they cannot be fulfilled. There needs to be a concerted effort to sensitise judges and prosecutors and to win them over to implement these policies. However the rights of the accused must also be preserved and a victim should not be 'prostituted' or be deprived of the due process of law. We are at the cross roads of our criminal justice history because of the wide spread perception that interests of victims are not respected and the unraveling of grave crimes daily. In order to enhance the concern for victims, the following steps are suggested;

1. A white paper on victims rights: The necessity to conduct in-depth research with a view to getting a better understanding about the needs and perceptions of victims and the rights that can be offered;

2. Laying down a solid conceptual and legal framework concerning the interests of victims and their rights;

3. Examining ways of improving victims' rights without impinging upon the existing adversarial system drastically by examining as to what extent the existing adversarial system could be stretched. Providing service rights would meet the aspirations of victims in this regard; particularly through measures to furnish information, treat the victim with respect and dignity and thereby avoid secondary victimisation. Possibility of setting up a statutory victim relief and compensation fund in respect of victims of violent crimes. Making restitution an integral part of the criminal justice system where appropriate;

4. Raising awareness among the victims and providing better information about the process and sensitising professionals attached to the criminal justice agencies such as investigators, prosecutors, judges and the Bar, with a view to getting their genuine cooperation;

5. Introducing a Victims' Charter and necessary legislation; drawing up guidelines for professionals;

6. Establishing a strong body consisting of professionals from each organ of the criminal justice system, with a view to effectively studying, recommending and implementing laws and guidelines on the subject.

If victims' experiences in the criminal justice system is to be improved, there must be better understanding as to the impact of victimisation and of the need to treat victims with courtesy, compassion, dignity, and sensitivity. Attitudes about victim's needs should be changed among the professionals of the criminal justice process. Victims will not accept their being shut out from key decisions and being kept uninformed; they seek more accountability from, and more participation in the process. Guaranteeing of victims' rights is not only going to benefit victims but it will also cater to the overall development of the criminal justice system. Thus we need not worry that it would impinge upon the rights of the accused. It is merely an act that empowers victims, whose role has been forgotten for the last century in our society.

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Exorcizing Ghosts and Disappearing Reports: Building the Political and Social Conditions for Implementing the Recommendations of the Report of the 'All-Island Commission of Inquiry into Involuntary Removal and Disappearance of Certain Persons'[1]

*Alan Keenan**

Having come to power on a promise to end the years of state-sponsored terror and the impunity with which state officials and their colleagues were able to carry it out, President Chandrika Kumaratunga acted promptly to fulfill the People's Alliance (PA)'s pledges, once in office. Three separate Commissions of Inquiry, whose work was divided up according to regions or zones of the country were appointed in late November, 1994. Their mandate was to look into the causes of and the remedies for the thousands of "involuntary removals and disappearances" committed by both state and non-state forces. This included the task of recommending legal prosecutions where there was credible evidence implicating specific perpetrators. The so-called Zonal Commissions presented their reports to the President in July and September of 1997.

Due to the inability of the three Commissions to investigate all the cases and allegations that were forwarded to them for their attention, it was decided that there should be appointed a final Commission, with a mandate to cover disappearances throughout the Island. Known as the All-Island Commission of Inquiry into Involuntary Removal and Disappearance of Certain Persons[2] a three member panel was appointed in April 1998 which was chaired by Ms. Manouri Muttettuwegama and was assisted by Mr. Hetti Gamage Dharmadasa and Mr. Ponnuchamy Balavadivel. The Commission Secretary was Mr. M.C.M. Iqbal. Although the Commission delivered its report to the President two years later in May 2000, the report was not to be presented to the public until the expiration of another two years, which it did in June 2002, together with its findings.[3]

All four Commissions uncovered evidence of massive disappearances, extra-judicial killings and other forms of political terror undertaken by state officials, police officers, other security forces, anti-state forces belonging to the Janatha Vimukthi Peramuna (JVP) and the

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[2] Hereinafter referred to as the Commission.

[3] It should be noted that the official date of publication listed on the cover is March 2001.

Liberation Tigers of Tamil Eelam (LTTE), and by other armed groups allied with and fighting against the Government. There was apparently a systematic use of unaccountable, arbitrary, cruel, and deadly power, both by state and non-state forces, including the involvement of those operating at the highest echelons of the ruling United National Party (UNP). As the Commission observes in its Report, "The involvement of politicians of the ruling party in abductions and disappearances came to light in the evidence in many of the complaints inquired into by this Commission. These witnesses took the Commission into their confidence, disclosed the name of the politician concerned and described graphically the chain of actions starting from a veiled or direct threat by the politician himself. There were several instances where activists of legal political organisations would be abducted and made to disappear 'as punishment' for not supporting the particular politician's political party. The spectacle of impunity conspicuous in this period gave rise to the public perception that such a spectacle could not have existed without the complicity of the political leadership."[4]

It is a noteworthy achievement that there is now an official, state-sponsored record of the state's own abuses. The next task is to see what democratic political work can be done with the evidence and testimonies gathered in the process.

In what follows, a brief review will be offered on the contents of the Commission's Report, which includes the nature of the problem it tries to address, and according to the writer's opinion the Commission's most important recommendations. Secondly, the paper will deal with the Issue as to how one might work to generate the political will to implement the Commission's most important recommendations – for these will never be implemented without substantial political pressure. After considering some of the many obstacles which confront such efforts, the paper concludes with a set of personal recommendations by the author on how a political movement aimed at addressing the legacy of disappearances and impunity might be built and what it should contain.

The Commission's Recommendations

While the Commission's Report does make some suggestions about the importance of establishing in international law the liability of non-state armed groups like the LTTE for violations of human rights, the bulk of its recommendations in relation to Sri Lanka's recent legacy of unaccountable use of power and violence concern legal reforms to control the excesses of state power. The Commission makes a large number of very important and useful recommendations as to the different actions the State could undertake. The wide range of recommendations made and the topics covered suggests just how massive and complex the phenomenon of "disappearances" is and how difficult and time-consuming it would be to respond to its full scope.

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[4] Report of the All-Island Commission of Inquiry into Involuntary Removal and Disappearance of Certain Persons, pp 12-13.

In order to summarise what could be considered as the Commission's most important recommendations, they have been categorised into three major components: Prosecution and Punishment; Prevention; and Measures for Rehabilitation and Reconciliation.

1. Prosecution and Punishment

The Commission makes a number of "urgent" (as of May 2000) recommendations with respect to those it calls "returned detainees" or in other words, those who survived their illegal detention and whose "disappearance" was temporary. In these cases, the Commission strongly recommends that the police and prosecutors take their testimony and investigate their complaints as a matter of urgency. The Human Rights Commission should in turn be directed to deal with the instances of torture of these detainees that were inquired into by the Commission, despite the fact that any such crime will have exceeded the time-limit that is stipulated by certain provisions of the Constitution for the purposes of prosection.

More generally, the Commission urges that the large number of cases on disappearances already under investigation and prosecution be expedited and completed in a thorough and impartial manner. The Commission further recommends that such prosecutions should not be confined to junior officers and that the Disappearances Investigations Unit of the Criminal Investigations Department (CID), which was established upon a recommendation of the previous three Zonal Commissions, should be given the necessary financial support and infrastructure to effectively pursue cases that are handed over to it by the previous Commissions of Inquiry.

2. Prevention

As for the Commission's recommendations with respect to preventing such abuses in future, many of them seem to undercut the basic characteristic of the phenomenon of disappearances – to wit the lack of documentation and information in this regard that transforms both victims and perpetrators into effective ghosts which in turn disempowers citizens and other public bodies in their attempt to hold the police and security forces accountable.[5] Thus, the Commission recommends that there be serious penalties for those who refuse to comply with the requirements that police and security officials record all detentions, that they give receipts to relatives, that they inform the Magistrate of such detentions, and that they make places of detention known and accessible to investigating authorities. The report urges that failure or refusal by the Police to record an arrest, detention and transfer or to record complaints of abduction be declared a cognizable offence, in those cases where such failure is followed by an involuntary disappearance. It also recommends that in such cases citizens be given the right to file a private plaint if the Police fails to institute legal actions against non-complying officers. They recommend that disciplinary hearings be required to be conducted against

[5] See discussion *infra*.

offending officers, and their superiors to be held liable in cases of non-performance of this obligation. The Commission states further that the principle of "command responsibility" should be applied throughout the chain-of-command, to establish that officers with command responsibility who order or tolerate disappearances by their subordinates are also made criminally liable.

