LST REVIEW

Volume 17 Issue 234 & 235 April & May 2007

A "PRAXIS" PERSPECTIVE ON SUBVERTED JUSTICE;

SCRUTINY OF THE STATUTORY DISCRETION OF THE ATTORNEY GENERAL AND PROSECUTIONS INTO GRAVE HUMAN RIGHTS VIOLATIONS

A JUDICIAL RESPONSE IN REGARD TO IMPOSING ACCOUNTABILITY FOR 'ENFORCED DISAPPEARANCES'

THE DRAFT BILL FOR THE PROTECTION OF VICTIMS OF CRIME AND WITNESSES

RESETTLEMENT IN THE EAST: CIVIL SOCIETY FIELD MISSION TO BATTICALOA; MAY 2007

LAW & SOCIETY TRUST

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ISSN – 1391 – 5770

Editor's Note ... ...

The Review, in this Joint Issue, publishes some critical reflections on the inability of Sri Lanka's domestic institutions to deliver justice and in particular, examines the question of prosecutions in respect of torture, enforced disappearances and extra judicial executions. The role of the Attorney General is pivotal in this context.

Indeed, the statistics speak for themselves, as reflected upon in the first paper published in the Review, **"A 'Praxis' Perspective on Subverted Justice and the Deterioration of Rule of Law Norms in Sri Lanka."**

Thus,

> 'The decrease of public confidence in the office of the chief law officer of the land; the Attorney General (AG) has been marked in recent years. The prosecutorial record of the Attorney General's Department in respect of grievous human rights abuses has not been commendatory with very few successful prosecutions being evidenced in past decades of thousands of enforced disappearances and extra judicial killings.'

The same is true of prosecutions for acts of torture in terms of the Convention Against Torture and other Inhuman and Degrading Punishment Act No 22 of 1994, with no convictions during the first ten years since the law was enacted and only three convictions thereafter. While at no point is kangaroo justice advocated with convictions to be manifested purely for the sake of bolstering the convictions rate, there is no doubt that the question of legal accountability for grave human rights violations needs to be substantively addressed. This is a question that the Review will concern itself with in great measure during the coming months.

The problem of obtaining requisite data (including judgments, court orders and case records) that are indispensable in order to engage in sustained and thorough analysis, has emerged as a question of grave concern in Sri Lanka. For example, the efforts of the Law and Society Trust to obtain copies of relevant decisions of the High Courts in respect of convictions/acquittals for enforced disappearances, (prosecuted *interalia* as crimes of abduction or keeping in unlawful confinement), have been fraught with difficulties in the absence of a right of access to this documentation.

Indeed, obtaining even the case numbers in this regard has not been possible due to the lack of a publicly accessible and comprehensive data base. Equally troublingly, the official data furnished by the Government of Sri Lanka (GOSL) to the United Nations treaty bodies in pursuance of its periodic reporting obligations is unclear and inconsistent as is specifically highlighted in the first paper published in this Issue. This is a serious problem that ought to be collectively addressed by domestic and international human rights monitors.

The second paper published in the Issue, namely "**Judicial Review of the Statutory Powers of the Attorney General in the Prosecutorial Process; Some Thoughts**" engages in an examination of the relevant case law and suggests an amendment to the Code of Criminal Procedure Act No. 15 of 1979 (CCP Act), viz; a new Section numbered as Section 401A which would subject the powers of the Attorney General in relation to arbitrary discharges/committals for trial by a magistrate, to the revisionary jurisdiction of the Court of Appeal in terms of Article 138 of the Constitution of Sri Lanka.

Judicial reluctance to intervene in regard to the exercise of statutory powers of the chief law officer of the land is a special factor that emerges from this analysis. Readers interested in obtaining further perspectives in this regard are further referred to the *LST Review* (Vol 15, Issue 211 May 2005) "***Judges and the Law, Public Accountability of the Attorney General, Prosecutorial Discretion and Fair Trial***" for, in particular, the relevance of the decision of the Supreme Court in *Victor Ivan vs Sarath Silva, Attorney General, [1998] 1 Sri LR, 340* in this context.

The third paper in this Issue also focuses on the question of justice in regard to prosecution of grave human rights violations and examines the manifold practical obstacles that hinder the realization of this objective. The fourth publication concerns an important recent decision of the Court of Appeal quashing a circular issued by the Deputy Inspector General (DIG) Personnel reinstating police officers who had been interdicted consequent to their indictment for enforced disappearances, as being *ultra vires* the Establishments Code. This is succeeded by the draft **Bill for the Protection of Victims of Crime and Witnesses** in regard to which the Review would be publishing a critical review in the following months.

The final article in this Joint Issue is a good contrast to the relatively 'legalistic' preceding papers in that it is a report of a recent civil society mission to Batticaloa, which eloquently highlights the plight of the internally displaced persons (IDPs) in the resettlement process and calls for greater consultation of the IDPs as well as inclusion of non governmental organisations, relief and humanitarian agencies in the process. The inactivity of the Human Rights Commission of Sri Lanka is of note in this respect.

Two findings of the field mission are of specific importance, namely that there should be no intimidation or coercion including the use of armed military personnel to collect people for resettlement, including the threat of cutting off food rations or not providing relief assistance, in order to 'engineer' consent to return and that displaced people should be reassured that if they choose not to return, they will continue to receive rations and will not face repercussions, including being deprived of resettlement packages when they do return.

Kishali Pinto-Jayawardena

A 'PRAXIS' PERSPECTIVE ON SUBVERTED JUSTICE AND THE DETERIORATION OF RULE OF LAW NORMS IN SRI LANKA

Kishali Pinto-Jayawardena[*]

1. Introduction

> *Praxis – the practice or practical side of an art or science as distinguished from its theoretical side.*[1]

At each historical point in time, the framers of Sri Lanka's post independence constitutional documents suffered from a deep rooted distrust of giving practical effect to the rule of law and the idea of justice; the 1972 'autochthonous'[2] Constitution subordinated the judiciary and superficially embodied a Bill of Rights while declining to grant the Supreme Court, explicit jurisdiction over the determination of violations. Thereafter, the 1978 Constitution[3] entrenched the concept of the all powerful executive President whose actions in office were placed virtually outside the law, besides (in a most absurd paradox), omitting the right to life and enacting a constitutional rights chapter with procedural restrictions that diminished the protection of those very rights.[4]

This same deviously subversive rationale outlined each and every grudging measure agreed to ostensibly in the name of constitutional democracy; whether in relation to the enactment of a law establishing a national human rights commission or the implementation of a constitutional amendment meant to restore public confidence in the governance process. The old familiar adage of 'giving with one hand and taking with the other' took on terrible meaning in the gradual but relentless deterioration of Sri Lanka's political, constitutional and legal systems.

From this core political objective of subversion of the rule of law, sprang a rabidly intolerant response to legitimate dissent; the constitutional documents of 1972 and 1978 were used to deny justice to both the majority Sinhalese and the minority Tamils and Muslims, though the extent of the denial differed in important respects. What is important to note is that the failure of the justice system and the breakdown of the ordinary law enforcement process impacted on all persons of all ethnicities, resulting in the deaths, enforced disappearances, physical and mental torture of thousands during the past three decades. Pertinently, this phenomenon was manifested not only during active conflict but

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[*]lawyer, columnist and author. This publication contains excerpts from this paper which was published in full in *article 2*, Vol.6. No 2, April 2007, Asian Human Rights Commission, Hong Kong.

[1]The Chambers Dictionary, 2000.

[2] The Independence Constitution in 1947 established the judicature as a body distinctly separate from the executive and the legislature and safeguarded minority rights in Section 29(2). But affronted by what it saw as an unwarranted bridling of their authority, the leftist United Front government which formed the government in 1970, deciding on an autochthonous or disastrously 'home grown' formula, specified that the legislature, (the National State Assembly) was the sole and supreme repository of power. All other institutions, including the judiciary, had to give way. Regardless of whichever government came into power, such political expediency was thereafter to determine the course of constitutional and political events in Sri Lanka.

[3]The current constitutional document.

[4] These developments were in sharp contrast to, for example, neighbouring India's commitment to the democratic norm and in particular, its wholesale fashioning of a constitutional environment where the right to life was recognised in all its ramifications as not only including physical existence but also, all the ingredients that go to make the quality of life.

also in times of relatively normal functioning. The conceptual foundations of the liberal democratic polity, such as the belief in protection of human rights, independence of the judiciary, a democratic electoral system and the insistence on separation of powers were used as weapons to strike at the heart of the public's understanding of the rule of law and to twist the constitutional process to suit political exigencies.

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

This paper departs from the above premise in unequivocal terms; it reiterates the failure of the democratic process in a most profound sense and systematically dissects the centrality of the breakdown of the justice system within this context. The point, albeit controversial, is stressed; the ongoing conflict in the North/East is inextricably linked to a destructively cyclic perpetuation of coercive violence by the State wherein the brutality practiced against the majority community with pervasive force at particular periods formed a useful base for the perpetuation of abuses using ethnicity as a ground during periods of intensification of the North/East conflict.

Egregious human rights violations including torture, extra judicial executions and enforced disappearances and systematic sexual violence carried out by soldiers/police in the war theatre[5] or police actions in enforcing proof of identity for persons of Tamil ethnicity over and above what was normally required even in the non-conflict areas, well illustrates this fact. The consequent result was the alienation of the Tamil community and their abandonment to the ferocious mercies of separatist forces that were not propelled by a liberation ideology but only by a thirst for totalitarian power.

What this paper emphasizes however is that the redressing of the brutal nature of the Sri Lankan State must be seen as a problem not restricted to the minorities alone but as an overriding issue of concern for citizens of all ethnicities.

This theme of the failure of justice will be pragmatically reflected in the manner in which this study critically questions past thinking wherein the authority of the constitutional order has been situated primarily around the failure of constitutionalism to provide for the needs of ethnic minorities and to ensure the multi-ethnic character of the polity. While conceding the importance of these intertwining themes, this analysis presents a strong argument for a different focus; in other words, the centering of the struggle around broader questions of the failure of justice and of human rights in general and the failure of the law enforcement process in particular.

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[5] UN, Report of the Special Rapporteur on Violence Against Women, Violence against women perpetrated and/or condoned by the State during times of armed conflict (1997-2000), UN Doc. E/CN.4/2001/73, 23 January 2001, p. 30.

Thus;

> *A discourse on justice is separate from a discourse on politics. This does not mean that the two are unrelated – only that they are distinct. And for the discourse in justice to influence the political discourse in a country, thereby breaking its tautological nature, there must first exist something akin to a discourse on justice. However, sadly such a discourse is quite absent in Sri Lanka.*[6]

Such a discourse on justice should indeed, form the core of our discussions as opposed to the somewhat perfunctory attention that it has received so far. The inability, by a majority of domestic as well as international non-governmental organizations to view the failure of justice as underpinning human rights activism in Sri Lanka has had a direct impact on the perpetuation of a culture of violence. Further, in direct relevance to the peace process for example, the downplaying of the question of justice and the critical question of human rights protection for civilians consequent to the 2002 Oslo brokered ceasefire agreement deprived the entire exercise of that vital element of public 'ownership' and legitimacy.

The succeeding analysis does not focus exclusively on theory in exploring these questions but instead, takes the 'praxis' approach by exploring the above premise through the diverse findings that have emerged from sustained and pro-active campaigns in respect of the endemic prevalence of torture in Sri Lanka during the past several years. Informed and driven by the determination of the victims and grassroots activists, this has been a successful approach to learning that has distinguished itself by reflecting felt needs of the people as opposed to aridly academic theories.

2. Failure to Question the Subversion of the Justice System and Defeat of Constitutional Oversight of the Governance Process

A specific feature of the pervasive breakdown of the rule of law in Sri Lanka has been the problematic failure of the justice system to bring to brook, those perpetrators that commit abuses, whether in times of ordinary law and order or in periods of emergency.

This failure of justice is evident at all levels, from the highest to the lowest levels and merits close scrutiny by virtue of the central theme in this paper; that the failure of the justice system has been a primary factor in the deterioration of constitutional governance, including proper law enforcement, resulting consequently in pervasive violence. In this context, the phrase 'the justice system' infers much more than theoretical judicial pronouncements; rather, it is used to span the entire gamut of the legal system from prosecutions to decisions and thence to practical implementation of those decisions. Safeguarding of the independence of the judiciary as well as preservation of the credibility of the prosecutorial system is essential to this discussion.

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

The gradual politicization of Sri Lanka's judiciary and therein, the subordination of the rule of law to 'rule by politics,' is important as it frames this analysis. The absolute inability of 'civil society' non-

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[6] Basil Fernando, '*The Tale of Two Massacres; The Relevance of Embilipitiya and Bindunuwewa to Conflict Resolution in Sri Lanka*', in Law and Society Trust Review, Vol. 15 Issue 212, June 2005

governmental organizations based in Colombo to mount a vigorous campaign in regard to executive interference with Sri Lanka's Supreme Court and in particular, with the office of the Chief Justice in recent years was a particular consequence of the inability to situate the failure of justice as central to their work. In some measure, this also pointed to the political choices that these organizations made.[7]

Some context is necessary to this critique at this point. The question of the independence of Sri Lanka's judiciary is not a novel dilemma that has arisen in recent times. Soon after independence, attempts were made by the political establishment to reduce the independence of the institution of the judiciary but these attempts were valiantly resisted by the judges. When the separation of powers articulated by the Independence Constitution was sought to be overset by legislation attempting to give the Minister of Justice authority in the appointment of judicial officers, the Supreme Court responded by declaring the legislation invalid.[8] Further attempts at fettering the independence of the judiciary were also resisted.[9] Judicial determination to safeguard the rights of the minorities was evidenced in some instances.[10]

The Independence Constitution was however replaced by the 1972 constitutional document. The subordination of the judiciary was one immediate (and explicit) consequence thereof.[11] The 1972 Constitution abolished judicial review, established a Constitutional Court with the limited power to scrutinize bills, and this, too, in 24 hours when the bill was certified as being urgent in the national interest and allowed the declaration of a state of emergency to be passed without a debate. Fundamental Rights were included in the Constitution but made impotent by open ended restrictions and no specific enforcement procedure.[12]

The change in political leadership brought about the current second Republican Constitution in 1978, which (theoretically) protected the role of the Supreme Court as the highest and final superior court and gave the Court special jurisdiction in respect of election petitions, appeals, constitutional matters, fundamental rights (now made justiciable) and breach of the privileges of Parliament. The appointment of judges of the superior courts was by an elected President "by warrant under his hand."[13] In practice however, the spirit of authoritarian disregard for the independence of the judiciary

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[7] In certain instances, this was due to the mistaken view that the 'law is for the lawyers' and that the functioning of the legal/judicial system was a matter that should be left to the legal community. This view, of course, disregards the hugely negative impact that a subverted legal/judicial system would necesarrily have on processes of constitutional governance, thereby directly affecting rights of indivuduals as Sri Lanka was indeed fated to experience in recent years.

[8] *Senadheera Vs the Bribery Commissioner* 63 NLR 313

[9] *Queen vs Liyanage (1966) 68, NLR 265, Bribery Commissioner Vs Ranasinghe* (1964) 66 NLR 73

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

[11] In place of the earlier independent Judicial Service Commission, a politically subverted Judicial Services Advisory Board (JSAB) and an ineffective Judicial Services Disciplinary Board (JSDB) was established. The JSAB had no right to appoint minor judges but only to recommend their appointment to the Cabinet. (Articles 126 and 127 of the 1972 Constitution)

[12] only one case alleging violation of fundamental rights was filed during this time in the District Court, *Ariyapala Guneratne Vs The Peoples Bank*, 1986 SLLR 338

[13] Article 107. As in the two previous Constitutions, the security and tenure of the judges were guaranteed and judges of the superior courts held office during good behaviour and could be removed only after address of Parliament on grounds of proved misbehaviour or incapacity and that the full particulars of such allegations should be set out (vide Article 107 (2). The JSAB and the JSDB were replaced by a Judicial Service Commission (JSC) vested with the same powers. The JSC consisted of the Chief Justice and two other judges of the Supreme Court, named by the President, who could be removed only for cause assigned. (vide Article 112)

continued. A constitutional clause that specified that all judges of the appellate courts shall, on the commencement of the new Constitution, cease to hold office was soon used by the President to radically "reconstitute" the higher courts.[14]

Police officers found responsible for the violation of fundamental rights were not only promoted, but awards of compensation and costs of actions judicially imposed upon them were paid by the Government. Procedural difficulties in judicial officers taking the oath of allegiance under the Sixth Amendment resulted in the police locking and barring the Supreme Court and the Court of Appeal and refusing entry to judges who reported for work. Following unpopular decisions, judges' houses were stoned and vulgar abuse was shouted at them by thugs.[15]

In the wake of the sustained political barrage, decreased efforts made by the judiciary to protect the rights of the people were not surprising. In 1982, when the UNP government flouted honoured electoral traditions and substituted a referendum for the general election that was then due, the Supreme Court upheld the decision of the Government. In the subsequent Thirteenth Amendment case, the Court again refused to engage in a debate on the substantive merits and demerits of devolution while approving the amendments on the technical basis that they did not violate the unitary nature of the state.[16]

From about the 1990's however, judicial restraint of politicians, state agents and particularly officers in custodial authority such as police officers and prisons officers was far more substantive. This was in part, due to widespread public acknowledgement that the abuses of the past could not be tolerated further and part due to the efforts of some liberal judges on the Bench at that time. Working within the limited confines of a constitutional document that –

- did not permit public interest litigation,[17]
- did not allow challenge of legislative acts,[18]
- did not allow judicial review of even unconstitutional laws if they were enacted before 1978[19] and

[14]Seven out of the nineteen judges holding office were not re-appointed, thus reducing their guaranteed tenure.
[15]The attempted impeachment of then Chief Justice Neville Samarakoon allegedly due to criticism of the government by him during the course of a speech at a school prize giving day was another black mark during this time. The findings of a Select Committee appointed to investigate his conduct (divided according to party affiliations), found no "proved misbehaviour" which could justify the Chief Justice's removal but saw his conduct as a serious breach of convention.
[16] (SC Application Nos 7-47/87 (Spl) and SD 1&2/87(Presidential Reference).
[17]Article 126(2) gives the right to move court only to a person alleging the infringement of any right 'relating to such person', or an attorney at law on his behalf. Bona fide public interest groups, unlike in the Indian constitutional context, cannot come before court on behalf of a victim.
[18] Only executive and administrative challenge is permitted. Judicial or legislative acts are not challengeable.
[19] Article 16(1) of the Constitution. Article 121 of the Constitution states that bills must be challenged within one week of their being placed on the Order Paper of Parliament. Even though there is a constitutional requirement to publish the bills in the gazette at least seven days before it is placed on the Order Paper of Parliament, (vide Article 78 (1) of the Constitution), the gazettes are not easily obtainable and offensive bills go unchallenged. In any event, this scrutiny is also brushed aside when the Cabinet certifies a bill as being urgent in the national interest. Here, (vide Article 122 of the Constitution), the bill is referred directly by the President to the Supreme Court for its constitutionality and citizens have no formal right of challenge.

- did not include the right to life,[20] the judiciary did as much as it could.

Importantly, the vicarious liability of officers in authority who did not intervene when their subordinates violate rights has been specifically affirmed in recent times.[21]

Insofar as abuses of power under emergency was concerned, the Supreme Court's response was far more sensitive than in the past; it relaxed procedural rules that prescribed strict compliance with the manner in which a petition must be filed in court and thus allowed hundreds of persons detained under emergency to file fundamental rights petitions.[22] The power of the defence authorities to arrest and detain using emergency regulations and provisions of the PTA was also restrained and the Court went on to disregard an ouster clause in the Public Security Ordinance (under which emergency regulations are issued) to strike down the validity of a regulation itself.[23]

This judicial 'activism' resulted in an intensely hostile reaction from the political regime; the Supreme Court and those perceived to be 'liberal' judges came under scathing criticism from government ministers and then President Chandrika Kumaratunge. The appointment of then Attorney General SN Silva as Chief Justice in 1999 was over the head of the then seniormost justice on the Court, MDH Fernando who had, along with some of his judicial colleagues at that time, fashioned a substantial body of 'rights jurisprudence' during the previous decades and consequently incurred political wrath. In the years that followed, allegations of political partisanship were levelled against the Chief Justice[24] including the arbitrary listing of benches[25] and arbitrary disciplinary control of junior judicial

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[20]It was only in 2003 that the Court inferred a positive right to life from the constitutional right not to be punished with death or imprisonment except by court order (Article 13(4). *Silva vs Iddamalgoda* 2003 [2] SriLR, 63) per judgment of Justice MDH Fernando and the *Wewalage Rani Fernando case, SC(FR) No 700/2002, SCM 26/07/2004,* per judgment of Justice Shirance A. Bandaranayake). These two cases are also authority for the proposition that a dependant has the right to come before court on a rights petition when a family member dies as a result of police torture. It took the Court more than twenty five years to affirm these core rights as being implied from the existent constitutional provisions.

[21]Per Justice MDH Fernando in *Silva vs.Iddamalgoda* (ibid), *Sanjeewa vs Suraweera*, 2003 [1] SriLR, 317, *Wewelage Rani Fernando* (ibid), *Banda v. Gajanayake(in the context of emergency regulations)* 2002] 1 SriLR 365, *AM Vijitha Alagiawannawe vs LPG. Lalith Prema, Reserve Police Constable and Others* (SC (FR) No 33/2003 SCM 30.11.2004. *Deshapriya v. Weerakoon* SC 42/2002 SCM 8.8.2003. The principle asserted was that participation, authorization, complicity and/or knowledge is not compulsory for responsibility to be found on the part of a superior officer. This could arise purely on dereliction of duties. This principle was judicially stretched to encompass even an instance where an officer-in-charge of a police station fails to promptly record the statement of the Petitioner regarding his assault and to embark on an investigation in respect of the same, in the *Vijitha Alagiawannawe case (*above, per Chief Justice Sarath Nanda Silva)

[22]*In re Perera*, SC 1/90; Supreme Court Minutes ("SCM") 18.9.1990.

[23]*Joseph Perera Vs The Attorney General* (1992) 1 Sri LR 199, 230, *Shanthi Chandrasekeram v D.B. Wijetunge and Others* (1992) 2 Sri L.R. 293, *Channa Peiris v AG* (1994) 1 SLR 1 at p 51 and *Sunil Rodrigo v De Silva* (1997) 3 SLR 265 where the Court upheld the right of a detainee under emergency to be speedily produced before a magistrate and to have legal representation.

[24] See report by the United Nations Special Rapporteur on the Independence of the Judiciary in April 2003 to the UN Commission on Human Rights, (E/CN.4/2003/65/Add.1 25, February 2003) and among several relevant press releases of the Special Rapporteur, see releases dated 27 February 2003 and 28 May 2003. Also Report of the International Bar Association, 2001 "Sri Lanka: Failing to protect the Rule of Law and the Independence of the Judiciary."

[25]The Chief Justice has absolute power to constitute benches to hear cases in the Supreme Court.. Justice MDH Fernando was not assigned to sit on any bench hearing important constitutional matters consequent to 1999. He retired two years prematurely in early 2004. A letter writen by him in response to the pleas of more than forty five leading civil society organisations and more than two thousand lawyers, activists and academics that he should continue in office, stated that his premature resignation was due to the fact that he could no longer continue working with the same expectation of serving the public interest as was the case when he assumed judicial office.

officers.[26] In turn, the Chief Justice was never, at any point, brought before a formal inquiry process thus allowing him either to clear his name in the public sphere or face the disciplinary consequences of his actions. Sri Lankan law stipulates that the disciplinary control of superior court judges is through the parliamentary mechanism of an impeachment process which is very unsatisfactory as it is heavily influenced by political considerations.

Recently, the Supreme Court has declared itself not bound by views of monitoring bodies established under international human rights treaties entered into by the executive,[27] thus giving the formal stamp to an informal process whereby, for years, the Government had been ignoring the Views of the Human Rights Committee.[28] All this took place without significant public discussion by academics or activists, excepting a few seminars held by one or two organizations.

2.2 Failure of Civilian Oversight Mechanisms and Constitutional Governance

Any effort to remedy a politically influenced approach to governance has had a short-lived lifespan in Sri Lanka and/or has been thoroughly ineffective. The collective fate that befell two important commissions; the Bribery and Corruption Commission and the National Human Rights Commission evidenced this in no uncertain terms. The first was set up by a law unanimously passed in Parliament in 1994[29], however it has been wholly ineffective, catching only insignificant and lower ranking public officials in its net while stupendous frauds and corrupt acts engaged in by heads of institutions and politicians have been bypassed. During long periods of its existence, it has been almost non-functional due to its infiltration by political elements, the infighting of its officials and efforts by successive governments to use it for their own political ends.

