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SRI LANKA'S JUDICIARY; PRIORITIES FOR THE FUTURE

LAW & SOCIETY TRUST

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- A Report by International Crisis Group -

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Editor's Note

This Issue of the *LST Review* publishes a recent report of an international human rights monitor on the state of Sri Lanka's judiciary, in response to several requests by readers who had not been able to access the electronic version of the report.

In many respects, this report reflects similar concerns as detailed in other recent monitoring reports, as for example, the findings by the Human Rights Institute of the International Bar Association (IBAHRI) contained in its report, *Justice in Retreat: A report on the independence of the legal profession and the rule of law in Sri Lanka* of May 2009.

These reports, together with several domestic critiques during the past few years, point to a crisis of confidence in regard to the country's judicial systems.

Two major problems are commonly identified. First, legal and jurisdictional constraints on judges in the context of the current Constitution have been major hindrances in regard to securing the independence of the judiciary. The Constitution does not permit judicial review of enacted laws, invocation of fundamental rights protections are hedged around with heavy obstacles and emergency laws have weakened constitutional protections despite efforts by judges to restrict the ambit of such laws. While attempts were made to de-politicize the appointment of higher court judges, and most importantly, the Chief Justice through the 17th Amendment to the Constitution, these have now been rendered nugatory due to an absence of political will. Impeachment of appellate court judges also remains in the hands of partisan political actors.

Secondly, at various points in Sri Lanka's history, there has been direct interference by the executive with the functioning of the judiciary, when even the slim legal fetters imposed on executive abuse of power have been discarded.

These problems have been compounded by the internal politicization of Sri Lanka's judiciary, best charted during the ten-year term of former Chief Justice Sarath N. Silva (1999-2009) during which the politics of the Court took a wayward and maverick direction.

In particular, the functioning of the Judicial Service Commission lacked transparency and accountability in the dismissal and disciplinary control of

lower court judges thus leading to adverse comments by international tribunals (see *Soratha Bandaranayake v. Sri Lanka*, CCPR/C/93/D/1376/2005, adoption of views, 24.07.2008). Contempt of court was regularly threatened to be used by the former Chief Justice against his critics, leading to public consensus on the need for a contempt law clearly defining and limiting the power of judges in this regard so as to guard to some extent against abuse. The former Chief Justice also openly spurned the relevance and impact of international human rights treaties that the country had acceded to, taking the domestic legal systems into unpleasantly direct collision with international human rights law binding on the community of nations. During the last few years of his term, though several judgments challenged the executive, some of these decisions have been critiqued for their lack of sound jurisprudential reasoning. The inability of the Bar Association of Sri Lanka (despite some efforts) to arrest the decline in public confidence in the judiciary during this tumultuous period was pronounced.

These troubling experiments of the Sarath Silva Court are now behind Sri Lanka. However, abusive political structures, weakened institutions and the absence of apolitical checks and balances that facilitated the significant erosion of the country's judicial systems during the past ten years are still painfully evident. This gives rise to reasonable apprehensions for the future.

It must be properly said in this context that ensuring the fair and proper functioning of the judicial systems is not the responsibility of the legal community alone but rather also of the concerned public. As we have seen, judicial oppression is perhaps the worst of all manifestations of abuse by those in power. However, even if judicial oppression is to be a thing of the past, this should not be looked upon as being enough by itself. More is required; most particularly, the country looks to its judges to manifest sturdy independence and determination to abide by the law and the Constitution to the exclusion of every other influence.

The report of the International Crisis Group that this Issue publishes contained useful recommendations that may form a starting point for a wider public discussion in regard to the manner in which gradual and thoughtful reform of Sri Lanka's judicial systems, once regarded as being one of the best in South Asia, may be carried out.

Kishali Pinto-Jayawardena

SRI LANKA'S JUDICIARY: POLITICISED COURTS, COMPROMISED RIGHTS*

I. Introduction

On the evening of 27 September 2008, a grenade was thrown into the house of prominent Sri Lankan human rights lawyer J.C. Weliamuna.¹ It shattered windows but did not harm Weliamuna, his wife or two young children.² The incident stunned Sri Lanka's legal community, normally insulated from direct violence, but was part of a longstanding pattern of intimidation and more subtle manipulation of the judicial system.³ As a result, the Sri Lankan judiciary's ability to fairly adjudicate legal questions implicating the sensitive political and human rights issues at the heart of Sri Lanka's ethnic conflict has been deeply compromised.

At a local level, magistrate courts supervise criminal and military detention but rarely intervene to prevent or condemn ill-treatment, torture or prolonged illegal detention. Provincial high courts can issue "writs of habeas corpus" as remedies for illegal detention, but with little effect. While the Supreme Court provides partial relief in some detention cases and torture, its location in Colombo and the difficulty of travel for litigants, especially Tamils from the north and east of the island, render that option unavailable to many potential petitioners.

The Supreme Court under recently retired Chief Justice Sarath Nanda Silva also emerged as a pivotal, unpredictable and contentious political actor. The court has issued populist judgments condemning fiscal improprieties and a handful of decisions constraining some of the Rajapaksa government's anti-terrorism policies, but in disputes touching on the core of executive power, the Supreme Court has not acted. In cases related to the ethnic conflict, the court has reached out to invalidate arrangements fashioned to achieve difficult political compromises. This has entrenched an unflinching vision of Sinhala⁴ nationalism, political centralisation and the unitary state that runs counter to effective forms of devolution of power and power-sharing.

This report, based on interviews with lawyers, litigants, current and former judges and magistrates, and government officials, examines the role of both inferior and higher courts in Sri Lanka's violent political and ethnic conflicts. It explains how formal constitutional and

* Reprinted in this Issue of the *LST Review* is the International Crisis Group's Asia Report No.172 of 30 June 2009 titled as above.

¹ Such attacks are part of a larger human rights crisis in Sri Lanka. See Crisis Group Asia Reports No.125, *Sri Lanka's Human Rights Crisis*, 14 June 2007; and No.146, *Sri Lanka's Return to War: Limiting the Damage*, 20 February 2008.

² Crisis Group interview, senior lawyer, Colombo, 12 November 2008.

³ For details of one case involving a physical assault and detention of a lawyer who protested police beating of a prisoner, see Kishali Pinto-Jayawardena, "Judicial Protection of Human Rights", in *Sri Lanka: State of Human Rights 2005* (Colombo, 2005), pp.16-17; and Jayampathy Wickramaratne, *Fundamental Rights in Sri Lanka* (Pannipitiya, 2006), p.89.

⁴ In everyday usage, Sinhala and Sinhalese are often interchangeable. In this paper, Sinhala will be used in all cases except when referring to the ethnic group as a collective noun, as in "the Sinhalese".

statutory rules and the practices of police, judges and government officials have undermined the independence of those tribunals. The net result is unprincipled discretion exercised in ways that further the goals of powerful political actors, while undermining the rule of law, deepening the political crisis and compounding harm to human and constitutional rights.

Without addressing this corrosion, Sri Lanka is unlikely to forge the stable political compromises that might now be available with the military defeat of the LTTE. Courts presently provide no guarantee of personal security or redress against arbitrary state violence, let alone the possibility of transitional justice, necessary for a transition from violence. They are more likely to destabilise political compromises that could help mitigate Sri Lanka's enduring social fissures. Much needs to be done to insulate judges from political and other improper influences and to allow them once more to guarantee elementary civil and political rights and to play their crucial part in moving Sri Lanka from war to lasting peace.

II. A Legacy of Diminishing Independence

The precolonial Sinhala kingdoms had a multi-tiered judiciary headed by a "Maha Naduwa", or Great Court, until its abolition by the British in 1815.⁵ The con-temporary court structure emerged from colonial institutions, particularly those imposed by nineteenth century British governor generals. Surprisingly, colonial-era courts evinced a high degree of independence.

A. The Colonial and Post-Independence Judiciary

Under Dutch rule, Colombo, Jaffna and Galle provinces each had a Court of Justice.⁶ British rule in 1798 over-hauled the courts and introduced English common law and institutions. An 1833 Charter of Justice reorganised the judiciary by creating a "Supreme Court of the Island of Ceylon", a High Court of Appeal, five provincial courts and a lower tier of district courts.⁷ This basic structure is still discernible today.

An "old boy's club"⁸ recruited largely from the civil service until 1939, the colonial judiciary nevertheless had a reputation for independence and professionalism.⁹ Judges would "not infrequently asser[t] their independent position to the manifest detriment of the Government".¹⁰ In 1937, for example, the Supreme Court overturned a governor's deportation order against English labour activist Mark Anthony Bracegirdle, who had protested restrictions on estate workers' organising efforts.¹¹ Freeing Bracegirdle, the court

⁵ J.A.L. Cooray, *Constitutional and Administrative Law of Sri Lanka* (Colombo, 1995), p.487.

⁶ Ibid; L.J.M. Cooray, "Common Law in England and Sri Lanka", *The International and Comparative Law Quarterly*, vol.24, no.3 (1975), pp.553-554. These courts applied Roman-Dutch law. The court's presiding officer also superintended the execution of government orders. J.A.L. Cooray, *Constitutional and Administrative Law of Sri Lanka*, op.cit., p.485.

⁷ Nira Wickramasinghe, *Sri Lanka in the Modern Age: A History of Contested Identities* (Colombo, 2006), p.40; J.A.L. Cooray, *Constitutional and Administrative Law of Sri Lanka*, op.cit., p.486.

⁸ Crisis Group interview, lawyer, Colombo, November 2008.

⁹ L.J.M. Cooray, *Constitutional Government in Sri Lanka 1796-1977* (Pannipitya, 2005), p.58; Lal Wijenayake, *Independence of the Judiciary in Sri Lanka Since Independence* (Pannipitya, 2005), p.3.

¹⁰ M.J.A. Cooray, *Judicial Role under the Constitutions of Ceylon/Sri Lanka* (Colombo, 1982), p.41.

¹¹ Patrick Lawrence, *Conversations in a Failing State* (Hong Kong, 2008), pp.28-29.

rejected the state's argument that "the safety of the State is a matter of paramount concern and every other principle must give way to the safety of the State".¹²

Independence in February 1948 did not change the courts' basic architecture.¹³ Post-independence courts inherited from their colonial antecedents customs and expectations of independence from political influence. The Judicial Committee of the Privy Council of England, a supervisory body for Sri Lanka courts during the early post-colonial period, confirmed this. It explained in 1964 that "the importance of securing the independence of the judges and maintaining the dividing line between the executive was appreciated by those who framed the [Sri Lankan] Constitution".¹⁴ The Privy Council also held that while the 1947 Soulbury Constitution—which governed the island for the first quarter-century of independence—did not "confer a power of judicial review of the constitutionality of legislation on the courts... the courts exercised such power on the ground that it was implicit in the Constitution".¹⁵

Little came of this judicial review power. The Soulbury Constitution contained few means to judicially enforce rights.¹⁶ The only attempt by a court to strike down a law as in conflict with the constitution came in 1956, when the district judge of Colombo invalidated the Official Language Act No.33 of 1956, which had made Sinhala the official language.¹⁷ Because the decision was vacated on other grounds on appeal, it had little practical impact. As a result, the possibility that Sri Lanka's courts might have restrained rising communal tensions of the 1950s and 1960s went unrealised and is today largely forgotten.

B. The 1972 Constitution's Rejection of Judicial Independence

On 22 May 1972, a coalition Sri Lanka Freedom Party (SLFP)/Marxist United Front government enacted an "autochthonic"¹⁸ constitution and repudiated the Soulbury Constitution.¹⁹ This 1972 constitution elevated parliament and the cabinet of ministers over

¹² Quoted in M.J.A. Cooray, *Judicial Role under the Constitutions of Ceylon/Sri Lanka*, op.cit., p.58.

¹³ All then-applicable jurisdictional ordinances remained in force. J.A.L. Cooray, *Constitutional and Administrative Law of Sri Lanka*, op.cit., p.487. Judges of the Supreme Court were to be appointed by the governor general and served without diminishment of salary until the age of 62, with one possible twelve-month extension. M.J.A. Cooray, *Judicial Role under the Constitutions of Ceylon/Sri Lanka*, op.cit., p.69.

¹⁴ *Liyanage v. The Queen*, (1965) 68 NLR 265, 281-285. The case is quoted and discussed at length in M.J.A. Cooray, *Judicial Role under the Constitutions of Ceylon/Sri Lanka*, op.cit., pp.167-170.

¹⁵ L.J.M. Cooray, *Constitutional Government in Sri Lanka 1796-1977*, op.cit., p.271.

¹⁶ Section 29 did state that "[n]o such law shall" infringe on rights of free speech or religious exercise, or impose special privileges or disabilities based on religious or communal identity. M.J.A. Cooray, *Judicial Role under the Constitutions of Ceylon/Sri Lanka*, op.cit., pp.65-66.

¹⁷ L.J.M. Cooray, *Constitutional Government in Sri Lanka 1796-1977*, op.cit., p.272. The act, also known as the "Sinhala only" act, "effectively ended the two-language formula that was accepted at one time as by the emergent national polity". N. Wickramasinghe, *Sri Lanka in the Modern Age: A History of Contested Identities*, op.cit., p.186; K.M. de Silva, *Reaping the Whirlwind: Ethnic conflict, ethnic politics in Sri Lanka* (New Delhi, 1998), p.50.

¹⁸ Lakshman Marasinghe, *The Evolution of Constitutional Governance in Sri Lanka* (Colombo, 2007), pp.3, 145.

¹⁹ Crisis Group Asia Report No.141, *Sri Lanka: Sinhala Nationalism and the Elusive Southern Consensus*, 7 November 2007, pp.6-7; and N. Wickramasinghe, *Sri Lanka in the Modern Age: A*

the judiciary. While expanding the 1947 constitution's sparse detailing of rights, the 1972 constitution terminated all judicial review of executive or administrative action, while shifting jurisdiction over constitutional rights outside the formal judiciary.²⁰ The constitution's drafters explicitly aimed to repudiate judicial independence.²¹

Accordingly, the drafters assigned constitutional review to a five-member "constitutional court" appointed by the president for five-year terms. That body, however, could only issue rulings at the request of the attorney general, speaker of the National State Assembly or certain other members of the assembly.²² It lacked power to review legislation after enactment. Appeals to the Privy Council in London were abolished.²³ A 1973 administration of justice law abolished the Court of Appeal and the Supreme Court, creating instead a single Supreme Court comprising some, but not all, of the dismissed judges.²⁴ The cabinet of ministers appointed all judges, while the justice minister had broad authority to transfer them.²⁵ Judges, as before, could be removed for misconduct by parliament.²⁶ Between 1972 and 1978, not one fundamental rights case was adjudicated.²⁷

C. *The 1978 Constitution's Ambivalent Embrace Of Judicial Independence*

The current constitution, adopted in 1978, reversed course and strengthened judicial independence, but without abandoning key constraints on judicial power. It abolished the constitutional court, moving all judicial powers back into a hierarchy of courts headed by a Supreme Court.²⁸ It mandated not only a Supreme Court but also a Court of Appeal and a system of high courts.²⁹ The new constitution also included a section captioned "independence of the judiciary" that mandated judges exercise their powers "without being subject to any direction or interference proceeding from any other person except a superior court, tribunal, institution or other person entitled under law to direct or supervise such judge".³⁰

History of Contested Identities, op.cit., p.183.

²⁰ One member of the Constituent Assembly explained: "Let us be quite clear in our minds about the question of independence of the judiciary. It does not and cannot deprive the legislature of its rightful supremacy". L.J.M. Cooray, *Constitutional Government in Sri Lanka 1796-1977*, pp.277, 279.

²¹ Quoted in Wijenayake, *Independence of the Judiciary in Sri Lanka Since Independence*, op.cit., p.10.

²² 1972 constitution, Arts.53-54, available at www.tamilnation.org/srilankalaws/72constitution.htm#CHAPTER%20X. Under Article 54(e), a citizen could notify the speaker of a constitutional question raised by a bill, but the speaker appears to have retained discretion as to whether to refer the matter to the constitutional court. The constitutional court was loosely based on the French Conseil d'État. M.J.A. Cooray, *Judicial Role under the Constitutions of Ceylon/Sri Lanka*, op.cit., p.242.

²³ H.L. de Silva, *Sri Lanka: A Nation in Conflict: Threats to Sovereignty, Territorial Integrity, Democratic Governance and Peace* (Boralesgamuwa, 2008), p.409.

²⁴ Wickramaratne, *Fundamental Rights in Sri Lanka*, op.cit., p.87.