In one of its most important recommendations, the Commission urges, the establishment, through an amendment to the Human Rights Commission Act, of an Independent Human Rights Prosecutor to conduct prosecutions into complaints of human rights violations in general and disappearances in particular. These should include any additional cases of disappearances that were not able to be inquired into by any of the disappearances Commissions. The Independent Prosecutor should also be empowered to pursue cases as mentioned earlier, with respect to the alleged torture of "returned detainees."

Equally important, is the recommendation for the appointment of a "panel of lay visitors" or monitors in each Police area with powers to speak to the detainees, check their conditions of detention, check police detention records, assist in the presentation of complaints to the police station and to make complaints directly to the Human Rights Commission.[6]

The Commission also recommends the establishment of a right to, and procedures for, amnesty for witnesses, including perpetrators who confess to participating in human rights violations and give evidence relating to the circumstances of the crimes, including the orders received, planning, etc. The Human Rights Commission should be directed to establish a Special Committee of Eminent Persons to entertain applications for amnesty and to record their evidence of human rights violations. Unfortunately, while the Commission suggests that the South African Truth and Reconciliation Commission could serve as a model for such procedures of amnesty in exchange for testimony, it says very little else about what it envisions, or how such amnesties would relate to the prosecutions that it also calls for.

Finally, it is worth mentioning that the Commission also calls for wide publicity to be given to its own Report as well as to the Reports of the previous Commissions of Inquiry and for translations of this Reports in Sinhala and Tamil to be made easily available to all citizens.

3. Reparations and Rehabilitation

The Commission has also made important recommendations with respect to compensation for and rehabilitation of victims and other survivors of political violence. As the results of many sociological researches including the emergence of "female-headed households" – make clear, the social and psychological burdens of disappearances have fallen disproportionately on women. While it is noted that this issue is not given adequate attention in the

[6] See discussion *infra*.

Commission's report, it is submitted that the needs and special concerns of women should nevertheless be taken into account when working to implement the Commission's various recommendations regarding reparation and rehabilitation survivors and / or victims of political violence. The most important of these include:

1. the establishment of a trust for the rehabilitation of survivors and surviving families;

2. the establishment of a scholarship program for children of affected families, along the lines of that which is available to children of missing soldiers. This is particularly urgent, because, more than ten years have passed since the last of these cases on disappearances was dealt with by the four Commissions, and many children have already come of age with little or no financial assistance;

3. the establishment of vocational training programs tailored to the needs of the surviving families;

4. the planning and implementing of a program by the educational and health services with the assistance of NGOs, for the sensitisation of their personnel about the need to provide counseling services to affected families;

5. the imposition of a special 2% sales tax to fund the various programs.

The Necessity of Political Will

Even in the very abbreviated form in which they are being discussed the recommendations present a list of important suggestions to the state, in relation to the phenomenon of disappearances. However, as the Commission itself suggests, these reforms require the political will to carry them out, especially because they would involve the state and its officials to agree to place restrictions on their own power. Commissions of Inquiry themselves are themselves quite limited in their mandate ie. usually they gather evidence and make recommendations. And because of the fact that they have to depend on the goodwill of those in power to act on the evidence and gathered the recommendations made, Commissions are increasingly looked upon with great scepticism, even cynicism, both by those in power and by the average citizens. Under the heading "The Manifestation of the requisite Political will," the Commission addresses this issue in its Report. The diplomatic tone of the words used for this purpose has with the passage of time, taken on greater and unintended, irony:

> *"This Country's immediate past history of non-prosecution of abuses of human rights despite the criminal nature of such acts under the law of that time, makes clear that the several prosecutions that have now commenced would not have been possible without the political will that the principle of*

accountability should prevail in respect of human rights abuses. That these prosecutions are taking place irrespective of the date of abuse, and in a period of a confrontation with an armed group, is a uniquely encouraging manifestation of the requisite political will, which must continue to be reinforced."[7]

The People's Alliance government, under the leadership of President Kumaratunga, had a certain degree of initial political will to investigate the disappearances and extra-judicial killings in the years prior to its taking power; and in the case of ***Krishanthi Kumaraswamy***, certain crimes that occurred even under its own watch. Yet with the exception of this case and the convictions in the ***Embilipitiya*** case, in my opinion, there have been no other successful prosecution of political killings or disappearances. It is of course, fair to say that the PA government and the President did not use the machinery of state power as ruthlessly as the previous UNP regime. And it is equally fair to say that the PA government clearly failed to go far enough in their housecleaning. Indeed, the Commission itself gives many examples of the inadequate action if not inaction (especially when read in conjunction with earlier reports). This now includes, ironically, the delay and virtual secrecy in the publishing of the Commission's Report itself. Published more than two years after being sent to the President, there was no public announcement of its publication, and not surprisingly, as of the date of writing, there has been no media coverage of its findings or recommendations. The Report, one might say, has itself disappeared; or more accurately, it has been disappeared. The precise reasons for this and for the delays in prosecutions, are perhaps obvious to some degree.[8]

In some ways, the fact that the UNP is now once again in power will likely make it harder to follow up the Commission's recommendations, since most of those who need to be prosecuted committed their crimes under the UNP's watch. Indeed, the present UNF government contains ministers against whom the Commissions found credible evidence of being involved in a large number of disappearances. Nevertheless, with the civil war being on hold and both the Government and the LTTE being more concerned about the opinion of the "international community," there is now at least the theoretical possibility of new political space being created for agitation and pressure to be imposed on this issue. On the other hand, the fact that the Sri Lankan civil society, foreign governments and international agencies are preoccupied with the peace process, also means that it will be a struggle to get the people's attention to be focused on the issue. Because there will inevitably be pressure to ignore it as 'old' news, or being 'too controversial' to be raised at present.

In terms of generating what the Commission calls "the requisite political will," the burden then falls on what is now known as the "civil society". It is up to these organisations to

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[7] *Supra* note at p. 31.

[8] Developing the means to challenge such obfuscations and delays is among the concerns that are dealt with in the final section of this essay.

redeem the trust that so many people have put in the different Commissions when they testified before them and to fight against the cynicism that increasingly surrounds the work of such Commissions. The Commission itself, and all its valuable work need to be resurrected from the ghostly existence it now finds itself in. In doing so, however, there is a danger of getting caught up in the legal details of the various recommendations the Commission has made – or those which other interested parties might make. It should be noted that it is very important to take up the challenge laid down by the final Disappearance Commission ie. not to be limited to the task of using those recommendations as tools to lobby for improved laws and administrative arrangements. While acknowledging the importance of such work, it should be noted that it will only be meaningful and successful to the extent that "civil society" is able to generate enough democratic power to hold those in power – including non-state agents like the LTTE – accountable for their actions and to put limits on their use of violence. Such democratic counter-power and effective political leverage is not going to generate on its own. Much work will need to be done; and much of it will have to be done beyond the confines of Colombo.

Obstacles to Democratic Resistance

What then are the obstacles to generating this democratic counter-power, especially in relation to issues of disappearances, arbitrary power, and impunity? They are obviously quite formidable. In his part of the paper, attention will be focused on three interrelated sets of obstacles facing would-be democratic mobilizers, even though these by no means exhaust the reasons why such mobilization is so difficult. These obstacles will have to be addressed and overcome if any democratic resistance to the culture of impunity is to be developed.