The Human Rights Commission of Sri Lanka (HRC)[30], on the other hand, was established through a law that is seriously flawed in many respects; it allows the body to engage only in conciliation and mediation with the end result that its directions are substantively ignored by not only the police

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[26]Transfers, disciplinary control and dismissal of lower court judges are handled by the Judicial Services Commission (JSC) headed by the Chief Justice. For a succinct opinion on problems affecting judges of the subordinate courts in the context of the deterioration of the independence of the institution of the judiciary, see '*Top judge hits out at judicial process*' - interview by former Supreme Court Justice CV Wigneswaran, one of the most respected judges of the Court, to the *Daily Mirror*, 20/10/2004, consequent upon his retirement. In 2006, two judges of the JSC resigned over what they termed as 'a conflict of conscience' with the Chief Justice in regard to the functioning of the JSC.

[27]See the judgment by a divisional bench of the Court in the *Singarasa case*, (SCM 15.09.2006, judgment of Chief Justice SN Silva, with Nihal Jayasinghe, N. K. Udalagama, N.E. Dissanayake, Gamini Amaratunga JJ agreeing) ruling that Sri Lanka's accession to the Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR) was unconstitutional. This has posed direct obstacles to ongoing campaigns to pressurise the Sri Lankan Government to ratify the Optional Protocol to the Convention Against Torture (CAT).

[28]The United Nations Human Rights Committee has, up to date, delivered six Communication of Views against the Sri Lankan State in terms of the Protocol to ICCPR, namely *Fernando vs Sri Lanka* Case No 189/2003, Adoption of Views on 31, March, 2005), *Sarma v Sri Lanka* No 950/2000, Adoption of Views on 31 July 2003, *Jayawardene v Sri Lanka*, Case No 916/2000 Adoption of Views on 26 July 2002, *Ivan v Sri Lanka*, Case No 909/2000, Adoption of Views on 26 August 2004, *Sinharasa v Sri Lanka*, Case No. 1033/2004 Adoption of Views on 23 August 2004 and *Rajapakse v Sri Lanka* Case No 1250/2004, Adoption of Views on 26 July 2006. However, there has been no implementation of these Views up to date. In some cases, such as in *Fernando* which involved a violation of ICCPR 9(1) as a result of the arbitrary sentencing for contempt by the Supreme Court, the government has replied to the Committee saying that it could not implement the Views since it would be construed as an interference with the judiciary.

[29] Act, No 19 of 1994

[30]Act, No 21 of 1996, hereafter the HRC Act

hierarchy but also other government departments and officials[31], its members are not stipulated to be full time, thus resulting in their giving only part time commitment to the work, Section 31 of the Act confers powers on "the Minister" to make regulations regarding implementation, including conducting investigations[32] and the Commission is not empowered to approach courts directly as petitioners in instances of grave human rights violations or even refer such questions to the appropriate court.[33]

Though some Commission officers have been engaged in useful work in, at least documenting human rights violations particularly from the conflict areas and in bringing their persuasive efforts to bear on police/army officers in regard to illegal arrests and detentions, the efficacy of the body as a whole has never been pronounced due to the inherent limitations in its mandate. Specific deficiencies in its functioning will be highlighted in the course of consideration of the particular cases forming part of activist campaigns against torture as discussed below.

The lack of legitimacy in the HRC has been further aggravated in recent times by the unconstitutional nature of the appointments of its currently sitting members, who have been appointed by Presidential fiat ignoring a specific constitutional amendment which specified that the appointments be approved by a 10-member Constitutional Council (CC). [34] The 17th Amendment also established two new monitoring bodies; namely the Elections Commission[35] and the National Police Commission (NPC). The CC was, in fact, in existence only for a relatively short period, from March 2002 to March 2005. The terms of office of its six appointed members expired in March 2005. But the vacancies arising therein were not filled, which resulted in the lapsing of the CC itself.[36]

The incumbent President, Mahinda Rajapakse, then made his own appointments to the commissions, including the HRC and NPC, predominating with his supporters and friends. At the time of writing

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[31]The requirement, for example, that the HRC should be informed of any arrest and detention taking place under the Prevention of Terrorism Act, No 49 of 1979 (Vide Section 28(1) of the HRC Act) is not adhered to. Indeed, the very requirement that any person with the authority of the Commission may enter into any place of detention (Section 28(2) of the HRC Act) is defeated by police practice that had in fact, been formalized by a police circular which allows officials on the HRC to inspect (with prior notice) only the cells of police stations themselves but not the entire precincts of the station including the toilets and the kitchen, where, most often, torture takes place.

[32]This provision violates the Paris Principles in that "[a]n effective national institution will have drafted its own rules of procedure and these rules should not be subject to external modification."

[33]Relevant rules that would have permitted the HRC to refer cases to the appropriate court as mandated by Section 14(3)(b) have not been yet prescribed by the Supreme Court.

[34]Five individuals of high integrity and standing in public life and with no political affiliations, (out of which, three members represented the minorities), had to be nominated jointly to the CC by the Prime Minister and the Leader of the Opposition. One member had to be nominated by the smaller parties in the House, which did not belong to either the party of the Prime Minister or the Leader of the Opposition. In addition, the President had the authority to appoint a person of his or her own choice. The rest of the CC comprised the Leader of the Opposition, the Prime Minister and the Speaker of the House *ex officio*.

[35] The Elections Commission was not constituted at all due to former President Chandrika Kumaratunge's refusal to appoint the nominee of the CC as its chairman.

[36] Though names of five nominated members were agreed upon by the Prime Minister and the Leader of the Opposition and communicated to the President for appointment as constitutionally required in late 2005, these appointments were not made. Disputes on the part of the smaller political parties in parliament to agree by majority vote on the one remaining member to the CC were cited as the ostensible reason for the CC not being brought into being. The many representations made to the President by civil society groups that the one vacancy in the CC should not prevent the appointment of the members already nominated and that the continued functioning of the body was essential to the good administration of the country were to no avail.

this paper, the unconstitutionally appointed Commissions remain. Appointments were made similarly bypassing the CC to the Judicial Service Commission (upon two vacancies arising the resignations of two of its members, both Supreme Court judges over differences of opinion with the Chief Justice in 2006) as well as in regard to vacancies arising in the appellate courts and in the office of the Attorney General. Though these later appointments were not impugned insofar as the substantive suitability of those so appointed was concerned, the procedural irregularity of the process remained a serious question. Though a Parliamentary Select Committee has been appointed to examine as how the 17th Amendment may be 'rectified' in its substance, this Committee has been sitting for the past many months with no visible result.

The constitutional 'experiment' of the 17th Amendment illustrates the huge resistance that is manifested from the political establishment in regard to any attempts to de-politicise the governance process. Early on, the relatively feeble attempts of the National Police Commission (NPC) to discipline the police and restore the service to some measure of independent functioning met with palpable antagonism from politicians. Frontline ministers remarked that the 'independence of the NPC' was not required and indeed, maintained amazingly that the Inspector General of Police (IGP) should be involved in the decision making processes of the NPC. Public hostility was evidenced between the IGP and the NPC where the former considered that the creation of the NPC had imposed an unwarranted fetter on his powers.

Though protests from the non-governmental community in regard to this unconscionable political subversion of the constitutional process were evidenced at the start, (perhaps to an extent that was more than at other times, including the refusal of some former members of the NHRC to be re-appointed on the basis that this would be conforming to an unconstitutional process), these protests did not gather momentum as a collectively outraged reaction and were, moreover, confined only to that time at which the unconstitutional appointments took place.

3. Exposing the Failure of the Rule of Law in Sri Lanka; A Practical Analysis of Some Activist Campaigns

The approach followed by some activist networks in Sri Lanka has been to engage in a full frontal critique of the justice system, focusing on a plethora of cases which takes the victims through the whole process, by providing them not only with legal help but also physical protection and counseling in order to provide a conducive environment for their rehabilitation. A significant factor is that a majority of these cases were from parts of the country not directly affected by the conflict. This was a deliberate choice[37] in order to examine the pervasive nature of the breakdown of the rule of law in the country. The rationale for choosing this approach was to document the cases in such a manner as to defeat the common assumption that violations are necessarily linked to the conflict. Rather, the results of these campaigns over several years indicated the deep seated subversion of the justice/prosecutorial process in relation to grave human rights violations, whether concerning torture, enforced disappearances or extra judicial executions. The cases examined below primarily concern practices of torture resorted to by custodial officers.

[37] AHRC, A Special Report on Torture, *article 2*, Vol.1, No 4 August 2002, at page 2.

Two positive consequences could be inferred as a result of these campaigns. In the first instance, the 'victims' of torture became transformed from the 'powerless' to the 'powerful' purely by articulating their grievances in a collective manner. This process became instructive as a best practice example in regard to activist interventions. Secondly, a normally unresponsive media became part of the campaign, engaging in the daily reporting of torture.

> *Torture by the police is now almost daily reported in newspapers, television, radio and other media. Public actions have been held against torturers. Heavy pressure has been placed upon defective state institutions. The judiciary is under attack for its failure to deal effectively with the problem.*[38]

Some specific facets of this phenomenon will be examined now. Principles and perspectives emanating from case law of the Supreme Court and the High Courts will also be adverted to, where necessary.

3.1 The 'Endemic' Nature of the Problem of Police Abuse

> *The vast majority of custodial deaths in Sri Lanka are caused not by rogue police but by ordinary officers taking part in an established routine.*[39]
> UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston

The 'convenient' assumption on the part of most Sri Lankans that torture is practiced only against a particular segment of societal undesirables (terrorists or hard core criminals as the case may be), is now comprehensively debunked. Instead, as examination of cases brought before the Supreme Court reveal, police brutality is evidenced against individuals of very diverse backgrounds; a labourer assaulted with batons and sticks while in army detention[40] the cleaner of a van assaulted after being blindfolded[41] an attorney-at-law pulled out of his car and assaulted[42]another attorney-at-law who was a bystander at a protest demonstration (and not a participant) shot at close range[43] and an alleged army deserter tortured to the extent that he died in police custody.[44]

However, there is no doubt that torture is most evidenced against the poor and the marginalized; often gruesome torture is perpetrated against a teenager accused of stealing a bunch of bananas[45]or some such petty theft. The actual criminals and the underworld characters are allowed to escape with the nexus between senior/junior police officials/politicians and the underworld being too strong to allow their capture.

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[38]AHRC Second Special Report on Torture, *article 2*, Vol 3. No 1, February 2004, at page 2.
[39] Mission to Sri Lanka, 28 November – 6 December 2005, LST Review, Vol. 16, Issue 221 March 2006. He called on government officials to accept that disrupting this pattern of custodial torture is a necessary step not only in ensuring the human rights of those arrested but also of retaining public trust and confidence.
[40]*Konesalingam* vs. *Major Muthalif and Others*, S.C. (FR) No. 555/2001, SCM. 10th February, 2003.
[41]*Shanmugarajah vs. Dilruk, S.I., Vavuniya*, S.C. (FR) No. 47/2002, SCM. 10th February, 2003
[42]*Adhikary and Adhikary* vs. *Amerasinghe and Others*, S.C. (FR) No. 251/2002, SCM. 14th February, 2003
[43] *Senasinghe* vs. *Karunatilleke and Others*, S.C. (FR) No. 431/2000, SCM 17th March, 2003.
[44] *Silva vs. Iddamalgoda*, supra n20
[45]Both in the *Chamila Bandara case* (AHRC UA -35-2003) and the *Wewelage Rani Fernando case,*(supra n20) the police arrest was on the basis that the arrestee had stolen some bunches of bananas. The first petitioner, while being a minor was brutally tortured by the police while the second arrestee was tortured by prison officials resulting in his death.

As reflected in the observation made by the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions above, torture is not resorted to by a few 'rogue' policemen but is widespread due to many factors; the lack of good investigative training, public pressure to apprehend suspects and the general feeling that torture is not a condemned practice but is implicitly allowed and even expressly ordered by senior police officials despite laws and regulations prescribing otherwise.

One specific feature that emerges from these case studies is the brutality manifested on the part of law enforcement officials. In one case,[46] Koralaliyanage Palitha Tissa Kumara from Halawala, Mathugama, was a local artisan engaged in painting and carvings for the past thirteen years, for which he had been awarded a gold medal by the Hotels Corporation as well as certificates from the Housing Development Authority and the National Apprentice Board. This thirty one year old father of two sons had been returning home from the southern city of Galle where he had undertaken carving work in early February, when he was suddenly arrested by the Wellipenna Police on the basis that he had given food to a person who had allegedly committed some serious crimes.

After his arrest, Tissa Kumara was subjected to severe assault by a sub-inspector attached to the Wellipenna police station. Thereafter, with extraordinary barbarity, that same police officer had exhorted a tuberculosis patient who was in the same police station, to spit into Tissa Kumara's mouth, telling him that he too would die within two months of the same disease. After that, he was put into the remand prison on fabricated charges of possession of a grenade and for robbery. After fears of being inflicted with tuberculosis arose following a severe cough and blood in his saliva, Tissa Kumara was put in a solitary cell. Food was passed through to him by a narrow opening in the door as the prison authorities were nervous of contamination.

His wife made frenzied appeals to the various monitoring bodies in Colombo, including the Human Rights Commission (HRC) and the National Police Commission (NPC) but her husband continued to lack proper medical treatment. *Palitha Tissa Kumara's case* was distinguishable in its extreme perversion from the ordinary cases of police brutality being reported. On 17.02.2006, the Supreme Court declared that there had been violation of his right to freedom of torture in terms of Article 11 of the Constitution[47] and directed that the offending police officer pay a sum of Rs 5,000 personally as compensation and costs. The State was also ordered to pay a sum of Es 20,000/= as compensation and costs.

3.2 Militarisation of Law-Enforcement Agencies

The failure of the law enforcement process has been a persistent and central feature of the failure of the justice system in Sri Lanka. Persistent corruption within the police ranks, police brutality, lack of investigative skills, inefficient and time consuming procedures in dealing with complaints of torture,[48]

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[46] AHRC Urgent Appeals (UA-18-2004).

[47] *Koralaliyanage Palitha Tissa Kumara v Silva (Inspector) and others* (SC (FR) No 121/2004; SCM 17.02.2006), per judgment of Justice Shirance A. Bandaranayake.

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

and the virtual militarization of the police service accustomed to using emergency powers for long decades is clear.

The studies analysed in this paper are referable to two discernible patterns of torture, firstly where torture is resorted to for interrogation purposes and secondly where it is apparent as a pure abuse of power.[49] Into the first category of cases falls the denial of all of the commonly accepted rights available under the normal criminal procedure laws[50] such as the right to be given reasons for the arrest and the right to be speedily brought before a magistrate.

In this regard, the trauma of persons mistakenly arrested by the police and tortured in the belief that they are criminals, is common[51] as is the arbitrary arresting and torturing of individuals possessed of a minor criminal record purely as a convenient cover when the police has been unable to apprehend the actual perpetrator. *Palitha Tissa Kumara's case* (detailed before) and the case of *Lalith Rajapakse* who was severely beaten on 19 and 20 April 2002 by officers from the Kandana Police Station and remained in a coma for 3 weeks[52] are two latter examples. Numerous judgments of the Supreme Court have held that even a hardened criminal cannot be tortured with impunity. In the *Wewelage Rani Fernando Case*, (where it was contended that the deceased had stolen two bunches of bananas), the court observed that this allegation of theft should not have detracted from the duty to afford to the deceased, the protection of his constitutional rights of personal liberty.

Thus;

> *the petitioner may be a hard-core criminal whose tribe deserve no sympathy but if constitutional guarantees are to have any meaning or value in our democratic set-up, it is essential that he be not denied the protection guaranteed by our Constitution.*[53]

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[49]AHRC Third Special Report on Torture; An X-Ray of the Sri Lankan policing system and torture of the poor, at page 6

[50]Section 23(1) of the Code of Criminal Procedure Act, No 15 of 1979 prescribes accepted procedures in relation to arrest, including the stipulation that the person making the arrest must inform the arrestee of the nature of the charge or allegation upon which the arrest is made and must be brought before a magistrate within twenty four hours. These provisions of the Code reflect similar principles in the old Criminal Procedure Code which it replaced. However, these salutary safeguards have been virtually displaced in Sri Lanka for the better part of the past many decades due to the imposition of emergency rule under the *Public Security Ordinance (PSO) No. 25 of 1947* and the *Prevention of Terrorism (Temporary Provisions) Act No 48 of 1979* which departs from these norms and allows *interalia*, arbitrary arrest and incommunicado detention. Efforts by the Supreme Court to impose restrictions on the arbitrary use of emergency powers by the forces and the police have not had significant practical impact.

[51]The case of Gerald Perera is one good example. This was a law abiding employee of the Ceylon dockyard who was arrested by the police who had mistakenly thought him to be a known criminal by the name of 'Gerald." He was tortured so severely that he suffered renal failure. This rights petition that he filed was upheld by Court, *Sanjeewa vs Suraweera*, (supra n21).

[52]AHRC UA-19-2002. He had been accused of involvement in two petty theft cases even though no one had filed any complaints against him and there was no proof to implicate him.

[53] The case law is specific in this respect; see *Amal Sudath Silva vs Kodituwakku* [1987] 2 Sri LR, 119, *Senthilnayagam vs Seneviratne* [1981] 2 Sri LR 187, *Dissanayake vs Superintendant, Mahara Prisons*, [199] 2 Sri LR, 247, *Premalal de Silva vs Inspector Rodrigo* [1991] 2 Sri LR 307, *Pellawattage (AAL) for Piyasena vs OIC, Wadduwa* SC Application No 433/93 SCM 31.08.1994. In *Silva vs Iddamalgoda*, (supra n22), a specific argument that an alleged bad record of the petitioner should be held against him was dismissed by Court pointing not only to the presumption of innocence but also that by the respondent's actions in depriving the petiitoner of life, he lost the opportunity to redeem the alleged bad record.

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

In the *Madiliyawatte Jayalathge Thilakarathna Jayalath*[54] case which concerned the first conviction under the Convention Against Torture and other Inhuman and Degrading Punishment Act No 22 of 1994 (hereafter the Anti-Torture Act), the absence of due process at all stages of the investigative process was well illustrated. The case involved the alleged theft of four gems from the office of a gem dealer who alleged that the victim, a business acquaintance and a broker, was responsible. The victim stoutly denied that he had stolen the gems but was threatened by the gem dealer that, if the gems were not handed over, he would get the police to assault him.

Some time later, while traveling to Colombo in the bus, the victim was arrested and taken to the Wellawatte police station where he was mercilessly assaulted with a salon pipe by the accused police officer, then attached to the crime division as an acting officer in charge. Thereafter, he was kept in the police station for two days. It was only after the members of his family had protested asking why he was not produced before court, that he was taken before a magistrate. He did not make any complaint of assault to the magistrate or the officer in charge of the Wellawatte police station. When asked why, he said that there had been 'no point' in doing so. The medical evidence showed injuries on the victim, which had been caused by a blunt weapon, including the fracture of his hand.

The accused police officer contended that the victim had been arrested on suspicion of being involved in the theft of gems and had hurt himself attempting to run away at the time of arrest. Somewhat more interestingly, it also turned out that the gem dealer who had lodged the complaint, had later found the gems and had informed the police that his allegations against the victim had been unfounded. In assessing these facts, the Colombo High Court[55] determined that the prosecution had established beyond reasonable doubt that the accused had assaulted the victim in order to obtain a confession from him, which he had done in his official capacity as a police officer and therefore, a public officer. The absconding accused was convicted to the minimum seven years rigorous imprisonment (RI) and payment of a fine of Rs 10,000, in default of which, a further two years of RI was ordered.

The case illustrates the various points at which the system fails to work in Sri Lanka. At the most fundamental level, immediate deficiencies in the law enforcement process are apparent where basic investigation skills and training are replaced by brute force on the part of not only junior but also senior police officials. This is buttressed by the impunity that law enforcement officers can claim for their actions, a continuing legacy of extraordinary emergency laws which give them virtual powers of life and death. Consequently, even though an arrest or detention may take place in terms of the normal law (as opposed to emergency law) which specifies very clear safeguards against abuse such as the requirement that the arrestee must be informed of the reasons for the arrest and must be taken before a magistrate within twenty four hours, these provisions are violated at will. The element of supervision that should normally be operative at the chain of command is also rendered completely nugatory by this breakdown in the systems of policing.

> *In all these cases, what the police officers are, in fact, doing is producing substitute suspects for crimes that they have not resolved. In some instances, the police may be aware of the*

[54] HC 9775/99, order of High Court Judge (as he then was) S. Sriskandarajah
[55] *Ibid*

identity of the real culprits who were allowed to 'escape' after undue influence. In these cases, it is even more essential for the police to find substitutes. Producing substitutes creates the impression-among the department as well as the public-that the police are efficient and crimes are being solved. This paves the way to financial rewards and promotions.[56]

The second category of cases includes infliction of torture as a sheer abuse of power, with several concrete examples to illustrate this point. Saman Priyankara[57] for example, was illegally detained on January 5, 2004 and severely tortured by the policemen attached to the Matale police station. Boiling water was poured down his right leg from the hip downwards, severely burning him. The perpetrator sub inspector of police (acting on the instigation of Priyankara's neighbour), claimed that he was going to make sure that the victim would not be able to have a normal sex life anymore. Afterwards he was given some ointment to apply on his wounds but was warned not to report the incident to anyone and not to take any treatment at the hospital.

In many cases, torture has been practiced as a result of a legitimate query by a citizen. For example, Saman Jayasuriya,[58] was driving a van with two others when his vehicle was stopped by two policemen in civilian clothes who asked for his license and insurance. In response, he asked for their identity and was instead, pulled out and assaulted. He managed to escape, but a contingent of policemen from the Kadugannawa police station visited his residence and mercilessly assaulted him in the presence of his wife. He was then arrested and taken to the police station with his son.

Another well documented instance concerned the killing of a restaurant manager, H. Quintus Perera allegedly for refusing to sell liquor on a religious holiday (Poya Day).[59] These cases illustrate the most heinous depths to which law enforcement has degenerated; namely the illegal punishment of individuals for trying to uphold the law by brutalized law enforcement officials who have long since, lost any respect and adherence to the very standards that they are sworn to protect.

3.3 Maintenance of a Culture of Impunity

Police officers are not generally removed from their positions or interdicted consequent to Supreme Court decisions delivered against them. Though the applicable law dictates that public officers should be interdicted when indicted for a criminal office or for bribery and corruption, this too has been disputed in certain instances.[60] Delay in interdictions or in respect of prosecutions under the Anti-Torture Act has had catastrophic effect as seen in one particularly poignant instance of Gerald Perera, a law abiding employee of the Ceylon dockyard who was arrested by the police on the mistaken basis that he was a known criminal by the name of 'Gerad." He was tortured so severely that he suffered

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[56] *Supra* n49, at page 7
[57] AHRC-UA 07-2004
[58] AHRC-UA 31-2004 (1 April 2004).
[59] AHRC-UA 132-2004 (5 October 2004).
[60] *Pathirana vs DIG(Personnel & Training) and others*, C.A. Writ Application No 1123/2002, CA Minutes 09.10.2006, per Justice S Sriskandarajah's reasoning that a circular of the 1st Respondent DIG, Personnel reinstating police officers indicted in cases of enforced disappearances was *ultra vires* the Establishments Code which mandated the immediate interdiction of a public officer who is indicted for a criminal offence or for bribery or corruption.
Ed Note; This judgment is reproduced for the benefit of readers in this Issue of the Review.

renal failure. This rights petition that he filed was upheld by Court.[61] However, no disciplinary action was taken as recommended by the Court, against the responsible police officers who continued serving in their posts. A year later, as he was due to testify in the case instituted in the High Court in terms of the Anti-Torture Act against the police officers who had tortured him, he was shot and killed at point blank range by some of those very same police officers. The murder trial is ongoing.

At a point, the National Police Commission (NPC), in its first (and constitutionally proper) term of office decided to interdict police officers indicted of torture in terms of the Anti-Torture Act. However, the continuation of this practice by the current Commissioners is yet to be ascertained.

Meanwhile, the blatant disregard with which implicated police officers falsify official documents, including the Information Book is facilitated by the fact that they are allowed to remain in their posts even after indictment. This practice is therefore resorted to at leisure. In one case where the court found that Grave Crimes Information Book and the Register/Investigation Book had been altered with impunity and utter disregard for the law, the view was taken that it was unsafe for a Court to accept a certified copy of any statement or notes recorded by the police without comparing it with the original.

> *It is a lamentable fact that the police who are supposed to protect the ordinary citizens of this country have become violators of the law. We may ask with Juvenal, 'quis custodiet ipsos custodies?' Who is to guard the guards themselves?*[62]

Even where police officers (junior as well as senior) have been identified as personally responsible for acts of torture in courts of law, no internal departmental action has been taken against them. Directions of the Supreme Court to the police hierarchy to initiate disciplinary action against erring police officers have been blatantly ignored.[63] Official resistance to these pronouncements by the Court has always been high and the police department had, (from some time back) established a separate fund to provide for lawyers to appear for the accused police officers as well as to pay the sums of compensation due personally from the implicated officers.