²⁵ Marasinghe, *Evolution of Constitutional Governance*, op.cit., p.147.

²⁶ 1972 constitution, Art.122(2), available at www.tamilnation.org/srilankalaws/72constitution.htm; M.J.A. Cooray, *Judicial Role under the Constitutions of Ceylon/Sri Lanka*, op.cit., p.234.

²⁷ Radhika Coomaraswamy, *Ideology and the Constitution: Essays on Constitutional Jurisprudence* (Delhi, 1997), p.25.

²⁸ Constitution of the Democratic Socialist Republic of Sri Lanka, Art.105, certified on 31 August 1978. The constitution's English-language text is also available at www.priu.gov.lk/Cons/1978Constitution/CONTENTS.html.

²⁹ Ibid.

³⁰ Art.116(1) of 1978 constitution. Art.116(2) made it a criminal offence to interfere with the judiciary.

Chapter III of the 1978 constitution listed eight fundamental rights, including free speech, association and conscience; freedom from torture and illegal detention; and equality.³¹ Chapter III took a “minimalist” approach to human rights, taking no account of developments in civil and political rights since the 1950s, or economic, social and cultural rights.³² Finally, the constitution allowed more restrictions on rights—including on the presumption of innocence and the immunity from ex post facto criminal punishment—than are permissible under international law.

The United National Party (UNP) government’s unwillingness to tolerate alternative centres of political power soon undermined the judiciary’s new independence. President J.R. Jayawardene used the 1978 constitution to stack the judiciary with allies. Article 163 of the new constitution terminated the service of all judges of the Supreme Court and the sole high court then existing, requiring all the judges to swear a new oath. While all nineteen judges were forced to resign, seven were not reappointed.³³ Some junior judges were shifted to the Supreme Court. More senior judges were relegated to the new Court of Appeal.³⁴ The result was “naked and unashamed... ‘court-packing’”.³⁵

On 11 June 1983 three Supreme Court judges’ homes were stoned by crowds brought in on government-owned buses. Police failed to respond to the judges’ calls for aid. Two days earlier, the same judges had ruled against a police sub-inspector for illegal arrest and fined him 25,000 rupees (\$500 at the time).³⁶ According to one senior lawyer, the protesters were UNP supporters.³⁷ In September 1983, parliament imposed in the Sixth Amendment a new oath requirement. While no judges lost their positions, the Sixth Amendment underscored the fragility of their tenure.³⁸ Finally, in 1984, the government convened a parliamentary select committee that investigated a speech critical of government policy given by then-Chief Justice Neville Samarakoon, but declined to remove him.³⁹ As a result, most judges refrained from aggressive application of constitutional rights.⁴⁰

D. The Present Structure of Sri Lankan Courts

The 1978 constitution created a Supreme Court, a Court of Appeal and provincial high

³¹ Arts.10-17 of 1978 constitution.

³² Crisis Group interview, lawyer, Colombo, November 2008.

³³ Kishali Pinto-Jayawardena, “Subverted justice and the breakdown of the rule of law in Sri Lanka”, April 2007, available at www.article2.org/mainfile.php/0602/277.

³⁴ H.L. de Silva, *Sri Lanka: A Nation in Conflict: Threats to Sovereignty, Territorial Integrity, Democratic Governance and Peace*, op.cit., pp.410-411.

³⁵ Ibid, p.411.

³⁶ Wijenayake, *Independence of the Judiciary in Sri Lanka Since Independence*, op.cit., pp.39-40; H.L. de Silva, *Sri Lanka: A Nation in Conflict: Threats to Sovereignty, Territorial Integrity, Democratic Governance and Peace*, op.cit., pp.411.

³⁷ Wickramaratne, *Fundamental Rights in Sri Lanka*, op.cit., p.87.

³⁸ Wijenayake, *Independence of the Judiciary in Sri Lanka Since Independence*, op.cit., p.18-19.

³⁹ Wickramasinghe, *Sri Lanka in the Modern Age: A History of Contested Identities*, op.cit., pp.14-15.

⁴⁰ “The court could have looked to India for a very different model of a Supreme Court, but we have not developed a tradition of activism [like the Indian Supreme Court] or even of facing up to the executive”. Crisis Group interview, fundamental rights lawyer, Colombo, November 2008.

courts.⁴¹ Lower courts—most importantly the district courts and magistrate courts—are created by the Judicature Act, No.2 of 1978.⁴² The Supreme Court comprises a chief justice and six to ten judges. It has unique authority to assess the legality of legislation, to provide advisory opinions to the president, to serve as a court of last resort for the lower judiciary, and to hear cases implicating the “fundamental rights” created by the 1978 constitution.⁴³ Next in the judicial hierarchy is the Court of Appeal, which hears appeals from the high courts and has power to issue writs of habeas corpus or injunctions against unlawful executive action.⁴⁴ Many cases in that tribunal involve challenges to the legality of government actions rather than constitutional challenges.⁴⁵

At the provincial level are high courts, which hear serious criminal cases and have power to adjudicate habeas corpus applications.⁴⁶ At the base of the hierarchy are magistrate courts, which largely hear criminal cases, and district courts, largely devoted to civil matters.⁴⁷ In magistrate courts, criminal cases are generally prosecuted by the police and in the absence of defence counsel.⁴⁸

Two other offices play important roles. The justice ministry is responsible for budgetary matters, legislative drafting and legal aid provision.⁴⁹ The attorney general’s office is responsible for the prosecution of criminal cases and appears in Supreme Court and Court of Appeal proceedings where the constitutionality or legality of a statute or executive action is called into doubt.⁵⁰ The attorney general “plays a dual role”, both advising the government on the legality of counter-terrorism and other government measures and also prosecuting when those measures step across a constitutional line.⁵¹ The contradictions of the role have often led to clear conflicts of interest, as human rights advocates have frequently noted.⁵² The attorney general’s department has, with few exceptions, failed to investigate and prosecute effectively massacres and disappearances cases.⁵³

⁴¹ See appendix B for a chart showing the structure of the judiciary.

⁴² M.J.A. Cooray, *Judicial Role under the Constitutions of Ceylon/Sri Lanka*, op.cit., p.275.

⁴³ Arts.120-132 of 1978 Constitution; J.A.L. Cooray, *Constitutional and Administrative Law of Sri Lanka*, op.cit., pp.494-504.

⁴⁴ J.A.L. Cooray, *Constitutional and Administrative Law of Sri Lanka*, op.cit., pp.505-507.

⁴⁵ Crisis Group interview, state counsel, Colombo, November 2008.

⁴⁶ J.A.L. Cooray, *Constitutional and Administrative Law of Sri Lanka*, op.cit., pp.507-509.

⁴⁷ M.J.A. Cooray, *Judicial Role under the Constitutions of Ceylon/Sri Lanka*, op.cit., p.26.

⁴⁸ Crisis Group interviews, lawyers and magistrate judge, Colombo, Kandy and Anuradhapura, November 2008. Despite the absence of representation, magistrate courts can impose sentences of two years and fines of up to Rs.1,500/-. J.A.L. Cooray, *Constitutional and Administrative Law of Sri Lanka*, op.cit., p.512.

⁴⁹ Crisis Group interview, state counsels, Colombo, November 2008.

⁵⁰ Crisis Group interview, state counsel and lawyers, Colombo, November 2008.

⁵¹ Crisis Group interview, former senior state counsel, Colombo, November 2008.

⁵² See “Sri Lanka: Has the Attorney General Violated the Penal Code?”, Asian Human Rights Commission, 5 December 2008, available at www.ahrchk.net/statements/mainfile.php/2008statements/1794/. The International Independent Group of Eminent Persons (IIGEP), an ad hoc panel appointed by the Sri Lankan president to oversee a special commission of inquiry into a series of high profile human rights cases in early 2007, was a frequent and forceful critic of the attorney general’s department’s conflict of interest. For their numerous statements on the issue, see www.iigep.org/press-releases.htm.

⁵³ Crisis Group Report, *Sri Lanka’s Human Rights Crisis*, op.cit., pp.4-5.

III. Jurisdictional Constraints on the Courts

The judiciary today has lost its freedom from political influence. Courts abet human rights violations on a daily basis. The Supreme Court compounds political conflict and hinders compliance with international law. This weakness derives from two major sources: flaws in the legal and jurisdictional constraints on judges, and manipulation and direct interference by the executive, sometimes via the chief justice. The 1978 constitution contains several provisions that hinder or eliminate courts' ability to serve as an effective check on the executive power. Compounding these barriers are the Public Security Ordinance, No.25 of 1947 (as amended), and a torrent of "emergency regulations" from the executive. This section addresses purely legal constraints. The following section deals with political manipulation.

A. *The Constitution's Barriers to Judicial Action*

The 1978 constitution defines and channels higher courts' jurisdiction in ways that constrain the courts' efficacy as a check on executive overreach. The Supreme Court has "sole and executive" jurisdiction to determine the constitutionality of laws, including constitutional amendments, except that challenges must be lodged within one week of the bill being placed on parliament's order paper.⁵⁴ The cabinet can abbreviate and require the court to reach a verdict within 24 hours.⁵⁵ Further, the court's determinations can be over-ridden in most cases by a super-majority of two thirds of parliament.⁵⁶ A 1997 International Commission of Jurists study examined this jurisdiction over the constitutionality of laws and found it "so restricted as to be largely illusory".⁵⁷ This remains true today. While some bills are reviewed at this early stage, the 1978 constitution has created a system of de facto "pre-enactment review" akin to that of the 1972 constitution.⁵⁸ Further, the constitution bars absolutely suits against an incumbent president. It also limits the filing of constitutional "fundamental rights" challenges against "executive and administration" to the Supreme Court only.⁵⁹

The limitation on forums for fundamental rights cases imposes an even heavier burden on those living outside Colombo. They must not only travel to Colombo but also find a fundamental rights lawyer in the city; few are to be found outside the capital.⁶⁰ Travel for Tamil litigants is especially difficult.⁶¹ Since a suit must be filed within one month of the

⁵⁴ Arts. 120 & 121(1) of the 1978 constitution.

⁵⁵ Art. 122(2) of the 1978 constitution.

⁵⁶ Art. 82(5) of the 1978 constitution. Amendments that change specified fundamental aspects of the constitution must be enacted by referendum. Arts. 83(a) and 85(2).

⁵⁷ "Judicial Independence in Sri Lanka: Report of a Mission 14-23 September 1997", Center for the Independence of Judges and Lawyers (CIJL), 1998, p.25.

⁵⁸ Crisis Group interview, Colombo, November 2008.

⁵⁹ Arts. 35(1) & 126(1) of the 1978 constitution. Human rights groups have vigorously criticised the presidential immunity provision as a device for "legitimizing illegal and unconstitutional acts". "Sri Lanka: Presidential immunity an expression of legalised tyranny guaranteed by the 1978 Constitution", Asian Human Rights Commission, 10 May 2006, available at www.ahrchk.net/statements.

⁶⁰ Crisis Group interviews, lawyers, Colombo, Trincomalee and Anuradhapura, November 2008.

⁶¹ Crisis Group interview, human rights activist, Colombo, November 2008.

violation,⁶² those unaware of their remedies or lacking quick access to counsel lose their right to file.

Fundamental rights litigation in the Supreme Court is also difficult in fact-heavy cases, such as those involving allegations of torture by police or military officials.⁶³ The Supreme Court does not hold hearings or gather factual evidence. Lawyers must develop their arguments solely on the written pleadings without an opportunity to introduce testimonial evidence. Allegations beset by claims and counter-claims—as charges of torture or illegal detention often are—are difficult to sustain. There is no appeal to address errors of fact or law.⁶⁴

B. Emergency Laws

With weak constitutional constraints on derogation from fundamental rights, little prevents the frequent and unfettered invocation of Sri Lanka's two sets of emergency powers: emergency regulations issued under the Public Security Ordinance (PSO), No.25 of 1947, and the 1979 Prevention of Terrorism Act (Temporary Provisions) (PTA). Both the PSO and PTA exploit the constitution's provisions for derogation and weaken the protection of rights significantly. Purportedly deployed against the Liberation Tigers of Tamil Eelam (LTTE) only, both the PSO and the PTA are routinely used against Tamils in matters unrelated to terrorism.⁶⁵

1. Emergency regulations

Emergency regulations are promulgated under Section II of the PSO.⁶⁶ It vests the executive with open-ended authority to promulgate "emergency regulations" that override otherwise applicable laws (except the provisions of the constitution) and cannot be challenged in court.⁶⁷ Since the adoption of the Thirteenth Amendment in 1987, the proclamation of a state of emergency has been made immune from judicial challenge.⁶⁸ Since independence, at least seventeen sets of emergency regulations have been issued pursuant to the PSO on topics as diverse as "terrorist activities, special administrative arrangements, high security zones [and] procurement".⁶⁹ More frequently than not, Sri Lanka has been in a state of emergency.⁷⁰

⁶² Art. 126(2) of the 1978 constitution.

⁶³ Crisis Group interview, fundamental rights lawyer, Colombo, November 2008.

⁶⁴ Crisis Group interview, Colombo, November 2008.

⁶⁵ Crisis Group interviews, lawyers, Colombo and Trincomalee, November 2008.

⁶⁶ "Judicial Independence in Sri Lanka: Report of a Mission 14-23 September 1997", CIJL, op.cit., pp.19-20.

⁶⁷ Part II, Sec.5, Public Security Ordinance, No.25 of 1947. Section 7 of the PSO states that such regulations override laws, and section 9 precludes criminal prosecution for acts done pursuant to any emergency regulation.

⁶⁸ Art. 154j(2) of the 1978 constitution, which states that a proclamation under the PSO "shall be conclusive for all purposes and shall not be questioned in any Court", was adopted through the Thirteenth Amendment in order to overrule a Supreme Court decision—*Joseph Perera v. Attorney General* (1992) 1 SLR 199—allowing such challenges.

⁶⁹ Asanga Welikala, *A State of Permanent Crisis: Constitutional Government, Fundamental Rights and States of Emergency in Sri Lanka* (Colombo, 2008), p.176; Suriya Wickremasinghe, "Emergency Rule in the Early Seventies", in *Human Rights: Theory to Practice* (Colombo, 2005) pp.378-383; and Crisis Group interviews, Colombo, November 2008.

⁷⁰ Except for a five-month gap, emergency rule lasted uninterrupted from 1983 to 2001. Radhika Coomaraswamy and Charmaine de los Reyes, "Rule by Emergency: Sri Lanka's Postcolonial

There is no systematic publication of regulations. Many are only haphazardly available. The regulations themselves are fragmentary.⁷¹ On occasion, the English and Sinhala versions have been found to be inconsistent.⁷²

Despite its 1956 promise to repeal the PSO, the SLFP, like its rival the UNP, has relied heavily on emergency regulations. Before President Rajapaksa entered office, regulations permitting arrest without a warrant and prolonged detention without trial already were in force. A 1989 regulation (No.17) already allowed the defence secretary to detain persons to prevent them from “engaging in acts inimical to national security in the future”.⁷³ Other regulations dispensed with search warrants and allowed police to dispose of corpses without notifying the deceased’s family.⁷⁴ Regulations from the 1990s expanded detention powers.⁷⁵

The Rajapaksa administration has supplemented these wide-ranging powers since emergency rule was re-imposed nationwide in 2005 by the preceding administration of President Kumaratunga.⁷⁶ Of greatest significance are the Emergency (Miscellaneous Provisions and Powers) Regulations No.1 of 2005 and the Emergency (Prevention and Prohibition of Specified Terrorist Activities) Regulations No.7 of 2006. The 2005 regulations allow the secretary of the defence ministry to order the military or police to detain a person for up to a year to prevent acts “prejudicial to the national security or the maintenance of public order”.⁷⁷ The regulation contains no clarification of this vague standard. A new August 2008 regulation expands the government’s power by allowing it to detain a person for a further six months.⁷⁸ In addition, the 2005 regulations vest police with broad search and seizure powers and allow the use of confessions made to police, in contrast with normal criminal law and with no effective safeguards against abuse.⁷⁹ It is left to the defendant to prove a confession was coerced.⁸⁰

Constitutional Experience”, *International Journal of Constitutional Law*, vol.2, no.2 (2004), p.272. Emergency rule was reimposed in August 2005 after the assassination of Foreign Minister Lakshman Kadirgamar.

⁷¹ Crisis Group interview, lawyer, Colombo, November 2008.

⁷² Saliya Edirisinghe, “Emergency Rule”, in *Sri Lanka: State of Human Rights 2006* (Colombo, 2006), p.175. Emergency regulations are published in the government Gazette simultaneously in Sinhala, Tamil and English.