1) The "irrationality" of democratic politics: Firstly, the reluctance of people to engage themselves in democratic struggle over issues of political violence and impunity is, to some degree, a rational and predictable reaction. Indeed, whenever one attempts to engage in any form of democratic politics beyond simply voting, one is always faced with some form of, what is known in the literature of political science as a "collective action problem." In such situations, the risks or costs to any one individual in getting involved seem to outweigh the likely benefits – at least until many others can be convinced to join in. This basic pattern is made much worse by the well-founded fear that is entertained by many, in getting involved in such issues; for the apparatus of terror is still in place and could be activated again if necessary. The various unsolved political murders over the past few years, the routine use of torture by police throughout the island, the stalled investigations into disappearance cases already handed over to the Attorney General's etc. testify to the possible danger of getting involved in a political campaign, to weaken and eventually dismantle this apparatus. The fact that forms of modern democracy and liberal legal practices do function in Sri Lanka alongside other, more hierarchical and violent forms of political patronage and dependency,

is obviously a major factor that limits any active democratic mobilization against abuse of power by the State.[9]

2) The social and pychological effects of terror: The fundamental set of obstacles mentioned above is made worse by a series of related psychological and social problems arising from the actual experience of terror (at least for Sinhalese people outside of the North and East). These include, the natural desire among many simply to put the - painful – and fearful memories behind them so as to "move on."

Additionally, there exists the psychic burdens that come from the experience of terror and violence, and the ongoing chain of suffering it produces: the trauma, guilt, and paralysing anxiety of many victims and their families. Indeed, social research has shown that one of the fundamental effects of the experience or witnessing of political violence is often the shattering of any sense of predictability and regularity in social relations and patterns. Many people are subsequently rendered ghosts, alive but unable to engage in regular activities; their trust in the most basic of social relationships shattered by the disruptive effects of the violence.[10] This is particularly important in our present context, since countering impunity amounts precisely to re-establishing a regular relation of cause and effect between wrongdoing and punishment – precisely the kind of relationship that many who have suffered terror, find difficult to do.

There is in turn, the related effect of a generalised distrust throughout communities, made worse by a breakdown in community relationships that was both a cause and an effect of the violence that was unleashed in the late 80's and early 90's. Both present and previous Commission Reports, as well as other academic and journalistic accounts suggest the extent to which local Sri Lankan communities are divided, whether along lines of ethnicity, political affiliation, class, caste, or simply personal and family disputes. What Sasanka Perera terms the "dismantling of community" came about as a result of the existing social cleavages being exploited and deepened for political purposes, by various forces which were willing to use terror to achieve their ends.[11] The fact that local communities were significantly atomized helps to explain the rise of the JVP; as the absence of solidarity was in part, what allowed the JVP to initially impose its will through collective terror. From the Commission's report and from other research done in the aftermath of the political violence of the 80's and 90's in the South, it is clear that these social divisions remain exacerbated by poverty and scarce resources. Additionally, there are the stories of bitter jealousy and exploitation sparked by

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[9] For a valuable collection of essays that touches on many of these forms of anti-democratic power in contemporary Sri Lanka and their various uses of violence, see Matters of Violence: Reflections on Social and Political Violence in Sri Lanka, Janaka Biyanwila and Jayadeva Uyangoda eds. (Colombo: Social Scientists Association, 1997).

[10] For an illuminating discussion of this phenomenon, see p. 67. See also Selvy Thiruchandran, The Other Victims of War: Emergence of Female Headed Households in Eastern Sri Lanka (New Delhi: Vikas, 1999).

[11] Sasanka Perera, Stories of Survivors: Socio-political Contexts of Female Headed Households in Post-Terror Southern Sri Lanka (New Delhi: Vikas, 1999) p. 53.

the comparative wealth that some "lucky" survivors enjoy thanks to the government donating monetary compensation for the loss of a family member(s). Indeed, given the fact that the violence originated from so many different sources – the JVP, the Police, the Army, pro-government vigilantes – or in the north and east from the Army, Navy, STF, the LTTE and other Tamil militants – and often, at least in the south, for reasons of personal or family feuds, it has been very hard to build the kind of trust and solidarity that is needed for collective political efforts. The lack of clear demarcations at times between perpetrators and victims – as many different people could conceivably have been the perpetrators further complicates the work of reconciliation and reconstruction of community.

3) Public Secrets: Finally, the task of building democratic power to challenge impunity is made more difficult by the uncertain status of the information and knowledge that is publicly available about the years of terror. These difficulties include, most obviously, the basic uncertainty as to who exactly was responsible for particular disappearances and killings (and often, why people were killed). Similarly, there is a general lack of clear and uncontested information among the public about the larger patterns and institutions of terror and those responsible for their maintenance. While the present and the previous Commissions' reports contain a wealth of important information, they have not been adequately disseminated to the Sinhala and Tamil speaking public. As a result, the history of the phenomenon is not known by many Sri Lankans, especially young people. In other words, the knowledge that many people have at the local level about the history of terror has not yet been ratified in a sufficiently public and official way.

Therefore, it is not only a problem of a lack of knowledge, which could simply be overcome through more and better information; there is, instead, both too little and too much knowledge, in the sense of ineffective information. That is, many people often know much about the years of terror and those responsible for it but are unable to act on the knowledge. Such a condition easily breeds cynicism and the turning away from politics altogether. There exists, in other words, a lot of "public secrets"; secret in part, because of the vague quality of knowledge, in part because of fear, in part because of the deliberate gaps in official records that the Commission urges to be made the subject of punishable offenses, and in part because of legal rules about what accusations can and cannot be made in public. The end result is that many people know, both at the local level and national level, that many still in power whether in the police, the army or the government are reliably alleged to have ordered or carried out murders and disappearances and other gross violations of the most basic of rights, which is difficult to talk publicly about. Such killers exist much like ghosts – still roaming around, but impossible to pin down due to much uncertainly.

So disseminating information in an effective way is one of the most crucial tasks for building a real political will to tackle and dismantle the institutional conditions of disappearances. But doing so will, to say the least, be hard. As we have seen, many of the Commission's wise recommendations are aimed at attacking – or rather, laying to rest – some of the ghosts

mentioned above, through a variety of reforms that would make it harder to hide records and conceal identities. It is suggested that to be effective, a reform package should ideally – both from an ethical and a pragmatic point of view – address the psychological and spiritual needs of the Sri Lankan people. Politics and law in this sense need to be wedded to other concerns, to allow people to really confront what happened and heal some of the breaches in local and national communities, and thereby contribute to what the Commission report calls a "process of national healing and reconciliation." This will ultimately require harnessing non-legal practices that can address and acknowledge the pain of the past – for example, traditional Sinhala, Tamil, Hindu, Buddhist, and Christian spiritual practices, which are practiced and interpreted at most often local level. Indeed, in some ways the most important work is to be done at the local level. But this will, as mentioned already, require both a more political and a more spiritual and psychological form of activism than is generally practiced in Sri Lanka.

A Democratic Fantasy?

This section includes the recommendations of the author, which at times might appear naive and unrealistic to some and perhaps in some cases even dangerous for those who would try to engage in it. Nevertheless, it might still be worth entertaining, if only to clarify the obstacles that it, or another, more humble form of democratic challenge to impunity and unaccountable power would face.

It is proposed, most generally, that a network of "civil society" organizations, working at both the local and the national levels be built that would specifically aim at tacking the legacy of disappearances and the forms of unaccountable power that existed in the past and that continue to exist today. Doing so would involve an attempt to try to revive or reinvent forms of activism that existed in the 80's and 90's. It would aim to go beyond exclusively legal and legislative strategies and State-oriented remedies it would also have to go beyond the highly institutionalised forms of Colombo civil society, which while marking an important stage in the growth and development of Sri Lankan civil society, should now attempt to reach beyond it. Such a network, in other words, would seek to combine the organisational strengths of Colombo based groups – in particular their institutional solidity their high profile and international connections – with the personal motivation and determination and the local roots that only the victims and survivors of political violence can provide. Would it be possible, for example, for groups like the Movement for the Defense of Democratic Rights, the Civil Rights Movement, the Organization of Parents and Family Members of the Disappeared, the Family Rehabilitation Center and perhaps the Asian Human Rights Center - all of whom have done valuable work on the issue of disappearances and impunity - to coordinate their efforts and help reawaken energies at the local level on work regarding these issues? Could the energy and passion of a group like the Mothers Front and other local, village and town-level groups throughout the country including the North and East be reawakened, even at this late date, though with much greater independence from political parties and militant groups than in the past? Such a network, actively linking different local

groups with each other and to national, Colombo-based organisations, would aim to engage in a different form of political action; one that helps satisfy the psychological needs of the victims for justice and for public expression by channelling them in non-violent democratic ways. It would be important here to engage the strengths and insights of local women as well as women's groups – not just because of the special needs that women have, but also because of the special knowledge and political awareness that many women have gained through their experience of surviving political violence.