The National Police Commission (NPC) was the first serious legislative attempt to restore discipline to the police force. It comprises a body of seven persons whose security of tenure is explicitly provided for.[64] Its powers are two fold. Firstly, it is vested with the powers of appointment, promotion, transfer, disciplinary control and dismissal of all officers other than the Inspector General.[65] Secondly – and most vitally – the 17th Amendment stipulates mandatorily that the NPC "*shall* establish procedures to entertain and investigate public complaints and complaints from any aggrieved person made against a police officer or the police service...[italics added]"[66]

However, the NPC, during its first term of existence, did not fulfill its constitutional expectations to any great extent, though it does deserve credit for its decision to interdict police officers indicted in

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[61] *Sanjeewa vs Suraweera*, (supra n21).
[62] *Kemasiri Kumara Caldera 's case*, S.C. (F.R.) 343/99, SCM 6/11/2001.
[63] *Sanjeewa v Suraweera* (supra n21), *Silva vs Iddamalgoda* (supra n20), as well as *Dayaratne's Case*, (SC (FR) 337/2003 SCM 17.5.2004) where a senior attorney was severely assaulted for attempting to remonstrate with the police over the arrest of a neighbour's son, are some recent examples.
[64] Vide 17th Amendment, Article 155A.
[65] Vide 17th Amendment, Article 155G(1)(a).
[66] Vide 17th Amendment, Article 155G (2).

terms of the Anti-Torture Act as stated above. Its prevention of police officers being arbitrarily transferred during the pre-election periods was also to be commended. However, the first NPC failed to take significant steps, (beyond a few preliminary discussions with members of civil society), to implement the Public Complaints Procedures as constitutionally mandated.[67]

3.4 Ineffective Prosecutions

The decrease of public confidence in the office of the chief law officer of the land; the Attorney General (AG) has been marked in recent years. The prosecutorial record of the Attorney General's Department in respect of grievous human rights abuses has not been commendatory with very few successful prosecutions being evidenced in past decades of thousands of enforced disappearances and extra judicial killings. According to statistics submitted by the Government of Sri Lanka to the United Nations Committee Against Torture in February 2007[68] the number of cases filed in the High Court in respect of enforced disappearances, (prosecutions take place in terms of the relevant penal provisions *interalia* relating to abduction and keeping in unlawful confinement in the absence of a specific crime of enforced disappearances), had been three hundred and seventy six, out of which the accused had been discharged in one hundred and twenty three cases while the number of convictions were a marginal twelve.

It must be cautioned that the general data itself supplied by the Government to the CAT Committee in February 2007 contains serious discrepancies. This is obvious when the quoted total of cases filed in the High Court and Magistrate's Court is contrasted with the total number of concluded cases, which latter total amounts to more than the reported number of cases filed. The Law and Society Trust queried regarding this discrepancy (as well as other lacunae in the information supplied) from the Attorney General's Department, to which query a response is yet forthcoming. This underscores a common problem in Sri Lanka; namely the lack of public access to information as a matter of right in the hands of government/statutory authorities including the Attorney General's Department. The problem of public access to data regarding prosecutions of grave human rights violations needs to be acknowledged in all its severity.

Out of these reported twelve convictions, the two high profile prosecutions concern the rape and killing of a Tamil schoolgirl and thereafter, the murder of her mother, brother and friend who went in search of her by Sinhalese army soldiers in the North in 1996 (the *Krishanthi Kumaraswamy* case) and the enforced disappearance of twenty five Sinhalese schoolchildren (though the numbers that were abducted and never found were much larger) by Sinhalese army soldiers in 1990, acting in collusion with the school principal motivated by a private vengeance (the *Embilipitiya* case). The extremely low conviction rate illustrates the duality of the failure of the prosecutorial and justice process in respect of extraordinary crimes, irrespective of ethnicities. Indeed, the record of successful

[67] Though a Public Complaints Procedure was put into place by the second NPC, its legitimacy has been negated by the unconstitutional appointment of its members by the President as was discussed previously.

[68] Comments by the Government of Sri Lanka to the conclusions and recommendations of the Committee against Torture : Sri Lanka. 20/02/2007. CAT/C/LKA/CO/2/Add.1. (Follow-up Response by State Party) Para 3. Response of the Government to Observation No. 249 - 'the Committee is gravely concerned by information on serious violations of the Convention, particularly regarding torture linked with disappearances.'

prosecutions in respect of grave crimes[69] as well as in regard to 'ordinary' torture cases has been extremely unsatisfactory.[70] From the time that the Anti-Torture Act was enacted into law in 1994, no convictions for torture resulted up to 2004, for a period of ten years. Thereafter, two convictions by the High Court were manifested (and a third conviction in recent months) but this remedy continues to be inefficacious due to long delays in filing indictments, filing of faulty indictments and delays in the substantive trial proceedings. In data submitted by the Government of Sri Lanka to the CAT Committee in February 2007, (mentioned above) it was disclosed that forty three police officers and armed forces personnel have been indicted in the High Court on charges of torture. Internal disciplinary proceedings have been instituted against twelve officers on their failure to take proper steps to prevent instances of torture.[71]

The deficiencies in the prosecutorial process are many. Though some indictments have been sent to the relevant High Courts almost two years to the date, they have yet to be served on the accused. The delay is commonly blamed on the severe backlog of cases in many high courts.[72] On its own part, the Department, which is responsible for the issuance of the indictments, is accused of delay to which a general (if unacceptable) response is that this because most torture cases reported are from the North and the East and the conflict impedes expeditious proceedings.[73] Predictably, the renewal of conflict in the North/East from 2006 onwards has aggravated this situation.

In many cases, despite evidence of grievous torture being disclosed, prosecutions do not ensure. For example, in the *Nandini Herath case*, indictment was not filed under the Anti-Torture Act but the police merely pressed charges for simple hurt.[74] In *Jagath Kumara's case*[75] (where he was arrested, detained and tortured by the Payagala police station officers in June 200 and died at the Welikada prison thereafter), though the information and relative files were handed over to the Attorney General, no prosecution ensured. *Yogalingam Vijitha's case* is also instructive in this regard.[76] The Supreme

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[69]The rate is 4% see the State of Human Rights in Eleven Asian Nations-2006, Asian Human Rights Commission, in the chapter on Sri Lanka, at page 288.

[70]In its reports to the UNHRC and to CAT, (UN Human Rights Committee (CCPR/CO/79/LKA) Human Rights Committee, seventy ninth session, November 2003 and Committee Against Torture (CAT/C/LKA/CO/1/CRP.2. 7-25 November 2005), the State referred to a special unit [Prosecution of Torture Perpetrators Unit (PTP Unit)] in the Attorney General's Department. Closer scrutiny during the preparation of a joint report to the 2005 CAT sessions by the Law and Society Trust (LST) and the Asian Human Rights Commission (AHRC) however revealed that there is no separate Unit dealing with torture cases and the Unit is only an administrative convenience with neither specially assigned staff nor separate premises. The torture cases are distributed among 4 - 5 State Counsels, who also handle other criminal cases. The AG does not seem to monitor to investigations conducted by the SIU. Neither is the progress of an investigation reported to the AG.

[71] Comments by the Government of Sri Lanka to the conclusions and recommendations of the Committee against Torture: Sri Lanka. 20/02/2007. CAT/C/LKA/CO/2/Add.1. (Follow-up Response by State Party); Para 3. Response of the Government to Recommendation No: 255(c) *"While continuing to remedy, through compensation, the consequences of torture, give due importance to prompt criminal prosecutions and disciplinary proceedings against culprits."*

[72] Condensed from information afforded by the Attorney General's Department during interviews by researchers with its officers during 2004 for the preperation of a joint report to the 2005 CAT sessions by the Law and Society Trust (LST) and the Asian Human Rights Commission (AHRC).

[73] *Ibid.* Lack of adequate state law officials is also mentioned as a problem.

[74]Supra n37, at pages 14 and 15. situation existent as at August 2002.

[75]*Ibid*, at page 18 – situation existent as at August 2002.

[76] S.C. (FR) No. 186/2001, SCM 23.8.2002

Court ordered compensation and costs to be paid to a Tamil woman who had been arrested, detained and sexually tortured. The Court[77] stated as follows;

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

Though it was directed that the culpable officers be prosecuted, this was not done.[78]

A primary problem in this regard is that prosecutors depend solely on police investigations for the establishing of a *prima facie* case on which indictment is issued. In many cases, good investigations are simply not forthcoming by police officers who are essentially, investigating their own colleagues.

3.5 Nature of Litigation at the Supreme Court

Even at a point when fundamental rights litigation was at its zenith, the gap between judgments and their implementation was immense. Judgment upon judgment was delivered by the Supreme Court finding torture to have been committed by officers in custodial authority[79] and directions were made in respect of disciplinary action to be taken against them but none were implemented. A particularly distinct feature in recent times has been the decrease of judgments by the Supreme Court holding a violation of Article 11. For example, not a single judgment upholding a torture rights violation was delivered during 2005.

In general, examination of the depleted number of judgments delivered during other years shows judicial inconsistency in granting of compensation to victims of torture in fundamental rights cases. Earlier, such sums had been considerable, pointing to the judicial wish that the imposing of these amounts would have a deterrent impact. In *Silva vs. Iddamalgoda*[80], an alleged army deserter arrested by the police, died whilst in remand custody. The Court gave relief to his widow on the basis that she and her minor child were entitled to the compensation that the deceased would have received, but for his death. A sum of SLR 700,000 was directed to be payable by the State and SLR 50,000 each by the two errant police officers personally.

In one case[81] where death was due to assault by prison officials rather than by the police, the State was directed to pay a sum of SLR 925,000 while each of the three prison officials were directed to pay SLR 25,000, amounting to one million in equal shares. In awarding this considerable sum as

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[77] Citing Athukorala J in *Sudath Silva Vs Kodituwakku* 1987 2 SLR 119 with approval.

[78] Vide letter written by co-ordinator of the urgent appeals programme of the AHRC to then Minister of the Interior dated 9 September 2002, asking that the relevant police officers be indicted. – quoted at AHRC Special Report on Torture, *article 2*, Vol.1, No 4, August 2002, at page 52

[79] The number of credible complaints of torture and cruel, inhuman and degrading treatment whilst in police custody shows no decline." per observation of Justice Mark Fernando in *Sanjeewa vs Suraweera,* (supra n21). This is one of the many cases in which the Court recommended that disciplinary action be taken against the relevant police officers but which recommendation was not adhered to.

[80] *Supra* n 20

[81] *Wewelage Rani Fernando* (supra n20)

compensation and costs, the Court took into account the fact that the deceased was a father of three minor children. The treatment meted out to him while he was at the Negombo prison, which "painted a gruesome picture where a hapless prisoner was brutally tortured and left alone, tied to an iron door, to draw his least breath," was a contributory factor.

While these two cases involved the ultimate death of the victim, in *Gerald Perera's case*[82]which concerned severe torture, the Court granted the sum of SLR 800,000 as compensation and costs for the violation of the petitioner's rights, payable both by the police officers found to be responsible for the violations and the State. Additionally, the Court granted the petitioner's claim to reimbursement by the State of his medical expenses, including treatment obtained at a private hospital due to the gross torture that he suffered, despite the contention of the respondents that the charges were exorbitant and treatment could have been obtained at a state hospital. At that time of his killing by the very police officers who were responsible for torturing him, a major portion of the medical re-imbursements had yet not been paid to him.

As contrasted to these awards, small amounts of compensation being awarded in recent cases are exemplified in *Palitha Tissa Kumara's case* (see above) as well as in some others.[83] In the case of *BA Surange Wijewardene*[84], the amount awarded was a paltry SLR 15,000, split between the three respondents while in *D.A. Nimal Silva Gunaratne v Kodituwakku*[85], the petitioner was given only a nominal sum of SLR 50,000 and SLR 20,000 as costs despite the loss of one eye as a result of torture as well as the finding that his right to freedom from arbitrary arrest and detention had been violated.

In *Erandaka and Anor vs Halwela, OIC, Police Station, Hakmana*[86] where the petitioners were assaulted while in prison as evidenced by the medical records, payment of compensation in the sum of Rs 25,000 by the State was awarded to each of the two petitioners, in the absence of the identification of the particular prison officers responsible for the assault.

One notable instance where a large amount of compensation was awarded by the Court in the absence of a finding of death or, for that matter, of physical assault, (emphasis mine) was the case of *Shahul Hameed Mohammed Nilam and Others vs K. Udugampola and Others.*[87] The State was directed to pay each petitioner a sum of Rs 750,000 with the 1st respondent Superintendent of Police ordered to personally pay each petitioner a sum of Rs 50,000. The petitioners were officers of the military intelligence directorate who had been arrested and detained during the raid of their safe house in a Colombo suburb by a Superintendent of Police from Kandy.

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[82] *Sanjeewa vs Suraweera* (supra n21)
[83] see the State of Human Rights in Eleven Asian Nations-2006, Asian Human Rights Commission, in the chapter on Sri Lanka, at page 288
[84] *Ibid*
[85] *Ibid.*
[86] [2004] 1 Sri LR, 268. Also, *Adhikary and Adhikary vs. Amarasinghe and Others*_S.C. (FR) No. 251/2002, SCM 14th February, 2003), another recent case again involving a police assault on a lawyer where the Court ordered Rs. 20,000/- as compensation and Rs. 5,000/- as costs to be paid by the State.
[87] SC(FR) Applications No;s 68/2002, 73/202, 74/2002, 75/2002, 76/2002 SCM 29.01.2004, judgement of (Dr) Justice Shiranee Bandaranayake with Chief Justice Sarath Nanda Silva and Justice P.Edussuriya agreeing

3.6 Inadequate Magisterial Supervision

In *Madiliyawatte Jayalathge Thilakarathna Jayalath,* (cited above), a particular feature remarked upon by the High Court was the paucity of magisterial supervision of the victim of torture when he had been produced before the judicial officer and specifically, the failure to question the suspect as to whether he had been tortured. This is a common problem in Sri Lanka. A relatively recent judgment of the Court (*Weerawansa v Attorney General*[88]), articulates this breakdown of the element of magisterial supervision in the detention process.

In this case, remand orders by the Magistrate, Harbour Court made under the ordinary law were held to be in violation of the Petitioner's rights in that several such orders of remand had been made even though the Magistrate or the acting Magistrate did not visit or communicate with him. This was ruled by Justice MDH Fernando, writing for the Court, to offend a basic constitutional safeguard in Article 13(2), that judge and suspect must be brought face to face before liberty is curtailed, which safeguard was not an obligation that could be circumvented by producing reports from the police. An earlier view[89] that remand orders, where they concern a patent want of jurisdiction, cannot be safeguarded under the cover of being 'judicial acts' with consequent immunity from fundamental rights challenge, was agreed with.

3.7 Complicity of Politicians in Abuses

Complicity of politicians in regard to the occurrence of torture is also marked. In *Nandini Herath's case*, for example, the Minister of Women's Affairs at the time that Nandini was tortured, who lived close to her house, at all times, only defended the accused police officers.[90]

3.8 Turning upon their own kind

Instances of police officers or military persons being themselves the targets of violence by their fellow officers is not uncommon. In VK Swarnarekha's case, a healthy thirty year old police woman had 'disappeared' in 1993 and there was suspected complicity of the police. However, the case was hushed up and there were no inquiries by the CID. There is also the case of a naval officer, Elmo de Silva being illegally detained and tortured in January 2001 when he tried to remonstrate with the police officers of the Ja-ela police station for using bad language to his wife and cousin when they had gone to visit his wife's uncle who was in custody.[91]

3.9 Corruption of medical officers and collusion of NHRC officers with police torturers

In the case of *Garlin Kankanamge Sanjeewa*[92] whom the police claimed, committed suicide inside the police station, the medical report pertaining to his death was seriously impugned by the family. The Chamila Bandara case is a further excellent example. Whilst being a minor, he was tortured from 20th to 28th July 2003 at Ankumbura Police Station, ostensibly on grounds that he had committed a petty

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[88] 2000) 1 SLR 387
[89] *Farook v Raymond* (1996) 1SLR, 217
[90] *Supra* n37, at page 15
[91] *Ibid,* at page 18 *Ekanayake vs. Weeraawasam,* S.C. (FR) No. 34/2002, SCM 17th March, 2003 concerned the case of a a reserve police constable subjected to assault by a reserve sub inspector.
[92] AHRC UA-41-2003

crime. He was hung by his thumbs and the Officer in Charge (OIC) hit him on his legs and the soles of his feet with wicket stumps used for cricket.[93] This young boy was not produced before a JMO for examination despite being admitted to the Kandy hospital for treatment. It was only, after being re-admitted to the Peradeniya Hospital, that Chamila was given a proper medical examination, as a result of which, doctors declared the impairment of the use of his left arm.

The second stage in this saga came when his case was reported to the district area co-ordinator of the Human Rights Commission of Sri Lanka (HRC) who, going by only the police version, concluded that there had been no mistreatment. Following this collusion of the HRC officer with the implicated police officers, his family appealed to the AHRC and its local partners. It was primarily as a result of this pressure that investigations were re-opened into Chamila Bandara's case by the HRC and the matter was handed over to a one man inquiry committee. Meanwhile, the members of his family were threatened by the police officers named as those responsible and Chamila himself had to go into hiding.

While this was ongoing, his case was taken by activists before the United Nations Human Rights Committee at its seventy ninth session when it considered Sri Lanka's combined fourth and fifth Periodic Reports under the International Covenant on Civil and Political Rights (ICCPR). Chamila himself gave testimony before the members of the UN Committee.[94] Chamila Bandara's grievance was ultimately vindicated by the report of the one man inquiry committee of the HRC which concluded that the young boy had, in fact, been tortured, as a result of which, his rights under Article 11, Article 12(1) and Article 13(1) and (2) had been violated.

The OIC of the Ankumbura police and other police officers serving under his command were found responsible. The final recommendation of the inquiry committee was that a copy of the inquiry report should be sent to the IGP who should send severe warning to the individual police officers that any further instances of abuse on their part would result in a termination of their services.[95] Like in the case of similar directions by the Supreme Court, this too has been of no practical value in bringing about disciplinary action against the culpable police officers.

In addition, the *Chamila Bandara case* illustrates a further problematic development at the stage of fundamental rights litigation. Some Supreme Court judges now prefer to lay bye fundamental rights hearings in instances where a parallel High Court trial is taking place, ostensibly on the basis that the finding of the Court might influence the attitude of the High Court. For example, in *Chamila Bandara's case*, this is precisely what happened and the matter is now indefinitely laid bye.[96] This attitude continues to be taken despite the protestations of lawyers appearing for the victims that the

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[93] AHRC UA-35-2003. The same manner of torture was inflicted upon Galappathy Guruge Gresha De Silva (AHRC, *article 2*, Volume1, Number 4, August 2002, p. 24).

[94] At that point, it is notable that the representative of the State before the UNHRC specifically denied that torture had occurred when the case was brought to his attention by the UNHRC, more or less alleging that the allegations had been fabricated.

[95] It later transpired that the one medical report adverse to Chamila Bandara the victim, (which contradicted the other reports finding physical injuries compatible with the nature of the torture described by the victim), was written out by a doctor who had not seen or examined Chamila Bandara.

[96] SC FR 484/2003. However, this approach is not uniformly followed by the Court. For example, some Supreme Court judges have insisted on taking the fundamental rights petition for argument and disposing of the matter despite a pending High Court trial as was the case in the rights violation declared in *Palitha Tissa Kumara's case* (see above)

inevitable laws delays attending the trial will render the Supreme Court remedy, redundant and that, in any event, the two judicial proceedings are different and should be proceeded with differently. The constitutional supremacy of the jurisdiction granted to the Court under Article 126 has unfortunately become of little significance in this regard.

3.10 Impossibility of Ensuring Justice without Witness Protection

Responsibility for the absence of a witness protection scheme speaks to the responsibility of the Department itself and the commitment of the State to ensuring justice. The extent to which this has been a factor in crippling the criminal justice process is clear. *Chamila Bandara* (cited above), together with his family members were threatened by the OIC of the Ankubura Police and, in consequence had to remain many years in hiding.

Similar patterns of intimidation are apparent in a large number of cases; *Lalith Rajapakse* (cited above), learnt that there was a plot to poison him after he made the initial complaint against the respondent police officers and had to go into hiding. In the case of *Gerald Perera* (cited above), he was, in fact, killed after numerous threats by the police officers who had tortured him proved to be unsuccessful in coercing him to withdraw the litigation that he was engaged in.

4. Conclusion

There is no doubt that the failure of effective law enforcement is a central question in Sri Lanka today. A number of measures that should be taken to redress this failure are self evident; these measures include revision of the prosecutorial and investigative process and the initiation of an effective witness protection system. A special investigative unit comprising of law enforcement officers who are given security of tenure, are not part of the ordinary police force, are not transferable and who are empowered to entertain complaints and immediately commence investigations remains a necessity, not only in 'special cases' of grave human rights violations (where international pressure is brought to bear on state authorities) but rather, in all cases.

Ideally, an office of an Independent Prosecutor with legislative safeguards to ensure independence from government should be established.[97] Independent investigative/prosecutorial machinery set in place should follow special procedures in relation to investigating and prosecuting complaints by women victims of rights violations. Such an office would also better co-ordinate present procedures in respect of examining urgent appeals by the victims instead of a committee of government officials which is presently the case. The application of the doctrine of command responsibility, the use of developed forensic investigations and a detailed list of specific suggestions[98] relating to arrest and production in court[99] speedy investigations and filing of indictment under the Anti-Torture Act and initiation of community protection mechanisms are also important.

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[97] There is precedent for this in Sri Lanka in that the Office of the Public Prosecutor was first established in 1973 but was done away with after 1978. The manner in which this office was permitted to function was however, not free from political control.

[98] *Supra* n49, at page 12

[99] *Ibid.* one useful recommendation is that suspects should be produced only before courts and not in the residences of magistrates given the practice that this manner of judicial scrutiny is often defeated by the judicial officer not even being shown the suspect.

The essential crisis in Sri Lanka remains the non-implementation of the rule of law. The shift from a central focus on this question to nebulous, (though highly profitable), ventures in peace and conflict resolution on the part of the country's non-governmental community has been unfortunate; it has wasted time and effort in processes that were literally 'doomed' from the start precisely due to its flawed conceptualization. More importantly, it has facilitated sometimes insidious and at other times, sledgehammer attacks on constitutional institutions and indeed, the very Constitution to take place with scarcely a murmur; the result has been a calamitous breakdown of the governance process. Further, the intensification of the conflict and the increasing breakdown of law and order in all parts of the country have led to incidents of disappearances, extra judicial killings, thereby creating a climate that is highly conducive to human rights abuses. This has been further enabled by the return to rule by emergency regulations conferring extraordinary powers of arrests and detentions on the forces which have had inimical effect in controlling and preventing practices of torture.

In this situation, talk of constitutional solutions to solve the 'ethnic problem' has been limited to rhetoric and political maneuvering; where constitutional provisions are blatantly abused by the political establishment in respect of governing the South, can there be any hope in such a Constitution providing any solution for the intractable war in the North/East? This paper examines the overriding importance of returning the reform process back to the basics of restoring the legitimacy of the justice system and in particular, the law enforcement process. This should, indeed, be the central focus of our work.

Judicial Review of the Statutory Powers of the Attorney General in the Prosecutorial Process; Some Thoughts

Dr Jayantha de Almeida Guneratne[*]

1. Introduction

It appears to be settled law in the country that when an accused person is taken before the Magistrate's Court in terms of Section 136(1) of the Code of Criminal Procedure Act, No 15 of 1979 (as amended) (CCP Act) and there is a likelihood of arbitrary discharge by the magistrate, the sanction of the Attorney General under Section 393 of the CCP Act may be obtained (in all instances excepting in terms of Article 136(1)(a))[1] in order to compel revision of this magisterial decision.

Conversely, where there is an arbitrary magisterial committal for trial, the Attorney General may quash commitment and issue instructions to the magistrate to that effect in terms of Section 396 of the CCP Act.

However, if the Attorney General refuses to intervene, would the matter be concluded for all intents and purposes?

Two aspects warrant reflection in that context.

(i) An aggrieved party who is confronted with the arbitrary discharge/committal for trial of a named perpetrator (accused) must seek the sanction of the Attorney General to compel such perpetrator to be committed to stand trial. Given the fact that, the Attorney General is the principal law officer of the State, one cannot fault that legal position.

(ii) But, what if the Attorney General refuses to intervene and the person is aggrieved by the said refusal? Should he/she not be entitled to have the decision of the Attorney General reviewed?

In this paper, it is proposed to reflect on this issue with reference to the relevant statutory provisions and judicial approach as reflected in some decisions of the Supreme Court under the Independent Constitution of Ceylon with the objective of suggesting amendments to the current criminal procedure law in the light of the present Constitution of Sri Lanka.

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[*] President's Counsel & senior law academic; Former Commissioner, 1994 Presidential Commission of Inquiry to investigate the Involuntary Removal or Disappearances of Persons in the Western, Southern and Sabaragamuwa Provinces. The issues that are discussed in this paper will be expanded upon and commented in the context of the functioning and findings of Commissions of Inquiry appointed to look into grave human rights violations in terms of the Commissions of Inquiry Act, No. 17 of 1948 in a forthcoming chapter *in Sri Lanka: State of Human Rights Report, 2007*, Law and Society Trust.

[1] Institution of a private plaint.