⁷³ Emergency (Miscellaneous Provisions and Powers) Regulations No.17, Gazette No.563/7 (20 June 1989); see also “Judicial Independence in Sri Lanka: Report of a Mission 14-23 September 1997”, CIJL, op.cit., pp.23-29, 41-46 (describing earlier emergency regulations).

⁷⁴ Deepika Udagama, “Taming of the Beast: Judicial Responses to State Violence in Sri Lanka”, *Harvard Human Rights Journal*, vol.11 (Spring 1998), pp.280-281.

⁷⁵ Coomaraswamy and de los Reyes, op.cit., pp.278-279. See also “The Emergency Regulations under the Public Safety Ordinance (Chapter 40)”, *LST Review*, vol.10, no.151 (2000), pp.17-23.

⁷⁶ Edirisinghe, “Emergency Rule”, op.cit., p.167.

⁷⁷ Section 19(1)(a) of Emergency (Miscellaneous Provisions and Powers) Regulations No.1, Gazette No.1405/14 (13 August 2005).

⁷⁸ Amendment to Emergency (Miscellaneous Provisions and Powers) Regulations No. 1 of 2005, Gazette No. 1561/11 (5 August 2008). The Center for Policy Alternatives, however, has challenged that regulation and its use is presently enjoined. Crisis Group interview, Colombo, November 2008.

⁷⁹ Sections 20 and 63 of 2005 Emergency (Miscellaneous Provisions and Powers) Regulations.

⁸⁰ Edirisinghe, “Emergency Rule”, op.cit., p.187. Human rights advocates and organisations within and outside of Sri Lanka have long advocated that if confessions are to be allowed the burden should be reversed: the police should have to convince the court that proper procedures were

The 2006 regulations criminalise loosely defined offences of “terrorism”, “specified terrorism activities” and “transactions” with terrorist groups in terms more sweeping than other countries’ approaches.⁸¹ As one legal analyst has noted, the “transactions” prohibition of Regulation 8 issued in 2006 renders “virtually any act of, for example, journalists, civil society organisations and even private landlords” potentially criminal if a link to a terrorism suspect is alleged.⁸² In one high-profile case, charges have been filed under emergency regulations against Tamil journalist Tissanayagam based on his writings.⁸³

The emergency regulations offer no effective judicial review against arbitrary or discriminatory application of these broad rules. Detainees should be brought before a magistrate within fifteen days but the magistrate cannot order release.⁸⁴ For offences established under the 2005 regulations, detainees must be produced before a magistrate within 30 days but cannot be released without “written approval of the Attorney General”.⁸⁵

2. The Prevention of Terrorism Act (PTA)

Parliament enacted the PTA in 1979 as a temporary response to growing unrest in the Northern Province.⁸⁶ It was made permanent in 1982. Its provisions apply regardless of whether there is a declared emergency.⁸⁷ Section 9 allows the justice minister to order a person detained without judicial review for renewable periods of three months, up to a total of eighteen months, if the minister “has reason to believe or suspect that any person is connected with or concerned in any unlawful activity”. The person is to be presented to a magistrate, however, within 72 hours of their initial detention under Section 7 of the ordinance.

The PTA differs from emergency regulations in that it requires ministerial involvement in detention decisions. Like emergency regulations, however, the PTA deprives judges of any authority to release prisoners on bail. Section 6 allows police to arrest persons and detain

followed and protections against abuse were in place in order for a confession to be admissible. Faced with a lengthy court procedure necessary to challenge confessions, most defendants plead guilty in exchange for reduced time in jail. When challenged, however, many confessions are thrown out. Crisis Group email communications, Sri Lankan human rights lawyers, June 2009.

⁸¹ Emergency (Prevention and Prohibition of Specified Terrorist Activities) Regulations, No.7, Gazette No.15181474/5 (6 December 2006); see also T.M.A. Luey, “Defining ‘Terrorism’ in South and East Asia”, *Hong Kong Law Journal*, vol.38, no.1 (2008), p.167.

⁸² Welikala, *A State of Permanent Crisis*, op.cit., p.180.

⁸³ Crisis Group interview, lawyer, Colombo, November 2008. J.S. Tissanayagam, a prominent Tamil journalist, was arrested on 7 March 2008 along with two other Tamil journalists. Held without charges for nearly six months under emergency regulations, he was eventually indicted under the PTA. He is currently on trial, charged with bringing the Sri Lankan government into disrepute, creating ethnic disharmony and aiding and abetting “unknown persons” in terrorism. The government’s case rests on two articles he wrote in 2006 criticising the government’s military campaign and its impact on civilians and on an alleged confession which Tissanayagam claims was coerced.

⁸⁴ Edirisinghe, “Emergency Rule”, op.cit., p.379.

⁸⁵ Section 21(1) of Emergency (Miscellaneous Provisions and Powers) Regulations No.1, Gazette No. 1405/14 (13 August 2005).

⁸⁶ S.J. Tambiah, *Sri Lanka: Ethnic Fratricide and the Dismantling of Democracy* (Chicago, 1986), pp.39, 42.

⁸⁷ Udagama, “Taming of the Beast: Judicial Responses to State Violence in Sri Lanka”, op.cit., p.275; and “Judicial Independence in Sri Lanka: Report of a Mission 14-23 September 1997”, CIJL, op.cit., pp.47-48.

them for three days without judicial supervision, and to search their home without a warrant. Section 16 deviates from the standard criminal procedure code by making confessions to judges admissible.⁸⁸ No provision of the PTA requires the detaining authorities to inform a prisoner of the reasons for the detention. The PTA also restricts free speech by criminalising certain forms of political expression and requiring prior approval for certain publications.⁸⁹

IV. Political Influences on the Judiciary

Legal constraints on the courts' supervisory authority act in tandem with practical and political intrusions. The executive uses its powers of appointment to influence the courts directly. Political influence is also filtered through the Judicial Service Commission (JSC), which is responsible for the appointment, transfer and discipline of judges in the lower courts. Although no Supreme Court judge has ever been removed for misconduct, judges are periodically reminded that impeachment is in the hands of partisan political actors. Finally, the recently retired chief justice wielded his powers of assigning and transferring judges and his control of World Bank funds and other resources to influence judges for political ends.

A. *Appointments to the Supreme Court*

1. The president's appointment power

The 1978 constitution initially vested the president with power to appoint judges to the higher courts constrained only by the stipulated age limits for different courts.⁹⁰ The president is not obliged to consult either parliament or the judiciary in making appointments. In 1997, the Supreme Court stated that the constitutional scheme assumes but does not mandate "co-operation between the Executive and the Judiciary".⁹¹

Appointments to the judiciary until the 1970s traditionally came from the pool of career judges in the lower courts, with judges elevated by seniority.⁹² Despite this tradition, there is also a long history of executive manipulation of judicial appointment to punish disfavoured judges and to promote political allies.⁹³ In 1988, for example, when the post of chief justice

⁸⁸ Udagama, "Taming of the Beast: Judicial Responses to State Violence...", op.cit., pp.275-277.

⁸⁹ Welikala, *A State of Permanent Crisis*, op.cit., p.185; and "Judicial Independence in Sri Lanka: Report of a Mission 14-23 September 1997", CIJL, op.cit., pp.30-35.

⁹⁰ Arts. 107(1) and (5) of the 1978 constitution.

⁹¹ *Silva v. Bandaranayake*, [1997] 1 SLR 92, 94. By contrast, the Pakistan Supreme Court held in 1996 that the Pakistani constitution, while it contained no textual requirement of consultation, by design entailed "effective[,] meaningful, [and purposive]" consultation" between the executive and the chief justice in appointments. Absent "very sound reasons", a chief justice's recommendation is binding. *Al-Jehad Trust v. Federation of Pakistan*, PLD 1996 Supreme Court, 324, 363-367. In India, moreover, although the constitution again commits judicial selection to seemingly absolute discretion, "deviation from the seniority rule... is considered as an executive interference in the judiciary". T.R. Andyarujina, "Judicial Accountability: India's Methods and Experience", in *Judges and Judicial Accountability* (Delhi, 2003), pp.106-107.

⁹² There are a few notable exceptions such as Chief Justice Neville Samarakoon and Justice Jaya Pathirana, who both came from private practice. Wijenayake, *Independence of the Judiciary in Sri Lanka Since Independence*, op.cit., p.20.

⁹³ Wickramaratne, *Fundamental Rights in Sri Lanka*, op.cit., p.81, notes incidents in 1964 and 1971.

opened up, the most senior judge of the Supreme Court was conspicuously passed over in favour of a judge seven years his junior. The president made “no secret” of the fact that the former was disfavoured because of his dissenting judgment in the case challenging the Thirteenth Amendment.⁹⁴ As a result of such presidential appointments, “any criteria there once were [for the appointment of justices and the chief justice] have fallen by the wayside”.⁹⁵

The president can also influence judicial outcomes by stacking the courts with lawyers from the attorney general’s department, who are generally pro-government in disposition. While not unqualified, a preponderance of former government lawyers shifts the higher courts’ sympathy to government positions.⁹⁶ Many legal observers believe the attorney general’s department has become “increasingly politicised” during President’s Rajapaksa’s tenure.⁹⁷ He also appointed an unusually large number of junior members of the attorney general’s staff to the higher courts.⁹⁸

Accelerating appointment of members of the attorney general’s department has a knock-on effect upon the lower judiciary. Since the 1978 constitution expanded the number of levels within the judicial hierarchy, explained one former Supreme Court justice, it has become more difficult and time-consuming for career judges to progress from being district judges into the higher judiciary.⁹⁹ “Too many career judges are overtaken by people from the attorney general’s office” as they climb the now-longer judicial ladder, observed one former magistrate judge.¹⁰⁰ While career judges find it more difficult to enter the higher judiciary, state counsels are appointed younger and have long tenures in office.¹⁰¹ Ambitious and talented lawyers without political connections have little incentive to work their way up through the judiciary, since they will quickly be overtaken by peers within government.

This problem is especially acute for Tamil lawyers. “By design or otherwise”, a senior Tamil lawyer observed, recent appointees to magistrate and district courts in the Tamil-speaking areas of Jaffna, Mannar and Vavuniya have been in their 40s and 50s.¹⁰² At the normal rate of career advancement, these judges will have to retire before being elevated to senior judicial office. In the future, there may be a shortage of Tamil judges to appoint as the number of Tamils working in the lower courts is decreasing. Many young Tamil professionals opt to leave the country to make careers rather than risk discrimination or violence.¹⁰³

⁹⁴ Ibid, p.87.

⁹⁵ Crisis Group interview, legal analyst, Colombo, 14 November 2008.

⁹⁶ Crisis Group interview, former Supreme Court justice, Colombo, November 2008.

⁹⁷ Crisis Group interviews, fundamental rights lawyer and former senior state’s counsel, Colombo, November 2008.

⁹⁸ In 2008, he appointed for the first time ever an additional solicitor general—a middling career position—to the Supreme Court. Crisis Group interviews, Colombo, November 2008. Previously, it had been assumed that only full solicitor generals could be appointed directly to that court.

⁹⁹ Crisis Group interview, Colombo, November 2008.

¹⁰⁰ Crisis Group interview, Colombo, November 2008.

¹⁰¹ The attorney general’s office has thus become “a place to make a career”, including a fast track to judicial office. Crisis Group interview, state counsel, Colombo, November 2008.

¹⁰² Crisis Group interview, Colombo, November 2008.

¹⁰³ Crisis Group interview, senior Tamil lawyer, Colombo, November 2008.

2. The Constitutional Council

On 3 October 2001, parliament unanimously enacted the Seventeenth Amendment, creating a ten-member constitutional council tasked with appointing members of the higher judiciary.¹⁰⁴ Once nominated, the president “shall ... forthwith make the respective appointments”.¹⁰⁵ The Seventeenth Amendment represented one of the first efforts to impose constitutional constraints on the misuse of executive power.¹⁰⁶ The amendment, however, placed that check within the parliament despite historically weak legislative resistance to the executive presidency. The constitutional council failed to include members of the judiciary or sectors of civil society that have been watchdogs on the presidency. It has failed its mission in part because of the weakness of parliamentary will and in part due to President Rajapaksa’s willingness to disobey a clear constitutional command.

The first council convened in March 2002 to begin its three-year term.¹⁰⁷ It published an annual report with a “list of general criteria for disqualification”, creating a transparent and public measure for its work.¹⁰⁸ Its judicial appointments largely followed “tradition” in drawing on members of the lower judiciary based on seniority, members of the attorney general’s department and some members of the private bar.¹⁰⁹ The first council’s term lapsed in 2005, shortly before President Rajapaksa took office. Since his inauguration, President Rajapaksa has not reconvened the council. He has taken advantage of the gap to make direct appointments to both the courts and national commissions.¹¹⁰

Initially, the president justified his refusal to convene the council by pointing to the “deliberate delay” of minority parties the Tamil National Alliance (TNA) and Janatha Vimukthi Peramuna (JVP) in choosing a tenth council member.¹¹¹ Rajapaksa rejected the opinion of his own attorney general that the JVP, then part of the government, could not be considered a minority party.¹¹² Even when the TNA and JVP agreed on a candidate, the president nonetheless declined to appoint him stating, among other things, that he wished first for a parliamentary select committee to investigate and report on the amendment.¹¹³ That

¹⁰⁴ Art. 41A of 1978 constitution. The council comprises the speaker, the prime minister, the leader of the opposition, one presidential appointee, five people nominated jointly by the prime minister and the opposition leader, and one person agreed on by members of those parties other than those to which the prime minister or the opposition leader belong. See Crisis Group Report, *Sri Lanka’s Human Rights Crisis*, op.cit., pp.19-20.

¹⁰⁵ Art. 41A(5) of the 1978 constitution.

¹⁰⁶ Crisis Group interview, former Court of Appeal judge, Colombo, 20 November 2008.

¹⁰⁷ Ruana Rajapakse, *A Guide to Current Constitutional Issues in Sri Lanka* (Rajagiriya, 2008), p.52.

¹⁰⁸ Ibid, p.54.

¹⁰⁹ Ibid, p.54.

¹¹⁰ Poorna Rodrigo, “President sidesteps CC, appoints Commissions”, *Daily Mirror*, 11 April 2008; S.S. Selvanayagam, “Arbitrary appointments might lead to anarchy, say petitioners”, *Daily Mirror*, 27 May 2006.

¹¹¹ Elaine Chan, “Sri Lanka’s Constitutional Council”, *LST Review*, vol.18, no.243 (2008), p.4; and “The Forgotten Constitutional Council”, Transparency International Sri Lanka (TISL), May 2008, p.2, available at www.tisrilanka.org/post.htm.

¹¹² Chan, “Sri Lanka’s Constitutional Council”, op.cit., p.4; and “The Forgotten Constitutional Council”, Transparency International Sri Lanka, op.cit., p.3.

¹¹³ As one legal scholar noted, “[t]his is not a valid excuse because the 17th Amendment is part of our Constitution, it is already law”. Rohan Edrisinha, “The Continuing Violation of the Seventeenth Amendment: Yet More Unconvincing Excuses”, 3 March 2008, available at www.groundviews.org.

select committee, on 9 August 2007, concluded that the council should be able to function with a quorum of six members, and recommended that the president's interim appointments be dismissed so that new appointments could be made in accord with the Seventeenth Amendment.¹¹⁴ The president ignored its recommendations and continued to appoint judges without council involvement.¹¹⁵

Legal scholars generally agree that the president's refusal to convene the council has been "in bad faith".¹¹⁶ But "[t]here is no ostensible way to force Rajapaksa" to convene the council as a result of the president's constitutional immunity which extends even to clear non-performance of his legal duties.¹¹⁷ A lawsuit currently before the Supreme Court has led nowhere¹¹⁸. In effect, the constitution enables its own violation.

3. The Chief Justice

The president's unfettered appointment power includes selecting the chief justice of the Supreme Court. The chief justice in turn influences fellow judges of the Supreme Court and members of lower tribunals. The recently retired chief justice, Sarath Silva, is widely regarded as having played a central role in the judiciary's current politicisation. His appointment is viewed as a "turning point for the judiciary".¹¹⁹ He developed his position into an alternative political centre to the presidency. In the words of one lawyer in late 2008, "there are now two dictators in our system".¹²⁰ As a result, one commentator noted, "the court ceased to restrain government actions and indeed arbitrarily upheld the powers of government against citizens".¹²¹ Another commentator described Silva as having "ruined [the judiciary] from within".¹²² Silva's style of judicial governance has left a problematic legacy for his successor.