This network could be seen as an expansion of the "Panel of Lay-Visitors" that the Commission Report recommends to be set up in each Police area, so as to give it local support. These local panels seem to represent one of the most important of the Commission's recommendations, especially if they were in fact empowered to file complaints to the Human Rights Commission (HRC) with prosecutorial powers. This capability would be particularly important with respect to complaints about the police for not complying with their duty to record detentions and properly notify the next-of-kin, the Magistrate, and the HRC. The legal empowerment of citizens to take on this work would be a major step forward and a major barrier to renewed abuse of state power. But even under relatively stable political conditions, it could be dangerous work. For the panels to be effective, they would have to be backed up by a larger network of citizen support at the local, national and even international levels so as to overcome intimidation from the local networks of non-democratic power that often work in tandem with the local police. Ideally, citizen groups should begin forming themselves and pressing for this role even prior to the enactment of legislation empowering them to do so, as part of a larger agitation campaign on behalf of implementation of the Commission's recommendations.

It would be of critical importance for these groups – at both local and national level – to work to strengthen the hand of reformist elements of the Sri Lankan police. It is always important for human rights activists, not to fall into the trap of demonising all those in the state security forces. While it is also important not to be naive about the possibilities of such reform in the short term or about the *bona fides* of particular members of the police hierarchy, all efforts should be made to reach out to those elements within the police and security forces who would be amenable to the monitoring of their work by the general public and to greater safeguards being taken against abuse of their powers. This should be done at the local level in individual police stations, but efforts should also be made at the national level to make necessary changes in the police regulations and administrative policy, in order to strengthen the hand of reformist elements and to ensure their autonomy.

The Tasks for Democratic Mobilization

The proposed network of groups would be involved in executing the following tasks;

1) *Dissemination*: It would coordinate the formidable tasks of translating and publication of excerpts and summaries of the various Commission reports, distributing them at special public meetings designed to raise awareness among the public and perhaps functioning as the foundation of local truth commissions. This effort would flow from a real commitment to disseminate and maintain the collective memory of the suffering that ensued from political violence. This is crucially important, as the present and previous Commissions have emphasised, since the lack of effective information, knowledge, and documentation is central to the possibility of systematic disappearances.

2) *Public Shaming*: The network would support an organised campaign to shame the UNP, the LTTE, the JVP and other recently disarmed militant groups for their lack of remorse or public apology for the shocking amount of violence and destruction they have unleashed against their own people. Through their lack of apology, such organisations imply that they consider the routine and massive violation of the rights of Sri Lankans should be justified, however "regrettable" it might be. Apparently, this attitude is more widespread than many would like to imagine. One cannot assume that all Sri Lankans agree that what was done by the Government or the LTTE or even the JVP was unacceptable. There is a real need for a robust propaganda, or public awareness campaign on this issue to remind people of how such unaccountable power/violence puts everyone at risk – whether Tamil, Muslim or Sinhala, whether involved in violence oneself or not.

3) *Targeted Prosecutions*: The network would organise a targeted public campaign of direct agitation against a small number of important perpetrators of the crimes, documented by the four Disappearances Commissions. The idea would be to choose a small number of cases that, with the proper kind and amount of pressure, could possibly be won. The aim would be to put real pressure on the system of impunity by shaming the politicians and the legal system into real action. The cases should be chosen carefully, with perhaps one case for each ethnicity and/or a victim at the hand of each perpetrator, to ensure unbiasness and to build bridges of reconciliation and political mobilisation. This effort would obviously be complicated by the present peace process and the difficulty of demanding accountability from the LTTE. One crucial aspect of the network's activism on this front would be to ensure the support and protection of the chief witnesses in such cases. This might be one area in which the international community could play a significant role. It is striking to read in the Commission's report, the names and addresses of ten "returned detainees," who are listed as having provided credible evidence implicating specific perpetrators of disappearances and killings. One might wonder whether if anything is being done to protect these people. Would it be possible for an organisation or simply an informal network with international support, to be charged with the task of ensuring their safety? They – and others like them at later stages – would seem to be at great risk; and without them; no cases can be made.

4) *Memorials for Reconciliation*: However, it should be noted that, the network and activism that is proposed here, would have as its focus more than just punishment. Crucial to its

efforts would be the work of remembrance and reconciliation. It is in that respect that the Commission's recommendation for a "Wall of Reconciliation" should be endorsed. This could be a very powerful symbolic gesture which should also be doable. It is emphasised though, that any national monument to victims of political violence should be done independent of government and political parties. It has already been seen what the political nature of the "Shrine of the Innocents" on Parliament Road has meant for the memory of the Embilipitiya case. There is a lot of positive and hopeful energy - especially among young people, just waiting to be tapped into once people believe there is a feasible and inspiring task to do. It is hoped that some wealthy person or set of persons could buy or donate the land on which a national memorial could be built, which would need to include space for the religious practices of all four major faiths. On the difficult side, there would be complexities with respect to whose names should be on it. These would have to be very carefully worked out – should it include only the names listed in the reports of the five Disappearances Commissions? Or should it include others eg. victims of political assassinations, suicide bombers soldiers, LTTE cadres etc?[12]

Central to this and all the other proposals made in this section, is the need to try to exploit as much as possible the peace process and the small political openings it might now allow and which might not be open for too long. Indeed, it may be the case that any successful activism around human rights issues at this point will have to be placed explicitly within the context of the peace process if it is to be viable. The point should be to build a coalition across ethnic and political and crucially, class divisions based on the shared pain and suffering at the hands of arbitrary and violent power. It is also crucial to remember that the violence of the UNP's "counterinsurgency" campaign was directed disproportionately at poor and rural young people, while the middle class, professionals and elites were left relatively unharmed, at least physically. As an example of the kind of solidarity this fantasy would hope to expand upon, it is apt to refer to a passage from Sasanka Perera's Stories of Survivors, in which he tells of a town in the Monaragala district that was virtually destroyed by government forces thanks to it being known as a "JVP town." It came to be known by many as "Vadamarachchi," in solidarity with the Tamil town of that name that had also been completely destroyed due to armed clashes and deliberate destruction. The book quotes a local villager as saying: "The JVP and the army killed most of the young men in that village. In effect the village was destroyed. So we call it Vadamarachchi. It was also destroyed like that."[13]

Even more important and productive than a national monument for the disappeared and other victims of political violence that would be located in Colombo, it is suggested that the proposed network could take on the task of establishing many more and much smaller, formal and informal monuments at the local level. The idea would be to let a thousand flowers bloom, for people to be encouraged and organised to memorialise all those places where pain and suffering where was inflicted within the local communities, especially where the worst

[12] These last two would seem likely to be too controversial to be included.
[13] *Ibid*, p. 48

forms of violence, took place eg. the detention centers, torture chambers and mass graves. This would be one of the major projects for the local committees and network members to organise. These would be sites of mourning and remembrance that would help build strength and community solidarity, if done correctly. They would have the effect of both healing and keeping the issues alive, in order to make political pressure for reform. Such memorials would give active symbolic support to efforts aimed at preventing future recurrences of abuse and give sustenance to local organising efforts.

All this may be an unrealistic fantasy. But it is hard not to worry about what might happen in the future if something like these coalitions are not built. It is not too hard to imagine the consequences of something like the political instability and violence of the late 80's, which may be a real possibility, most obviously in the event of the peace process breaking down which might be combined with a worsening economy. It seems that there is nothing more important today – with the possible exception of ensuring the establishment of human-rights protection mechanisms as a central part of the peace-process – than to respond to this danger with the kind of preventative measures suggested by the All-Island Commission, backed by the support of local and national people's organisations suggested earlier. And while such a program of national political organising might seem fantastic, one wonders whether one has always to live, at least to some degree, in a fantasy world – in the sense of a world of imagination, of invention, of creativity, of hope – in order to make any meaningful democratic social change. It is hoped that this particular fantasy is at least productive of thought and discussion.