2. Intervention of the Attorney General in Arbitrary Discharges by a Magistrate

Relevant judicial precedents in this context

King vs Noordeen[2] involved the question as to the jurisdiction of the then Supreme Court to entertain applications in revision where the Attorney General had refused to sanction an appeal from an acquittal, or in similar class of circumstances (which would include the powers of intervention of the Attorney General where a magistrate discharges an accused). The Supreme Court held that, it would not hesitate to exercise its powers of revision provided that proper materials have been laid before Court to call for its exercise.[3]

As the Court in that case opined, a heavy onus would lie on an applicant who seeks revision to establish "a strong case amounting to a positive miscarriage of justice in regard to either the law or the judge's application of the facts.[4]

In *Attorney General V Kanagarathnam*[5] the nature and scope of the powers of the Attorney General were emphasized, the Court going to the extent of saying that, (at the non summary stage) "it is not open to the magistrate to do anything that carry out the instructions of the Attorney General."[6] That was a case where the Attorney General had moved in revision against an order of a magistrate directing the prosecution to furnish particulars in order to amplify certain charges, the Attorney General having taken the initiative to direct the magistrate to proceed with the charges in the form in which they had been read out to the accused initially.

It is also to be noted that, in that case, the Supreme Court exercised its powers of revision[7] wherein it was specifically held that, such powers of revision of orders made by the magistrate in the course of non summary proceedings would be exercised, whether such orders were made prior to or subsequent to the prosecution of the indictment against the accused. However it is also to be noted, given the context of the issue focused on in this paper, the Court felt free to revise magisterial orders in the light of the Attorney General's instructions given to the magistrate while not commenting on its powers of revision in relation to the exercise of statutorily conferred power on the Attorney General himself.[8]

Attorney Genera V Don Sirisena[9] also involved a case where the magistrate had discharged the accused (on the basis that there was insufficient evidence) without proceeding to read the charge and on the Attorney General's direction that certain provisions of the Criminal Procedure Code be complied with, had again discharged the accused after such compliance resulting in a further direction by the Attorney General to commit the said accused to trial. It was upon the magistrate's refusal to comply with that direction, that, the Attorney General had moved the Supreme Court in revision of

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[2] 13 NLR 115.
[3] at p. 117 per Wood Renton J, *ibid*
[4] *Ibid* at p. 118
[5] 52 NLR 121
[6] *Ibid*, per Nagalingam J
[7] In terms of Section 356 of the then Criminal Procedure Code (Vol. I Legislative Enactment of Ceylon, (1956 Revised edition)
[8] Section 390(2) of the said Code
[9] 70 NLR 347

that order of non compliance. The Supreme Court held that, the magistrate's refusal was unlawful and allowed the Attorney General's application for revision against the said magisterial order.

Note however, the view expressed by the Court that "A magistrate does not exercise a judicial function when he conducts a preliminary inquiry for the purpose of deciding whether or not a person is to be committed for trial" which, it is submitted with respect, must be regarded as *obiter* particularly in view of the further view expressed by the Court that, the Attorney General's powers in that context are quasi-judicial. It is submitted further that, in the view of the later developments in the realm of Public Law it is doubtful whether that view viz. " the magistrate does not exercise a judicial function'', could be regarded as a sound view as **rights of aggrieved persons** are affected by the same.[10]

3. Consideration of the Converse Situation where a Magistrate Commits a Person to Trial but the Attorney General Intervenes to Quash Such Committal.

That this course of action is available to the Attorney General has been judicially acknowledged by the then Supreme Court interpreting Section 388 of the former Criminal Procedure Code[11] and the same provision is contained in Section 396 of the Code of Criminal Procedure Act No. 15 of 1979 (the present Law.

What remedy is available to an aggrieved party in the event of a refusal by the Attorney general to intervene?

Would an aggrieved party who has given evidence before the magistrate be entitled in law to have such a decision of the Attorney General revised by the Court of Appeal under CHAPTER XXVII of the present Act of 1979 read with Article 138 of the Constitution of Sri Lanka.

Velu v Velu[12] is a case in point where, the then Supreme Court having proceeded on the basis that, a magistrate had discharged the accused and the Attorney General also had refused to interfere considered the question whether the Court could circumvent the magistrate's order as well as the Attorney General's decision not to intervene and commit the accused to stand trial in the exercise of its powers by way of revision.

Responding to that question, Justice Weeramantry, in the course of expressing the view that, the Supreme Court "may in theory have the power to revise an order of discharge made by a magistrate' the Court would, in so doing (that is, if it were to revise the Attorney General's decision in affirming the magistrate's order) be entering upon a field where, to say the least, another authority namely the Attorney General, enjoys a concurrent jurisdiction[13] refused the application for revision.[14]

An analysis of that decision reveals three discernible grounds for the said refusal.

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[10] ever since the House of Lords decision in *Ridge vs Baldwin* (1964 AC)
[11] *AG V Kanagarathnam*, supra, at p. 129
[12] 76 NLR 21
[13] *Ibid*, at p. 22
[14] Which the court acknowledged as possessing, (in theory) at p. 2, *ibid.*

i. The Court held that, such powers of revision would only be exercised where a positive miscarriage of justice "would otherwise result"[15]

While the criterion of "a positive miscarriage of justice would otherwise result" would undoubtedly be defensible, nevertheless the judgment does not reveal a discussion as to why the Court had come to that conclusion.

ii. The second ground for the refusal on the Court's part to act by way of revision, as the judgment reveals, is contained in the reason that:

In view, however, of the Attorney General's power and functions in this respect, there can be no doubt that through the exercise of such functions, a case of positive miscarriage of justice will not arise. This judicial view which apparently explains the reason why the Court had not embarked on an inquiry as to whether, in fact, the proceedings in question would amount a miscarriage of justice

Consequently it is submitted with the highest respect that, the said second ground in refusing the application for revision amounts to an unwillingness on the part of the Court to exercise its discretionary powers by way of revision, the said discretion being surrendered in favour of the *ipse dixit* of the Attorney General.[16]

True, that, the high office of Attorney General must be accorded due respect but it must be at the same time noted that the said high office (respectfully) has not always commanded public confidence (an aspect brushed aside by then Supreme Court)[17]

If so, what remedy could an aggrieved person seek against a decision of the Attorney General to direct a magistrate to enter an order of non committal? Although the Supreme Court has opined that, "the subject is therefore not lacking in a remedy against an order of discharge or committal with which he is dissatisfied.....[18]" in the same breath the Court had said ".....and in the result, it never ought to be necessary for this Court to be called upon to exercise its powers."[19]

Viability of the approach of the then Supreme Court in regard to its powers of revision in the light and impact of Article 138 of the present Constitution of Sri Lanka.

Whatever might have been said in defense of that judicial approach as reflected in the judicial precedents cited above, it is submitted with respect that those precedents must be regarded as being of academic value given the fact that, the present revisionary jurisdiction of the Court of Appeal flows from the Constitution[20] exercisable on behalf of people of Sri Lanka in whom sovereignty resides.[21]

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[15] *Velu vs Velu*, supra, at p. 23
[16] See at p. 356 of 70 NLR, *A.G v Don Sirisena*, supra.
[17] *Ibid*, per H.N.G Fernando CJ wherein His Lordship had said: "indeed, the argument of counsel who appeared in this case for the respondents actually involved the alarming proposition that the Attorney General may not lawfully direct the discharge of a person whom a magistrate commits for trial.
[18] at p. 23 *Velu's case*, *supra*, though in theory acknowledging its power of revision.
[19] *Supra*
[20] By virtue of Article 138 of the Constitution of Sri Lanka.
[21] Article 3 read with Article 4(c) of the Constitution.

That conceptual cum constitutional shift demands therefore a fresh judicial approach in regard to the duties and obligations of magistrates vis a vis the Attorney General's powers contained in statutory provisions which must give way to the said constitutionally conferred power by way of revision in the Court of Appeal in terms of Article 138 of the Constitution, being the higher norm.[22]

iii. The third ground (impliedly) in *Velu's case* that appears to have influenced the Court is the Attorney General's power to enter *a nolle prosequi* at any stage of the subsequent proceedings. As had been pointed out by the Attorney General in *King vs Noordeen*[23] and noted by the Court in the case under consideration,[24] even if the Supreme Court (presently the Court of Appeal) were to revise an order or discretion of the Attorney General it would be a mere *brutum fulmen* since it would be open to the Attorney General to enter *a nolle prosequi* at any stage of the subsequent proceedings, which however the Supreme Court in *King vs Noordeen* (*supra*) felt "quite sure that no Attorney General would feel himself justified in exercising (such) powers.....[25] The dictum that,

> *"It is conceivable that any Attorney General would issue instructions that would probably so illegal"*[26] must also be noted.

4. Conclusion – the Need for Amendment of the Law

i. In regard to a magistrate's decision to discharge or commit an accused, where an aggrieved person seeks the Attorney General's intervention, the magistrate would have no option but to carry out any contrary direction(instructions) given by the Attorney General.

ii. Although in theory, an accused person or aggrieved person, as the case may be, could have invoked the revisionary powers of the Supreme Court against an ensuing decision of the Attorney General, the Supreme Court has shown an inhibition to do so.

iii. However, given the fact that, the present Court of Appeal is conferred with powers of revision under the Constitution itself[27], any statutory provision that may seem to derogate therefrom (including any order, instruction, direction and, decision of the Attorney General) must give way to the said constitutional jurisdiction.

iv. Consequently in the exercise of its said jurisdiction, where any person is aggrieved by an order of commitment or discharge of the magistrate and the Attorney General affirms or reverses or refuses to intervene upon being requested to do so (as the case be) the Attorney General must be cast with the burden of establishing the correctness of his order, direction, instruction, or decision which would thus circumvent the need for any aggrieved person

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[22] *Atapattu V People's Bank (SC)* (1997 (1) SLR at p. 221) per MDH Fernando J approved in *Moosajee V Arthur*(SC) and others 2004 (2) Appellate Law Recorder 1 per Weerasuriya J

[23] 13 NLR 115

[24] *Velu's case*, supra at pages 22-23 relating to the Attorney General's powers contained in Section 201 of the former Code which are contained in Section 194(1) of the Code of Criminal Procedure Act, No 15 of 1979..

[25] Wood Renton J at p. 117-118 *supra*

[26] Nagalingam J, in *Attorney General V Kanagarathnam* 52 NLR 121 at 130, supra

[27] Article 138

invoking the revisionary powers of the Court of Appeal "to pursue any (other) legal remedy."[28]

Proposed amendment to the Code of Criminal Procedure Act

In order to give effect to the thinking articulated above, it is proposed that, the Code of Criminal Procedure Act No. 15 of 1979 (CCP Act) be amended by adding a new Section numbered as **Section 401A** in the following terms: viz

> *"The powers of the Attorney General hereinbefore contained shall be subject to the revisionary jurisdiction of the Court of Appeal conferred by Article 138 of the Constitution of Sri Lanka.*

Furthermore in the event of an intervention on the part of the Attorney General in reviewing a magistrate's decision to commit to trial or discharge, the Attorney General must be required to give reasons for his order, decision, direction or instructions given to such magistrate, which should find expression statutorily in the CCP Act.

[28] As suggested in *Attorney General vs Kanagarathnam, supra*

A Critique of the Prosecutorial/Judicial System and the Role of the Attorney General in respect of Prosecutions for Grave Human Rights Violations

Samith de Silva[*]

1. Introduction

This paper will reflect upon the law and procedures applicable to the criminal justice system in Sri Lanka. The contrasting provisions of the repealed Criminal Procedure Code Ordinance (CPC), the repealed Administration Justice Law No. 44 of 1974 and the currently applicable Code of Criminal Procedure Act (CCP) Act No.15 of 1979 will be examined as contextual background to a stringent critique of the legal and prosecutorial role in that context.

The contents of the Criminal Procedure (Special Provisions) Act No 15 of 2005 which introduced several changes with regard to police power to detain after arrest and vested the Attorney General with the power to forward direct indictments to court without submitting to a non summary inquiry in certain instances, will also receive special attention.

The specific focus of this paper will be the judicial role in the prosecution of grave crimes, such as enforced disappearances and extra judicial executions.

2. The Criminal Law and Procedure; Providing Contextual Background to the Old Law and the Current Legal Provisions

2.1 The Criminal Procedure Code Ordinance (CPC)

Trial by Jury

The right of trial by jury was introduced into Ceylon by the Charter of Justice of 1810 (see also Proclamation of 1811), and was reaffirmed in the Charter of Justice of 1833). The aforesaid concept of trial by jury[1] that existed under the (now repealed) Criminal Procedure Code Ordinance[2] (CPC) was given practical effect by the stipulation that trial of all offences in the First Schedule should be conducted before the Supreme Court by a judge of the Supreme Court or a Commissioner of Assize [3] on indictment by the Attorney General.[4]

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[1] This paper will be confined to some provisions relating to trials before the Supreme Court under the now repealed CPC and before the High Court under the current Code of Criminal Procedure Act No.15 of 1979.

[2] Sections 10, 216, Criminal Procedure Code and Sections 19, 25 and 29 Courts Ordinance CLE Ch.6;

[3] Section 216(1) of the CPC read with Courts Ordinance (Ch.6 of the Ceylon Legislative Enactments) Section 26

[4] Section 165 F, CPC

The CPC provided[5] that where an accused pleaded not guilty or refused to plead, jurors should be chosen to try the case. The jurors had to be selected from the panel elected by the accused at the time of committal from the Magistrates Court[6] or at the time of arraignment, if otherwise directed by Court under section 224 (1)[7] In order to facilitate the accused on his election, he will be questioned by the magistrate at the time of committal on the type of jury that he wished to elect i.e. 'From which of the respective panels of jurors the jury shall be taken for trial.'

The accused had the option to elect his jury from English, Sinhalese or Tamil jury panels[8] or from the Special Jury Panel.[9] Depending on the option exercised, the accused was entitled to be tried by a jury of his choice.

Trial at Bar

The CPC encompassed provisions for trials at bar. Under these provisions, the Chief Justice had the power in his discretion, to appoint three judges of the Supreme Court to hold a trial at bar and such trials were held at Colombo. Under the CPC, the provision for a trial at bar had great significance as it was before a jury consisting of three judges of the Supreme Court (which was the highest court within the country), whereas jury trials were either before a Supreme Court Judge or a Commissioner of Assize.

Section 440A subsections (a) and (b) of the CPC provided for trial at bar before three judges of the Supreme Court for the offence of sedition under Section 120 of the Penal Code[10] and other offences such as civil commotion, disturbance of public feeling or other similar offences which the Minister of Justice may consider appropriate. The Minister had the power under Section 440A of the CPC to direct that a person be so tried by three judges of the Supreme Court.

The reasons behind this subsequent introduction of Section 440 A by an amendment to the CPC was discussed in the judgment of *Queen v Tejawathie Gunawardene*[11] where it was stated that "This provision was introduced in a year of stress", referring to the 1915 civil disturbances.[12] In this regard, the sequence of legislative attempts to interfere with the judicial process after the unsuccessful *coup d'etat* in 1962 (though discussed *ad nauseam* in legal textbooks) is briefly relevant for the purposes of this analysis. The Criminal Law (Special Provisions) Act No 1 of 1962 was introduced just before the trial of the conspirators. This Act was introduced with the intention of effecting certain amendments to Section 440A of the CPC. These were *inter alia:*

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[5] Section 221 (1)
[6] Section 165 B of the CPC
[7] *The Queen v Gnanaseeha Thero and Others,* 70 NLR at page 265. Where accused persons elected, under Section 165 B of the Criminal Procedure Code, to be tried by a Sinhala-speaking jury from the list of persons referred to in Section 257 (1) (6), the Court will not override such election otherwise than on cogent grounds if the Attorney-General makes an application thereafter to the Supreme Court under Section 222 for an order requiring a special jury to be summoned to try the case against the accused
[8] Section 257 (1) (a) (b)and (c)
[9]Section 222(2) read with section 257 (1) (d). The jurors in the Special Jury Panel consisted of persons from a higher income group
[10]The offence of exciting or attempting to excite disaffection to the Queen or Her Government
[11] 56 NLR, at page 203
[12] *Ibid.* at page 208

(a) That any act of the minister done in the exercise of the power vested in him under Section 440A of the CPC shall not be called into question in a court of law.[13]
(b) That the minister shall nominate three judges to the bench that holds the trial at bar. Such nomination of the Minister shall not be called in question in any court of law.[14]
(c) That the trial of offences under chapter VI of the Penal Code should be before a trial at bar.[15]

In addition, punishment for offences under Sections 114 and 115 of the Penal Code was increased.[16]

In *The Queen v Liyanage*[17] (The first trial at bar) it was held *inter alia* that, Section 9 of the aforesaid Act was *ultra vires* the Constitution, as the power of nomination of judges of the Supreme Court to sit as a trial at bar which was conferred on the Minister, was an exercise of judicial power by the executive and therefore unconstitutional. Subsequently, the legislature introduced the Criminal Procedure (Special Provisions) Act No. 31 of 1962 which vested this power with the Chief Justice. The trial was then proceeded with and the accused was convicted. Thereafter an appeal was filed with the Privy Council which, in its decision in *Liyanage and others v the Queen*[18] ruled that the *ex post facto* and *ad hominem* legislation introduced by Act Nos. 1 and 31 of 1962 was invalid, resulting in the setting aside of the convictions and the acquittal of the accused.

2.2 The Administration of Justice Law[19]

The pro-socialist government that came into power with a sweeping victory in 1972, in addition to the hasty introduction of several pieces of socialist legislation, (most of which were later realized to be counterproductive), repealed the CPC and introduced the Administration of Justice Law (AJL).

The removal of the old provisions relating to non summary inquiries therein[20] was substantiated by the argument that going through a non summary inquiry will not only entail a substantial delay, impose unnecessary costs as well as engage in wastage of court time[21] and thereby result in a denial of justice. However, the notable significance of a non summary inquiry arose through the fact that the witnesses continued to be bound by their depositions on oath at the non summary inquiry and as a result of the same, they could not conveniently shift their evidential position without getting embroiled in penal provisions governing false evidence at a later point of time.

It may be recalled that under the CPC, (after recording the evidence at a non summary inquiry), if the magistrate was of the view that there was sufficient evidence against the suspect, he had to commit the suspect to stand trial before the Supreme Court, whereas in the absence of such evidence, he could discharge the suspect. If the magistrate was of the view that there was sufficient evidence, then, after

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[13] Section 8 of Act No. 1 of 1962
[14] *Ibid*, Section 9
[15] *Ibid*, Section 4
[16] *Ibid*, Section 6
[17] 1962 (64) NLR, at page 313
[18] *Liyanage v the Queen* 1965 (68) NLR, 265
[19] No.44 of 1973
[20] This is a pre trial recording of depositions (on oath) before a magistrate to ascertain whether there is a sufficient evidence (prima facie case) against the suspect to commit him to stand trial before High Court (Supreme Court/ Court of Assize under the CPC). See sections 153 and 154 of the CCP
[21] Section 2 of the AJL *inter alia* sets out these among other objectives

committing the suspect to stand trial, the case was referred to the Attorney General to decide whether the suspect should be indicted. In regard to non summary inquiries, the witnesses were summoned within a very short period of time (i.e. a couple of weeks at the most) to make their depositions before the magistrate and as a result of this short lapse of time, the opportunity for the suspect to give in to outside pressures was minimal.

Under the AJL, the situation was entirely different. The witnesses, (who were not bound by any deposition on oath), soon, learnt (perhaps with the able advice and assistance of legal practitioners), that they could deny whatever they have said in their statements to the police.

Then again, the depositions by witnesses made at non summary inquiries had the added advantage of being relevant and therefore admissible at the trial if such witness was dead or could not be found at the time of such trial.[22]

Functioning of the Attorney General's Department under the newly created office of the Director of Public Prosecutions[23]

With the repealing of the CPC, the provisions relating to non summary inquiries were abolished by the AJL and thousands of pending non summary inquires and other cases where non summaries should have been initiated, were transmitted[24] to the Director of Public Prosecutions (DPP).

The office of the DPP was newly created[25] under the AJL to handle serious crimes. Under the AJL, the DPP functioned in a position subordinate to the Attorney General but was vested with certain independent powers such as the authority to indict. It is quite well known that consequent to its establishment, the DPP's office received thousands of cases from all over the country i.e. from the police and magistrates courts (where non summaries were pending). Its officers, who were unable to cope with this sudden surge of cases,[26] sent out indictments even in cases where evidence was *prima facie* insufficient to secure convictions. This was done to avoid detailed report writing in cases where suspects had to be discharged.

The procedure adopted was that if the counsel attending to the file took the view that the suspect should be indicted, he/she could do so directly by himself. But, if the case required a discharge, he/she had to submit a detailed report to his/her supervising officer, upon analyzing the available evidence; if such supervising officer were to agree with the recommendation, he/she would then submit it to the DPP for final approval. Therefore, indicting was a much less cumbersome task in a case where there was 'some evidence' although the available evidence did not quite justify indictment.

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[22]Section 33 of the Evidence Ordinance, Chapter 33, Legislative Enactments

[23] Section 82 AJL

[24]Section 53(4) read with Chapter II, AJL.

[25]This was created giving effect to recommendations made by the Criminal Courts Commission Final Report, Sessional Paper XIII of 1953

[26] A prosecutor who had joined the Attorney General's Department just before the transition took place described the situation as "There was total chaos in the Attorney General's Department by this unplanned 'upsetting' of a system that had been well established for nearly a century"

DPP – A failure or success?

The Criminal Courts Commission anticipated[27] that it would be possible "to brush aside inessentials and drive to the heart of the case" as a result of the creation of the office of DPP with trained lawyers guiding the investigations.

The major advantages which were expected by creating the DPP's office were twofold, namely (1) that legal advise would be forthcoming to police officers, while inquiries were being made, as to the directions in which further inquiries should be made and (2) that the police would make the evidence available to the DPP's department to present the case once the investigations were complete[28] The Commission was of the view that the creation of the DPP's office would considerably promote the efficient presentation of cases for the prosecution and eradicate delays.[29]

However, as a result of exerting political pressure upon the persons appointed to the office, the objectives of the DPP's office as anticipated by the Commission never became a reality. The DPP's office became a tool in the hands of the politicians to achieve their ends.

Impact on the criminal justice system

The shortsighted legislative provisions introduced by the AJL impacted adversely on the criminal justice system of Sri Lanka. This was well experienced towards the end of the decade when it became clear that witnesses, especially before the High Court, were not conforming to their versions given to the police and as a result, the cases were ending in acquittals.

In cases where indictments forwarded with little or no evidence, the prosecutors made no demur in respect of the accused being acquitted; sometimes even before the close of the case for the prosecution, the prosecutors conceded that no useful purpose would be served by carrying on with the case any further. In short, by the early 1980's, prosecutors were not serious about obtaining convictions in cases spilling over from the 1970's where there had been no non summary inquiries. Thus, the legislature was prompted to reintroduce the provisions relating to non summary proceedings in 1979.

Unfortunately, the country lost a decade of possible enhancement of legal improvement in the prosecution of grave crimes, quite apart from litigants losing their faith in the system and the courts in consequence, failing in the proper regulation of their proceedings.

Trial by Jury

The AJL provided for the trial of criminal cases on indictment by jury before the High Court,[30] which became the highest court conferred with original criminal jurisdiction. Under the CPC, this

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[27]Final Report of the Commission. supra, n 25 at page 20 para. 50

[28]Peiris, GL, *Criminal Procedure in Sri Lanka* Lake House,Sri Lanka,1975, at page 87

[29] *Supra*, n 27. Also quoted in Peiris, *Criminal Procedure in Sri Lanka* , ibid

[30] Sections 18-23 sets out the jurisdiction of the High Court, and the schedule (section 6) sets forth the 16 High Court Judicial Zones.

jurisdiction had been with the Supreme Court. Although the AJL provided that all trials[31] except trials at bar[32] should be before jury, the Act itself, unlike the CPC, did not make express provisions therein for English, Sinhalese and Tamil jury panels.[33] Under the AJL, jury trials were possible only before Sinhalese and Tamil speaking panels.

Trial at Bar

The AJL provided for trials at bar in respect of offences against the State under Chapter VI of the Penal Code and in respect of *interalia* offences committed as a result of civil commotion or for a similar reason which the Minister[34] considers should be so tried. Under this provision, it was the Minister of Justice who had the power to order a trial at bar[35] and the Chief Justice was then required to nominate three High Court Judges[36] for the trial at bar.

Special Jury

The AJL also had provisions for special juries.[37] The Chief Justice had the power to allow such an application. If the application was by the Attorney General, it was not required to be supported by affidavit.

2.3 Code of Criminal Procedure Act (CCP)

The original provisions relating to jury trials in the CCP were somewhat different to the provisions in the repealed CPC. In terms of the CPC, although all trials before the Supreme Court for schedule one offences[38] such as murder, were on indictment,[39]schedule one contained several other offences that were triable by jury. Those were offences such as grievous hurt caused whilst causing lurking house trespass or house breaking[40] that fell within the provision of jury trials.

The CCP introduced a somewhat changed approach. Section 161 of the CCP provides that where at least one of the offences falls within the list of the offences in the Second Schedule[41] of the Judicature Act[42] or in any case where the Attorney General, having regard to the nature and the circumstances of the offence, determines that the trial should be held in the High Court by a jury, then the offence will be tried by a jury, thus giving extensive discretion to the Attorney General.