President Kumaratunga swore in then-attorney general Sarath Silva as chief justice on 16 September 1999.¹²³ At the time, Silva was subject to two pending complaints of misconduct. The UN special rapporteur on the independence of judges and lawyers Param Cumaraswamy

¹¹⁴ The report is reproduced at "Select Committee of Parliament on the 17th Amendment to the Constitution", *LST Review*, vol.18, no.238 (2008), pp.1, 3.

¹¹⁵ "The Forgotten Constitutional Council", Transparency International Sri Lanka, op.cit., p.3. As of May 2008, thirteen judges had been appointed to the Supreme Court and the Court of Appeal outside the framework of the Seventeenth Amendment. Ibid, p.7.

¹¹⁶ Crisis Group interview, law professor, 10 November 2008; see also Rajapakse, *Guide to Current Constitutional Issues*, op, cit., p.55; and "The Constitutional Council must Function", Civil Rights Movement of Sri Lanka, 23 April 2006.

¹¹⁷ Crisis Group interview, former Court of Appeal judge, Colombo, 20 November 2008.

¹¹⁸ Kishali Pinto-Jayawardena, "Why is the government so terrified of the 17th Amendment?", *Sunday Times*, 8 March 2009.

¹¹⁹ Crisis Group interview, Colombo, 7 November 2008.

¹²⁰ Crisis Group interview, Colombo, November 2008. Another, who had practiced under several chief justices, explained that "not one of them had been as dominant of the Court as Sarath Silva". Crisis Group interview, Colombo, November 2008.

¹²¹ Pinto-Jayawardena, "Subverted justice", op.cit.

¹²² Lawrence, *Conversations in a Failing State*, op.cit., p.69, quoting J.C. Weliamuna.

¹²³ Victor Ivan, *An Unfinished Struggle: An Investigative Exposure of Sri Lanka's Judiciary and the Chief Justice* (Maharagama, 2007), p.221.

indicated concern about the appointment given the pending complaints.¹²⁴ Two petitions in the Supreme Court challenged the appointment.¹²⁵ Those petitions were heard and rejected by the Supreme Court's seven most junior judges. That bench had been chosen by Silva, in a clear conflict of interest.¹²⁶

In his nearly ten years as chief justice, Silva used both traditional and innovative methods to control the judiciary. First, in a break from tradition, he assigned junior judges who were his close allies to decide on the panels (or benches) of judges for particular cases in the Supreme Court.¹²⁷ By tradition, assigning benches had been the responsibility of the most junior judge, who placed judges randomly on cases.¹²⁸ By directing who hears what cases, the chief justice wielded possibly decisive influence on outcomes. Early in his tenure, Chief Justice Silva ensured that justices with independent views, such as Justice Mark Fernando and Justice C.V. Wigneswaran, did not sit in significant constitutional cases.¹²⁹

Second, the chief justice also stacked the Judicial Service Commission (JSC), which is responsible for discipline and promotions in the lower judiciary. As discussed below, the JSC was a vehicle for Chief Justice Silva to ensure that lower court judges "toe[d] the line" he wished.¹³⁰

Third, the chief justice tightly controlled discretionary funding and training, with judges having to seek his approval for overseas travel, conferences and other side benefits.¹³¹ Between June 2000 and late 2007, the World Bank managed an \$18.2 million judicial reform program that primarily funded "huge, mainly infrastructure" projects and had little success with its larger reform objectives.¹³² The chief justice chaired the program's steering committee.¹³³ According to one former Supreme Court justice, "Silva used the World Bank to extract personal favours.... It was a patronage system".¹³⁴ Watchdog groups have

¹²⁴ Lawrence, *Conversations in a Failing State*, op.cit., p.73. Param Cumaraswamy is a Malaysian lawyer who was the UN Special Rapporteur from 1994 to 2003.

¹²⁵ The petitions were from attorney Rajpal Abeynayake and journalist Victor Ivan. Ivan, *An Unfinished Struggle*, op.cit., pp.237-39.

¹²⁶ Ibid, p.245.

¹²⁷ Crisis Group interviews, lawyers, Colombo, November 2008.

¹²⁸ Crisis Group interview, former Supreme Court justice, Colombo, November 2008.

¹²⁹ Crisis Group interviews, former Supreme Court justices, Colombo, November 2008. As the International Bar Association (IBA) noted, the former chief justice "used the administration of the case allocation procedure as a tool to sideline senior Supreme Court judges from hearing politically sensitive cases". "Justice in retreat: a report on the independence of the legal profession and the rule of law in Sri Lanka", IBA, May 2009, p.7.

¹³⁰ Crisis Group interview, state counsel, Colombo, November 2008.

¹³¹ Crisis Group interview, former Supreme Court justice, Colombo, November 2008.

¹³² Crisis Group interview, United Nations staff, Colombo, November 2008; "Sri Lanka: Failing to Protect the Rule of Law and the Independence of the Judiciary", International Bar Association (IBA), November 2001, p.28. The World Bank spent more than \$18 million on the project. Implementation Completion and Results Report (Cr.3382-CE), report no. 39538, 1 October 2007, at www.wds-worldbank.org.

¹³³ It also included the ministers of finance, commerce and justice, the attorney general, and the secretary of the JSC. "Sri Lanka: Failing to Protect the Rule of Law and the Independence of the Judiciary", IBA, op.cit., p.29.

¹³⁴ Crisis Group interview, Colombo, November 2008. In addition to the chief justice's influence, the president also has patronage tools. Judges are eligible for discretionary appointments to statutory

complained that beyond new physical infrastructure, there is little evidence that the World Bank funds have benefited the courts.¹³⁵

Finally, the chief justice exercised significant influence through the attitudes he expressed while adjudicating.¹³⁶ “When he takes cases lightly, this permeates the whole judiciary”, said one lawyer.¹³⁷ Early in his tenure, for instance, Chief Justice Silva made disparaging comments from the bench about the importance of detention and torture cases. In the following years, there was a marked decline in the number of fundamental rights petitions filed and judgments rendered.¹³⁸

As a result of these levers, Chief Justice Silva gained “a complete hold on both the JSC and the Court. He uses his juniors to get his own way”, said one former Supreme Court justice.¹³⁹ One sign of this control was the near-complete absence of dissenting opinions in the court’s judgments under Silva.¹⁴⁰ This is in clear contrast to the 1970s and 1980s, when dissent was common.¹⁴¹

In June 2009, President Rajapaksa appointed as chief justice Asoka de Silva, the most senior justice on the court—regrettably without involvement of the constitutional council. The appointment offers a chance to reverse the former chief justice’s legacy of a hyper-politicised judiciary. De Silva is known as a cautious, capable and fair jurist, without his predecessor’s strong and highly political personality. He is expected to work more closely and cooperatively with his colleagues on the court. His experience as a judge on the International Criminal Tribunal for Rwanda gives him a welcome familiarity with international legal practices and perspectives. Whether the new chief justice seizes the opportunity will help determine whether the judiciary reclaims its constitutional role as a check on abuses by the executive and legislative branches, which have deepened Sri Lanka’s ethnic conflict.

bodies such as the bribery commission, which by law must have two former Supreme Court justices. Crisis Group interview, member of the bribery commission, November 2008.

¹³⁵ The stated aim of the project was to “improve upon the existing legal and judicial framework by making it more efficient, transparent and responsive to the needs of the public at large and of the private sector in particular”. See “Sri Lanka: The role of the Judicial Service Commission in World Bank reform project”, Asian Human Rights Commission, 28 February 2006, available at www.ahrckh.net/statements/mainfile.php/2006statements/442/.

¹³⁶ Crisis Group interviews, lawyers and legal scholars, Colombo, November 2008.

¹³⁷ Crisis Group interviews, fundamental rights lawyer, Colombo, 19 November 2008. Another lawyer explained that, “Many judges tend to look to the chief justice as their [lead]”. Crisis Group interview, lawyer, Colombo, November 2008.

¹³⁸ Kishali Pinto-Jayawardena and Lisa Kois, *Sri Lanka: The Right Not to be Tortured: A Critical Analysis of the Judicial Response* (Colombo, 2009), p.9; and Crisis Group interview, Colombo, November 2008.

¹³⁹ Crisis Group interview, November 2008.

¹⁴⁰ In its recent report, the IBA stated: “the Chief Justice’s excessive influence over other members of the judiciary, and particularly over most other Supreme Court judges, means that there is a real, though unspoken, reluctance for judges to issue dissenting opinions, with fewer than five reported opinions dissenting from the Chief Justice having been issued in the past ten years in the Supreme Court”. “Justice in retreat: A report on the independence of the legal profession and the rule of law in Sri Lanka”, IBA, op.cit., p.32.

¹⁴¹ Crisis Group interviews, lawyers and legal scholars, November 2008. Dissenting opinions from three-judge panels of the high court have generally been considered a prerequisite for the rehearing of a case by a larger panel of judges.

B. Removal of Supreme Court Justices

Under Article 107(2) of the 1978 constitution, the president may remove a Supreme Court justice only if a third of all sitting members of the parliament sign a resolution for removal and then two thirds vote for a finding of “proven misbehaviour” or incapacity.¹⁴² No Supreme Court justice has ever been removed in this manner. With parliament elected under a system of proportional representation, no government since the 1980s has gained enough seats to assemble the necessary two-thirds vote.¹⁴³ While this prevents the too-easy removal of justices for partisan reasons, it also prevents action even when clear grounds for impeachment exist.

There were two efforts to impeach Chief Justice Silva based on alleged misconduct either before or after his appointment.¹⁴⁴ The first was cut short by President Kumaratunga’s proroguing of parliament in July 2001.¹⁴⁵ The second attempt failed when, once again, the president dissolved the legislature.¹⁴⁶ These failed attempts signal that justices can avoid investigation of serious allegations of misconduct or corruption if they have the president’s support. Before the president cut short the first impeachment effort, the Supreme Court inserted itself into the parliamentary impeachment process by accepting for review three fundamental rights petitions challenging impeachment. It issued an injunction against the speaker seeking to short-circuit the removal of its own head judge. Parliament ignored this injunction,¹⁴⁷ but the injunction undermined the court’s impartiality, and provided the political branches with a precedent for ignoring judicial orders in the future.

In other cases when removal of justices has been raised, it has been based not on “proven misbehaviour” or incapacity but political enmity. In 1984, for example, the investigation of Chief Justice Neville Samarakoon was motivated by President Jayawardene’s dissatisfaction with his former ally.¹⁴⁸ Initial votes on whether to convene a select committee fell along party lines.¹⁴⁹ According to the committee report’s own account, the chief justice had criticised corruption in the political branches and nepotistic efforts to secure patronage appointments on his own staff.¹⁵⁰ The select committee found no misbehaviour but “a serious breach of

¹⁴² Parliament has issued standing order 78A to regulate impeachment proceedings, which requires that a select committee be formed to investigate charges and report within a month. Committee findings are not disclosed absent a finding of guilt. Wijenayake, *Independence of the Judiciary in Sri Lanka Since Independence*, op.cit., p.15.

¹⁴³ K.M. de Silva, *Reaping the Whirlwind: Ethnic conflict, ethnic politics in Sri Lanka*, op.cit., p.38; and Laksiri Jayasuriya, *The Changing Face of Electoral Politics in Sri Lanka (1994-2004)* (Nugegoda, 2005), p.129.

¹⁴⁴ Crisis Group interview, Colombo, 14 November 2008.

¹⁴⁵ “Sri Lanka: Failing to Protect the Rule of Law and the Independence of the Judiciary”, IBA, op.cit., pp.13-14.

¹⁴⁶ Lawrence, *Conversations in a Failing State*, op.cit., p.73.

¹⁴⁷ Ivan, *An Unfinished Struggle*, op.cit., pp.361-375.

¹⁴⁸ Crisis Group interview, lawyers, Colombo, November 2008.

¹⁴⁹ Suriya Wickremasinghe, *Of Nadesan and Judges* (Colombo, 2003), pp.14-15.

¹⁵⁰ “Report from the Select Committee appointed to investigate and report to parliament on the allegations referred to in the resolution placed on the order paper of 5th September, 1984, for the presentation of an address to his excellency the President requesting the removal of the Hon. N.D.M. Samarakoon Q.C., from the office of Chief Justice of the Supreme Court”, parliamentary series no. 71, Colombo, 13 December 1984, p.81.

convention”, and warned that Samarakoon’s behaviour had “imperilled the independence of the judiciary and undermine[d] the confidence of the public in the judiciary”.¹⁵¹ A recent effort to investigate another Supreme Court justice, Saleem Marsoof, in 2008, for a speech he gave criticising the government’s non-implementation of the Seventeenth Amendment, also foundered at the select committee stage.¹⁵²

C. *Appointments and Removals in the Lower Courts*

1. The JSC and the Seventeenth Amendment

The JSC is “vested” with power over the “appointment, transfer, dismissal, and disciplinary control” of lower court judges.¹⁵³ While still chaired by the chief justice, the two other judges on it, per Article 112(1), were initially selected by the president.¹⁵⁴ The president has delegated to the JSC authority to handle those issues for high court judges.¹⁵⁵ The constitution says nothing, however, about how the JSC’s powers are to be exercised or the procedures to be used when imposing penalties. Nor has the JSC promulgated rules on these matters.

Before 1999, most promotions within the lower judiciary followed a seniority rule.¹⁵⁶ Promotions and transfers were done in a predictable manner. Judges would be assigned for fixed three-year slots to specific courts. “Everyone knew the rules, and they were followed”. Newer judges were first assigned to a position far from Colombo, and then rotated on a predictable basis to new, gradually better stations.¹⁵⁷

During Chief Justice Silva’s tenure, the JSC was troubled. Silva rejected the tradition of appointing the two senior justices of the court. He removed from the JSC Justice Mark Fernando, a respected jurist with a long record of independence from the executive, with the stated goal of increasing its “diversity”. He then passed over the most senior Tamil judge, Justice C.V. Wigneswaran, in favour of more junior judges.¹⁵⁸ “The two remaining judges on the JSC were then very weak”.¹⁵⁹

¹⁵¹ Ibid, pp.90-91.

¹⁵² Sonali Samarasinghe, “MR gets set to battle the judiciary as the war takes its toll on IDPs”, *The Sunday Leader*, 28 September 2008; and Crisis Group interviews, lawyers, Colombo, November 2008.

¹⁵³ Arts. 114(1) & (6) of 1978 constitution.

¹⁵⁴ Until 1972, authority to appoint, transfer or remove district court judges lay with a Judicial Service Commission comprising the chief justice and the two most senior justices of the Supreme Court. H.L. de Silva, *Sri Lanka: A Nation in Conflict: Threats to Sovereignty, Territorial Integrity, Democratic Governance and Peace*, op.cit., p.408; M.J.A. Cooray, *Judicial Role under the Constitutions of Ceylon/Sri Lanka*, op.cit., p.69. Abolished by the 1972 constitution in favour of cabinet control, the Judicial Service Commission (JSC) was reconstituted under Article 112 of the 1978 constitution. Article 115 of the 1978 constitution also criminalises efforts to influence the JSC.

¹⁵⁵ Crisis Group interview, former Supreme Court justice, Colombo, November 2008.

¹⁵⁶ One former judge explained that the previous chief justice, G.P.S. de Silva, “was honourable but cautious”. Crisis Group interviews, retired judge and lawyers, Colombo, November 2008.

¹⁵⁷ Crisis Group interview, former magistrate judge, Colombo, November 2008.

¹⁵⁸ Crisis Group interview, former Supreme Court justice, Colombo, November 2008.

¹⁵⁹ Crisis Group interview, senior lawyer, Colombo, November 2008.