Victim Satisfaction: Judicial Responses in Sri Lanka

Lakmini Seneviratne[*]

1. Introduction

This paper seeks to analyse the manner in which the Fundamental Rights jurisdiction of the Sri Lankan Supreme Court has evolved as regards awarding remedies to victims of fundamental rights violations under Article 126 of the Sri Lankan Constitution of 1978. It commences with an overview of the parameters within which the fundamental rights jurisdiction of the Supreme Court operates and moves on to analyse some of its key judgments that can be identified as milestones in the history of remedies to victims of fundamental rights violations in Sri Lanka. The paper concludes with a brief analysis of the provisions in the Statute of the International Criminal Court[1] that deal with victims rights and interests, thus bringing an international dimension into the discussion which also puts the Sri Lankan position in perspective amidst the vast strides made in the international sphere in this regard.

2. Background

Article 17 of the fundamental rights chapter in the 1978 Constitution of the Democratic Socialist Republic of Sri Lanka enacts,

> *Every person shall be entitled to apply to the Supreme Court, as provided by Article 126, in respect of the infringement or imminent infringement, by executive or administrative action, of a fundamental right to which such person is entitled under the provisions of this chapter.*

According to Justice S. Sharvananda[2], the right conferred under Article 17 *"... is itself a fundamental right and therefore the existence of an alternative remedy is no bar to the Supreme Court entertaining an application under Article 17/126 for the enforcement of a fundamental right."*

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[1] Rome Statute of the International Criminal court adopted in June 1998;came into force in July 2002.

[2] Justice S. Sharvananda, **Fundamental Rights in Sri Lanka (A Commentary)**, Arnold's International Printing House Private Limited, 1993 at p.414

Accordingly, it is enacted in Article 126 (1) that,

> *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 ..... declared and recognised by chapter III...*

Thus, any person alleging such infringement or imminent infringement, *"may himself or by an attorney -at- law on his behalf, within one month thereof,..... apply to the Supreme Court by way of petition in writing .... praying for such relief or redress in respect of such infringement."*[3] The application will proceed only on being granted leave to proceed, by not less than two Judges of the Supreme Court.

With a view to ensuring speedy justice, it is further enacted in sub section (5) of Article 126 that,

> *The Supreme Court shall hear and finally dispose of any petition or reference under this Article within two months of the filing of such petition or the making of such reference.*

However, it should be noted that in practicality, this time period is not strictly adhered to by the Supreme Court. The position was clarified in ***Jayanetti*** v. ***The Land Reform Commission***[4] where a Divisional Bench of five judges unanimously held that the provision was only directory, and that the time limit must be complied with except when delay is necessitated in the interests of justice or by circumstances beyond the court's control.

3. Parameters of Jurisdiction

It has been established by judicial pronouncements[5] that the burden of establishing the facts on which (s)he invites the Court to grant relief lies with the Petitioner. The standard of proof is on a preponderance of probabilities, which *"should be commensurate with the gravity of the allegation sought to be proved."*[6] The Supreme Court has taken the position that it *"will*

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[3] The Court of Appeal may also invoke the fundamental rights jurisdiction of the Supreme Court in certain circumstances. See Article 126 (3) of the Constitution.
[4] (1984) 2 Sri L.R,172
[5] ***Vivienne Goonewardena*** v. ***Hector Perera and others***, Fundamental Rights (Volume 2) p.426; ***Velmurugu*** v. ***The Attorney General and another*** (1981) 1 Sri L.R. 406
[6] ***Vivienne Goonewardena*** v. ***Hector Perera and others***, Fundamental Rights (Volume 2) p.426 at 432

insist on a high degree of probability as for instance a Court having to decide a question of fraud in a civil suit would"[7]

The term 'executive or administrative action' has been given wide interpretation by the Court. In the ***Vivienne Goonewardena*** case, the Supreme Court held that,

> *The State no doubt cannot be made liable for such infringements as may be committed in the course of the personal pursuits of a public officer or to pay off his personal grudges. But infringements of Fundamental Rights committed under colour of office by public officers must result in liability being cast on the State.*[8]

This position is further clarified in the following statement by Soza. J in the same case,

> *What the petitioner is complaining of is an infringement of his fundamental right by 'executive or administrative action' that the State has through the instrumentality of an overzealous or despotic official committed the transgression of his constitutional right. The protection afforded by Article 126 is against infringement of fundamental rights by the State, acting by some public authority endowed by it with the necessary coercive powers. The relief granted is principally against the State, although the delinquent official may also be directed to make amends and/or suffer punishment.*

In this case the Court awarded Rs.2500 as compensation to the Petitioner, for the violation of her fundamental rights under Article 13 (1) of the Constitution[9] by the unlawful actions of police officers ' acting as an organ of the State' in placing her under unlawful arrest.

It was also stated in ***Velmurugu*** v. ***AG***[10], per Sharvananda J. that,

> *".... the claim for redress under Art.126 for what has been done by the executive officers of the State is a claim against the State, for what has been done in the exercise of the executive powers of the State. This is not*

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[7] *Ibid*
[8] *Ibid* at p. 438
[9] No person shall be arrested except according to procedure established by law. Any person arrested shall be informed of the reason for his arrest.
[10] *Supra note* 4

vicarious liability;it is liability of the State itself..... it is a liability in the public law of the State"[11]

A further development in the approach of the court is seen in ***Karunaratne*** v. ***Ranasinghe***[12], where it was held that in addition to the state which is primarily liable, the offending officer may also be liable and accordingly in appropriate cases, both the State and such officer may be ordered to pay compensation.

4. Type of Relief

Article 126 (4) enacts that,

The Supreme Court shall have power to grant such relief or make such directions as it may deem just and equitable in the circumstance in respect of any petition or reference referred to in paragraphs (2) and (3) of this Article or refer the matter back to the Court of Appeal if in its opinion there is no infringement of a fundamental right.....[13]

Accordingly, it is a constitutional obligation cast upon the Supreme Court to entertain an application under Article 126 (2) and to grant such relief or to make such direction as it may deem *just and equitable in the circumstances.* It should be noted that once it is established that a fundamental right has been or is about to be infringed by executive/administrative action, the type of relief to be granted is in the discretion of the court. The power conferred upon the court under Article 126 (4) is very wide and as Justice Sharvananda[14] points out,

"(f)or this purpose, it may adopt any appropriate procedure to discover the truth of the allegations in support of the infringement complained of. The court has a discretion to evolve procedure, appropriate in the circumstances of a given case, to enable it to exercise its power to enforce a fundamental right. It is not obligatory for the court to follow adversarial procedure."

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[11] See also the cases – ***Mariadas*** v. ***Raj*** (1983) 2 Sri L.R. 461; ***Ganeshanathan*** v. ***Vivienne Goonewardene*** [1984] 1 Sri L.R. 319; ***Visvalingam*** v. ***Liyanage*** F.R.D. (2) 452; ***Samanthilaka*** v. ***Ernest Perera*** [1990] 1 Sri L.R. 318 etc.,

[12] S.C. App 71/90, S.C. Min 17/6/91. See also ***Sirisena*** v. ***Perera*** S.C.App 14/90, Min 27/8/91

[13] It should be noted that the court's power to make directions as a means of enforcing fundamental rights will not be discussed in this paper, as it is beyond the scope of the discussion.