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[31]Section 193 AJL
[32] Section 230(1)(a) and (b) AJL
[33] Sections 198 and 199, AJL. However, it seems that rules were made for Sinhalese and Tamil jury panels.
[34] Minister of Justice
[35] Section 230 AJL
[36] Section 20(3) AJL
[37] Section205 AJL
[38]Schedule One of the CPC
[39]It may be recalled that the CPC also had provision for trials on indictment before the District Court for lesser offences than murder. Vide section 165 F CPC.
[40]Section 445 of the Penal Code.
[41] These are; (i) Offenses under sections 296(murder), 297 (culpable homicide not amounting to murder), 300 (attempted murder) and 364 (rape) of the Penal Code (ii)Offences under sections 4(2) and 4(2) read with 6(1) of the Offensive Weapons Act and (iii) Abetment and conspiracy for abetment for the commission of offences in (i) above for conspiracy for the commission of offences in (ii) above.
[42] No. 2 of 1978 and amendments thereto.

Though the CCP initially conferred a wider discretionary power on the Attorney General in regard to the 'imposition' of a jury trial on a suspect, was a fetter imposed on this power subsequently by Section 11(2) of the Judicature Act[43] which stipulated that the Attorney General could so determine (to impose a trial by jury) in any other case 'in accordance with the law for the time being. Here two arguments are possible. Firstly, the Attorney General has the discretion to order trial by jury and the jury procedure will follow in accordance with the law for the time being and secondly, that the Attorney General can impose a trial by jury if, and only if, the law provides for a jury trial of that offence.

A subsequent amendment to the CCP [44] removed the provisions relating to the State's mandatory obligation to provide jury trials for schedule two offences and made it optional to the accused to decide whether he wishes to be tried by a jury or by the High Court Judge.[45] This amendment removed the wide discretion given to the Attorney General to impose 'jury trials' on accused.

Trial before High Court Judge (non jury trials)

Since the option to conduct non jury trials in regard to offences in the Second Schedule [46] was introduced, the accused more often opted for non jury trials on the advice of their lawyers. Today, almost 95% (or even more) of cases under in terms of the Second Schedule are non jury trials. Unlike trials before jury, these trials are not taken up day-to-day. Intermittent trial dates help lawyers to collect more fees from their clients as fees are often paid on a daily basis. Trials before jury were heard continuously to an end (day to day). However in non-jury trials, the situation is different; as result of interim adjournments, lawyers do not have to get ready for the whole case. In short, both the prosecution and the defense generally do not get ready for the whole case - neither party plans the case as a whole. This practice is quite detrimental to the prosecution. Other than a few prosecutors who are duty conscious, this is the usual sequence of events.

Meanwhile, the judge, (as a result of not being accustomed to day to day trials), fixes a large number of trial cases (usually six to ten) for a day. Consequently, the time of recording evidence of a witness is reduced to 30 to 45 minutes or even less on each day of trial. This compels witnesses to come to court on several days to give evidence, causing them untold inconvenience and at the same time, facilitates the opposing parties and the witnesses to meet in court.

Such meetings provide golden opportunities to the police and the officers of the armed forces if they happen to be the accused. Long adjournments between two trial dates help interested persons to approach the witnesses and come to terms with them to retract their testimony. Quite often, the adjournment between two dates of the same witness giving testimony is a couple of months but it is also common to see periods spanning up to two years or more between these dates. As aforementioned, these long adjournments obviously help interested parties to prevail upon the witness and coerce them to shift their testimony.

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[43] No. 2 of 1978 (as amended)
[44] No 11 of 1988
[45] Section 161 of the CCP as amended by Act No. 11 of 1988 provides that if at least one of the charges in the indictment relates to an offence in the second schedule of the Judicature Act , then its obligatory for the court to inquire from the accused whether or not he elects to be tried by a jury"
[46] *Ibid*

This long drawn out nature of the trial process has undoubtedly contributed towards an uncontrollable overall increase in the cases before High Courts. Today, as a result of the large number of pending cases, there is an inordinate delay even in the commencement of a criminal case before the High Court. These delays before the commencement of trial sometimes range from three years to ten years or more. In this context it is also important to pay some attention to excessive delays at the Government Analyst's Department. Often, the Government Analyst takes a couple of years to examine the samples sent in detections of heroin, leave aside the productions sent for analysis in cases of murder and etc. If the judge opts not to grant bail until the Government Analyst sends his report to court, the suspect may be denied bail for a very long period, even if the quantity of heroin is very small. Delays at the Government Analyst's Department are attributed to lack of resources and staff.

Usually, a prosecuting counsel (State Counsel) prosecutes in a High Court for three to six months. Unless the prosecuting counsel is keen to study his cases and the judge is committed to conclude cases, the most that can happen during this period is that the evidence of one or two witnesses are concluded. The prosecutor is aware that it is sufficient if he can manage to lead a witness for half an hour or so as the judge will then, adjourn the case for another date. When witnesses are led at random in an unplanned prosecution, it ends with the obvious outcome –an acquittal. Thus, the system facilitates the marking of time. It is sad to note that there have been instances where state counsel who have been prosecuting for several years, have had no experience in conducting a prosecution before the High Court from start to finish. Such officers who cannot perform their official duties with confidence naturally tend to succumb to internal and external pressures and interferences in regard to their official functions. Their mindset is to 'somehow survive in their job' with the least realization that their institutional involvement as State Counsel calls for much higher standards of honesty, integrity and commitment than in regard to an ordinary 'job'.

The situation is no better with a majority of judges. The usual *modus operandi* is to fix around six to ten trials a day, record some evidence in two or three cases and postpone the other cases, giving observers the impression that the judge is attempting to conclude a large number of cases every day. This is however, far from the case.

Two recent incidents reveal the state of knowledge of some of the present day High Court Judges. One incident occurred when the accused had made a statement from the dock consequent to which the High Court judge had requested the prosecuting counsel to cross examine him. When the prosecuting counsel had refused to do so, pointing out that such cross examination is not permitted under the law, the judge himself had cross examined the suspect. This untoward judicial act clearly infringes a basic criminal justice right that the accused can make a statement from the dock, without being subjected to cross examination. It is reliably understood that the Attorney General has appealed in this case.

The other instance is where a High Court judge had been engaging in the practice of adjourning jury trials for weeks despite this practice not being legally permissible. Before the option on Schedule Two trials was given, generally an average trial took 3-4 days and the trial was heard from beginning to end. These two incidents are but mere sample illustrations of the current deterioration in judicial standards.

Special Jury

The CCP retained the provisions relating to 'Special Juries' [47] although the burden on the accused to exercise his option was more stringent as he had to satisfy court by affidavit whereas the State could exercise the option on an oral application made in court.

Trial at Bar

The CCP retained the power to order trial at bar[48] but brought in some significant changes in that regard. Under the CCP, only three offences i.e. offences under Sections 114, 115, 116 of the Penal Code are made triable before a High Court at Bar. Further, the power to order a trial at bar is given to the Chief Justice where "He is of the opinion that owing to the nature of the or the circumstances of and relating to the commission of the offence, in the interests of justice a trial at bar should be held", keeping in line with the doctrine of separation of powers and the principle of non interference by the executive into the functioning of the judiciary.

Jury Panels

Unlike the CPC, the CCP does not expressly provide for jury panels conversant in English, Sinhalese and Tamil Languages. The only provisions that affords the accused a jury of his choice are sections 195(ee) and (f) of the CCP.[49] In other words, (in keeping with the past practice of questioning the accused as to whether he wishes to be tried by a jury and if so, by a jury that speaks the language of his choice), the accused obtains the opportunity to inform court that he opts for a jury that speaks Sinhalese or the Tamil language.

In *Raja and another vs Republic of Sri Lanka,*[50] Justice A. de Z Gunawardene, (speaking for and as President of the Court of Appeal) held that this is a recognition of the basic right of an accused person to be tried by his peers. Thus, it is important that, the accused should be given the opportunity to exercise the right whether to be tried by a jury or not. In that case the court held that, the learned trial judge had failed to follow the procedure laid down in Section 195 (ee), in denying the accused that right.

This "basic right" had been recognized in the earlier cases of *Namal Bandara vs the State*[51] and in *Wijesena Silva and Others vs the Attorney General.* [52] In *Wijesena Silva's case* it was held that it is incumbent on the trial judge to inquire from the accused as to whether or not he elects to be tried by a jury. This duty implies no discretion but imposes a mandatory obligation on the part of the High Court Judge. A trial held without compliance with this provision is a nullity. The Court acknowledged and recognized "the basic right of" an accused person to be tried by his peers.

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[47] Section 208(1) of the CCP.
[48] Section 450 of the CCP and Section 12 of the Judicature Act as amended.
[49] Section 195 (ee) If the indictment relates to an offence triable by a jury, inquire from the accused whether or not he elects to be tried by a jury; and Section 195 (f) Where trial is to be by a jury direct the accused to elect from which of the respective panels of jurors the jury shall be taken for his trial and inform him that he shall be bound by and may be tried according to the election so made.
[50] 1996 (2) SLR at page 403.
[51] 1996 (1) SLR, at page 214
[52] 1998 (3) SLR, at page 309.

***Criminal Procedure (Special Provisions) Act*[53]**

In 2005, an amendment to the CCP introduced several changes in regard to the police power to detain after arrest and vested the Attorney General with the power to forward direct indictments to court without submitting to a non summary inquiry in certain instances. The amendment that was brought into operation on 31st May 2005 provided for the following:

(a) Detention

Proviso to Section 2 of the amendment authorizes a police officer not below the rank of an Assistant Superintendent of Police to file in the Magistrates Court, a certificate before the expiration of 24 hours after an arrest of a person, if it was necessary to keep such persons in police custody for an additional period of 24 hours (not to exceed an aggregate of 48 hours), except in situations falling within Section 43(A) of the CCP.[54]

(b) Depositions

Section 6 of the amendment effected some changes in the mode of recording depositions of witnesses by Magistrates at non summary inquires. Under the provisions of the amendment, statements made by witnesses to the police at the investigation have to be read out to the witnesses at the non summary inquiry. The witnesses are given the opportunity to make additions and alterations to their statements made to the police. These alterations and additions have to be recorded. If any clarification is required on any matter by the accused or his pleader, then, the magistrate is given the discretion to put that question to the witness and those clarifications also have to be recorded. Unlike the provisions that existed prior to the amendment, cross examination of a witness is not permitted unless the prosecution tenders the witness for cross examination.

After having read and recorded the witness's statement made to the police, the magistrate is bound to read what was recorded once again to the witness and require him to swear or affirm to the truth of the matters so recorded. This amendment which was intended to be in operation for two years[55] lapsed on the 31st of May 2007 and has now been extended by Parliament for a further term of two years.

(c) Direct Indictments (in terms of Amendment Act, No 15 of 2005)

Where there is aggravating circumstances or circumstances that gives rise to public disquiet in connection with an offence specified in the Second Schedule[56] to the Judicature Act[57] the Attorney General is empowered to forward an indictment direct without holding a non summary inquiry and he could do so ex *mero motu* or upon receipt of the relevant record from the magistrate in terms of Section 4(1) of the Act.

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[53] Act No. 15/2005

[54] Section 43(A) authorizes a Superintendent of Police to file a certificate if it is necessary to keep a suspect in a child abuse cases in custody up to 3 days in police custody. This amendment to Section 43 of the CCP was introduced by Section 3 of Act No. 28 of 1998.

[55] Section 7 of the Act.

[56] *Supra* n41

[57] *Supra*, n42

If there are aggravating circumstances or circumstances that gives rise to public disquiet, the magistrate is under a duty, (without proceeding to hold a non summary inquiry), to forward the record to the Attorney General. Where the Attorney General is of the opinion that the circumstances do not warrant the forwarding of direct indictment, then he is under a duty to return the record directing the magistrate to hold a non summary inquiry.[58]

Brief revival of the prosecutorial system under the CCP

With the introduction of the non summary proceedings under the CCP, a weakened prosecutorial system before High Courts,[59] specially in relation to cases of murder , attempted murder and rape (being cases where non summary inquiries were required under the law) was revived to some extent. However, this revival did not last long as would be further discussed.

3. Pattern of Prosecutions during the 'Terror Regime' ('87-'91 era)

Towards the latter part of 1987, when abductions of the members (and sympathizers) of the Janatha Vimukthi Peramuna (JVP) were taking place, followed by enforced disappearances, public sympathy was with the victims. However, when the JVP commenced to attack not only government politicians but also public figures who were not politically aligned, a shift in that sympathy was seen. This was aggravated when the JVP engaged in large scale killings of ordinary villagers purely as a result of their political involvement, high social standing, unwillingness to support the JVP etc. The government was not successful in bringing the situation under control. It is no secret that one of the main measures adopted by the government to combat the situation with a view to bringing it under control was to engage in enforced disappearances.

This opened the flood gates to indiscriminate killings by the police and armed forces. The perception on the part of the public that they were being protected from the JVP as a result of this counter wave of terror began to change once again upon the realization that the government sponsored enforced disappearances and killings were far more indiscriminate and brutal than the JVP violence.

The Functioning of the Presidential Commissions of Inquiry into Involuntary Removals and Disappearances

The three Presidential Commissions of Inquiry that investigated into enforced disappearances during this period ('87-'91) were established in 1994 as a result of an election promises made by Chandrika Bandaranayake Kumaratunge during her Presidential Election campaign. It is again no secret that the establishing of these Commissions of Inquiry had the underlying motive of publicly 'naming and shaming' key political personalities of the previous regime. However, it is the credit of these Commissions that they functioned (largely) in a manner that belied this political agenda.

It must be noted also that when investigations into enforced disappearances on the authority of these Commissions commenced, the military establishment as well as the police hierarchy protested vigorously, claiming that it was unfair to prosecute these officers who had saved the country during

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[58] Section 4(2)(b).

[59] By this time the standards of the judges and the prosecutors had not drastically deteriorated.

the period of terror in the South, thus drawing a parallel with the fight against the Liberation Tigers of Tamil Eelam (LTTE) in the North/East. The Kumarantunge administration was questioned as to whether the officers who are fighting a war in the north will eventually face the same consequences.

This was an attempt to build public opinion against investigations into the '87-'91 incidents. To some extent, these protests impacted negatively on the investigational process. The police and the forces capitalized on the political instability of the government and the later intensification of the war situation in the north to achieve this result. Consequently, some accused officers who were initially interdicted, were reinstated. The present incumbent in the office of the Inspector General of Police (then functioning as Deputy Inspector General) went an extra mile to issue a circular authorizing the reinstatement of interdicted police officers which was later struck down by the Court of Appeal as *ultra vires* the Establishments Code. [60]

Enforced Disappearances, Family Trauma and an Unsympathetic Legal Response

For years, some parents had refused to accept that their disappeared children were not among the living. The torment of the parents (or members of the family/loved ones) who suffered in the South from '87-'91 and continue to suffer in the North (as well as in the East) cannot be different from one another.

It is relevant in this context to examine perspectives arising from two cases, firstly from the South[61] and secondly the *Sarma Case*[62] that relates to enforced disappearance from the North, in order to illustrate the gravity of the problem faced by family members of victims in their appeals to the authorities.

In a case that was heard before the 1994 Presidential Commission of Inquiry to investigate the Involuntary Removal or Disappearances of Persons in the Western, Southern and Sabaragamuwa Provinces[63], the father of a disappeared child was a well known senior professor attached to a university. He pleaded with the Commission to assist him to find his son who had disappeared in 1988/9. The professor was extremely emotive when he said that on the day in question, his sixteen year old son had returned after school and had started cycling on the Sri Jayawardenapura main road (that leads to the country's Parliament which is a few kilometers away), when he had been forcibly removed. The professor stated that within fifteen minutes he had contacted the then President of Sri Lanka and requested for his help to save his son whereupon the President had promptly informed the Commander of the Army and other relevant authorities. However, this exercise proved to be of no avail. The professor stated that there was a rumor that the JVP had been planning to assassinate the Minister of Defense on the Sri Jayawardenepura main road that afternoon and at the time his son went missing, a large number of youngsters on that road had been forcibly removed. He said that he believed his son was being kept under arrest "in a large cave in an irrigational tank and due to the long

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[60] *Pathirana V.D.I.G. Perera and others*, C. A. Writ Application 123/2003 C.A. Minutes of 09.10.06. per Justice Sri Skandarajah.'
Ed Note; This decision is reproduced in this Issue of the Review.

[61] The father of the disappeared child discussed in this case is a well known professor in Sri Lanka and therefore it may not be appropriate to mention his name.

[62] *Sarma v Sri Lanka* No 950/2000, Adoption of Views by the United Nations Human Rights Committee on 31 July 2003,

[63] Sessional Paper No V – 1997 – Final Report of the 1994 Western, Southern and Sabaragamuwa Disappearances Commission.

lapse of time he may have forgotten many things, including his name and the only way to identify him would be by his unusual right sole which is bigger than the left, and his mild mental deformity."

The father was clearly under the tramutized belief that his son was still alive. His case exemplified many other similar instances that were investigated by the 1994 Western, Southern and Sabaragamuwa Disappearances Commission as well as the other two Commissions appointed with a specific geographical mandate of inquiry [64] These inquiries that took place over three years did not result in the effective prosecution of the perpetrators excepting a few stray cases.

The *Sarma case* is again another illustration of the anguish that family members face as a result of the enforced disappearances of their loved ones. Mr. Jegatheeswara Sarma, [65] was the father of the victim Thevaraja Sarma who had been removed from their residence in Anpuvalipuram by the army during a cordon and search operation. Several village youth had been forcibly removed in this operation. The desperate and helpless father, (seemingly not having immediate access for redress to any person in authority), had kept searching for his loved son from pillar to post, receiving replies different to one another from the authorities.

Finally on 25th October 1999, he addressed a communication to the United Nations Human Rights Committee in terms of the Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR) wherein he prayed for the immediate release of his son and for compensation for the disruption of his son's future. Like in the earlier case, this father too, (nine years after the enforced disappearance of his son), refused to admit that his son was not among the living. His communication was declared admissible by the Committee which thereafter went on to affirm a violation of his rights occasioned by the disappearance of his son.[66]

The point that needs to be made in reference to these two cases, (symbolic as they are of many more similar cases), is that there appears to be a psychological element that affects the mental stability of the victims' family members, thereby adversely impacting on their evidence. In these two cases and possibly in most cases of enforced disappearances, continuous attempts made for long periods of time to find the 'disappeared' persons had clearly affected the mindset of most family members. Motivated by such feelings, statements made to the police or other authorities to the effect that their children are kept in some place could have an adverse impact if during the trial, the judge acts on such statements to the extent of disbelieving the witness for making a contradictory or imaginary statement. In such a context, will the true ends of justice be met? Perhaps some of the present day judges may follow the easy path of acquitting rather than analyzing such complicated issues of evidence and assessing other evidential issues such as the contextual background in which these extraordinary events occurred and the overall credibility of the witnesses.

[64] namely the Central, North Western, North Central and Uva Provinces Disappearances Commission and the Northern and Eastern Provinces Disappearances Commission.
[65] *Supra*,n62
[66] *Ibid.*

Enforced Disappearances: Trials before the High Court

Sri Lanka's High Courts have acquitted the accused in a greater majority of cases of enforced disappearances[67] purely on account of the delay on the part of the family members of the victim in complaining to the police.

In most cases of enforced disappearances, family members of the disappeared persons did not make prompt complaints to the police due to a variety of reasons; the refusal of the police to entertain such complaints, the fear that the police will harm the person in custody or the family members, the apprehension that the police could abduct other male members of the family if complaints are made against them, the verbal assurances given by the police that the person in custody will be released soon, the instructions of friends and others to complain to the higher police authorities rather than to the local police and son. Thus, the family members of the abducted person were driven from pillar to post and after becoming exhausted and penniless, lost their interest in further pursuing the matter. There were instances where the members of the victims' familes (due to their poverty) made up their minds that the abducted person is dead (often after being so informed). Under such circumstances, it is not unusual at all for the family members to abandon hope of complaining against the police or military officers whom they suspected to be the perpetrators.

In this context, one has to understand the mindset of the members of the missing person's family. The government that prevailed for a few years after the worst of the disappearances occurred (1991-1993) was the same government under which state agents had engaged in causing those same disappearances. Consequently, the trepidation that an ordinary villager would feel in lodging a compliant at the police station was natural. This atmosphere obviously compelled people to decide not to pursue their complaints until there was a regime change, namely after 1994. However, this delay was often taken against them in the subsequent prosecutions.

Again, in the course of evidence before court, there were instances where it was revealed that the victim's family members made different statements at different times. For example, there were instances where it was revealed during the trial proceedings that the witness (say, a parent of the missing person) had stated before the 1994 Presidential Commission of Inquiry that the abduction was by the JVP and obtained compensation paid by the government thereafter. However, after obtaining these sums of money, the witness would state at the investigation (conducted subsequent to the Commissions recommendations to record their statements) that the abduction was by state agents and often name them in the process.

Further, in many cases of such acquittals, judges acted on the assumption that the police version of the statement of the family member of the victim (which did not identify the perpetrator and omitted vital details) was true and consequently disbelieved the witnesses.

However, this *per se* amounts to a denial of justice. The practices that the police resorted to during the '87-91' period of refusing to record complaints or recording them inaccurately is common knowledge.

[67] In Sri Lanka, enforced disappearance is not an offence and therefore the suspects are indicted under Section 356 (for the offence of abduction/kidnapping person) and Section 359 (for the offence of wrongfully concealing or keeping in confinement an abducted/kidnapped person) of the Penal Code.

It would therefore be necessary to bear in mind that although the 'belatedness' of a complaint could be taken into consideration as a ground for attacking the 'consistency' of the witness, such a course of reasoning should not be resorted to, to the extent of disbelieving the witness on that ground alone, as would be the case in ordinary matters. These situations were extraordinary to the highest degree and should be judicially treated as such. The simple approach should be to 'judge' the witness on his demeanor, and decide whether he is creditworthy or not. It is not the duty of the judge to create a doubt in order to give the benefit of the doubt to the defense. For the witness, the incident is one that cannot be forgotten in his life as it is often the only occurrence of that nature, specially, if the witness is a parent or family member of the missing person. Depending on the opportunity the witness had to observe the abduction, an average person, should possibly remember it well even after a couple of years. Therefore, in cases of this nature, the judge should follow a more practical approach rather than applying an imaginary reasoning of 'belatedness' applicable to cases under normal conditions.

In this context, the judgment in High Court Galle Case No.2073 is well worth discussing.[68]

Attorney General vs Abeysooriya Gunasekera Upali Chandrasiri [69]

In *Chandrasiri's case* two charges under Sections 356[70] and 359[71] of the Penal Code, regarding offences committed between 24th December 1989 and 17th February 1990 were leveled against Inspector of Police Chandrasiri who was then the Officer in Charge of the Hikkaduwa Police.

The key witness Kusumawathi, the mother of the abducted had been the Registrar of Marriages, Births and Deaths of the area. Seemingly the learned judge's only ground for disbelief of the witness concerned her failure to make a statement to the police for five years. The evidence of the other witness was viewed in the same manner and it was judicially opined that these belated statements may have been made to support and corroborate Kusumawathie.

However, some questions remain unanswered in this regard, first and foremost being the question as to why Kusumawathi would have wanted to falsely implicate the Officer in Charge several years later who, by that time that he had left that police station. The incident had taken place in broad daylight in the bazaar and was witnessed by many people. The witness had later visited her son at the police station as well. This evidence appears not to have been weighed in the scales.

The learned judge (in support of her decision) followed an observation of Justice Hector Yapa[72] in *Jayawardene' case* that by 1991 the country has reached normalcy and anybody could have made any statement at any police station. However, this need not necessarily have been the case for the reasons detailed hereinbefore. It is no secret that many people did not want to complain about enforced disappearances even after several years, until those incidents were reinvestigated by the Disappearances Commissions of Inquiry. The reasons for such inaction were quite clear; emotional trauma, fear of the police, etc, etc as discussed above. These reasons appear not to have been taken into account. In order to support her decision to acquit the accused, the learned judge refers to the lack

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[68] *Attorney General vs Abeysooriya Gunasekera Upali Chandrasiri* decision delivered on 29th July 2004.
[69] *Ibid.*
[70] Abducting with intent secretly and wrongfully to confine a person.
[71] Wrongfully concealing or keeping in confinement an abducted person.
[72] *Jayewardene & Others vs the State* (2000) SLR (3), at page 192.

of consistency on the part of Kusumawathi, apparently in regard to her not making the statement as soon as possible, an argument extended by Justice Yapa in *Jayawardene's case.*

Should Enforced Disappearance be made an Offence in Sri Lanka?

The offence of enforced disappearance is far more heinous than manslaughter. Manslaughter (or culpable homicide in Sri Lanka) is often influenced by factors such as a sudden fight, grave and sudden provocation & etc. whereas enforced disappearances amount to preplanned abductions with the prior intention of causing the victim to disappear from the face of the earth. Such person suffers in fear of death until he/she is killed. Unlike in cases of manslaughter where the fact of death and the cause of death are known, the dead body is not found in cases of enforced disappearances, sending the family members and loved ones in circles in search of the missing person. As was recognised by the UN Human Rights Committee in Sarma's case (examined above) they live for years in hope and anguish that the person will come back. His/her estate lies in an unsettled state.