The deliberate sidelining of the constitutional council further undermined the JSC. Under the Seventeenth Amendment, the two members of the JSC other than the chief justice are to be appointed by that body. In February 2006, the two appointed members of the JSC, Justices Shiranee Bandaranayake and T.B. Weerasuriya, resigned from the JSC over differences with the chief justice about the use of its disciplinary powers. The president appointed two new members based on recommendations from the chief justice without input from the constitutional council.¹⁶⁰ These appointments “created a perception that the government accords more favoured treatment as a reward for ‘cooperation’”.¹⁶¹ The June 2009 re-appointment of Justice Bandaranayake to the JSC is a positive step that holds out some hope that the JSC may be able to move away from the politicised legacy of the former chief justice.¹⁶²

2. Appointments and removals by the JSC

As early as November 2001, an International Bar Association delegation found “consistent complaint[s] relating to improper judicial supervision under the auspices of the JSC and [Chief Justice Silva]”.¹⁶³ The World Bank also found that “complaints against the judiciary are not always investigated”.¹⁶⁴ The UN special rapporteur on the independence of lawyers and judges, Malaysian jurist Param Cumaraswamy, in addition has expressed concern about “allegations of misconduct on the part of Chief Justice Sarath Silva” in the exercise of JSC powers.¹⁶⁵

There is currently no established procedure for evaluating judges on the basis of which transfers, promotions and punishments can be decided in a relatively fair and objective manner.¹⁶⁶ The earlier, more predictable schedule of transfers and appointments has been “abandoned”, leaving judges uncertain as to where they will be living and whether they will rise or fall in the hierarchy.¹⁶⁷ This creates opportunities for abuse. Judges who did not decide in favour of friends and political allies of the chief justice have been removed or transferred to unfavourable locations. By contrast, allegations of impropriety or misconduct against the former chief justice’s allies were not pursued in the JSC.¹⁶⁸

One case in particular highlights the scope for abuse of the chief justice’s and the JSC’s discretionary power. According to one former magistrate, Chief Justice Silva, while attorney general, intervened in a pending criminal case before the magistrate and sought dismissal of

¹⁶⁰ Chan, “Sri Lanka’s Constitutional Council”, op.cit., p.9 and n. 53.

¹⁶¹ H.L. de Silva, *Sri Lanka: A Nation in Conflict: Threats to Sovereignty, Territorial Integrity, Democratic Governance and Peace*, op.cit., p.415.

¹⁶² Ranjith Ananda Jayasinghe, “Justice Shirani Bandaranayake to JS Commission”, *Daily Mirror*, 11 June 2009.

¹⁶³ “Sri Lanka: Failing to Protect the Rule of Law and the Independence of the Judiciary”, IBA, op.cit., p.21.

¹⁶⁴ Ibid, p.29.

¹⁶⁵ Quoted in “Sri Lanka: Serious Concerns Affecting Sri Lanka’s Judiciary”, Asian Legal Resource Center, 31 May 2007, at www.alrc.net/doc/mainfile.php/alrc_statements/418/.

¹⁶⁶ Crisis Group interview, lawyer, Colombo, November 2008.

¹⁶⁷ Crisis Group interviews, senior lawyer and former magistrate judge, Colombo, November 2008.

¹⁶⁸ A magistrate judge with whom Crisis Group spoke gave the example of a Colombo magistrate judge who had violated ethics rules but remained in office. Crisis Group interview, 19 November 2008; and Ivan, *An Unfinished Struggle*, op.cit., pp.164-167.

charges against his allies. The attorney general does not normally appear in criminal cases; his intervention was reportedly through back-channels rather than a formal legal filing. On becoming chief justice, Silva pressed charges of misconduct against that same magistrate, alleging he had told police at a checkpoint that he was a high court judge, not a magistrate judge. In the JSC proceeding, this magistrate was not allowed to see the findings against him or to know why the JSC reached those findings.¹⁶⁹ When the magistrate vigorously challenged them in the JSC, he was denied the right to call witnesses and told that his earlier refusal to help the attorney general could also be grounds for dismissal.¹⁷⁰ The magistrate appealed, but the JSC neither considered nor ruled on that appeal.

The magistrate then submitted a communication to the Human Rights Committee, a UN body established under the Optional Protocol to the International Covenant on Civil and Political Rights. In July 2008, this body concluded the dismissal had been arbitrary and lacked basic procedural guarantees.¹⁷¹ Nothing came of this communication. The former magistrate judge observed that: "In general, judges are not independent" of political influence. "Judges are very scared. The chief justice's secretary can just phone anyone", and get the result he wants.¹⁷²

Another judge who had sat in various magistrate and district courts inside and out of Colombo was removed by the JSC after having a falling out with former Chief Justice Silva while secretary of the judges' association. He too noted that Silva had attempted to influence outcomes of cases by offering benefits to judges who would decide the way he wished.¹⁷³

Former judges and legal analysts agree that the JSC had become a conduit for those with connections to the former chief justice. This includes not just the present government, but also elements of the Buddhist Sangha and business figures.¹⁷⁴ One magistrate, Hiran Ekanayake, was dismissed as "mentally unfit" after he refused to "finish... briefly" a set of cases in which the chief justice had an interest. Ekanayake had earlier been abruptly transferred from Thambuthegama, near Anuradhapura, after pushing an investigation into a political bombing possibly linked to the SLFP.¹⁷⁵ Other instances of JSC intrusion have cut short inquiries into human rights violations allegedly committed by the Sri Lankan military. For instance, in prosecutions involving the disappearance of Fr. Jim Brown in Jaffna and the killing of seventeen Action contre la faim (ACF) aid workers in Mutur, both in August 2006,

¹⁶⁹ In 2001, Chief Justice Silva told an International Bar Association delegation that judges received copies of the proceedings. "Sri Lanka: Failing to Protect the Rule of Law and the Independence of the Judiciary", IBA, op.cit., p.22. This no longer appears to be the case.

¹⁷⁰ Crisis Group interviews, Colombo, November 2008.

¹⁷¹ Crisis Group interview, lawyer, Colombo, November 2008.

¹⁷² Crisis Group interview, former magistrate judge, 19 November 2008.

¹⁷³ Crisis Group interview, former magistrate judge, Colombo, November 2008.

¹⁷⁴ Crisis Group interviews, Colombo, November 2008. The former chief justice has close relations to the Sangha. He appears on local television weekly explaining Buddhist principles and is closely associated with a politically influential meditation centre in Colombo.

¹⁷⁵ Lawrence, *Conversations in a Failing State*, op.cit., pp.92-93; and Ivan, *An Unfinished Struggle*, op.cit., pp.287-290.

magistrate judges were ordered to transfer the cases to new judges just as they neared their investigation's end.¹⁷⁶

These examples are not outliers. One former judge estimates that at least twenty judges were pushed out by Chief Justice Silva. "Mainly these judges refuse to do something", he explained, "They refuse to do something the chief justice wants, or make an order against the justice's friends [or] Buddhist monks [who are close to him]".¹⁷⁷ Pretexts were often found to penalise judges not in the good graces of the chief justice.

In addition, the manner in which JSC proceedings are conducted raises due process concerns. According to former lower court judges who have faced proceedings in the JSC, judges are still not always informed of the evidence against them or of the ultimate disposition of charges. The JSC instead suggests they resign rather than being dismissed.¹⁷⁸ Because a formal dismissal makes it difficult for the judge to return to private practice, many judges will resign rather than fight charges.¹⁷⁹

The JSC was not the only vehicle for the chief justice to exercise influence. According to former magistrate judges, the chief justice also appointed allies as the secretary to the Judges' Institute, where all lower court judges train. That position served as a conduit for messages to and from the chief justice, where judges would signal the places they wished to be posted and the chief judge would select judges for favoured treatment.¹⁸⁰

D. Intimidation of Lawyers and Judges

Compounding the pressure on judges, lawyers face intimidation or violence, as in J.C. Weliamuna's case, when they act on behalf of politically unpopular clients or detained persons.¹⁸¹ Lawyers dealing with police detention decisions have been detained themselves and harassed or beaten. In October 2008, for example, one lawyer was detained and threatened in Bambalapitiya police station in Colombo after he advised his client in detention not to confess, invoking police wrath.¹⁸² In addition, lawyers and litigants are also constrained by the threat of contempt of court.¹⁸³ A lack of clear rules for imposing contempt

¹⁷⁶ Chan, *op.cit.*, p.10; "From Welikade to Mutur and Pottuvil", University Teachers for Human Rights (Jaffna), (UTHR(J)), special report no.25, 31 May 2007; and "The Second Fascist Front in Sri Lanka", UTHR(J), special report no.29, 21 February 2008, appendix III. In March 2009, the magistrate in the Fr. Jim Brown case, Mrs. Srinithy Nandasekaran, was named a finalist for the U.S. State Department's "Women of Courage Award".

¹⁷⁷ Crisis Group interview, Colombo, November 2008.

¹⁷⁸ Crisis Group interviews, former magistrate judges, Colombo, November 2008.

¹⁷⁹ Crisis Group interview, former magistrate judge, Colombo, November 2008.

¹⁸⁰ Crisis Group interview, former magistrate judge, Colombo, November 2008.

¹⁸¹ Lawyers who represent detainees have recently been directly threatened. Basil Fernando, "Lawyers in Sri Lanka threatened", UPI Asia, 2 January 2009, at www.upiasiaonline.com. Overt intimidation of judges appears rare. In one seemingly exceptional instance in 2007, however, Minister of Labour Mervyn Silva allegedly threatened a magistrate judge when his son was arrested after a nightclub brawl. "Minister 'threatens' judiciary", BBC Sinhala (bbc.sinhala.com), 18 September 2007.

¹⁸² Crisis Group interview, members of Bar Association of Colombo, 21 November 2008.

¹⁸³ Crisis Group interview, lawyer, Colombo, November 2008.

sanctions yields uncertainty about the consequences of criticising the courts. In February 2003, a Supreme Court bench imprisoned a teacher who had filed fundamental rights applications and had raised his voice in a hearing. The teacher lodged a complaint with the UN Human Rights Committee, which in turn condemned the “severe and summary penalty” that had been imposed with “no reasoned explanation”.¹⁸⁴ Possible litigants expressed concern that if they were to try to use such international channels in the future, however, they too would be at risk of contempt sanctions.¹⁸⁵ A draft contempt of court law, approved by the bar council and later published by the non-governmental Asian Human Rights Commission, was sent to the government, but no action has been taken on it.¹⁸⁶

Professional organisations provide little effective constraint on judiciary or protection against intimidation. The Bar Association of Sri Lanka (BASL), formed in November 1994, insists strenuously that it is a non-partisan organisation that zealously protects the profession’s interests.¹⁸⁷ Other lawyers disagree. Lawyers representing criminal and military detainees, and even former judges, variously label the BASL “docile”, “a mouthpiece for those in power” and a “disaster”.¹⁸⁸ With the exception of statements issued in the wake of the grenade attack on J.C. Weliamuna and the assassination of editor Lasantha Wickrematunge, the BASL has no record of defending lawyers or judicial independence.¹⁸⁹ By contrast, in June 2001 the BASL adopted a resolution requesting parliament’s speaker abstain from convening a select committee to investigate charges of misconduct against Chief Justice Silva.¹⁹⁰

V. Failure to Protect Fundamental Rights

Improper political considerations have thus entered the judiciary through the appointment process and the threat of politicised removals, thanks to the wide discretionary powers of the chief justice, especially as they have operated through the JSC. As a result, lower courts are reluctant to challenge illegal detentions or coercive interrogations by government actors. The Supreme Court, too, has proved unwilling to provide adequate remedies in such cases. The

¹⁸⁴ Views of the Human Rights Committee in *Tony Michael Fernando v. Sri Lanka*, Communication No.1189/2003, 31 March 2005, available at www.alrc.net/doc/mainfile.php/un_cases/351/. See “Sri Lanka: The need to set aside the blatantly wrong conviction of Anthony Fernando”, Asian Human Rights Commission, 9 June 2009, at www.ahrchk.net/statements/mainfile.php/2009statements/2082/.

¹⁸⁵ Crisis Group interview, Colombo, November 2008.

¹⁸⁶ See Basil Fernando and Shyamali Puvimanasinghe (eds.), *Sri Lanka: Towards a Contempt of Courts Law* (Hong Kong, 2008), pp.27-35. The national Human Rights Commission, the Editors Guild and other civil society organisations made a range of submissions to a Parliamentary Select Committee in 2003 in support of a comprehensive contempt of court statute embodying established principles accepted across the British Commonwealth. The select committee’s term was not renewed after the dissolution of parliament in late 2003 and no further government action has been taken. Crisis Group interviews, lawyers and civil society activists, Colombo, May 2009.

¹⁸⁷ Crisis Group interview, former president of the Bar Association of Sri Lanka, November 2008; “Sri Lanka: Failing to Protect the Rule of Law and the Independence of the Judiciary”, IBA, op.cit., p.32.

¹⁸⁸ Crisis Group interviews, Colombo, November 2008.

¹⁸⁹ *Sunday Leader* editor Lasantha Wickrematunge was an outspoken critic of alleged corruption by government and military officials and the social costs of the war. He was murdered in a commando-style attack by gunmen on a Colombo street on 7 January 2009.

¹⁹⁰ Ivan, *An Unfinished Struggle*, p.357.

court has also limited options available under international law and hindered domestic advocates' ability to call the government to account for gaps in the domestic incorporation of international human rights.¹⁹¹

A. *The Absence of Remedies for Illegal Detention in Lower Courts*

Military or police detention can be challenged in three ways in the lower courts. First, when a person is detained under either the criminal procedure code or under emergency laws (the PSO or PTA), that person must at some point be presented to a magistrate. Second, a person subject to prolonged illegal detention can file a "writ of habeas corpus", which is a procedure for challenging a detention's legal basis. Third, a fundamental rights petition can be filed in the Supreme Court. None of these options provides an effective check on detaining authorities. Nor can victims of torture easily obtain damages after the fact.

1. Detention and magistrate courts

Magistrate courts are the judiciary's first point of contact with detainees. In both military and criminal detention, however, magistrates are largely unable to constrain either illegal and abusive detention or torture. This is partly due to limits imposed by the emergency laws on the scope of a magistrate's inquiry into a detention, and partly due to practical problems with how magistrate courts function.

Police are responsible for arrests and prosecutions of minor criminal offences. Most torture occurs in police custody immediately after the initial arrest.¹⁹² Police engage in torture, in part, because they lack the basic tools necessary to investigate effectively. For unskilled but ambitious officers, torture leading to confessions is perceived as the easiest road to promotion.¹⁹³ Torture also disproportionately affects the poor.¹⁹⁴ Given its pervasiveness in

¹⁹¹ Arbitrary treatment and rights violation, especially for minorities, though, has yet to translate into majority suspicion of the judiciary. A 2002 survey found that about 84 per cent of those it polled through focus groups "did not think that the judicial system of Sri Lanka was always fair or impartial", but that only one in five thought it "never fair and impartial". Yet the same survey found that a slight majority of court users contacted (54 percent) had "moderate" trust in judges, while a quarter had a "high level" of trust in them. By contrast, 80 percent of the same respondents stated that they had a "low" level of trust in the police. Marga Institute, *A System under Siege: An Inquiry into the Judicial System of Sri Lanka* (Colombo, 2002), pp.39, 48.

¹⁹² Crisis Group interviews, human rights activists and lawyers, Colombo, November 2008. See also Basil Fernando, "Police Torture in Sri Lanka", UPI Asia, 16 November 2007, at www.upiasia.com. For comprehensive reports that document the prevalence of torture in detention in Sri Lanka, see "Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak: mission to Sri Lanka", UN Human Rights Council, 26 February 2008; and Kishali Pinto-Jayawardena, "The rule of law in decline: Study on prevalence, determinants and causes of torture, and other forms of cruel, inhuman or degrading treatment or punishment (CIDTP) in Sri Lanka", The Rehabilitation and Research Centre for Torture Victims, Copenhagen, March 2009.

¹⁹³ Crisis Group interview, lawyers, Colombo, Kandy and Western Province, November 2008. S.V. Ganeshalingam, "PTA violates international human rights standards", *Beyond the Wall*, June-August 2002, p.32 (noting police reliance on forced confessions). See also "No political will to eradicate torture", Asian Human Rights Commission, 25 June 2008, at www.ahrchk.net/statements/mainfile.php/2008statements/1591/ (blaming pervasiveness of torture on an absence of

police custody, when and how a prisoner can secure bail is especially important.¹⁹⁵ Under the criminal procedure code, police must present a detainee to a magistrate within 24 hours. This rule is routinely violated.¹⁹⁶ Except for serious offences, such as possession of weapons, bail is available from the magistrate court.¹⁹⁷ According to one experienced criminal lawyer, the most frequently brought charge involves possession of illegal alcohol.¹⁹⁸

Magistrates and police maintain close relations that render effective oversight by the former of the latter illusory. Magistrates are generally appointed to places other than their towns of origin.¹⁹⁹ They rely on police for protection. Although a conflict of interest, police often provide judges with services such as driving their children to school.²⁰⁰ Police also are repeat players in the magistrate's court, where they prosecute cases. Magistrates and police are linked from the beginning by collegial and social connections. As a result, judges are generally unwilling to challenge aggressively police detention and treatment decisions.²⁰¹ A lawyer from Ampara, for example, explained that "judges believe in good faith in what police say".²⁰² In contrast, criminal defendants, who often appear without a lawyer, are ill-equipped litigants. Further, many "magistrates are insensitive.... They believe that everyone is a criminal and that they need to be beaten once or twice before they will admit what they've done".²⁰³ Sensitivity to human rights is not part of judicial training.²⁰⁴

This network of close ties extends to include lawyers. Only a limited pool of lawyers will work in any particular magistrate court, and lawyers generally practice only in their local courts. In the provincial capital Anuradhapura, for example, there are up to 80 lawyers who work all the courts.²⁰⁵ Lawyers often come from the same social sphere as police officials.²⁰⁶ Further, they depend on a local client base when appearing in either magistrate or district courts. As a result, local lawyers are more often than not unwilling to take on cases that seem directly to challenge police, who may be of use in a subsequent case.²⁰⁷

After arrest, police often "suggest" a lawyer. The clear implication is that those lawyers will be the only ones who can successfully seek bail or secure a sentence without imprisonment.

political will and the incentives for police to curry favour with political authorities by suppressing social mobilisation among the poor).