[14] *Supra note* 1 at p.414

In their effort to grant relief that is *just and equitable in the circumstances*, the court is expected to be guided by principles of equity, justice and good conscience. Thus "*(t)his jurisdiction entitles the court to subject the exercise of legal rights to equitable considerations, that is, of a personal character arising between one individual and another which may make it unjust or inequitable, to insist on legal rights to exercise them in a particular way*"[15]

Therefore, in ***Shahul Hameed*** v. ***Ranasinghe***[16] where the (5th) Respondent in the case benefited from the acts of the police officers which in turn were discriminatory towards the Petitioners, the court made the important observation that, even though the (5th) Respondent was not liable for the violation of the fundamental rights of the Petitioners,

> *"(t)his court has the power to make an appropriate order even against a respondent who has no executive status where such respondent is proved to be guilty of impropriety or connivance with the executive in the wrongful acts violative of fundamental rights or even otherwise, where in the interest of justice it becomes necessary to deprive a respondent of the advantages to be derived from executive acts, violative of fundamental rights eg. an order for the payment of damages or for the restoration of property to the petitioner...."*

Generally, the court has granted *compensation* in cases involving violation of fundamental rights under Article 11[17] and Article13[18], and the quantum of damages would depend on the circumstances of the case and the nature of the particular violation. For eg. in ***Saman*** v. ***Leeladasa***[19] which involved the infliction of cruel, inhuman and degrading treatment and punishment by a prison guard (Article 11), the court assessed compensation based on two premises;

(1) Fernando J. assessed compensation in respect of the injury, hospitalization and the pain, suffering and humiliation suffered by the petitioner and the conduct of the respondent which was high handed and in blatant disregard of the petitioner's rights.

(2) Amerasinghe J. was of the view that compensation should be assessed by way of an acknowledgement of regret and a solatium for the hurt caused by the violation and not as a punishment for duty disregarded or authority abused.

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[15] *Ibid* at p.415 per Lord Wilberforce in ***Ebrahim*** v. ***Westbourne Gallaries Ltd.***,(1972) 2 AER 492 at 500
[16] [1990] 1Sri L.R 104
[17] No person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.
[18] Freedom from arbitrary arrest, detention and punishment, and prohibition of retroactive penal legislation.
[19] [1991] 1 Sri L.R. 1

5. Judicial Creativity

This section contains an analysis of a few land mark judgements delivered during the last ten years or so, which had a significant impact on defining the parameters of granting compensation to victims, as a form of relief for the violation of their fundamental rights.

In Welikannage Don Abeygunawardana v. ***Dahanayake and others***[20], a fore-runner of the 25 year old fundamental rights jurisdiction of the Supreme Court, the Petitioner alleged that his fundamental rights guaranteed under Articles 11 and 13 (1) had been infringed by the actions of two police officers, who allegedly subjected him to brutal assault when they arrested him.

Court upheld his claim and held that the acts of the police did amount to cruel, inhuman and degrading treatment, thereby violating his fundamental rights under Articles 11 and 13 (1) of the Constitution.

Fernando J. delivering judgement drew attention to the usual dilemma before the Court, of the need to compensate the victim considering the circumstances of each case, and the difficulties faced by a victim in proving his/her eligibility to receive such.

> *As generally happens in cases of this kind, the petitioner has not placed sufficient material to enable the Court to make a comprehensive assessment of compensation; the fact that an application has to be filed within one month inhibits the production of such evidence... ...* [21]

However, Court noted that this is not a bar for the Petitioner to seek leave to file additional affidavits and documents with regard to compensation, after leave to proceed had been granted.

In the absence of evidence in the present case to show that "*... in consequence of his injuries, the petitioner suffered (or would suffer) some disability, incapacity or disfigurement, which is likely to cause him pain or discomfort, or in a way to affect his work, his earning capacity, his leisure or his enjoyment of life in general*", the Court observed that *"(i)t is, of course open to the Petitioner to institute a civil action for damages...."*[22]

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[20] S.C. Application No.255/94
[21] *Ibid* at p.6
[22] *Ibid*

Nevertheless, the petitioner was granted a declaration for the violation of his fundamental rights and was awarded a sum of Rs.50,000 as compensation for such infringement (to be paid by the State and the officials concerned in equal shares) plus costs. The court also made the important observation that,

> *"..... this Court has jurisdiction, under Article 126 (4), first to determine whether a petitioner should be granted a declaration that his fundamental rights have been violated, and thereafter to give directions (if requested by the petitioner) necessary for the assessment of compensation. However, it is preferable that Rules should be made under Article 136 (1) prescribing the procedure to be followed in regard to such directions and the inquiry to be held thereafter"*[23]

It should also be noted at this point that, in several instances the court has given a purposive interpretation to the 'one month' rule in order to give effect to the spirit of the law and to avoid the undue hardships that a petitioner would have to go through by strictly adhering to the letter of the law.[24] This positive approach of the court could be hailed as a progressive step in securing justice to victims of fundamental rights violations seeking redress through the seemingly only effective channel available to them.

In the later case of ***Priyangani*** v. ***Nanayakkara and Others***[25], the petitioner, a primary school teacher, alleged that her transfer was contrary to the Transfer Circular in question and hence violative of her fundamental rights guaranteed under Article 12 (1)[26] of the Constitution.

The Court held that the alleged order of transfer by the respondents, who were public officials, was violative of the petitioner's right to equality. Because, the discretionary power in question ie. the power to transfer teachers, which is held 'in trust for the public', had not been exercised for the benefit of the public and for the purpose for which it had been conferred ie. to promote the education of the child. Accordingly, the order of transfer was quashed and the petitioner was entitled to resume work immediately.

Considering the assessment of compensation, the Court observed that,

> *"....malice or other improper motives have not been proved. However, powers have been exercised with scant regard to the rights of the individual, and so I cannot but recall that "it is excellent to have a giant's*

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[23] *Ibid*
[24] See for eg. ***Gamaethige*** v. ***Siriwardena*** [1988] 1 Sri L.R. 384
[25] [1996] 1 Sri.L.R. 399
[26] All persons are equal before the law and are entitled to the equal protection of the law.

power, but it is tyrannous to use it like a giant" (Measure for Measure, II,ii,107) especially when the ultimate victim is the nation's children"[27]

Thus, the State was directed to pay the petitioner Rs.15.000 as compensation and the officials concerned were to pay Rs.6000 as costs (at the rate of Rs.2000 each).

The case of ***Bandara*** v. ***Wickremasinghe***[28] involved a petitioner, who was a minor at the time of the alleged incident which gave rise to the application. The petitioner was a student attending school, and he contended that he was assaulted during school hours by the respondents ie. Deputy Principal, Vice Principal and a teacher.

Focusing on the issue whether the alleged acts fall within the definition of 'executive or administrative action', the Court observed that,

"... discipline of students is a matter within the purview of school teachers. It would follow that whenever they purport to maintain discipline, they act under the colour of office. If in doing so, they exceed their power, they may become liable for infringement of fundamental rights by executive or administrative action"[29]

Considering the fact that the petitioner was a teenager at the time of the incident *"who is likely to suffer humiliation and nervous shock by violence of the kind complained by him"*, the Court held that the conduct in question would be in excess of disciplinary power and violative of the petitioner's rights under Article 11 of the Constitution.

In granting compensation to the victim, the Court also took note of the special nature of the case.

This Court has hitherto been deciding cases of torture by police officers. However, the victims of such torture generally belong to a different class. Here it is a student with an unblemished record. This Court by granting appropriate relief reassure the petitioner that the humiliation inflicted on him has been removed, and his dignity is restored. That will in some way guarantee his future mental health, which is vital to his advancement in life.[30]

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[27] *Supra* n.24 at p.407
[28] [1995] 2 Sri.L.R. 167
[29] *Supra* n.28 at p. 172
[30] *Ibid* at pp 173-174

Accordingly, the State was ordered to pay Rs.50,000 as compensation. The respondents were held personally liable for the violation and were directed to pay individual costs. A total of Rs.60,000 was awarded to the petitioner as compensation and costs.

Considering the facts of the case and its impact for the future as far as the petitioner was concerned, the Court went a step further and issued a timely and just order.

> *The Registrar is directed to forward a copy of this judgement to the Secretary, Ministry of Education and Higher Education. The Secretary is directed to ensure that the compensation and costs ordered herein are expeditiously paid, to maintain a record of this judgement for departmental purposes and to take such the appropriate action and to report to this Court compliance with this judgement on or before 31.08.1995.*[31]

A somewhat controversial judgement to have been delivered by the Supreme Court in the new millennium is the case of ***Floor Care Cleaning Services (Pvt.) Ltd.,*** v. ***The University of Ruhuna and Others.***[32] The case involved a tender which called for the provision of cleaning services to the Respondent – University. The Petitioner's allegation was that his fundamental rights guaranteed under Article 12 (1) of the Constitution had been violated by reason of the evaluation process followed by the Evaluation Committee in reaching its decision relating to the awarding of the contract.