By all norms, it is can only be fair and reasonable to attach the same penal responsibility applicable to murder to the offence of enforced disappearance. Therefore, it is submitted that, then no reason why 'enforced disappearance[73]' should not be made an offence in Sri Lanka. .

The Absence of the Doctrine of Command Responsibility

The principle of command responsibility "which holds superior officers in armed forces legally responsible for human rights abuses by subordinate officers if the official knew or should have known about them and failed to prevent them or punish those who committed them"[74] has not been yet recognized in Sri Lanka in any statute governing the armed forces[75] and the police[76]

Due to severe violations of human rights during the past 2-3 decades by the police and the armed forces, human rights organizations have consistently demanded that command responsibility should be brought in as a principle governing criminal liability in Sri Lanka. Command responsibility has been an internationally recognized norm of criminal liability for many decades and has been explicitly recognised in the relevant modern standards of international human rights law [77]

Undeniably, a major reason for the continuing unlawful conduct of the police and army personnel is the State's failure to take action against senior officers who are responsible for offences committed. In short, the doctrine of command responsibility is not considered as a basis of liability even with the availability of ample evidence to demonstrate liability on this ground.

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[73] The United Nations Declaration on the Protection of all Persons from Enforced Disappearances Resolution 47/133 dated 18th Dec.1992 states that Enforced Disappearances should be regarded as a crime against humanity. Under the Criminal Code Act (Australia) 1995, section 268.21 – enforced disappearances is a crime against humanity.

[74] Command Responsibility by Jeremy Brecher and Brenden Smith, http://www.counterpunch.com/brecher01122006.html

[75] Army Act – Legislative Enactments (Sri Lanka) 1980 Revision ch.625, Navy Act – Legislative Enactments (Sri Lanka) 1980 Revision ch.626, Air Force Act – Legislative Enactments (Sri Lanka) 1980 Revision ch. 627

[76] Legislative Enactments (Sri Lanka) 1980 Revision Ch.65.

[77] Rome Statute The International Criminal Court and more recently the Statute of the International Criminal Tribunal for the former Yugoslavia.

A clear demonstration of this lacunae relates to an incident that took place in 1971 when several army officers were indicted for murdering (presumably after raping) a 23 year old girl who had been crowned as a beauty queen, at Kataragama during the 1971 inserrection[78] overlooking the liability of the area commander on the basis of his orders to 'bump off' the arrested insurgents The subordinate officers (i.e. the officers who in fact committed the murder) were indicted making the area commander a witness. The Attorney General's inclination not to indict the area commander who, in fact, had ordered the 'bumping off' of the prisoners was a decision to be deplored in retrospect.

Though there cannot be more than a handful of high ranking police officers who were involved in killings, whether duty related or otherwise, whether during the '87-'91 era, in the North and the East or at some other time during their tenure of office, no action has been taken against these officers. Senior officers have been indicted very rarely by the Attorney General, primarily due to the lack of evidence on the basis of direct involvement. However, if the problem was approached on the basis of command responsibility, one could say with certainty that the prosecutions would have taken a totally different dimension. This would have been true, for example of the prosecutions in the *Embilipitiya disappearances case* (where the officer in charge of the camp at which more than fifty two schoolchildren had been detained and thereafter "disappeared' was acquitted due to the absence of evidence directly linking him to the disappearances) and the *Bindunuwewa massacre case* (where police officers who stood bye and allowed rehabilitation camp inmates to be massacred by Sinhalese villagers escaped criminal liability). In the latter case, the prosecution of the police officers on the basis of the offence of culpable inaction (though resulting in convictions in the High Court) did not find favour in the opinion of the Supreme Court which (in an extensively critiqued judgment) dismissed the convictions on appeal. [79]

Sri Lankan authorities have deliberately denied the significance of revising the necessary legal framework to hold superior officers liable for their own inaction and for the actions of their subordinates.

The following evidence recorded[80] by the 1994 Southern, Western and Sabaragamuwa Provinces Disappearances Commission will indicate the degree to which the doctrine of command responsibility had eroded within the structures of the Sri Lankan police during '87-'91 era.[81]

The evidence was recorded by the Commission in camera and not at the place where the usual sittings were held. The sequence of questioning may be slightly different to what was recorded in the Commission's proceedings.[82]

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[78] *Wijesuriya v the State* (77) NLR, at page 25

[79] S.C. Appeal 20/2003 (TAB) H..C. Colombo No. 763/2003 SCM 21.05.2005). See'*Bimudunuwewa & Embilipitiya: Questions of Substantial Justice*", Law and Society Trust Review, Volume 15 Issue 212 June 2005.

[80] This recording was in regard to the initial recording of evidence pertaining to the Batalanda torture camp

[81] The crux of the incident was that, during 87'-'91 era, a sub inspector of police (S.I.) had gone missing. A couple of days prior to his disappearance, the S.I. had assaulted and killed within the police station the brother of an underworld thug who was very powerful with some powerful politicians. The witness who was also a S.I. attached to another police station, went in search of his missing colleague (both had been friends from school days) when he met the A.S.P. of the area who had a notorious record for abductions. They were traveling in opposite directions and had stopped their vehicles at a railway crossing for a train to pass when the A.S.P. called the S.I. up to his vehicle, where this conversation ensued.

[82] The questions and answers are accurately reproduced to the best manner possible in which the account was related to this writer. To preserve anonymity, the name is not disclosed.

Q: When the Assistant Superintendent of Police (A.S.P) called you, did you go up to his vehicle?
Sub Inspector (S.I): No
Q: Why didn't you go? He is your senior officer.
S.I: I feared for my life.
Q: What do you mean? He is your superior officer.
S.I: The white van was behind his car. I was frightened.
Q: Why were you frightened of this van?
S.I: Rasendra was there.
Q: Who is Rasendra.
S.I: He is a brutal killer. He did all killings for the A.S.P. For him, it is a pleasure to kill people. This van follows the A.S.P's car wherever he goes. When the A.S.P was in Batticaloa Rasendra was taken by him to kill the Tamils.
Q: What did you do?
S.I: I held a lamp post. Took a grenade and threatened to throw it. Then some Army officers were passing by in a truck and saved me.
Q: You could have complained against the A.S.P. to his superior, the Superintendent of Police (S.P.).
S.I.: It would serve no purpose. The S.P. will not take any action against the A.S.P.
Q: Why? Why would the S.P. not take action against the A.S.P. who is his subordinate?
S.I. No way. The A.S. P. was so powerful and if he showed the sun to the S.P. and said that it is the moon, he would invariably agree with that view.

Supreme Court's Initiatives in the context of Fundamental Rights Applications Re Principles of Command Responsibility

There have been a few instances in the recent past where the Supreme Court of Sri Lanka has referred to command responsibility as a basis on which the Court has declared superior officers liable in applications against violations of fundamental rights.

In one such instance, Justice MDH Fernando stated:

> *"The 1st respondent's responsibility and liability is not restricted to participation, authorization, complicity and/or knowledge. His duties and responsibilities as the Commanding Officer were much more onerous. In the Forces, command is a sacred trust, and discipline is paramount. He was under a duty to take all reasonable steps to ensure that persons held in custody (like the petitioner) were treated humanely and in accordance with the law. That included monitoring the activities of his subordinates, particularly those who had contact with detainees. The fact that the petitioner was being held in custody under his specific orders made his responsibility somewhat greater."*[83]

In the course of the same judgment, Justice Fernando further stated "If indeed, the 1st respondent really did not know how the petitioner was being treated, that was willful ignorance due to want of

[83] *Deshapriya v Weerakoon* 2003 [2] SLR, at page 99

care, and not a genuine lack of knowledge"[84] thus, bringing culpable inaction as a basis of liability as well. In *Sriyani Silva V. Iddamalgoda, Officer in Charge, Police Station Payagala and Others*[85] Justice MDH Fernando came to a similar conclusion, that the fundamental rights of the petitioner had been infringed by the 2nd respondent; and also by the 1st respondent [who was the superior officer]on the ground of culpable inaction to monitor the activities of his subordinates.

It is interesting to note that culpable inaction has been referred to as a basis of liability in one of the cases reported at the turn of the 20th century (1898).[86] Bonser C.J. affirming the conviction of a Notary who failed to send his monthly returns as contemplated by section 26 of the Notaries Ordinance (Act 2 of 1877) stated, "The conviction, however, should be amended by substituting the word " neglect" for the word " fail." A man may fail to do something required by law to do owing to some inevitable accident, whereas neglect is a culpable omission.

4. The Attorney General's Department - Its Functioning During'87-'91 and thereafter.

A former Attorney General in Sri Lanka, Mr. Siva Pasupathi[87] in commenting on the question of the balance to be struck by the officers of the Attorney General's Department in regard to the public and social interest on the one hand and the individual interests on the other, stated:

> *"In the decision making process, legal, equitable and policy considerations come into play and the ultimate decision of the Attorney General is based on a harmonious blend of all these considerations which is in consonance with principles of justice and equity,"* [88]

There is no doubt that there is a bounden duty on the part of the officers of Attorney General's Department to present facts in their proper perspective when a case is presented by them before court. Though this is the theory, this is, at times not reflected in practice. For example, it is disheartening to note that the Attorney General did not act impartially during the late '80's especially in *habeas corpus* applications made on behalf of the disappeared. It is well known that the Attorney General's Department had a special 'unit' to handle *habeas corpus* applications, established by then Attorney General Mr. Sunil Silva (who was Mr Siva Pasupathi's successor) and whose impartiality was much in doubt.

It is indeed a pertinent question as whether the present day decision making process in the Attorney General's Department is a harmonious blend of those different considerations which Mr Pasupathi anticipated.

5. The Judiciary – Displacing of International Standards of Human Rights?

In *Weerawansa v AG*[89] Justice MDH Fernando stated that the State must respect international treaty obligations. In the course of this judgment, he stated

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[84] *Ibid.* at page 104
[85] 2003 [2] SLR, 63
[86] *Queen v Tilakaratna* 3 NLR, at page 208 [DC (Criminal), Galle, 12,620]
[87] He held the office of Sri Lanka's Attorney General for 14 years, until 1988.
[88] Pasupathi, Siva. *A Brief Description Of The Court Defence Of State Administration And The Role Of The Attorney General In Sri Lanka*, at pages 10 (unpublished)
[89] 2000 (1) SLR 387

"Should this Court have regard to the provisions of the Covenant? I think it must. Article 27(15) requires the State to "Endeavour to foster respect for international law and treaty obligations in dealings among nations". That implies that the State must likewise respect international law and treaty obligations in its dealings with its own citizens, particularly when their liberty is involved. The State must afford to them the benefit of the safeguards which international law recognizes" [90]

This statement is an exemplary recognition of the State's obligation not to act contrary to its international obligations even when such international obligations have not been incorporated into domestic law. These principles have been reiterated in other judgments of the Supreme Court and some judgments of the Court of Appeal. In the latter category falls the *Leeda Violet case* [91] where Justice Sarath Nanda Silva J. (as he then was) used principles of international human rights law to uphold the rights and liberties of people. Justice Silva was pleased to quote Justice MDH Fenando's following observation:

"The powers conferred on the Court of Appeal are not subject to any such implied condition or restriction. Being a Constitutional provision intended to safeguard the liberty of the citizen, the proviso must receive a liberal construction."

Justice Silva also quoted passages from Sir Nigel Rodley's book entitled "The Treatment of Prisoners under International Law"[92] The learned author had traced the modern genesis of the phenomenon of disappearances to the NACHT UND NEBEL DECREE of Nazi forces in occupied Europe. According to this decree, suspected resistance movement members could be arrested and secretly transferred to Germany "under cover of night". This measure was to have "a deterrent effect because the prisoners will vanish without leaving a trace, no information may be given as to their whereabouts or fate."

Justice Silva further cited the following quote from a decision of The Inter American Human Rights Court in the *Velasques Rodriguez case*[93]

"Disappearances are not new in the history of human rights violations. However, their systematic and repeated nature and their use, not only in causing certain individuals to disappear, either briefly or permanently, but also as a means of creating a general state of anguish, insecurity and fear, is a recent phenomenon ... The phenomenon of disappearances is a complex form of human rights violation that must be understood and confronted in an integral fashion."

Exemplary costs were ordered against the respondents. Yet the comparison of Justice Silva's judgments in *Leeda Violet's case* and *Sinharasa's case* [94] (which was written as Chief Justice of Sri Lanka) is pertinent at this point. In *Leeda Violet's case*, Justice Silva sitting as a judge of the Court of Appeal agreed with international norms condemning disappearance as a 'complex violation of human rights' when enforced disappearance was not an offence under the law of this country, which situation

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[90] *Ibid* at page 410.
[91] *Leeda Violet & Others v Vidanapathirana & Others,* (1994) [3] Sri LR, 277, per judgment of Justice Sarath Nanda Silva as he then was
[92] "Disappeared Prisoners: Unacknowledged Detention, published by UNESCO
[93] (1989) Judgment dated 29th July 1998(Ser.C.) No.4 (1998)
[94] SCM 15.09.2006, judgment of Chief Justice Sarath Nanda Silva

continues to date. However, he took a far stricter view concerning the relevance of international human rights obligations in the *Sinharasa case*[95] where the Presidential act of accession to the Optional Protocol to the International Covenant on Civil and Political Rights was declared to be unconstitutional on the basis that 'judicial power' had been conferred thereby on the United Nations Human Rights Committee. Use of the Protocol's individual communications procedures was declared to have no domestic effect until a law was passed conferring such authority which had to secure not only the approval of a two thirds majority of parliamentarians but also the assent of the people at a referendum.

7. Conclusion

The foregoing analysis reveals the lack of legislative initiatives to arrest the shortcomings that exist in the criminal justice system in Sri Lanka, having regard particularly to the workings of the Attorney General's Department, the functioning of the police and even the means by which criminal justice proceedings are conducted.

As demonstrated above, even the promise held out by the highest court in the land in decisions such as *Sriyani Silva vs Iddamalgoda*,[96] *Weeranwansa vs. A.G.*[97], and *Deshapriya vs. Capt. Weerakoon* [98]and *Leeda Violet's Case*[99] have not enabled explicit statutory change in relation to changing the current legal climate in respect of accountability for enforced disappearances. Until the legislature responds positively and the Courts develop a pro-active and sensitive commitment to fill those gaps in the existing law and the criminal justice system, the said shortcomings will continue to be the bane of the country.

[95] *Ibid.*
[96] *Supra* n85
[97] *Supra*, n89
[98] *Supra*, n83
[99] *Supra*, n91

IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an Application for the Issue in the nature of Writs of Certiorari and Mandamus under Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Seemanmemeru Pathiranage Shantha
Dharmapriya Pathiraua,
155/B, Duwa Road,
Kolamcdiriya North,
Bandaragamua

Petitioner

C.A. Writ Application N 1123/2002

Vs

1. Mr. Victor Perera
   DIG / Personal Training1 Police Head Quarters, Colombo 1.
2. Mr. Nihal Dharmadasa, Senior Superintendent of Police, Director Personnel Human Resources and Employees, Police Head Quarters, Colombo 1.
3. Inspector General Of Police, Police Head Quarters, Colombo 1.
4. Director Establishment, Ministry of Public Administration, Colombo 7.

Respondents

BEFORE	:	S. SRISKANDARAJAH, J.
COUNSEL	:	Hemantha Situge with WR Sanjeewa and M.K.P. Chandralal for the Petitioner Ms. Farzana Jameel SSC for the Respondents.
ARGUED ON	:	21.06.2006 and 2107.2006
WRITTEN SUBMISSION	:	Petitioner on - 4.09.2006
DECIDED ON	:	09.10.2006

S. Sriskandarajah, J

The Petitioner in this application is seeking a writ of certiorari to quash a circular letter of 5th January 2001 issued by the DIG, Personnel and Training marked P5 directing all DIGG Ranges, SSPP Divisions (Territorial and Functional) to reinstate all officers who have been interdicted following the

inquiries conducted by Disappearance Investigation Unit (DIU) and charged in courts but subsequently bailed out in connection with the cases of disappearance of persons.

The Respondent raised two preliminary objections. The first objection is that the Petitioner has no legal interest with regard to the administrative decision of the Police Force and the second objection is that the Petitioner has failed to file this application within reasonable time from the impugned decision dated 5.1.2001.

I will first deal with the first preliminary objection on the question of standing first and the objection of delay will be dealt with at the end of this judgment.

The Petitioner submitted that he was subjected to (sic) traumatic suffering during the period 1989 - 1990 due to the disappearance of his brother Seemonmeru Pathiranage Sudath Deshapriya Pathirana who disappeared on 10.12.1989. He is at present the General Secretary to the Organization of Parents and Family Members of the Disappeared OPFMD). He further submitted that his brother was the Secretary of the Republic Health Workers Trade Union, affiliated to the Nava Samasamaja Party. In relation to his disappearance, his mother made a complaint to the Police Station Borella and his father made a similar complaint to the Commission of Disappearances. Copies of the said complaints are marked as P2a to P2 j. The Petitioner's brother is found among the disappearance list enlisted by the Commission of Disappearance in 1997 (P3). The Petitioner submitted that he and his home front has been left in total misery of life by the disappearance of his brother as the Petitioner was the sole bread winner of his family. When dealing with standing of an applicant in a Fundamental Rights Application Bandaranayake J observed, in *Lama Hewage Lal v Officer in Charge, Miner Offences, Seeduwa Police Station, Supreme Court Minutes of 26th July 2004:*

> *"A careful reading of Article 13(4) of the Constitution clearly reveals that no person should be punished with death or imprisonment except by an order of a competent court. Accordingly if there is no order.. no person should be punished with death and unless and otherwise such an order is made by a competent court, any person has a right to live... Article 13(4) should be interpreted broadly to mean that the said article recognizes the right to life impliedly and that by reading Article 13(4) with Article 126(2) of the Constitution which would include the lawful heirs and or dependents to be able to bring an application in a situation where the death had occurred as a result of a violation of Article 11."*

In applications for writs, the courts have relaxed the rules of standing even wider than the rules of standing in fundamental right applications in order to ensure good administration. In *Shell Gas v Consumer Affairs Authority Court of Appeal Minutes of 23 August 2004* Marsoof J observed:

> *"Courts in Sri Lanka as well as in other Jurisdiction have liberally interpreted rules of standing in regard to matters of vital concern to society Time and time again, our Courts have repeated that the fact that the irregularity or the grievance for which redress is sought is shared by a large number of people or society as a whole would not prevent one of the many affected persons from seeking relief from the courts there can be no doubt that a consumer such as the intervenient -Petitioner will have locus standi to challenge an order or action of a statutory body such as the Consumer Affairs Authority in an appropriate case...."*

An association or group seeks to represent some or all of its members were also said to have standing in relation to the matters affecting the interest of their members; *Consumers Association of Lanka v Telecommunications Regulatory Commission of Sri Lanka and others CA (Writ) Application No 1776/2003 CA Minutes 25.7.2005.* In *Jayathilaka v Jeevan Kumarathunga and Others CA (Writ) Application No.1312/2004* reported in the BASL News, August 2004. A person who has a long standing association and interest in a particular field such as sports was given standing to challenge an appointment of the Chef De Mission for Olympic Games. A movement called Green Movement of Sri Lanka was given standing in *CA (Writ) Application No. 2047/2003 C.A. Minutes 06.06.2006* where the Green Movement of Sri Lanka having the objects of preserving the environment and natural resources of Sri Lanka, instituted proceedings on the complaint of the villagers who are directly affected but does not have sufficient resources to present their grievance before a court of law.

The Petitioner of this application is the General Secretary to the Organization of Parents and Family Members of the Disappeared (OPFMD). In addition the Petitioner himself is directly affected by the disappearance of his brother. The Petitioner submitted that he and his home front have been left in total misery of life by the disappearance of his brother. The Petitioner's brother is found among the disappearance list enlisted by the Commission of Disappearance in 1997 (P3). In these circumstances this court holds that the Petitioner has *locus standi* to have and maintain this application.

The Petitioner submitted that during 1989-1990 when disappearance of persons both in north and south of the country were at its highest and the violations of the rights of people were at optimum levels, (sic) persons had been taken into custody from their homes, at checkpoints or at round-ups and often confined incommunicado and tortured and many of them are no more, which includes his brother. A Presidential Commission was appointed by her Excellency the President on or about 1995 June to inquire into these disappearances. Consequent to the finding of this Commission, the Attorney General had framed charges against more than 450 police and security force personnel against whom there is adequate evidence to prosecute them in Courts. Ordinarily any officer of state, be it the police officer or otherwise, against whom a criminal case has been filed has to be interdicted from service until the conclusion of the case and dismissed if he is convicted. This was done in terms of provisions in the Establishment Code, which *inter alia*, deal with disciplinary procedures against state officers.

The Petitioner further submitted that the 1st Respondent issued a circular with the approval of the 3rd Respondent marked P5 in violation of the provisions envisaged in the Establishment Code. The Petitioner contended that by the said circular all DIGG and SSPP are directed to re-instate all officers who have been interdicted following the inquiries conducted by the Disappearance Investigation Unit and charged in courts but subsequently bailed out in connection with cases of disappearances of persons and that (sic) this direction is a violation of the provision of 27:10 of the Establishment Code Volume II.

It is admitted that the power of dismissal and disciplinary control of Police officers referred to in the said circular are governed by the Establishment Code of the Government of the Democratic Socialist Republic of Sri Lanka Volume II which came into force on 1st November 1999. According to the provisions of Chapter XLVIII 2:3, the powers of dismissal and disciplinary control of all Police Officers referred to in the said circular are vested with the Public Service Commission (during the relevant time) and these powers were delegated by the Public Service Commission by its letter dated 14th December 1992 (3R3) and annexure A gives the details of delegation.

It provides:

> *"The power of dismissal and disciplinary control of Police Officers of the rank of Chief Inspector and Police Officers of and below the rank of Inspector in the Police Department, i.e. all subordinate officers to whom disciplinary powers are not delegated, are delegated to the officers of staff rank (ASP and above as given in the annexed schedule)."*

The 3rd Respondent contended that subsequent to the filing of cases in court, the relevant officers were interdicted. Most of these cases were (sic) based on the complaints made between 1989 and 1990, i.e. more than ten years ago and the accused were enlarged on bail but continued to be under interdiction. Some of these police officers filed SC Application Nos 146/99, 147/99 and 152/99 and one of them applied to the Human Rights Commission by case No 111/2000 stating that they were kept on interdiction unfairly for over 10 years. The 3rd Respondent farther contended that considering the facts stated in the above applications he issued circulars dated 5.01.2001, P5 (3RI) and 6.06.2001, 3R2 as per the authority vested in him under the provisions of 27:8 and 27:9 of Chapter XLVIII of the Establishments Code. It appears that P5 & 3R1 was issued by the 1st Respondent with the approval of the 3rd Respondent. The document 3R2 which gives discretion in implementing P5 (3R1) to Ranges DIGG was issued by the 3rd Respondent.

The Petitioner filed certified copies of the orders of the aforesaid SC Applications with his written submissions. It appears all the aforesaid applications were withdrawn and the Supreme Court has dismissed the said applications.

Chapter XLVIII of the Establishments Code provides in

> 27:8: When a public officer taken into custody by the Police or any other statutory authority is released from custody, he should be reinstated. However, if such reinstatement would obstruct a formal disciplinary inquiry scheduled to be held by the Disciplinary Authority, the accused officer should not be reinstated but interdicted.
>
> 27:9 When an officer remanded pending legal proceedings against him is released on bail, he should be reinstated in service if the Disciplinary Authority determines that his reinstatement will not adversely affect the interests of the public service. If the disciplinary authority is satisfied that his reinstatement in service will adversely affect the interest of the public service he should be further kept on compulsory leave. Similarly, where the Disciplinary Authority contemplates disciplinary action against the officer and his reinstatement is an impediment to the contemplated disciplinary proceedings the officer should be interdicted as appropriate.

Procedure to be followed when Court of Law or a Statutory Authority proceeds against a public officer is provided in paragraph 27 of Chapter XLVII of the Establishment Code. Paragraph 27:1 deals with a criminal offence punishable under the Law of Sri Lanka by a Court of Law as disclosed; paragraph 27:2 deals with an offence of bribery or corruption as disclosed and paragraph 27:3 deals with an offence punishable through a duly authorized statutory authority or institution (e.g. Director General of Customs, Commissioner General of Income Tax) for violating any provision in an Act passed by the Legislature of Sri Lanka as disclosed. Paragraph 27:8 deals with a public officer who had been taken in to custody by the Police or any other statutory authority and released from custody

and Paragraph 27:9 deals with an officer remanded pending legal proceedings and released on bail. In this instant case following the inquires conducted by the Disappearances Investigation Unit, charges were framed by the Attorney General against the accused police officers in court and pending the trial the accused officers were released on bail. This position cannot be construed as a stage falling under paragraph 27:8 or 27:9 but it is a stage covered by paragraph 27:10.