¹⁹⁴ Basil Fernando and Shymali Puvimanasinghe, *An X-ray of the Sri Lankan policing system & torture of the poor* (Colombo, 2006), p.52.

¹⁹⁵ Crisis Group interview, lawyer, Colombo, November 2008.

¹⁹⁶ Crisis Group interview, lawyers, Colombo, November 2008. See also Statement of Manfred Nowak, UN special rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, 29 October 2007, available at www.unhcr.ch/hurricane/hurricane.nsf/0/F493C88D3AFDCDBEC1257383006CD8BB?opendocument.

¹⁹⁷ Otherwise it must be sought from the provincial high court.

¹⁹⁸ Crisis Group interviews, lawyers, Western Province, November 2008.

¹⁹⁹ Crisis Group interview, present and former magistrate judges, November 2008.

²⁰⁰ Crisis Group interview, lawyers, Western Province, November 2008.

²⁰¹ Crisis Group interview, lawyers, Western Province, November 2008.

²⁰² Crisis Group interview, November 2008.

²⁰³ Crisis Group interview, lawyer, Colombo, November 2008.

²⁰⁴ Crisis Group interview, lawyer, Colombo, November 2008.

²⁰⁵ Crisis Group interview, lawyer, Anuradhapura, November 2008.

²⁰⁶ Crisis Group interview, lawyer, Colombo, November 2008.

²⁰⁷ Crisis Group interview, lawyers, Western Province, November 2008.

The police, and in some cases the magistrate or court clerk, will receive a portion of the lawyer's fee in exchange for the light sentence.²⁰⁸ As a consequence, defendants are often under pressure to plead guilty, to pay a relatively small fine (often around 5000 rupees, or \$50) or a short sentence in lieu of risking prolonged imprisonment, perhaps based on coerced evidence.²⁰⁹ This pressure to plea bargain has a perverse knock-on effect: judges often look at whether a person has a prior conviction in assessing whether the police have caught the correct person.²¹⁰ Especially for young Tamil men who are by default suspected by police, this creates a vicious circle. Unwarranted attention from police justifies later unfair treatment by the justice system. The situation of Tamil defendants is made worse by the fact that almost all police and court officials are Sinhalese, very few of whom speak Tamil.²¹¹

A further disincentive to meaningful judicial oversight is the threat of an undesirable transfer by the JSC.²¹² "The police can always inform the JSC, which can then put pressure on the magistrate", explained lawyers with one human rights organisation.²¹³ Lawyers identified judges in Jaffna and Trincomalee who had been transferred after training their attention on detention cases.²¹⁴ Given these examples, "judges are scared of not being promoted or of being transferred [to unfavourable places] and they want to be in the good books of the chief justice and the president".²¹⁵ Judges with qualms about following instructions from the JSC "simply avoid political cases".²¹⁶

The situation under the emergency laws is worse as a judge has little power to grant any real remedy for illegal or abusive detention.²¹⁷ A judge has no power to order release, even if a person is being ill-treated or detained for manifestly improper reasons. As one magistrate judge explained, "under the emergency regulations, we simply can't give bail" and so no effective action is possible.²¹⁸ Bail applications under the regulations are instead channelled to the attorney general, who often does not reply for months to a release request.²¹⁹ Indeed, in some provincial towns, such as Trincomalee, there is often no state counsel in the magistrate court to triage bail requests.²²⁰ In detention cases involving the emergency laws, moreover, representation is harder to find than in criminal cases. In Trincomalee, there is only one lawyer who will provide counsel in such cases.²²¹

Detaining authorities are supposed to issue a receipt to the family and to notify the national Human Rights Commission. In practice, neither may happen, and there is no way to enforce

²⁰⁸ Crisis Group email interviews, Sri Lankan lawyers, June 2009.

²⁰⁹ Crisis Group interview, lawyers, Colombo, November 2008.

²¹⁰ Crisis Group interview, lawyers, Colombo and Anuradhapura, November 2008.

²¹¹ Crisis Group interview, lawyer, Colombo, November 2008.

²¹² Crisis Group interview, lawyers, Western Province, November 2008.

²¹³ Crisis Group interview, lawyers for Colombo-based human rights organisation, Colombo, November 2008.

²¹⁴ Crisis Group interviews, lawyers, Colombo and Trincomalee, November 2008.

²¹⁵ Crisis Group interview, lawyer, Western Province, November 2008.

²¹⁶ Crisis Group interview, fundamental rights lawyer, Colombo, November 2008.

²¹⁷ Crisis Group interview, lawyer, Colombo, November 2008.

²¹⁸ Crisis Group interview, magistrate judge, November 2008.

²¹⁹ Crisis Group interview, Ampara-based lawyer, November 2008.

²²⁰ Crisis Group interview, November 2008.

²²¹ Crisis Group interviews, Trincomalee and Colombo, November 2008.

either requirement.²²² Even when the Human Rights Commission is informed, lawyers report that it generally does little.²²³ In normal criminal cases, detainees have a right to seek counsel; in emergency cases, they are often denied access to a lawyer. The first time to seek counsel may be when they are presented to a magistrate court weeks or months after the first detention.²²⁴ Family members, especially of Tamil detainees, are often too frightened to seek legal counsel out of fear of being detained themselves if they protest.²²⁵

The emergency regulations impose no requirement on police to publish a list of detention facilities where people are held.²²⁶ Detainees are often held in parts of police or military facilities that are inaccessible to lawyers.²²⁷ They are often moved from the place of their arrest. Those from Tamil-majority Vavuniya and Trincomalee are routinely brought to Sinhala-majority Anuradhapura.²²⁸ Detainees from Mannar, Anuradhapura and Vavuniya are shifted to Kandy.²²⁹ Because detainees are kept incommunicado or moved from the place of arrest to other prisons, sometimes without notification to family or counsel, it is hard to make an accurate tally.

Prior to the mass surrender and arrests in the weeks following the military defeat of the LTTE, one human rights group estimated that some 1,500 people were detained under the emergency laws.²³⁰ That number is now at least 10,000 as the government has established a series of new detention centres to house those identified as or suspected of being members of the LTTE from among the nearly 300,000 people displaced by fighting in the Northern Province.²³¹ While the Supreme Court does not have the authority to intervene directly in the management of detentions, magistrates do have the power to visit and monitor any place of detention in the country at any time. Given that most magistrates have been reluctant to use this power, the JSC can and should insist that they do so. The JSC might also consider organising a training program to help equip and encourage magistrates to carry out this crucial aspect of their job more effectively.

Such a limited judicial role in detention results in little protection against torture. Under both the PTA and the emergency regulations, detaining authorities are supposed periodically to present a detained person to a magistrate.²³² While judges cannot order release, this could be a chance to ensure no torture is occurring and to facilitate access to counsel. In practice, however, judges almost never intervene even if there are visible signs of torture. One lawyer

²²² Crisis Group interview, November 2008.

²²³ Crisis Group interviews, November 2008.

²²⁴ Crisis Group interview, lawyer, Colombo, November 2008. Generally, it is the family that will find counsel for a detained person.

²²⁵ Crisis Group interview, Kandy, November 2008.

²²⁶ Edirisinghe, "Emergency Rule", op.cit., p.202.

²²⁷ One lawyer noted that several of his clients had been held in a criminal investigation division facility, where no lawyers were allowed. Crisis Group interview, lawyers, Western Province, November 2008.

²²⁸ Crisis Group interviews, lawyers, Trincomalee, Anuradhapura and Colombo, November 2008.

²²⁹ Crisis Group interview, Kandy, November 2008.

²³⁰ Crisis Group interview, human rights lawyers, Colombo, April 2009.

²³¹ "Sri Lanka holding over 9,000 ex-Tamil rebels", Agence France-Presse, 26 May 2009.

²³² The Supreme Court has stated that magistrate must visit or otherwise view the detainee. *Weerawansa v. Attorney General*, (2000) 1 SLR 387; and Pinto-Jayawardena, "Subverted justice", op.cit.

who represents detainees observed that even when tangible evidence of physical abuse is presented during interim presentations judges sometimes refuse to record it—even though they are mandated by law to do so.²³³ Another lawyer observed that judges sometimes will not even ask to see a prisoner, but nonetheless sign off on continued detention.²³⁴ With such lax scrutiny, police can detain someone illegally and then file a backdated detention order that enables lengthier detention than even the malleable contours of the emergency laws provide.²³⁵

Even after detention authority has expired and no charge filed, release is not guaranteed. A lawyer based in Kandy explained that if a person is detained under the emergency laws, and there is no evidence of wrong-doing, he or she can still be charged with having a past connection with the LTTE, such as having trained in the past with it. Indeed, it is often in the interests of an ambitious arresting officer to do so.²³⁶ There is also often considerable delay between an arrest under the emergency law and charges. In one instance, a person detained in September 1997 under the PTA was not indicted until December 1999, and then subjected to superseding indictments between then and January 2001. More than three years elapsed between the initial detention and the effective indictment.²³⁷

Lawyers throughout Sri Lanka concur that “practically nothing can be done that’s effective” in cases of detention under the emergency law. The best option is to “get a lawyer so that the authorities know that someone is watching the case”, explains one advocate. In the cases of young Tamil men this offers only very limited protection.²³⁸

Emergency laws also have a disproportionate effect on Tamils. In predominantly Sinhala areas, neither emergency regulations nor the PTA are used frequently, but when they are, the majority of those detained are Tamil.²³⁹ Routine criminal investigations that sweep up Tamil suspects are sometimes converted into terrorism cases, with detention covered by the emergency laws, simply because of the suspect’s ethnicity.²⁴⁰ One lawyer in the Eastern Province observed that Sinhala and Tamil suspects seized at road blocks will be treated differently, with Tamils more likely to be detained under the emergency laws and Sinhalese under regular criminal laws.²⁴¹ Once a case has been labelled terrorism-related, the attitude of judges changes: “They view the problem as being one of terrorism, and their view is that everyone must cooperate”, explained a lawyer for a human rights organisation. “There is a

²³³ Crisis Group interview, lawyers, November 2008.

²³⁴ Crisis Group interview, lawyer, Colombo, November 2008.

²³⁵ Crisis Group interview, lawyer, Colombo, November 2008.

²³⁶ Crisis Group interview, Kandy, November 2008.

²³⁷ Ganeshalingam, “PTA violates international human rights standards”, *op.cit.*, p.30.

²³⁸ Crisis Group interview, lawyers, Colombo, Kandy, Trincomalee and Anuradhapura, November 2008.

²³⁹ It is unclear why the PTA is relied upon for detentions in some areas and emergency regulations in others. It is hard to see any pattern in the use of either law. While the PSO’s emergency regulations have formed the basis for detentions in the Eastern Province, the PTA was used in Kandy in 2008 as the legal authority for detentions of largely Tamil youth after an attack on a police officer with a claymore mine. Crisis Group interview, lawyers and human rights advocates, Colombo, Kandy and Trincomalee, November 2008.

²⁴⁰ Crisis Group interview, lawyers for Colombo-based human rights organisation, Colombo, November 2008.

²⁴¹ Crisis Group interview, Eastern Province, November 2008.

shared mentality between the police, the army and the JSC and a collective approach to the problem".²⁴² Tamil litigants are further disadvantaged if they use Tamil lawyers. Explained one senior Tamil counsel, "there is an unusual suspicion of who you are".²⁴³

2. Habeas corpus

The writ of habeas corpus, the procedure borrowed from English common law for challenges to unlawful executive detention, is not an effective constraint on police or military detention. Until the mid-1990s, police would respond to a habeas corpus writ by simply denying they had custody of a petitioner.²⁴⁴ In December 1994, the Court of Appeal ended this practice. It ruled that the mere assertion by the police that they had not arrested and detained a suspect was not enough to end judicial inquiry if there was some evidence of the petitioner's initial detention.²⁴⁵ Even once this evasive practice ended, the government vitiated the utility of habeas by dragging out proceedings. In the late 1990s, "many cases took five or six years", with upward of 30 hearings, to be decided.²⁴⁶

Lawyers who handle detention and custodial torture cases view habeas as even more enfeebled. One experienced lawyer called it a "very limited remedy".²⁴⁷ Another said flatly that "habeas is not used today because it is not effective".²⁴⁸ According to one lawyer who has filed habeas petitions in the past, petitions will be referred back to the magistrate court in those cases where there is doubt about who is detaining a person. Even when a case is not referred, high court benches tend to be "not so good".²⁴⁹ Once a judge sees a detention order signed under the emergency regulations, detention will typically be found lawful.²⁵⁰ Judges will also accept government representations that they intend to indict a person and not grant any relief pursuant to the habeas action.²⁵¹

3. The failure to discourage illegal detention by damages actions and criminal prosecution

A third way to discourage state misconduct is through criminal prosecutions or civil suits against detaining authorities. But few lawyers, especially outside Colombo, are willing to undertake such damages cases. Representing torture victims puts a lawyer at odds with the police, and thus against their allies, the magistrates. This may imperil his or her other cases, and hinder his or her ability to get new cases.²⁵² "For a verdict to be granted, a lawyer has to

²⁴² Crisis Group interview, lawyers for Colombo-based human rights organisation, Colombo, November 2008.

²⁴³ Crisis Group interview, fundamental rights lawyer, Colombo, November 2008.

²⁴⁴ Udagama, "Taming of the Beast: Judicial Responses to State Violence in Sri Lanka", op.cit., p.292.

²⁴⁵ *Leeda Violet and Others v. OIC Dikwella Police Station*, Court of Appeal [1994] 2 Sri L.R. 377, 282. The opinion's author was Sarath Silva, the recently retired chief justice.

²⁴⁶ "Judicial Independence in Sri Lanka: Report of a Mission 14-23 September 1997", CIJL, op.cit., p.56.

²⁴⁷ Crisis Group interview, president's counsel, Colombo, 20 November 2008.

²⁴⁸ Crisis Group interview, lawyer, Colombo 12 November 2008.

²⁴⁹ Crisis Group interview, lawyer, Colombo, November 2008.

²⁵⁰ Crisis Group interview, lawyers, Colombo and Trincomalee, November 2008.

²⁵¹ Crisis Group interview, lawyers for human rights organisation, Colombo, November 2008.

²⁵² Crisis Group interview, lawyer, Anuradhapura, November 2008.

be on the good side of the local magistrate”, explained one lawyer, “so they are reluctant to do anything that is contentious”.²⁵³

Even senior lawyers in Colombo have experienced negative repercussions from police from taking on torture cases. One lawyer who also handles intellectual property cases explained that once he started taking on torture cases, the Colombo police would decline to carry out search warrants lawfully authorised in his commercial litigation.²⁵⁴ Even when a case goes forward, explained another lawyer, judicial proceedings are extremely slow. Often, police will pressure victims or their families into accepting settlements that under-value damages claims. Because courts do not supervise these settlements, families often settle for significantly less than they could.²⁵⁵ In one case, a torture victim, Gerald Mervin Perera, was shot and killed—allegedly by gunmen hired by the police officers accused of his torture—while his damages case was under consideration.²⁵⁶

Advocates noted that they have had some successful actions in the Supreme Court in damages cases where the plaintiff had secured medical records of the torture.²⁵⁷ When the attorney general determines there is credible evidence of torture, no state counsel will appear on behalf of the officer to defend a case—a policy first instituted by Sarath Silva when he headed the attorney general’s office.²⁵⁸ One study, however, has concluded that while the court has awarded compensation in cases involving criminal detention, it rarely does so in “cases relating to the war between the Government and the [LTTE]”.²⁵⁹

In any case, the attorney general’s office does not vigorously prosecute criminal cases involving serious human rights violations. Cases against state officials, when they do happen, take “many years” to prosecute, and the delays in torture cases are “even longer” than on other charges—a serious matter when even normal criminal charges can take up to ten years.²⁶⁰ One cause of delay in criminal proceedings is “non-summary proceedings”. These are threshold inquiries in which a magistrate court reviews prosecution evidence to ascertain whether there is sufficient evidence to hear a case involving serious charges in the high court.²⁶¹ Initially intended as a screening device to conserve judicial resources, non-summary

²⁵³ Crisis Group interview, lawyer, Colombo, November 2008.