Consequent to an in depth analysis of the facts of the case Wigneswaran J. concluded that the Petitioner's fundamental rights to equality and equal protection of the law guaranteed under Article 12 (1) of the Constitution had indeed been violated by the actions of the Respondents. The Judge further observed that, as a consequence of the flaw in the evaluation process and the consequent delay in awarding the contract, the Respondents were allowed to continue their contract of the previous year without a formal award for yet another year, thereby allowing them to be unjustly enriched by profits they were not entitled to.

Hence, as relief for the Petitioner, the court decided that the Respondent University should *not only take immediate steps to call for fresh tenders,* but should also pay a sum of Rs. 700,000 as compensation to the Petitioner calculated at the rate of Rs.50,000/- per month *in respect of the profits they acquired for the period in question under the contract.* A further Rs. 50,000/- was awarded as costs and an order was made to the Respondent to refund all tender fees and deposits made by the Petitioner.

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[31] *Supra* n.15 at p. 174

[32] S.C.F.R. Application No. 285 / 2001.

The judgement was widely debated and discussed among legal as well as non-legal circles, not only for the large sum of money awarded as compensation to the victim, but also for the controversial line of reasoning adopted by the Supreme Court in deciding, that the actions of the perpetrators were unlawful and arbitrary.

In the case of ***Yogalingam Vijitha Paruthiyadaippu*** v. ***Wijesekera and Others***,[33] the Petitioner, who was a 27 year old woman from a displaced family living in Jaffna, sought relief from the Supreme Court for her alleged illegal arrest and detention by the Respondent police officers and the consequent infringement of her fundamental rights guaranteed under Article 13 (1) and 13 (2) respectively of the Constitution. She sought further relief for the alleged infringement of her fundamental rights guaranteed under Article 11 of the Constitution, due to the unbearable acts of torture inflicted upon her by the Respondents.

Delivering judgement in favour of the Petitioner after extensive consideration of the available evidence, court declared that the arrest and detention of the Petitioner was unlawful and violative of her fundamental rights guaranteed under Article 13 (1) and 13 (2) of the Constitution. As regards the allegations of torture, upon careful examination of the medical evidence which also corroborated the Petitioner's version, the court observed in the words of Atukorala J. in ***Sudath Silva*** v. ***Kodituwakku,***[34] that –

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

Thus, the court declared that the Petitioner's fundamental rights guaranteed under Article 11 of the Constitution had also been violated by the illegal acts of the Respondents. The court went on to award Rs. 250,000/- as compensation and costs to the victim, a portion of which was to be paid personally by the Respondents in equal shares and the rest by the State.

The judgement is considered a vital step forward on the part of the Sri Lankan judiciary in imposing responsibility on the State and its officials for violating the fundamental rights of innocent civilians by 'acting the colour of office', apart from the large sum of money granted as compensation to the victim.

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[33] SC Application FR No. 186/2001.
[34] [1987] 2 Sri L.R, 119.

A land mark judgement in the history of the fundamental rights jurisdiction of the Supreme Court of Sri Lanka was delivered this year in the case of ***W. R. Sanjeewa*** v. ***Sena Suraweera and Others***,[35] where the Petitioner alleged the infringement of his fundamental rights under Article 13 (1) and 13 (2) of the Constitution by his unlawful arrest and detention respectively by the Respondents. It was further alleged that his fundamental rights under Article 11 had been infringed by the Respondents who had allegedly tortured him while questioning him regarding a murder, of which the Petitioner allegedly knew nothing.

After careful consideration of the version of the Petitioner and the Respondents, Fernando J. delivering judgement observed that, acting upon 'a bald allegation' of an informant, who may even be considered reliable, that a particular person is committed a murder, would not even justify the *questioning*[36] of any person suspected of such crime, let alone his/her arrest. The court held that the evidence "strongly suggests that they (Respondents) did not, even subjectively, believe that he (Petitioner) had committed an offence, but were merely *hoping*[37] that something would turn up."[38]

Additionally, considering the medical evidence and the evidence given by the Petitioner's wife and brother, the court concluded that–

> *The irresistible inference is that while in Police custody the Petitioner had been subjected to severe torture endangering life. There is no doubt whatsoever that he had been tortured and how exactly he had been tortured does not matter in the least. The failure to release the Petitioner promptly, or at least to secure prompt medical attention for him was cruel and inhuman.*[39]

Hence, the court declared that the Petitioner's fundamental rights guaranteed under Article 13 (1) and (2) were violated by his unlawful arrest and detention by the Respondents and that the Petitioner was subjected to torture and to cruel and inhuman treatment in violation of his fundamental rights under Article 11 of the Constitution. Consequently, the court awarded the Petitioner an unprecedented sum of Rs. 800,000 as compensation and costs, a portion of which was to be borne personally by the Respondents and the remaining sum to be paid by the State.

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[35] SC No. 328/2002 (FR)
[36] *emphasis added*
[37] *emphasis added.*
[38] p. 8 of the judgement.
[39] p. 8 – 9 of the judgement.

As regards the reimbursement of medical expenses was concerned, it was contended on behalf of the Respondents that the choice of the Petitioner to seek treatment at a private hospital as opposed to a State hospital had led to exorbitant charges and that he should have sought treatment at a state hospital instead. Considering the evidence at hand and existing social reality, Fernando J. held that *"(c)itizens have the right to choose between State and private medical care, and in the circumstances the Petitioner's wife's choice of the latter was not unreasonable – and was probably motivated by nothing other than the desire to save his life."*[40] More significantly, Justice Fernando also referred to human rights obligations of the State at international level in fortifying his lordship's conclusion and held that, *"Article 12 of the International Covenant on Economic Social and Cultural Rights recognizes the right of everyone "to the enjoyment of the highest attainable standard of physical and mental health."*[41] Thus, the court in addition directed the State to pay the medical expenses that the Petitioner had already incurred as well as any further sum that was remaining for his period of hospitalisation.

The judgement obtains a significant place in the history of compensation awards in fundamental right cases, due to several reasons:

(a) the unprecedented sum of money awarded as compensation to a victim who suffers a violation of his fundamental rights by the actions of the State;

(b) the effect of the order on perpetrators on the one hand and victims on the other: as an indicator of the strong stand of the judiciary in the face of fundamental rights violators, in the case of the former; and an indication of the treatment meted out by the Supreme Court to genuine victims of fundamental rights violations, in the case of the latter.

(c) the reference to state obligations at international level to guarantee the rights of the public: the express reference of the court to the provisions in the ICESCR in the context of the state's obligations at local level, is a strong reminder to both the State and the public that the effects of one's actions / omissions are no longer limited to the domestic sphere.

The case of ***Leeda Violet and Others*** v. ***Vidanapathirana, OIC, Police Station, Dickwella and Others***[42] involved petitions by 3 mothers who were seeking writs of Habeas Corpus to release their respective sons, who had allegedly 'disappeared' after being taken into custody by the 1st Respondent, a police officer. Though the case does not technically fall within the parameters of the subject matter discussed in this paper, the judgment warrants discussion

[40] p. 10 of the judgement.
[41] p. 10 of the judgement.
[42] (1994) 3 Sri L.R. 377

considering the impact it had on the Sri Lankan judiciary in relation to granting compensation awards to victims.

In allowing the applications of the petitioners the court held that, Article 141 of the Constitution which gives power to the Court of Appeal to issue writs of Habeas Corpus, is "intended to safeguard the liberty of the citizen." Therefore, the court observed that

> *"(t)he Rule of Law, freedom and the safety of the subject would be completely nullified, if any person in authority can cause the disappearance of an individual who has been taken in to custody and blindly deny to this Court having jurisdiction to safeguard the liberty of the subject, any knowledge of the whereabouts of such individual. The process of the historic remedy of the writ of habeas corpus, ... cannot be reduced to a cipher by a person in authority, who yet continues to wield authority , by falsely denying the arrest and custody of an individual whose freedom the writ is intended to secure"*[43]

Habeus Corpus jurisdiction does not, unlike in cases involving violations of fundamental rights, permit the granting of damages. In these circumstances, the court moved out of the traditional concept of costs that may be awarded in a case. Instead, the court took into account the degree of responsibility cast upon the respondents in the case and the heavy expenditure incurred in the proceedings by the petitioners who *"... ... boldly pursued these applications, which is commendable conduct considering that the 1st respondent continues to hold office... ... . with the firm belief that truth and justice will finally prevail."*[44]

Accordingly, the court awarded exemplary costs and directed the 1st respondent to pay each petitioner a sum of Rs. 100, 000 on or before a specified date. The case is recognised as a progressive step in the history of compensation awards to victims of rights violations.