Paragraph 27:10 provides:

> 27:10 where legal proceedings are taken against a public officer for a criminal offence or bribery or corruption the relevant officer should be forthwith interdicted by the appropriate authority. (the emphasis is mine)

Instead of the word "or" the word "of" is used in the English translation of the Establishment code. The Sinhala version of the Establishment Code reads as "criminal offence or bribery or corruption". The Establishment Code contains matters relating to public officers including powers of appointment, transfer, dismissal and disciplinary control based on cabinet approval, it is an official document and its original has to be in the (sic) official language. Therefore reliance has be placed in the Sinhala and Tamil text of the Establishment Code and not on the English translation. It also appears that the criminal offences and the offence of bribery or corruption are dealt with separately in 27:1 and 27:2 and therefore the proper construction of the words in the English text in paragraph 21:10 should be read as "criminal offence or bribery or corruption but not as "criminal offence of bribery or corruption".

If criminal proceeding are taken against a public officer, he should have been dealt with under paragraph 27:10 When legal proceedings are taken against a public officer, he has to be considered as an officer who has passed the stage of taking into custody and/or remanded pending legal proceedings, therefore he cannot be considered under paragraph 27:8 or 27:9 of Volume II the Estabhshment Code. Under paragraph 27:10, if legal proceedings are taken against a public officer for a criminal offence it is mandatory for the relevant authority to forthwith interdict that officer.

In *Elmore Perera v Major Montagu Jayawikrema, Minister of Public Administration and Plautation Industries and Others [1985] 1 Sri L R 285 at 335* Wanasundara J observed:

> *'The Establishment Code is the basic document relating to procedures of disciplinary action against public officers. It has been formulated by the Cabinet of Ministers under Article 55 of the Constitution in whom such a power is reposed. This formulation has the characteristic of a policy decision as it deals with the broad principles and procedures governing disciplinary action against officers of practically the entire public service in this country. The particular weight to be attached to this Code could be judged from the fact that public officers in this country under the new constitutional provisions have now been brought entirely within the domain of the Executive. Any complaints from public officers relating to their appointment, transfer, dismissal or disciplinary control cannot be entertained by the ordinary courts and decisions of the Cabinet, the Public Service Commission, or their delegates in regard to any of the above matters cannot be canvassed in a court of law - Article 55 (5). The only matter that a public officer can take to the courts, - and that only to the Supreme Court under Article 126 - is a violation of a fundamental right and no other. The administration of the public*

service is now an internal, matter of the Executive It would however appear that the Cabinet, after due deliberation, has sought to formulate a Code of regulations containing fair procedures and safeguards balancing the requirements and interests of the Government with the rights of public officers, and the legal protection now provided by the law to public officers is contained in this Code These procedures are therefore mandatory and cannot be superseded or disregarded without due legal authority."

The (sic) same view was expressed by Wanasundara J with L.H.D. Alwis J and Senevaratte J agreeing in *The Public Services United Nurses Union v Montagu Jayewickrema, Minister of Public Administration and Others (1988) I Sri L R 229 at 236*

The contention of the 3rd Respondent is that he relied on the provisions in paragraph 27:8 and 27:9 of the Code and issued the impugned circular. The provisions in paragraph 27:8 and 27:9 on which the 3rd Respondent claims to have relied on has no application in this instant situation. Here the Police Officers after an investigation by the Disappearances Investigation Unit and after the consideration of the Attorney General, were charged in Courts for serious criminal offences relating to disappearance of persons and the cases are not concluded, As I have discussed above, the 1st Respondent or the 3rd Respondent the Inspector General of Police has no authority whatsoever to ignore the mandatory provisions laid down in paragraph 27:10 of the Code in issuing the impugned circular P5.

In these circumstances I hold that the circular issued by the 1st Respondent on 5th January 2001 (P5) with the approval of the 3rd Respondent to reinstate all officers who have been interdicted and charged in courts but subsequently bailed out in connection with cases of disappearance of persons is ultra vires. Atkin L.J. in *R v Electricity Commissioners exp. London Electricity Joint Committee Co (1920) Ltd (1920) 1 KB 171* held that the writ of certiorari will be issued "wherever any body of persons having legal authority to determine questions affecting the rights of subjects and having the duty to act judicially act in excess of their legal authority" In this instant case, the 3rd Respondent has acted in excess of its legal authority in issuing the said circular. In *The Surveyors, Institute of Sri Lanka v The Surveyor — General and Another (1994) 2Sri L R 319* Kulatunga J with G.P.S. De Silva, CJ and Ramanathan J agreeing issued a writ of certiorari to quash a circular issued by the Surveyor — General as it is *ultra vires.*

I will now deal with the second preliminary objection raised by the respondents i.e. the application is belated. The impugned circular was issued on 5.01.2001 and this application was filed on 9th July 2002. The Petitioner submitted that the said circular is an internal circular sent by the 1st Respondent to all DIGG ranges, SSPP Divisions (Territorial and Functional) and the Petitioner came to know about the said circular P5 only when he received the reply from the 2nd Respondent dated 18.4.2002 (P4) to a letter written by his Attorney at Law on 08.03.2002. In *Varakesari Ltd v Fernando 66 NLR 745* the court held that an application for a writ of certiorari will not be refused on the ground of delay if the delay is not attributable to the petitioner. Senanayake, J in *Chas P Hayley and Co. Ltd v Commercial and Industral Workers and Others (1995)2 Sri L.R 42* held that laches (sic) could be excused if the order is a nullity In the above circumstances as the circular P5 is a nullity, this court overrules the second preliminary objection of laches (sic).

The learned Senior State Counsel for the Respondents objected to the relief claimed by the Petitioner on an additional ground urged at the time of argument namely; that the impugned circular was in

operation from 2001 January and if it is quashed by this court now, it will cause administrative inconvenience. In view of this submission, this court requested the Counsel for the Respondent to produce the list of officers who were benefited by the impugned circular Document X, Y and Z were produced by the respondents giving the list of officers A perusal of this list shows that twelve officers were reinstated after the circular came into effect and one of them were reinstated after this action was instituted. *In Consumers Association of Lanka v Telecommunications Regulatory Commission of Sri Lanka and Three Others* CA/WRIT/App/No.1776/2003 CA minutes 25.07.2005 this Court held; citing the Judgment *Congreve v Home Office* [1976] QB 623 that when an order is *ultra vires*, the order was acted upon and the quashing of that order would cause administrative inconvenience cannot be a criteria to refuse a writ of certiorari.

For the reasons stated above this Court issues a writ of certiorari quashing the circular dated 5th January 2001 issued by the Respondent with the approval of the 3rd Respondent marked P5. The application for writ of certiorari is allowed with costs.

Judge of the Court of Appeal

Draft Bill for the Protection of Victims of Crime and Witnesses

An Act to provide for the establishment of the National Authority for the Protection of Victims of Crime and Witnesses; to provide for the protection and promotion of the rights of Victims of Crime and Witnesses; to provide for the protection of victims of crime and witnesses, to set out the rights and entitlements of Victims of Crime and Witnesses ;for the establishment of the Victims Compensation and Victim and Witness Protection Fund; and/or matters/or connected therewith or incidental thereto.

Be it enacted by the Parliament of the Democratic Socialist Republic of Sri Lanka as follows,

Part I

1. This Act may be cited as the Protection of Victims of Crime and Witnesses, Act No ..... of 2006. Short Title

2. The objects of this Act shall be to Objects of the Act

(a) provide for the establishment of the National Authority for the Protection of Victims of Crime and Witnesses;
(b) stipulate the functions and powers of the National Authority for the Protection of Victims of Crime and Witnesses;
(c) stipulate the organizational structure of the National Authority for the Protection of Victims of Crime and Witnesses and to provide for the effective management of the said Authority
(d) stipulate the rights and entitlements of victims of crime and witnesses and to provide for mechanisms for the enforcement and enjoyment of such rights and entitlements;
(e) provide for the rendering of assistance and protection victims of crime and witnesses;
(f) enable victims of crime to obtain compensation from persons convicted of having committed offences against them;
(g) provide for the establishment of the Victim Compensation and Victim and Witness Protection Fund;
(h) provide for the establishment of the Victim and Witness Protection Division of the Sri Lanka Police Department;
(i) provide for the duties and responsibilities of judicial officers and public officers towards the promotion of rights and for the protection and providing of assistance to victims of crime and witnesses; and
(j) stipulate certain offences that may be committed against victims of crime and witnesses; and
(k) provide for matters connected therewith or incidental thereto.

3. (1) There shall be an Authority called the National Authority for the Protection of Victims of Crime and Witnesses (hereinafter referred to as 'the authority'). National Authority for the protection of victims of crime and witnesses.

(2) The authority shall, by the name assigned to it by subsection (I), be a body corporate with perpetual succession and common seal, and may sue and be sued in such name.

4. (1) The formulation of policy and supervision of the administration and management of the affairs of the authority shall be vested in a Board of Management (hereinafter referred to as 'the Board'). Board of Management

(2) The Board shall comprise of five members including the Chairman of the Board. The Board shall consist of –

(a) two members academically or professionally qualified and/or experienced in fields of professional activity associated with the criminal justice system, appointed by the Minister in charge of the subject of justice;
(b) a nominee of the Attorney General;
(c) Secretary to the Ministry of the Minister in charge of the subject of Justice or his nominee; and,
(d) a nominee of the Inspector General of Police holding-- the- rank of an Senior Deputy Inspector General of Police.

The Minister shall appoint the Chairman

(3) The provisions of the first schedule to this Act shall apply to the resignation and removal of, the term of office of, and the remuneration payable to, the members of the Board.

5. (1) There shall be a Director General of the Authority who Director General shall be in charge of the management and administration of the affairs of the Authority. Director General

(2) The Director General-of the Authority shall be the chief executive officer of the Authority.

(3) The Director General shall be appointed by the Board of Management in consultation with the Advisory Commission.

6. The functions of the Authority shall be to — Functions of the Authority.

(a) promote recognition of, and respect for, the rights of victims of crime;
(b) promote the recognition of and respect for the entitlements of victims of crime and witnesses?

(c) cause the protection of the rights and entitlements of victims of crime

(d) advice or make recommendations to the Sri Lanka Police Department, to other relevant government departments and statutory institutions, and to pubic officers either generally or on a case by case basis, on appropriate and specific measures to be taken, adopted or implemented with the view to giving effect to the enjoyment of rights and entitlements of victims of crime and witnesses, and in particular regarding the providing of (a) effective protection, (b) necessary rehabilitation and (c) other assistance, to victims of crime, members of their families and witnesses;

(e) review existing Legislation, practices-and procedures for their conformity with internationally recognized standards relating to the promotion and protection of the rights and entitlements of victims of crime and witnesses, and based on such review, to make recommendations to appropriate authorities for the adoption, amendment and application of relevant legislation, practices and procedures;

(f) take measures to sensitize public officers involved in the enforcement of the law (including but not limited to, officers of the Sri Lanka Police, the Prison Department government medical officers, and public officers associated with probation and social services), on needs of victims of crime and witnesses, and on the special needs of particular categories of victims of crime arising from the harm inflicted on them or from their gender, religion, language, cultural beliefs and practices, ethnic or social origins or disabilities;

(g) promote and recommend the observance and application of codes of conduct and internationally recognized standards relating to the protection of the right of victims of crime and entitlements of witnesses by courts of law, public officers and employees of statutory bodies involved in the enforcement of the law (including but not limited to, officers of the Sri Lanka Police, the Prison Department, government medical officers, and officers of government social service institutions);

(h) conduct or promote the conduct of research into ways in which incidents of crime can be reduced or prevented and victims of crime can be rehabilitated, assisted, compensated and protected;

(i) recommend to appropriate government institutions, social, health, educational, economic and crime prevention policies, for the reduction of incidence of crime and for facilitating assistance and protection to victims of crime;

(j) recommend the adoption of measures of restitution to

victims of crime of crime as a sentencing option in the criminal justice system;

(k) make recommendations generally, for the prevention, detection, investigation and the prosecution, of offences; and

(l) promote community participation in crime prevention.

Powers of the Authority.

7. The Authority shall have the power to —

(a) acquire, hold, take, or give on lease or hire, mortgage, pledge, sell or otherwise dispose of any movable or immovable property;

(b) enter into all such contracts as may be necessary for the proper discharge of its functions;

(c) open and maintain, current, savings or deposit accounts in banks;

(d) appoint, dismiss, and exercise disciplinary control over, employees, contractors, consultants, advisors as nay be necessary for the proper discharge of its functions;

(e) accept and receive, gifts, bequests and grants from sources in Sri Lanka or aboard, and to apply them for the proper discharge of its functions;

(f) determine the remuneration payable including the salaries, allowances and other conditions of employment applicable to the Director General, other employees, contractors, advisors and consultants of the Authority; and

(g) generally, to do all such other things as may be necessary for the proper discharge of its functions.

Advisory Commission.

8. (1) There shall be an Advisory Commission on Victims of Crime and Witnesses (hereinafter referred to as 'the Advisory Commission') to advice the Board of Management and the Director General on the policy and overall direction to be adopted by the Authority and, the general discharge of the functions of the Authority.

(2) The Advisory Commission shall consist of –

(a) the Chief Justice or his nominee;

(b) the Attorney General or his nominee;

(c) the President or nominee of the President of the Bar Association of Sri Lanka;

(d) Inspector General of Police or his nominee holding the rank of Senior Deputy Inspector General of Police;

(e) the Chairman of the Legal Aid Commission;

(f) five persons appointed by the Minister in charge of the subject of justice, who are academically or professionally qualified and or experienced in medicine and more

particularly psychological medicine, promotion and protection of human rights, social service or welfare, probation and rehabilitation of victims of crime ; and,

(g) one person appointed by the Minister in charge of the subject of justice, who has experience in voluntary social service in the area of the promoting and protecting the rights of victims of crime and providing assistance to victims of crime and who shall represent non-governmental organizations working in the field of providing assistance to victims of crime.

(3) The provisions of paragraphs (1), (2), (3), and (4) of the first schedule to this Act shall, *mutatis mutandis*, apply to members of the advisory commission appointed under paragraph (g) of subsection (2).

(4) The Advisory Commission shall meet once a month or more frequently to discharge its functions.

(5) It shall be the duty of the Board of Management and the Director General to act on the advice of the Advisory Commission.

Officials of the Authority deemed to be public officers.

9. Members of the Board of Management, the Director General and other employees of the Authority, and members of the Advisory Commission, consultants and advisors of the Authority when they discharge functioned of the Authority, shall be deemed to be public officers.

PART II

Rights and entitlements of victims of crime.

10. (1) A victim of crime has

(a) the right to be treated with fairness and with respect for his or dignity and privacy;

(b) the right to receive, through formal and informal procedures available, prompt and fair redress for the harm which he has suffered;

(c) the right to be informed of the remedies available in law for the redress of the harm which he has suffered;

(d) the right to be informed of;

(i) the dates fixed for the hearing,

(ii) the progress and disposal,

of judicial proceedings relating to the relevant offence, and his role and entitlements in such proceedings;

(e) the right to be informed of

(i) the release on bail, and the discharge of the suspect,

(ii) institution of criminal proceedings against the accused,

(iii) conviction, sentencing or acquittal of the accused,

(iv) release from prison of the convict, who had committed or is alleged to have committed an offence and inflicted harm or suffering on the relevant victim of crime;

(f) the right to be present at all judicial proceedings relating to the relevant offence, unless the court determines that his or her evidence would be materially affected if he or she heard other evidence at such proceedings;

(g) the right to be reasonably protected, and to have his family protected, from intimidation and retaliation;

(h) the right to be informed of medical and social services and other assistance available for the treatment and amelioration of the harm caused to him or her;

(i) the right to be represented at the several stages of the criminal proceedings relating to the relevant offence and to be provided with legal assistance for such purpose;

(j) following the conviction of the offender and prior to the determination of the sentence, the right to either personally or through legal counsel submit to court the manner in which the relevant offence had impacted on his body, state of mind, employment, profession or occupation, income, family, quality of life and / or property.

(2) It shall be the duty of every public and judicial officer to respect, protect and advance the rights referred to in subsection (1).

(3) A victim of crime shall be entitled to apply to the Authority and obtain financial assistance to receive medical treatment for bodily or mental injury or impairment suffered as a result of being subject to an offence.

(4) A victim of crime or a witness who has reasonable grounds to believe that harm may be inflicted on him in relation to his cooperation with an investigation into an offence or participation or intended participation in any judicial proceedings, shall be entitled to seek protection from real or possible harm arising out of or aimed at retaliation or intimidation in relation to or in consequence of his cooperation with a law enforcement authority or testimony given before any court of law or intended testimony to be given in a court of law.

(5) A request for protection in terms of subsection (4) of this section shall be made to the Authority or to the Victim and Witness Protection Division of the Sri Lanka Police Department or to the officer-in charge of any police station.

(6) An officer-in charge of a police station who is in receipt of a request made in terms of subsection (5) of section, shall promptly

take steps to inquire into the request made for protection, and if circumstances so require forthwith provide necessary protection, and immediately communicate the receipt of such request and information pertaining to action taken by him following the receipt of such request, to the Authority and to the Victim and Witness Protection Division of the Sri Lanka Police Department.

11. (1) Notwithstanding anything to the contrary in the Judicature Act and the Code of Criminal Procedure Act, every High Court and Magistrates Court may upon conviction of a person by such Court, order the convicted person to pay compensation in an amount not exceeding one million rupees. Compensation

(2) Before making a determination on quantum of compensation to be paid, the presiding Judge shall call for and examine material relevant to the victim of crime including the report of the government medical officer who had examined the victim and other material that may enable the court to determine the nature and- the extent of damage, toss or harm that the victim of crime may have suffered as a result of being subject to the offence the persons convicted of had been charged.

(3) Following the payment of such compensation, the presiding Judge shall after apportioning ten percent of such monies paid to be remitted to the Victim Compensation and Victim and Witness Protection Fund and deducting any sum of money the victim nay have already received from the Victim Compensation and Victim and Witness Protection Fund, determine the manner in which the remaining sum of money should be paid to the victim of the relevant offence and other persons who may have suffered from the commission of such offence.

(4) Following the payment of such compensation, the presiding Judge shall direct the payment of ten percent of the relevant sum of money and any sum of money which may have already been paid to the relevant Victim of Crime from the Victim Compensation and Victim and Witness Protection Fund to the said Fund.

(5) In the event of the accused failing to pay compensation ordered, the presiding Judge shall determine the default term of imprisonment the convict shall be required to serve in lieu of the non-pay of compensation.

(6) The receipt of compensation made in terms of sub section (1) of this section shall not prejudice or bar a victim of crime from claiming damages in any civil proceedings. Provided however, when determining the quantum of damages to be awarded, such court shall pay due regard to the compensation already received by such victim of crime.

12. (1) There shall be a Find called the Victim Compensation and Victim and Witness Protection Fund (hereinafter referred to as 'the Fund'). Victim Compensation and Victim and Witness Protection Fund.

(2) The fund shall be administered and managed by the Authority.

(3) There shall be paid into the Fund –

(a) all such sums as may be voted by the Parliament for the Victim Compensation and Victim and Witness Protection Fund;
(b) all such sums as may be received by the Authority to be remitted to the Victim Compensation and Victim and Witness Protection Fund as gifts, bequest and grants from local and foreign sources;
(c) ten percent of all monies collected by the High Courts and Magistrates Court paid to such courts in consequence of orders for the payment of compensation made by such courts and any further sum of money that may be remitted to the Victim Compensation and Victim and Witness Protection Fund by the said courts.

(4) There shall be paid out by the Fund all such sums as may be determined by the Authority, for the payment of –

(i) compensation to victims of crime who have as a result of offences being inflicted on them, sustained bodily injury or impairment of physical or mental health;
(ii) compensation to dependants and next of kin of victims of crime who have died physically or mentally incapacitated;
(iii) monies necessary to rehabilitate victims of crime;
(iv) monies to provide assistance to victims of crime; and
(v) monies necessary to provide protection to victims of crime and witnesses.
(vi) a portion of the sum of money that may be required for the Victim and Witness Protection Division of the Sri Lanka Police Department for the discharge of its duties.

(5) The Director General shall be the principal accounting officer of the Fund and shall cause proper accounts to be kept of the income and expenditure, and assets and liabilities, of the Authority.

(6) The Auditor General shall audit the accounts of the Authority, including the accounts of the Victim Compensation and Victim and Witness Protection Fund.

13. A victim of crime shall be entitled to apply to the Authority (a) for the payment of compensation in respect of bodily or mental injury or impairment, or for damage to property suffered as a result of being subject to an offence and; (b) for the payment of monies required to obtain medical treatment or rehabilitation services in relation to bodily or mental injury or impairment suffered as a result of being subject to an offence.

Entitlement to apply for compensation and assistance.

14. (1) The Sri Lanka Police Department shall establish and maintain a Division named the 'Victim and Witness Protection Division', for the protection of victims of crime and witnesses, and to set in place and implement a program to provide effective measures for the protection of victims of crime and witnesses from existing or potential retaliation and intimidation. Such protection measures shall include protection during the conduct of criminal investigations, and protection before, during and after judicial proceedings.

Victim and Witness Protection Division.

(2) It shall be the duty of the Division to establish and maintain a 'Victim and Witness Protection Programme' and to take effective measures to provide protection to victims of crime and witnesses from potential or existing retaliation and intimidation.

(3) The Division shall give effect to and implement advice and recommendations made to the Sri Lanka Police Department by the Authority.

(4) The Division may undertake the admission of a victim or witness into its Victim and Witness Protection Programme on

a. a recommendation made by the Authority;
b. a request made by a victim of crime or witness
c. a report submitted by a law enforcement agency; or
d. a communication received from a court.

(5) The provision of protection to a victim of crime or witness shall be effected by the Division after the conduct of a threat assessment.

(6) When a request for assistance is made by the Division, it shall be the duty of government and statutory institutions and public servants to assist the Division in providing protection to victims of crime and witnesses.

15. (1) A court which has reasonable grounds to believe that a victim of crime or a witness in judicial proceedings before such court requires protection from retaliation or intimidation, shall take necessary steps to cause necessary protection to such victim of crime or witness. Such protection shall include the conduct of

Protection in Courts and Communication by courts, by law enforcement authorities and public servants.

judicial proceedings in *camera* and the adoption of appropriate measures to prevent disclosure of the identity or testimony of such victim of crime or witness to persons other than the relevant accused and his pleader.

(2) A court which has reasonable grounds to believe that a victim of crime or a witness in judicial proceedings before such court requires protection from retaliation or intimidation, shall take steps to issue a communication to such effect to the Authority and to the Division.

(3) A law enforcement authority of any public servant including a government medical officer who has reasonable grounds t believe that a victim of crime or a witness requires protection from retaliation or intimidation or assistance, shall promptly issue a communication to such effect to the Authority and to the Division.

PART III

Offences against victims and witnesses.

16. (1) Whoever threatens a victim of crime or a member of the family of a victim of crime or a witness with any injury to his person, reputation, or property, or to the person or reputation of any one on whom such victim of crime or witness is interested with intent to cause alarm to such victim of crime or witness to refrain from instituting a complaint against such person with a law enforcement authority, or not to testify truthfully at any judicial proceedings or to compel such victim of crime to withdraw a complaint or legal action instituted against such person, commits an offence, and shall upon conviction by a High Court be sentenced to a term of imprisonment not less than three years and not exceeding ten years and to a fine.

(2) Whoever voluntarily causes hurt to a victim of crime or a member of the family of a victim of crime or a witness, with the intent to cause such victim of crime or witness not to institute a complaint against such person with a law enforcement authority or not to testify truthfully at any judicial proceedings or to compel such victim of crime to withdraw a complaint or legal action instituted against such person, or in retaliation for the making of a statement by such victim of crime or witness or testimony provided by such victim of crime or witness in a court of law against such person, commits an offence, and shall upon conviction by a High Court be sentenced to a term of imprisonment not less than three years and not exceeding ten years and to a fine.

(3) Whoever voluntarily causes grievous hurt to a victim of crime or a member of the family of a victim of crime or witness, with

the intent to cause such victim of crime or witness not to institute a complaint against such person with a law enforcement authority or not to testify truthfully at any judicial proceedings or to compel such victim of crime to withdraw a complaint or legal action instituted against such person, or in retaliation for the making of a statement by such victim of crime or witness or testimony provided by such victim of crime or witness in a court of law against such person, commits an offence, and shall upon conviction by a High Court be sentenced to a term of imprisonment not less than five years and not exceeding twelve years and to a fine.

(4) Whoever wrongfully restrains a victim of crime or a member of the family of a victim of crime or a witness in such manner as with the intent to prevent such victim of crime or witness from instituting a complaint against such person with a law enforcement authority or testifying in any judicial proceedings against such person, or to compel such victim of crime to withdraw a complaint or legal action instituted against such person, or in retaliation for the making of a statement by such victim of crime or witness or testimony provided by such victim of crime, or witness in a court of law against such person, commits an offence, and shall upon conviction by a High Court be sentenced to a term of imprisonment not less than five years and not exceeding twelve years and to a fine.