²⁵⁴ Crisis Group interview, lawyer, Colombo, November 2008.

²⁵⁵ Crisis Group interview, lawyer, Western Province, November 2008.

²⁵⁶ “Sri Lanka: Gerald Perera’s torture case: Assassins of torture victims are rewarded by court”, Asian Human Rights Commission, 2 April 2008, at www.srilankahr.net/modules.php?name=Content&pa=showpage&pid=1574.

²⁵⁷ Crisis Group interview, lawyer, Colombo, November 2008.

²⁵⁸ Crisis Group interview, state counsel, Colombo, November 2008. This commendable policy seems to have been reversed with the June 2009 decision by the Attorney General’s department to appear in court for four police officers accused of torture in a fundamental rights suit. “Sri Lanka: Attorney General’s decision to represent alleged torture perpetrators undermines the rule of law”, Asian Human Rights Commission, 19 June 2009, at www.ahrchk.net/statements/mainfile.php/2009statements/2099/.

²⁵⁹ Kishali Pinto-Jayawardena and Lisa Kois, *Sri Lanka: The Right not to be Tortured. A Critical Analysis of the Judicial Response* (Colombo, 2008), p.8. Judicial orders requiring responses to persistent abuse at checkpoints have also been ignored. Basil Fernando, “Sri Lanka’s Supreme Court rulings ignored”, UPI Asia, 28 March 2008, at www.upiasia.com.

²⁶⁰ Crisis Group interview, human rights lawyers, Colombo and Kandy, November 2008.

²⁶¹ Ruana Rajapakse, *An Introduction to Law in Sri Lanka* (Colombo, 2005), p.4.

proceedings now are used in most or all criminal cases in the high courts, delaying prosecutions.

4. Remedies in the Supreme Court

The Supreme Court showed itself capable of responding with flexibility and resourcefulness to past waves of human rights violations. In June 1990, after the JVP insurgency led to thousands of detainees being held for prolonged periods in Boossa detention centre near Galle, the court issued rules allowing a new “epistolary jurisdiction” that detainees could invoke by writing letters to the court. Petitions were referred to the bar association for representation.²⁶² Having relaxed its procedural rules in light of changed circumstances, the court also read the PSO’s limitations on jurisdiction narrowly and went on to invalidate emergency regulations even though its power to do so was in question.²⁶³

Today, a so-called “fundamental rights” petition in the Supreme Court may be the sole avenue of relief open to a person detained without charge, given the unwillingness of magistrate judges to intervene and the failure of habeas corpus as a remedy in the high courts.²⁶⁴ Unfortunately, such petitions provide at best a partial and erratic remedy.²⁶⁵ Lawyers observe that the court has unfettered discretion to allow or deny leave to proceed in any fundamental rights case, and that its decisions are “arbitrary”.²⁶⁶ Moreover, “a practical difficulty in invoking [fundamental rights jurisdiction of the Supreme Court is] the ‘one-month rule’”²⁶⁷. Many people do not or cannot file in that brief window, and as a result lose their ability to file suit.²⁶⁸

While a fundamental rights filing in the Supreme Court will not always yield release, or a judgment that a detention was illegal, it can push the state into ending indefinite detention and on occasion spur release. This process, moreover, is considerably swifter than habeas in the high court, “where the court will issue notices, the state will set dates, and everything will take months and months”.²⁶⁹ For some litigants, as a result, the Supreme Court has proved a

²⁶² Udagama, “Taming of the Beast: Judicial Responses to State Violence in Sri Lanka”, op.cit., pp.279-80.

²⁶³ Basil Fernando, “Can a dysfunctional policing system be reformed”? in *article 2 of the International Covenant on Civil and Political Rights*, vol. 6, no. 2 (2007), p.15.

²⁶⁴ The petition gets its name from the court’s jurisdiction under Article 126(1) to hear cases concerning the constitution’s list of “fundamental rights”.

²⁶⁵ According to lawyers who file such cases in the Supreme Court, the typical procedure is to file an application for relief challenging illegal detention. The application is skeletal because the Supreme Court under Chief Justice Silva developed a means of dealing with those cases that entails no briefing. The court will neither grant nor deny leave to proceed. Rather, the panel of judges will request a response from the attorney general’s office. The court will generally give the attorney general between one and three months to respond. The attorney general will return within the stipulated time, informing the court that the detainee is either to be charged criminally or released. Crisis Group interview, lawyers and human rights organisations, Colombo, Trincomalee and Panadura, November 2008.

²⁶⁶ Crisis Group interview, lawyer, Colombo, 4 November 2008.

²⁶⁷ S.V. Ganeshalingam, “PTA violates international human rights standards”, *Beyond the Wall*, June-August 2002, p.28.

²⁶⁸ Crisis Group interview, legal and political analyst, Colombo, November 2008.

²⁶⁹ Crisis Group interview, fundamental rights lawyer, Colombo, November 2008.

“saviour”. One businessman who was detained by the police and whose investments were revoked by the government explained that the Supreme Court was instrumental in ensuring his release and in preventing the arbitrary revocation of commercial licenses.²⁷⁰ A former justice, on the other hand, argues that the court has become much more timid than in the 1980s. He contends the difference followed from judges’ “basic tendency to think in communal terms”, which meant they gave more attention to human rights in the 1980s, when most victims were Sinhalese, than now, when all but a few victims are Tamil.²⁷¹

In any case, the Supreme Court is not a realistic option for many litigants. Few lawyers outside Colombo are versed in fundamental rights or Supreme Court procedures.²⁷² Most people living outside Colombo cannot afford or are simply unable to travel to Colombo. Still fewer lawyers are willing to appear in cases of detention and torture. One of those who does noted that the number of such lawyers could be counted on one hand.²⁷³ Further narrowing the pool of possible representation, Chief Justice Silva reportedly treated several fundamental rights lawyers who used to take such cases with such contempt that they ceased to take cases to the Supreme Court.²⁷⁴

B. The Supreme Court and International Law

In two important and related cases, Chief Justice Silva’s Supreme Court undercut or minimised Sri Lanka’s international human rights commitments. The court acted from a strong ideal of sovereignty that parallels the aggressive vision of territorial integrity championed by many Sinhala nationalists and President Rajapaksa’s efforts to limit international supervision and awareness of the conflict with the LTTE. Its judgments, however, have undermined the protection of Sinhalese as much as Tamils by international human rights instruments. Their most significant beneficiary is the Sri Lankan government.

On 11 June 1989, Sri Lanka acceded without reservations to the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR).²⁷⁵ Sri Lanka ratified the Convention on Torture on 3 January 1994.²⁷⁶ Like most Commonwealth countries, Sri Lanka follows the “dualist” model for the reception of treaty law into the domestic legal system, whereby international law does not become part of domestic law unless it is contained in existing legislation or incorporated by subsequent legislative action.²⁷⁷ Rights established by the 1978 constitution and domestic legislation currently fall far short of those found in the ICCPR and ICESCR. Fewer rights are granted and deeper derogations from them are allowed.

²⁷⁰ Crisis Group interview, Colombo, 11 November 2008.

²⁷¹ Crisis Group interview, Colombo, November 2008.

²⁷² Crisis Group interviews, November 2008.

²⁷³ Crisis Group interview, Colombo, November 2008.

²⁷⁴ Crisis Group interview, lawyers, Colombo, November 2008.

²⁷⁵ “Judicial Independence in Sri Lanka: Report of a Mission 14-23 September 1997”, CIJL, *op.cit.*, pp.22-23.

²⁷⁶ For a useful listing of Sri Lanka’s international treaty obligations and its engagement with the relevant treaty bodies, see www.bayefsky.com/bycategory.php/state/162.

²⁷⁷ “Judicial Independence in Sri Lanka: Report of a Mission 14-23 September 1997”, CIJL, *op.cit.*, p.23.

In an attempt to demonstrate Sri Lanka's commitment to human rights and openness to international scrutiny, the government of President Chandrika Kumaratunga ratified 1966 Optional Protocol to the ICCPR in October 1997.²⁷⁸ With this, Sri Lanka also acceded to an international enforcement mechanism, the Human Rights Committee (HRC), a UN body created by the 1966 ICCPR. The HRC receives reports from signatory states about ICCPR rights. Under the Optional Protocol, the HRC may also receive "communications" from individuals who claim violations by the state. It may then formulate and forward "views" about the individual's case to the state. Such HRC proceedings are "in no sense a continuation or appeal from the judicial proceedings (if there were any) in the state in which the dispute originated" and have no binding effect on the state.²⁷⁹ At the same time, the HRC is the highest international authority on compliance with the ICCPR and states parties to the Optional Protocol undertake to comply with its views.²⁸⁰ Signatory states also have the obligation to respond to HRC's opinions even if courts are not required to change their rulings to comply.

In two cases, the Supreme Court has hedged and limited these international law commitments. The first case, *Singarasa*, arose out of the criminal conviction of a Tamil man detained in the Eastern Province in 1993 under the PTA.²⁸¹ His conviction was based on a confession made to a police officer. At trial Singarasa denied that he had ever made a confession at all, arguing, among other things, that his signed confession was in Sinhalese, a language he did not even speak. After his appeals were denied, Singarasa lodged a communication with the HRC, arguing that the PTA's provisions enabling the use of confessions to police, and its rule that defendants had to show a confession was coerced, violated the ICCPR's fair trial guarantees. The HRC agreed. It recommended that the government should give Singarasa "an effective and appropriate remedy". With this ruling in his favour, Singarasa re-filed in the Supreme Court, contending that the use of the confession had violated his fundamental rights under Article 13 of the Sri Lankan constitution.²⁸²

The Supreme Court rejected Singarasa's claims.²⁸³ The court barely addressed Article 13, the basis of Singarasa's argument. Rather, it chose to ask and answer a question neither Singarasa nor the government raised: whether the government of Sri Lanka had validly entered the Optional Protocol under which the HRC could receive individual communications. The court reasoned that the presidential signature of the Optional Protocol

²⁷⁸ Henry J. Steiner and Philip Alston, *International Human Rights in Context: Law, Politics, Morals* (Oxford, 1996), pp.501-503. The ICCPR's text is reproduced at www.unhchr.ch/html/menu3/b/a_ceschr.htm. The Optional Protocol's text is found at www.unhchr.ch/html/menu3/b/a_opt.htm.

²⁷⁹ Steiner and Alston, *International Human Rights in Context: Law, Politics, Morals*, op.cit., pp.535-536. State compliance with these views is "patchy". Ibid, p.550.

²⁸⁰ The Sri Lankan state is required to respond formally to the HRC even if the courts do not choose to follow the HRC's recommendations.

²⁸¹ *Singarasa v. Attorney General*, S.C. Spl. (LA) No. 182/99; SCM 15th September 2006.

²⁸² Details of the case are drawn from an examination of the petition and the state's response in that case, and also Crisis Group interviews, Suriya Wickremasinghe and R.K.W Goonesekere, counsel for Singarasa, Colombo, November 2008. Singarasa's lawyers did not raise the HRC ruling as a legal basis for relief. They did, however, refer to it in their oral arguments and urged the court to take the opinion into account. The court's reference to the Optional Protocol in its judgment was neither surprising nor misplaced.

²⁸³ *Singarasa v. Attorney General*, op.cit.

amounted to “a conferment of public rights” that properly belonged to parliament, and that the HRC’s power to issue communications was an assignment of “judicial power” inconsistent with the 1978 constitution.²⁸⁴ The court in effect invalidated Sri Lanka’s ratification of the Optional Protocol.

The *Singarasa* judgment raises numerous troubling questions. The court reached out to invalidate a treaty whose status was not directly relevant to the issues in the case and without any briefing from either party. More important, it did so based on incorrect assumptions about the HRC. Contrary to the court’s argument, the HRC does not issue binding rulings or adjudicate rights, public or otherwise. Its views are merely advisory; they are not revisions of a Sri Lankan court’s judgment but the means by which Sri Lankan citizens can receive a considered second legal opinion which Sri Lankan courts are advised to take into consideration. As a result, there were no grounds for considering the president’s ratification of the Optional Protocol an unconstitutional assignment of judicial power to an international body. The ratification of the protocol—as with any treaty under Sri Lankan law—was fully within the executive president’s powers. It would only be the decision to incorporate the protocol’s rights into domestic law—for instance, by making HRC opinions binding on Sri Lankan courts—that would require parliament’s approval.

The court’s decision has sown unnecessary and continuing confusion. Viewed through a domestic lens, the Optional Protocol no longer binds Sri Lanka. Arguably, this means that its citizens can no longer seek the HRC’s views. Indeed, to do so might expose a person to contempt sanctions from a Sri Lankan court. Viewed through an international law lens, however, Sri Lanka is still bound by the Optional Protocol. Countries cannot use their domestic law to void international law commitments. Hence, the Supreme Court’s view does not bind the HRC or any other actor; nor it is an excuse for non-performance of international law obligations, such as the obligation of the state to respond to HRC communications. The net result is uncertainty about Sri Lankan citizens’ access to an important international forum.

The *Singarasa* judgment is also inconsistent with the court’s approach to judicial independence in other areas. While the court has never strained against the tight bonds imposed by the emergency regulations and the PTA, which dramatically curtail judicial review, it treated an advisory and non-binding communication from an international body as an invasion of the courts’ domain. This apparent inconsistency is rooted in a deeper continuity: in reviewing the emergency laws and responding to the HRC, the Supreme Court has prioritised national sovereignty and territorial integrity as defended by a strong executive to the point of being willing to sacrifice even the mere possibility of a remedial avenue.

A second important ruling arose from President Rajapaksa’s March 2008 request for an advisory Supreme Court opinion on whether Sri Lanka was in compliance with its ICCPR obligations. This followed in part from concerns raised by *Singarasa* but also because of worries about Sri Lanka’s continued eligibility for the European Union’s Generalised System

²⁸⁴ *Singarasa v. Attorney General*, op.cit., pp.12-13.

of Preferences Plus (known as GSP+), which depends on a state's ratification and implementation of various treaties, including the ICCPR.²⁸⁵

The court rejected several arguments from petitioners to conclude that Sri Lanka gave "adequate recognition" to the ICCPR and that "individuals within the territory of Sri Lanka derive the benefit and guarantee of rights as contained in the [ICCPR]".²⁸⁶ The court did not grapple with, let alone resolve, the many ways in which Sri Lankan law falls far short of the ICCPR's requirements. It did not address, for example, Article 15 of the constitution, which allows greater derogation from constitutional rights than the ICCPR permits.²⁸⁷ The court instead relied on legislation enacted to introduce the ICCPR into domestic law,²⁸⁸ even though that law is "formulated on terms substantially and significantly different from the corresponding provisions of the ICCPR".²⁸⁹ Finally, its opinion did not address the state's ongoing failure to protect rights and prosecute state actors who violate those rights.²⁹⁰

The advisory opinion on the ICCPR made the court a full member of the government's diplomatic and political campaign to evade international opprobrium for the country's manifest shortfalls in rights protection. The decision was soon hailed in the government press as "a landmark ruling endorsing Sri Lanka's human rights commitments".²⁹¹ Like *Singarasa*, it elevated national sovereignty and executive power over an honest reckoning of the human rights situation.

VI. The Supreme Court, Executive Power and Territorial Integrity

In other cases, the Supreme Court under Chief Justice Sarath Silva used the constitution to promote a strong executive and an aggressive understanding of a unitary state. By cutting off efforts at political devolution, the court has narrowed options for accommodating Tamil and Muslim interests in a constitutional settlement to the ethnic conflict. Judgments seemingly restraining executive and emergency powers have either been incidental to the central political aims of President Rajapaksa's administration or have been ignored. Recent rulings on corruption within the executive have been too haphazard to deter future abuse by government officials.

²⁸⁵ Rohan Edrisinha and Asanga Welikala, "GSP Plus and the ICCPR: A critical appraisal of the official position of Sri Lanka in respect of compliance requirements", in *GSP+ and Sri Lanka* (Colombo, 2008), pp.77-78.

²⁸⁶ Advisory Opinion of the Supreme Court on the International Covenant on Civil and Political rights (ICCPR), in *GSP+ and Sri Lanka*, op.cit., p.157.