6. International Trends

This section seeks to examine the provisions made in the Rome Statute of the International Criminal Court (ICC)[45], with regard to the well being and protection of victims and / or witnesses in cases that are brought before the court.

The ICC seeks to establish *"a permanent institution ... ... (which) shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern... ..."*[46] The Court marks a significant development in the history of mankind, in that

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[43] *Ibid* at p. 383-384
[44] *Ibid* at p. 386
[45] A/CONF.183/9 17 July 1998 (Downloaded from http://www.un.org/icc/part1.htm)
[46] Article 1 of the ICC Statute

it establishes an international criminal court with *permanent jurisdiction* to try criminals who are accused of committing some of the most serious violations of International Human Rights Law and International Humanitarian Law such as the crime of genocide, crimes against humanity, war crimes etc. the significance of this development lies in the fact that the ICC is the 'first of its kind', when compared with the *ad hoc* Tribunals[47] that preceded it. These *ad hoc* Tribunals operated with a limited mandate which was temporally, geographically and jurisdictionally limited.[48] The ICC by contrast, is a court with permanent jurisdiction which can try any criminal belonging to any nationality who is guilty of committing one or more of the crimes within its jurisdiction, provided the requisites for invoking the jurisdiction of the Court have been fulfilled.[49]

The Statute of the ICC is an explicitly laid out document relating to the establishment and functioning of the Court. Apart from the crucial issues that are dealt with in a document of this kind such as the structure of the Court, its jurisdiction, admissibility criteria, appeals process etc, the Statute also delves deep into issues concerning the constitution and functions of the organs of Court, international cooperation among states, the rights of the accused, the rights of victims and witnesses etc. Considering the subject matter dealt with in this paper, not only the Statute of the ICC but also its Rules of Procedure & Evidence are of relevance. An area of significance is the special status being awarded to victims, both in terms of their participation in prosecutions and in the remedies that are especially tailored to meet victims' needs.

Section III of the Rules of Procedure & Evidence relating to victims and witnesses defines a victim as follows:

> *(a) "Victims" means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court;*
>
> *(b) Victims may include organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes.*[50]

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[47] ie. Nuremburg Tribunal established under the Nuremberg Charter of 1945; International Criminal Tribunal for the Former Yugoslavia (ICTY) established under UN Doc. S/RES/808 (22 February 1993); International Criminal Tribunal for Rwanda (ICTR) established under UN Security Council Res. 955 of 1994.

[48] For ex. Article 1 of the ICTY Statute defined the jurisdiction of the Tribunal as follows: "The tribunal shall have power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991…"

[49] See Article 12 – 14 of the ICC Statute.

[50] See also Rules 86 and 87 which lay down certain general principles relating to the guaranteeing of rights and protection to victims; Rule 88 which sets out the instances where special measures may be adopted by the Court to safeguard the interests of victims eg. measures to facilitate the testimony of a traumatized victim to be presented in private.

The extremely wide definition includes natural as well as juristic persons. Though in the case of the latter, it only covers 'direct' harm to property, it is significant to note that in relation to natural persons, the definition simply states *"persons who have suffered harm as a result of the commission of any crime..."* which could include both direct as well as indirect harm. And it is obvious that in both cases ie. natural or juristic persons, harm –whether direct or indirect – could include physical as well as psychological harm.

Following is a summary (though not exhaustive) of the extensive network of provisions made in the Statute and the Rules of Procedure & Evidence relating to the protection of the rights and interests of victims:

Right/Protection	**Relevant Article / Rule**	
	Statute	**Rules of Procedure & Evidence**
Direct access to the Court through the prosecutor: victims can make representations to the prosecutor who has the right to initiate proceedings based on these.	15, 53, 54	89
Victims have the right to be informed of all the steps taken (including decisions on whether to prosecute etc).	64, 19	92, 144
Victims have the right to participate at every stage in the trial and investigation.	64, 19	50, 59, 93
Victims have the right to legal representatives ie. if a large group of victims is involved, they have to either decide on one representative or work with the Registry in working out the deal.	68(3), 82(4)	90, 91, 171
A Victim and Witness Unit is established for support, protection and care for victims as part of the court to function under the Registry.	68(4), 43(6)	16, 17, 18, 19
Victims of sexual offences and child victims who have special concerns will be taken into special account by the court in obtaining evidence etc.	68(2)	70, 71, 72

The establishment of a trust fund for victims.	79	98
Provision for reparation for victims in sentencing.	75	94, 95, 96, 97, 143, 218
Ensuring victim participation in proceedings and their protection while keeping the rights of the accused as the paramount concern.	68(1),(3),(5), 69(2),(5),(7), 72, 73	43, 69, 70, 76, 99, 112, 113, 114, 145, 221, 223, 224

Several noteworthy aspects can be ascertained when considering these provisions in detail.

- The necessity to ensure that remedies are not only confined to punishing the criminal but also consider the impact on the victim eg. reparation, compensation etc.
- The necessity to ensure the safety, physical and psychological well being, dignity and privacy of victims pending, during and subsequent to the proceedings.
- The broad definition of victims, which includes even those who are indirectly affected by a crime eg. family members etc.
- The necessity to ensure the victims' right to participate in every stage of the trial and investigation while ensuring their protection.
- The necessity to ensure that the rights of the accused are not prejudiced in guaranteeing any of the above protections to victims ie. a balance is sought to be achieved between the rights of the accused and the victim.

Thus it can be concluded that the ICC seems to be equipped with a range of mechanisms to ensure that victims of rights violations receive a just and equitable remedy. This would undoubtedly act as an incentive for states to become parties to the Statute as well as to enhance the confidence of litigants about the administration of justice by the Court.[51] This is indeed a positive example for domestic courts to emulate, especially in view of the allegations made against most domestic courts including the judiciary of Sri Lanka, that they pay scant regard to guaranteeing the rights and interests of victims.

[51] It is noteworthy at this point that, Sri Lanka has not ratified nor signed the ICC Statute. It is thereby not in a position to invoke the jurisdiction of the Court in terms of Article 12,13 and 14 of the Statute. Sri Lanka may nevertheless opt for conditional acceptance under Article 12 (3) of the Statute, whereby a state which is not a party to the Statute may accept the exercise of jurisdiction by the Court with regard to a particular crime in question.

7. Conclusion

It can be seen that the Supreme Court of Sri Lanka has through its judgements, innovatively and creatively interpreted its jurisdiction to grant just and appropriate relief in the form of compensation awards and / or declarations to victims of fundamental rights violations.

However, it is observed that the fact that the Supreme Court which is the apex court of the land, is in the case of fundamental rights jurisdiction the court of first and last instance, acts as a hindrance to achieve greater heights, which international fora such as the ICC aspires to. On the one hand, this situation deprives litigants the right to appeal against a determination of the Supreme Court on a fundamental rights violation which is decided before it. On the other hand, the limited jurisdiction vested on the Supreme Court in terms of determining the appropriate remedy for an alleged fundamental rights violation, leaves the court with a limited choice of making either a compensation award and / or declaration to an alleged victim of fundamental rights, without having the opportunity nor authority to deal with more broader and practical issues such as reparations and rehabilitation of victims etc.

Therefore, considering the creative interpretations adopted by the Supreme Court within the confines of the existing limited jurisdiction, it is nothing but fair that the fundamental rights jurisdiction of the Supreme Court be expanded, particularly in relation to its scope of granting remedies in order to give meaningful realization to victims' needs and interests. An equally timely consideration would be to explore the possibility of vesting the fundamental rights jurisdiction in a forum from which there would be provision for appeal to a higher authority. This would ensure that justice is not only done but it is also seen to be done.

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