(5) Whoever by force compels, or by deceitful means, or by abuse of authority or any other means of compulsion, induces any person to go from any place, with the intent to prevent such victim of crime or witness from instituting a complaint against such person with a law enforcement authority or testifying in any judicial proceedings against such person or in retaliation for the making of a statement by such victim of crime or witness or for the testimony provided by such victim of crime or witness in any judicial proceedings against such person, commits an offence, and shall upon conviction by a High Court be sentenced to a tern of imprisonment not less than five years and not exceeding twelve years and to a fine.

(6) Whoever, with intent to cause or knowing that he is likely to cause wrongful loss, damage, or destruction to the property of a victim of crime or a member of the family of a victim of crime or witness, causes such loss, damage, or destruction of the property of a victim of witness, with the intent to preventing such victim of crime or witness making a statement against such person to a law enforcement authority or testifying against such persons in any judicial proceedings, or in retaliation for such victim of crime or witness making a statement to a law enforcement authority or testifying against such person in any judicial proceedings commits an offence, and shall upon conviction by the High Court be

sentenced to a term of imprisonment not less than five years and not exceeding twelve years and to a fine.

(7) Any person who attempt to commit, instigates any other to commit, engages in any conspiracy for the commission of or intentionally aids another to commit an offence under subsections (1), (2), (3), (4), (5) or (6) of this section, shall also be guilty of an offence, and according shall he upon conviction by the High Court be sentenced to the punishment provided for that offence by this Act.

(8) Offences under subsections (1), (2), (3), (4), (5), (6) and (7) of this section shall be cognizable, and non-bailable, and no person suspected, accused or convicted of an offence shall be enlarged on bail unless under exceptional circumstances by the court of appeal.

(9) Trials against persons accused of having committed offences under subsections (1), (2), (3), (4), (5), (6), and (7) of this section shall be taken up before any other business of that court and shall be held on a day to day 'basis and shall not be postponed during trial unless due to unavoidable circumstances.

17. 17 (1) No person shall in judicial proceedings be compelled to divulge that a victim of crime or a witness is receiving or has received assistance or protection in terms of this act. Secrecy

(2) No person shall otherwise than in accordance with provisions of this act or in accordance with any other law, divulge to any other person that a victim of crime or witness is receiving or has received assistance or protection.

(3) That a victim of crime or a witness is receiving or has received assistance or protection in terms of this act, shall not be a criteria for the assessment of the credibility of the testimony of such victim of crime or witness.

18. (1) The Minister in charge of the subject of justice may on the recommendation of the Authority make regulations for under this Act in respect of all such matters as are necessary for giving full force and effect to the principles and provisions of this Act. Regulations.

(2) Every regulation shall be published in the Gazette and shall come into force on the date of such publication or on such later date as may he specified in the regulation.

(3) All regulations made under this Act shall as soon as convenient after their publication in the Gazette, be brought before the Parliament for approval. Any such regulation which is not so

approved shall be deemed to be recinded as from the date of its disapproval, but without prejudice to anything done thereunder.

19. 19 In this Act unless the context otherwise requires – Interpretation.

'victim of crime' means a person who has suffered harm (including physical or mental injury, emotional suffering, economic loss or infringement of a fundamental rights), as a result of an act or omission which constitutes an offence under any law, and includes a person who has suffered harm by intervening to assist a victim of crime or to prevent the commission of an offence and shall further include the next of kin of such victim of crime and dependents of victims of crime;

'witness' means any person or a member of the family of such person who –

(a) has provided information to any law enforcement officer and based upon whose information an investigation has commenced in connection with the alleged commission of an offence,

(b) in the course of an investigation conducted by a law enforcement authority into the alleged commission of an offence, provided information or made a statement containing an account of matters in respect to which such persons had been questioned,

(c) has reasonable grounds to believe that he shall be summoned by a court of law to testify in any judicial proceedings against a person based on a statement made by such person to a law enforcement authority,

(d) has received summons from a court of law to testify, or produce any document, report or object in any judicial proceedings,

(e) being a public servant has investigated into the alleged commission of an offence,

and shall include a victim of crime.

BATTICALOA FIELD MISSION
MAY 2007

A team from the Centre for Policy Alternatives (CPA), INFORM Human Rights Documentation Centre, the International Movement Against Discrimination and Racism (IMADR) and the Law and Society Trust (LST) visited Batticaloa District from May 17- 18 2007 to assess the resettlement process in Vellaveli (Porathivu Pattu D.S. Division) in Batticaloa west.

Given previous instances of forced resettlement, such as the movement of people from Kanthale and Kinniya to Mutur in September 2006 and from Batticaloa to Killivetti Transit Site and Vakarai in March 2007, the team visited to ascertain whether the resettlement was being carried out in line with international human rights standards.

The team spoke to displaced persons awaiting settlement, those who already been resettled and to local organisations and international agencies involved in humanitarian and human rights issues in the district. The team visited displacement sites including Vinyagapuram Maha Vidyalayam and Alankulam, in Valaichennai. They attempted to visit Porathivu Pattu but were denied access.

This report is one in a series of reports by human rights groups highlighting human rights and humanitarian issues following the upsurge in violence during 2006-7.

Key Findings

- The voluntary nature of the resettlement process, which is a basic international human rights principle, was clearly in question. IDPs were not consulted regarding their return and resettlement, thus violating a key article of the Guiding Principles on Internal Displacement.
- The resettlement process was heavily militarised. Civil administration and relief and humanitarian agencies were clearly excluded from playing any critical role in the initial process of resettlement
- Elements of coercion were visible in the early part of the resettlement process - STF guards showing aggression when calling out family names and reportedly even pointing a gun at the crowd.
- The growing unwillingness of larger international agencies such as the UNHCR to publicly raise the issue of forced resettlement.

Context

The large-scale military operations launched in March 2007 by the security forces in LTTE-controlled areas to the west of Batticaloa District, and on its borders with Amparai District (including Kokkadicholai, Vavunativu and Thoppigala) saw a mass exodus of residents from these areas to government-controlled areas in Batticaloa. It is estimated that more than 40% of Batticaloa's entire

population was displaced over the last six months. By the end of March, the Ministry of Reconstruction and Rehabilitation quoted a figure of 34,927 families consisting of 127,134 persons living in Welfare Centres in Batticaloa.

Since March 2007 the Government has engaged in massive resettlement initiatives to ensure that displaced people return to their homes in areas under military control. The haste with which the resettlement was planned and executed raises questions with regard to the observance of and respect for international norms and principles. Concerns were also raised about the lack of consultation with the affected communities and with the local and international NGOs that work with them. Reports indicated that there was forced resettlement and instances where coercion was used. The Minister of Resettlement, Rishard Badurdeen confirmed these reports.[1]

Following the capture of areas west of the Batticaloa lagoon by the military, the Government announced plans for resettlement which were to proceed in three phases. In the first phase – May 14 - 24 - Vellaveli (Porathivu Pattu D.S division) which was home to approximately 38,577 persons from 9,870 families was to be resettled.

Pre – Resettlement Concerns of IDPs

On the 17th May we travelled to Baticaloa via Valaichchenai. In Valaichchenai, we visited the camp at the Vinjayagapuram School, where the numbers of IDPs were depleted due to resettlement to Vakarai and to Kiliveddy. The families still remaining there were from areas of Mutur East - Eachalampattu and Seruvila D.S. divisions – to which resettlement had not yet commenced. The camp, which had once accommodated over 1000 families, seemed deserted. The people feared that they would be sent to the Killivetti Transit Centre, which they had heard was in poor condition and saddled with water and sanitation problems. They were also concerned of reports of abductions in the camp and hence claimed that they felt much safer in Vinyagapuram.

We then visited a camp at Ondtachimadam from which people were to be taken to Porativu in the next days. There was a mixed sense of excitement and anxiety. People were very clear that they did not want to continue living in the tent sites that had been their home for several weeks. Their anxiety about returning was mostly based on the fact that they had no idea as to what to expect. Many of them had heard rumours that their livestock had been stolen and were worried about the implications of this for their livelihood options after resettlement. They were also not at all clear about their entitlements - what they would receive when, and where. Their Grama Sevakas had not been with them in this process of displacement and they were not sure whether the GS would turn up once they had returned.

[1] Daily Mirror, "IDPs moved against their will?" March 20 2007.

Procedural problems

The resettlement of Porativu took place over eleven days, each day being allotted to resettling three G.N. divisions. All the displaced persons were notified of the days on which resettlement would take place for each of the thirty four G.N divisions. The Centres where the people from each G.N. divisions were seeking shelter were identified and these sites served as the gathering point for people to be collected for resettlement.

The Special Task Force (STF) is the primary actor responsible for the resettlement program. It took charge of all the main procedures including transport, registration, security checks, while some civilians were seen assisting in distributing relief assistance packages.
Each morning a bus comes to each camp, with security provided by the STF. The displaced from the G.N divisions that have been listed for resettlement on that day, board the bus and are taken to a eucalyptus grove next to the DS's office in Kaluwanchikudy, where the registration takes place. The buses make multiple trips to and from the camp depending on the numbers from each camp who are set to leave.

At the registration site, there are separate queues for each of the G.N. divisions being resettled for the day, plus an additional one to deal with people who missed their assigned day. The displaced first have to undergo a body search and a through search of all their baggage before they are registered and a family photograph taken. The family photograph is a crucial element of this process.

The 'family photo' created a great deal of insecurity and uncertainty, since the IDPs had been told that this photo would be the basis on which the security forces would accept their right to remain in Porativu. Thus, the IDPs felt that if any member of the family was not present in the photograph for any reason, those persons would have difficulty in entering Porativu at a later date. A particular dilemma confronted families in cases where children had been entered in schools in and around Kaluwanchikudy prior to this round of displacement. There was a fear that if the children did not appear in the family photo, they would not be able to visit their families during vacation, and on the contrary that if they did appear in the family photo, they would be forced on to the buses that were carrying their family back to Porativu.

The Porathivu Patu returnees reportedly were to be provided with a special identity card, like in Vakarai, but this was not done at the registration site. Subsequent reports by other agencies have stated that returnees were given special IDs. The returnees we met at the registration site told us that they were given slips of paper to obtain their ration and, if they possessed a vehicle, another slip with which they could recover it at the Porativu end. They then board another bus that took them over the Padiruppu Bridge to Porathivu, reportedly to the school where they would be given their two week rations and instructions regarding security and their future.

We visited Thettathivu Camp on the 18th, the fourth day of resettlement, when residents from Kalumunthanveli, Veeranchanai and Gandhipuram G.N. divisions were being taken back to their

homes. For the most part, the entire process appeared to work smoothly. When we arrived at the camp at 7 a.m. families were already dressed and packed, waiting for the bus. Individuals from local NGOs and INGOs were also present and prepared to allay fears and intervene where necessary. We stayed until the final set of families had boarded the last bus. There was a general rush to get into the bus and load belongings. On the second trip the bus driver shouted that this was the last trip he would be making which led to a panic among the remaining families. They rushed towards the bus and tried to force themselves onto it, squeezing their belonging and children through the windows. However, this was not before some traumatic moments had already taken place. For example, a little girl who had been pushed into the bus through a window while her parents remained on the ground trying to get a foot on to the bus, screamed and leapt out of the window in a hysterical state when the bus driver revved his engine. This was an unnecessary situation as it was clear that the bus was full and that the remaining families and their possessions could not be squeezed in. Individuals from INGOs and NGOs intervened and the bus driver agreed to make a third journey.

The Militarization of the Resettlement Process

At the eucalyptus grove, the registration process was carried out with military efficiency by the STF and in a manner that was sensitive to the basic needs of those being resettled. The selection of the location for the registration site was thoughtful, since the trees provided shade for the mass of people gathered there. Drinking water was provided and there were loudspeakers playing Tamil music. Towards noon, lunch packets were distributed to those who were still at the site by the STF. There were also simple gestures like providing a chair for old people standing in queue. Importantly, the searching of women was carried out by female police officers.

The militarised nature of this resettlement operation was clear. Though there were civil administrators sitting in one of the tents, procedurally they were playing a peripheral role. Individuals from the D.S office did drive up to Thettathivu camp during the transport process but there was no attempt by them to engage with the people.

The displaced people in one camp complained to us that the local G.N. was not involved in the process, and only wanted to ensure that they would leave behind some of the items they had received as part of relief packages distributed by various NGOs. In other instances, the displaced complained that relief items were provided to the GN by agencies but not distributed.

Despite these limited interventions, it seemed that there was a clear decision to exclude the civil administration and relief and humanitarian agencies from playing any critical role in the process of resettlement. This reflected the decisions taken earlier on in the year, when the resettlement to Vakarai took place. Decisions regarding the process, the dates and the modus operandi were taken within the security hierarchy. Batticaloa based INGOs working with the IDPs claimed that they first found out about the dates of resettlement from the displaced. There were a few local NGOS and INGOs that seem to be actively monitoring the process on a daily basis and trying to intervene.

In addition, the Government imposed strict restrictions on access to Porathivu Pattu. None of the UN agencies was allowed access until the resettlement process was well under way. Their own security advisories as well as the official denial of access to Porativu had no doubt influenced their decisions regarding the role they would play in this process at this phase. The UN agencies had been taken on one 'go and see' visit by security personnel, and had reported a relatively low level of impact in the area, but NO agency local or international was given permission to actually accompany the IDPs on their trip back home. On the 17th, a UN convoy reached the transit point in Kaluwanchikudy by mid day. The UN was granted permission to enter Porativu only on the 19th, despite having been given assurances that they would have access on the 16th May.

Our request to cross the Padiruppu Bridge on May 18th was also refused by the STF. They cited security considerations raising a question as to how safe these areas are. The Government is using blanket security to deny any monitoring of the resettlement process in progress.

Overall the militarized nature of the resettlement process has meant that it is efficiently carried out but because of the fear associated with the military, be it the army or the STF, the lack of a civilian administration and humanitarian agency presence makes the process all the more frightening for the displaced.

Voluntary Nature of Return in Question

The resettlement process to Porathivu Pattu has been publicly presented as a voluntary process. The Government has stated that it would not engage in forced return, having acknowledged that it had previously done so with regards to the movement of IDPs to Kilivetti from Batticaloa.

Voluntary resettlement, as identified in the Guiding Principles on Internal Displacement, is when the displaced make a free and informed decision and choose to return home. By contrast forced return takes place when different forms of coercion, be it armed force or the denial of or the threat of denial of food and other forms of assistance to the displaced, are used to move people back to their homes. Based on the interviews during our visit, it became clear that the voluntary nature of return was clearly in question.

Restricted Rights: The key issue regarding the resettlement process that was brought to our attention was the lack of options presented to the IDPs regarding their future

There were no real provisions in place if the displaced did not wish to return. While all actors including government officials repeat the mantra that resettlement has to be voluntary, there is a general expectation that all the displaced will move back. For instance, we did not hear of a Government actor informing the displaced that they could continue to stay at the welfare camp or with host families and that they would continue to receive rations.

There are very specific cases where individuals have been allowed to remain where they currently are. Examples of this are people who are in need of hospital treatment or children who have been transferred to schools outside Porathivu Pattu. In these instances, INGOs and NGOs have had to rely on the discretion of the local authorities and STF officers. This was the case with children in schools in Kaluwanchikudy who had families in Porativu, and who wanted to be sure that their right to visit their families was not affected by the fact that they did not join the families in the return. It should be noted that at least on one occasion, the STF officers permitted individuals with very specific reasons to stay in their current location rather than join the resettlement.

In a Press Release issued on May 15, 2007, the UNHCR quoted its Representative in Colombo, cautioning that 'attention should be given to categories of people with special needs'.[2] While some local groups and INGOs are playing a crucial role in assisting such cases, it was most often as a response to a crisis situation.

The "success stories" of the 'special cases' who managed to win the right not to be returned – such as the students, or the ones in hospital - emphasize the fact that the right of refusal to being resettled has been restricted to very specific sets of displaced persons and is no longer a general right.

Lack of information and a consultative and participatory process: In our conversations with the IDPs, it became clear that the IDPs were not consulted regarding their return and resettlement, thus violating a key article of the Guiding Principles on Internal Displacement.
From the IDPs themselves, we heard a full range of opinions regarding the desire to return to their villages. Some were eager to return immediately due to the poor conditions in the camps. The rains in early April, which had inundated the empty fields in which most of the tents and shelters had been erected, had been the last straw for many. Most were determined to return eventually, but were apprehensive of resettling right now. A key reason cited for not wanting to return immediately was security. The IDPs knew that there were some military operations continuing in West Batticaloa, and wanted to return after fighting ceased. This fear is very real, based on their experiences of being used as human shields by the LTTE in the past. They were also haunted by previous experiences of living amidst mortar fire and some were also concerned about retaliation from the LTTE as it was the STF that asked them to move. The secrecy in which the resettlement process was shrouded, heightened this fear.

IDPs who were interviewed questioned as to why NGOs, INGOs and camp officers were not allowed to go and see their homes prior to their resettlement. They asked "What are they [the state] hiding? Why are they sending us back but won't let anyone else visit?" They invited us to come and visit them.

The lack of a 'go and see' procedure heightened the suspicion among the IDPs about the process of resettlement. They were anxious because they were returning to a situation in which they did not

[2] (UNHCR, Press Release, "UNHCR helps government start return of 90,000 IDPs to Batticaloa district," May 15 2007)

know whether or not their homes had been damaged, whether or not their household goods were intact, whether or not their means of livelihood – livestock, agricultural implements - had been destroyed or stolen. This meant that there was no assessment, either by the IDPs or by the humanitarian agencies as to what measures were needed to be put in place in order to facilitate the return. In addition, since the IDPs had no clear idea as to the fate of the remainder of their goods and belongings, they felt that if any one IDP family member was to return, the others should go along as well in order to prevent theft and looting. In communities that are poor and lack resources, the desire to preserve whatever possessions they have is paramount. People also raised concerns that in their absence, wild elephants would have caused significant damage to their fields and property. This issue of looting of property was also repeated to us by some recent returnees to Porativu who had crossed over the bridge to carry out errands in town. Some of them said that they were happy to be back but related stories of their houses being damaged and looted. The famous Paduvankarai Kannagi Amman Temple in Kokadichcholia is not going to hold its annual festival this year. While the security situation and displacement of local residents has been cited as the reason for this, it was also reported that the temple had been looted. This report however, has not been substantiated.

The silence of the NGOs regarding the upholding of the principles that IDPs should be the principle that IDPs should be offered choices and that their return should be voluntary, was very critical in this situation. We observed that the IASC notice regarding IDP rights, including on voluntary return, which had been widely disseminated in Tamil, Sinhala and English during the earlier processes of resettlement were not as widely distributed or re-issued during this phase. Nor was there any comprehensive awareness-raising process regarding the resettlement and avenues for reporting grievances.

Use of Coercion: Firstly, the manner in which transport from the displacement camp was carried out indicated a significant measure of coercion. According to conversations we had with agencies working on the ground and the displaced in the camps, the process we witnessed on Friday the 18th was markedly different to the first day. On Monday the 14th the bus was accompanied by, not just two STF personnel on board, but also others on motor bikes. They had been much more aggressive when calling out family names and reportedly had even pointed a gun at the crowd. Some of the people we spoke to said that people had actually wanted to resist being returned, having heard the stories from Killivetty and fearing the security conditions in their places of origin. Faced with the aggressive response of the STF, the displaced whose names were on the list for that day complied. This set a precedent. In the following days there appears to have been no resistance. No instances of people being dragged into buses were reported to us. The displaced also told us that the IASC notices gave contact information to report problems. They pointed out the obvious difficulties in finding a phone in an emergency to make a report and also wanted to know what support the NGOs, local and international, could provide them if they chose not to return. Clearly they wanted more international and local presence in the displacement camps, especially prior to and during the boarding of buses.

The role of humanitarian and human rights actors regarding protection of the rights of IDPs

The lack of space for participation of IDP communities and humanitarian agencies in discussions and decision-making regarding the resettlement has made it difficult for the INGOs and local NGOs to be more proactive. Ideally, the decision as to the 'special circumstances' in which people from Porativu did not have to join the resettlement process should have been taken prior to the resettlement process being put into action.

The fact that a number of key actors in the humanitarian arena have characterized the resettlement as being voluntary creates an environment in which focusing on the obstacles to a resettlement with dignity for the returnees or with the fullest respect for their internationally recognised rights has become all the more difficult. In its press release of May 15, UNHCR characterized the resettlement as "voluntary and in line with international standards". This is contrary to our findings, unless the term 'voluntary' has been re-defined.

The Inter Agency Standing Committee[3] issued a Situation Report (No.75) covering the period 17-24 May in which it reported that an inter-agency mission consisting of representatives of UNHCR, UNICEF, OCHA and the UN Security Division had visited Vellaveli (Porativu Pattu DS Division) on May 18. The statement issued by IASC on May 24[4] states that "initial findings reveal that the majority of people wished to return home and that the area was conducive to return." This finding that a majority of people wished to return home confirms our findings that many of the people we spoke to expressed a desire to resettle. Our conversations suggested, however, that people were afraid of resettling immediately and felt that they had no choice but to resettle. The IASC also mentions the 'ideals' of resettlement – full access to information, re-establishment of local administrative structures, 'go and see' visits, grievance mechanism – without mentioning whether these standards were complied with in Phase I. However, the IASC statement also pointed out that the issues of agriculture-based livelihoods and sustainable food security posed a challenge, as did the existence of mines and unexploded ordinances in the area. Again the IASC does not comment on whether this was a violation of international standards in Phase I.

An assessment of Porathivu is to be carried out so as to identify immediate needs. Although the initial assessment carried out by an UN Advance Team reported a "relatively low level of impact," subsequent visits have revealed more extensive damages including by wild elephants, with approximately 1,000 houses being partially damaged.

In general it seems that there has been a gradual loss of will among critical international agencies, including UNHCR, to publicly raise concerns regarding the process of resettlement, amounting to a significant shift in policy from March 2007.

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[3] (IASC, comprising FAO, OCHA, UNDP, UNFPA, UNHCR, UNICEF, WFP, WHO, IOM, World Bank, OHCHR, CHA, FCE, Sarvodaya, Sewalanka, Oxfam, NRC, CARE, World Vision, ACF, ZOA, Solidar, Save the Children, Merlin)

[4] Inter Agency Standing Committee Country Team, "Inter Agency mission confirms progress; calls for greater civilian involvement in return process," May 24 2007)

In the case of national institutions, the National Human Rights Commission, which has an office in Batticaloa and also a special IDP Protection Unit at the Colombo office, was notable by its absence, despite its protection mandate. The Commission was not monitoring the resettlement process and was in fact still debating a possible visit to Vakarai, months after the resettlement had taken place.

Conclusion

Based on our observations, the Porativu Pattu Resettlement process or Phase I was not a completely voluntary process given that people were unable to make informed decisions, had little choice and could not fully exercise their right to refuse to return due to the militarized nature of the process. It seems also clear that most of the displaced do want to go back to their homes but are apprehensive about returning immediately primarily due to security-related fears.

It is important that the IDPs have the right of return and that the Government supports that right. It should however, be a return that is voluntary and with dignity and safety. The Government faces a significant challenge in carrying out resettlement and these efforts need to be supported so as to ensure normalization for the affected populations. Yet, the process through which resettlement has been carried out raises a number of key concerns. As such we make the following recommendations, some of which echo those made by the IASC, in the hope that they may have some impact on changing the frameworks within which future processes of resettlement in Western Batticaloa and the other resettlement processes in the North, East and border areas are carried out:

1. The resettlement process should be spearheaded by civilian authorities, who can draw on the assistance of the security forces when it is absolutely necessary, such as for security related issues.

2. There should be no intimidation or coercion including the use of armed military personnel to collect people for resettlement, including the threat of cutting off food rations or not providing relief assistance, in order to 'engineer' consent to return

3. Displaced people should be reassured that if they choose not to return, they will continue to receive rations and will not face repercussions, including being deprived of resettlement packages when they do return.

4. Resettlement should not commence before 'go and see' visits by representatives of the displaced (Camp Committee members) and humanitarian and protection agencies have taken place, so that potential returnees can make an informed choice.

5. Local and international actors, especially humanitarian agencies, human rights groups and independent media, should be allowed access to the areas earmarked for resettlement before, during and after the resettlement process, , so as to ensure a more effective delivery of assistance and support for the returnees. This would also help allay the returnees' fears.

Access would also facilitate more comprehensive and accurate assessments. If there is a due procedure to gain access, this procedure should be made clear to actors involved in advance.

6. De-mining should be carried out prior to areas being opened for resettlement and a de-mining certificate obtained by the relevant government authorities of the area.

7. International and national humanitarian agencies should continue their assistance to IDPs and returnees and identify gaps in the current assistance system.

8. International agencies, particularly UN agencies, should take a more active stance in monitoring the resettlement process and play a more proactive protection role, such as making IDPs aware of their rights through distributing the IASC notices and being present at all stages of the resettlement process. International agencies should work in a more coordinated manner on the ground and make a rights-based approach a reality for displaced communities.

9. While the failure to appoint the Human Rights Commission in a legitimate manner raises serious questions regarding its independence, the IDP Unit and the Batticaloa Human Rights Commission should be encouraged to live up to its mandate and take an active role in protecting the rights of IDPs, particularly with regards to resettlement, including by monitoring and timely interventions.

Dated: June 4 2007

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