²⁸⁷ Edrisinha and Welikala, "GSP Plus and the ICCPR", op.cit., pp.85-86.

²⁸⁸ International Covenant on Civil and Political Rights (ICCPR) Act, No. 56 of 2007; Advisory Opinion, op.cit., p.149.

²⁸⁹ Edrisinha and Welikala, "GSP Plus and the ICCPR", op.cit., p.88.

²⁹⁰ The European Commission has launched an investigation into Sri Lanka's compliance with the ICCPR, the Convention on the Rights of Children and the Torture Convention. The review is expected to be completed in October 2009, with a formal decision on Sri Lanka's continued eligibility before the end of the year. Dilshani Samaraweera, "EU probe begins on Lanka's GSP+", *Sunday Times*, 26 October 2008.

²⁹¹ "Landmark verdict by Supreme Court", *Sunday Observer*, 30 March 2008, at www.sundayobserver.lk/2008/03/30/main.

A. *The Supreme Court and the Unitary State*

Silva's Supreme Court issued two judgments that limited options for devolution of power by favouring a unitary vision of the state. In both cases, the court reached out to decide an issue when it arguably lacked jurisdiction to do so. The resulting decisions can be defended as plausible readings of the constitution's text but needlessly reduced the constitutional flexibility that will likely be needed to craft devolution or power-sharing schemes able to respond to the legitimate political claims of Sri Lanka's ethnic minorities.

The court has not always been committed to an absolutist ideal of national sovereignty. In October 1987, the court rejected challenges to the Thirteenth Amendment, which implemented the July 1987 Indo-Lanka Accord by creating and empowering new provincial councils.²⁹² In a divided judgment, a five-four majority held that most aspects of the new provincial bodies were consistent with the "unitary state" protected by Article 2 of the 1978 constitution, and hence did not trigger a more stringent referendum process for constitutional amendment used when changing specified core parts of the constitution.²⁹³ Anxious to avoid such a referendum, the Jayawardene government changed those aspects of the Thirteenth Amendment that the court had isolated as problematic, and enacted the bill.²⁹⁴

1. The PTOMS case

In July 2005, the court issued an interim stay order invalidating the Post-Tsunami Operational Management Structure (PTOMS) between the government and the LTTE for coordinating aid delivery after the December 2004 tsunami.²⁹⁵ The case arose on petitions filed by the JVP and the Jathika Hela Urmaya (JHU). These parties argued that the government could not enter an agreement with the LTTE and that its expenditure mechanism did not comply with public finance and accounting provisions of the constitution.²⁹⁶ The court rejected the first argument, but accepted the second. It declared that "the rule of law, transparency and good governance" prohibited the aid disbursements without the constitution's specific accounting mechanisms. It also rejected the location of the PTOMS regional committee in then LTTE-controlled Kilinochchi, accepting the petitioners' argument that the lack of an "environment

²⁹² Thirteenth Amendment to the constitution, certified on 14 November 1987, in Constitution of Sri Lanka, op.cit.

²⁹³ Art. 83(a), Constitution of Sri Lanka, op.cit., p.53. There were widespread reports that members of the court were put under significant pressure by President Jayawardene to approve the amendment. See, for instance, Rohan Edrisinha, Mario Gomez, V.T. Thamilmaran and Asanga Welikala, eds., *Power-Sharing in Sri Lanka: Political and Constitutional Documents, 1926-2008* (Colombo, forthcoming), chapter 17.

²⁹⁴ Marasinghe, *Constitutionalism: A Broader Perspective* (Colombo, 2004), p.33. President Jayawardene expressed his displeasure with the dissenting minority when he chose not to promote the author of the dissenting opinion to the chief justice's position despite his seniority. H.L. de Silva, *Sri Lanka: A Nation in Conflict: Threats to Sovereignty, Territorial Integrity, Democratic Governance and Peace*, op.cit., p.412.

²⁹⁵ Certified copy of *Weerawansa v. Attorney General*, Slip Opinion of the Supreme Court of Sri Lanka, 15 July 2005.

²⁹⁶ Sugeeswara Senadhira, "Supreme court issues stay order on PTOMS on four counts", *Asian Tribune*, 15 July 2005.

of freedom” would prevent its effective operation.²⁹⁷ The Supreme Court’s interim order suspended the operation of PTOMS only temporarily, but effectively ended the process of negotiating with the LTTE over aid distribution.

The PTOMS judgment is legally contestable because it is unclear how the petitioners, who based their claims on Article 12’s equality right, had been harmed by the disbursement of aid to others. Not only did the court not explain how the petitioners had standing to file a case, but in its judgment did not address how possible of misuse of funds could constitute a violation of *equality*. Similarly, the court’s ruling on the regional committee’s location lacks a clear basis in the constitution, while reflecting a strongly nationalist and “unitarist” view of governance, hostile to power-sharing between the centre and regions.²⁹⁸ The judgment will likely discourage future efforts to reach political compromises via devolution and power-sharing.

2. The demerger case

The second important decision concerned the merger of the Eastern and Northern Provinces under the Indo-Lanka accord of 29 July 1987. Among its obligations under that agreement, the Sri Lankan government agreed to “form one administrative unit, having one elected provincial council” of those two provinces.²⁹⁹ Under Article 154A(1) of the constitution introduced by the Thirteenth Amendment, President Jayawardene merged the two provinces in November 1987.³⁰⁰ A merged north and east is a longstanding demand of Tamil nationalists and political parties, as it would create the basis for political autonomy in the region they claim as the traditional Tamil homeland. Sinhala nationalists—and many Muslims—oppose the creation of a single Tamil majority province, seeing it as a step towards a separate state.³⁰¹

In October 2006, the court invalidated the merger at the behest of three residents of those provinces who asserted they had been denied the right to vote in a referendum promised in 1987.³⁰² As in the PTOMS case, the court reached out to decide an issue even though the petitioners arguably lacked standing to bring a case. Article 126 requires a petitioner to file within a month of the violation, but the court accepted the argument that there was “a

²⁹⁷ *Weerawansa v. Attorney General*, op.cit., p.18. Specifically, it held that funds from bilateral and multilateral donors had to be placed into the national Consolidated Fund pursuant to Article 149(1) of the constitution, rather than disbursed by the regional committees established by the PTOMS. This conclusion suggests that the court believes no pooling of fiscal governance would ever be feasible.

²⁹⁸ The result “was a signal of Sarath Silva’s support for the ultra-nationalist” pole of Sri Lankan politics, explained one lawyer. Crisis Group interview, Colombo, November 2008.

²⁹⁹ Reproduced in Lakshman Marasinghe, *Constitutionalism: A Broader Perspective*, op.cit., p.40.

³⁰⁰ Saliya Edirisinghe, “The De-merger Case: a brief summary and some comments”, Civil Rights Movement, forthcoming, p.1.

³⁰¹ See Crisis Group Report No.159, *Sri Lanka’s Eastern Province: Land, Conflict, Development*, 15 October 2008, pp.6, 11-12. For a description of the accord’s passage, see Sumantra Bose, *States, Nations, Sovereignty: Sri Lanka, India, and the Tamil Eelam Movement* (New Delhi, 1994), pp.130-134.

³⁰² Certified copy of *Wijesekera v. Attorney General*, Slip Opinion of the Supreme Court of Sri Lanka, 16 October 2006. Petitioners were residents of the Eastern Province. Edirisinghe, “Emergency Rule”, op.cit. p.3.

continuing infringement of the right to equal protection of the law” and invalidated the presidential proclamation forming one administrative unit out of the two provinces.³⁰³ Such flexibility starkly contrasts with the harsh line taken in detention and torture cases. Since the merger had been completed through an emergency regulation, the court also had to invalidate that by holding that the constitution permitted only parliament, and not the executive, to merge provinces. This is also one of the rare instances the court invalidated an emergency regulation.

The demerger case has “transformed the terms of the debate, so it’s impossible now to envisage a new merger of the two provinces”.³⁰⁴ The decision is significant because the court stretched its procedural rules to favour a strongly Sinhala nationalist position over a longstanding demand of all Tamil parties. Again, a political decision, achieved at the expense of much political capital, was undone at the request of parties at the far end of the political spectrum.

B. The Supreme Court and Executive Power

1. The check-points and eviction cases

In two other widely publicised cases, the court has issued rulings in favour of plaintiffs using fundamental rights litigation to challenge security and counter-terrorism measures. Neither judgment, however, has constrained the state’s emergency powers to a significant degree.

First, in a June 2007 fundamental rights application filed by the Centre for Policy Alternatives (CPA), a local research and advocacy organisation, the Supreme Court granted a preliminary injunction against a decision by the secretary to the defence ministry, and brother of the president, Gotabaya Rajapaksa, to evict Tamil residents of boarding houses in Colombo and to bus them to Vavuniya. In the early morning of 7 June 2007, the army raided Tamil guesthouses in the capital and gave lodgers 30 minutes to gather belongings and leave Colombo. At least 376 Tamils were evicted before the Supreme Court stepped in.³⁰⁵ The defence secretary justified the decision by arguing that the number of Tamils in Colombo was “an immense problem for the security forces” and that the capital would be safer if all Tamils “without valid reasons” were expelled.³⁰⁶ The eviction provoked domestic outcry, including from some government ministers, and protests from India and European governments.³⁰⁷ Prime Minister Ratnasiri Wickramanayake later expressed “regret” over the expulsions, which he described as a “big mistake”.³⁰⁸

³⁰³ *Wijesekera v. Attorney General*, op.cit. pp.22-23.

³⁰⁴ Crisis Group interview, director of research organisation, Colombo, November 2008.

³⁰⁵ Simon Gardner, “Sri Lanka court blocks state deportation of Tamils”, Reuters, 8 June 2007; Lasantha Wickrematunge, “‘Ethnic Cleansing’ in Sri Lanka”, *Time*, 11 June 2007, available at www.time.com/world/article/0,8599,1631473,00.htm; and Muralidhar Reddy, “Sri Lanka Supreme Court restrains eviction of Tamils from Colombo”, *The Hindu*, 9 June 2007.

³⁰⁶ B. Muralidhyar Reddy, “Profiling problem”, *Frontline*, 24 October 2008, p.47.

³⁰⁷ “Lanka SA steps in, halts eviction of Tamils from Colombo”, *Times of India*, 8 June 2007.

³⁰⁸ Muralidhar Reddy, “Sri Lanka PM expresses regret”, *The Hindu*, 11 June 2007.

The Supreme Court's intervention against the eviction is a lonely example of judicial protection of basic rights. Rather than undermining President Rajapaksa's power, however, the decision may have shored it up. The decision rejected a hardline approach taken by one government faction led by the defence secretary in a case where a tough approach alienated important domestic and international constituencies. Without having to repudiate the defence secretary publicly, the president could use the Supreme Court judgment to justify a retreat from a policy that was proving too politically costly to sustain.

In the second case, the court invalidated the use of checkpoints on the Galle-Colombo road to block traffic on that major thoroughfare. The validity of the check-points was taken up in the course of a case concerning an arrest. One fundamental rights lawyer observed that the court did not need to address the checkpoints' legality, but had reached out to do so.³⁰⁹ It issued an extremely popular judgment that dealt with security measures that were an irritant to the whole population, even as it did little to remedy the pervasive unequal treatment and harassment of Tamils at checkpoints.³¹⁰ The judgment has largely been ignored, however: check-points remain throughout Colombo and the rest of the country.

2. The Waters Edge and Lanka Marine Services cases

In two cases known as Waters Edge and Lanka Marine Services, the Supreme Court invalidated contractual arrangements between the state and private parties based on alleged financial improprieties. These opinions have been lauded by many political observers in Sri Lanka as "significant blow[s] against the system of executive presidency".³¹¹ But it is unlikely these opinions will have the positive impact imagined by commentators. The Lanka Marine Services and Waters Edge cases are best understood as exercises in judicial populism in which the court takes highly symbolic action to great public acclaim that has little or no structural effect. When core presidential authority or policy is at stake, the court has declined to act. Rather than serving as a check on the executive the judiciary acts as an adjunct to executive policies and power.

Waters Edge concerned a sale of state land in Colombo initially acquired for public purposes but then left idle and sold to private developers for development as a golf course.³¹² The court invalidated the sale of the land as a violation of "public trust", and fined former President Kumaratunga three million rupees (\$26,000) to "'remind' present and future" office holders of their fiduciary obligations to the state.³¹³ It also required the treasury secretary to appear

³⁰⁹ Crisis Group interview, Colombo, November 2008.

³¹⁰ Other judgments fit this pattern. For example, in October 2008, the court ordered the government to reduce domestic electricity tariffs, a move that a "massive impact on middle class households". "CJ does it again: Supreme Court cushions shock therapy", *The Sunday Leader*, 26 October 2008.

³¹¹ See "Judiciary gets tough", *The Island*, 16 October 2008; and Harindra Dunuwille, "After Waters Edge, what's next?", *The Island*, 29 October 2008. The Lanka Marine Service judgment has been similarly lauded. See "Historic Judgment", editorial, *Daily Mirror*, 29 July 2008.

³¹² Certified copy of *Mendis and Senanayake v. Chandrika Bandaranaike*, Supreme Court of Sri Lanka, 8 October 2008; and "Why the Waters Edge deal is illegal in Sri Lanka", *Lankanewspapers.com*, 10 October 2008, available at www.lankanewspapers.com/news/2008/10/33368.html.

³¹³ *Mendis and Senanayake* judgment, op.cit., p.60.

before them and submit an affidavit undertaking never to hold government office again.³¹⁴ Lanka Marine Services involved the privatisation and tax treatment of a state-owned firm involved in fuel supply facilities in the Colombo port. The firm's shares had allegedly been sold by the government at a deeply discounted rate to a private entity without proper ex ante valuation by the government.³¹⁵ Again, the court voided the transaction and fined the government officials involved, including the sitting treasury secretary.³¹⁶

In both cases, the court voided deals based on a petition filed by a member of the public. If this expansion of the right to challenge government business dealing stands, it constitutes a dramatic expansion of possible litigation.³¹⁷ The court also broke new ground by in fact holding against a *former* president. Article 35 is quite clear that immunity only attaches to a sitting president, but the limits of this provision had never been tested.³¹⁸ More troubling, however, was the court's unprecedented decision to set aside the whole arrangement³¹⁹ and to sanction the treasury secretary the way it did. The new remedy of restitution instead of compensatory damages raises concerns: the land involved in the Waters Edge case had been sold on to third parties, whose rights to the land had been nullified without their being granted a hearing by the court.³²⁰ Moreover, the court singled out the treasury secretary, an official who did not play a major role in the deal, and in effect imposed quasi-criminal sanctions on him without the benefit of a criminal trial and its attendant procedural protections.

In the end, none of the corruption cases challenge the core of presidential power. At best, the Waters Edge and Lanka Marine Services cases may cause executive officials to "think twice" before exploiting their positions for fear that a later Supreme Court may be hostile to them.³²¹ But even this threat can be discounted: a president simply has a greater incentive to stack the bench and stay in office longer. While the checkpoints and the evictions cases might seem like defeats for the executive, any constraints imposed by the court on presidential power

³¹⁴ "PB submits affidavit in Supreme Court", *Daily Mirror*, 21 October 2008.

³¹⁵ Asanga Welikala, "The Supreme Court decision on the privatisation and liberalisation of fuel bunkering facilities at the Colombo Port", *Montage*, August 2008, p.32.

³¹⁶ *Vasudeva Nanayakkara v. N.K. Choksy and 30 Others* (2008) SC (FR) 209/2007; "Sri Lanka Supreme Court slam police, bribery authorities over bunker cases", Lanka Business Online (www.lbo.lk), September 2008; and Wasantha Ramanayake, "SC rules LMSL share sales agreement illegal", *Daily News*, 22 July 2008.

³¹⁷ Crisis Group interview, lawyer, Colombo, 21 November 2008.

³¹⁸ The decisions, in addition, are further evidence of a decisive rupture between now retired Chief Justice Silva and his former mentor President Kumaratunga. In August 2005, in another controversial judgment, the Supreme Court ruled that President Kumaratunga's second term ended a year earlier than she had believed because of the timing of her second-term oath. (Certified copy of *Thero v. Dishanayake*, Supreme Court of Sri Lanka, 27 January 2008.) Kumaratunga had sought an advisory opinion from the court in the face of protests from the UNP about the election's date. Despite the fact that he had administered the oath, Chief Justice Silva not only sat on the panel that heard this case, but wrote the decision against President Kumaratunga. While the constitutional text arguably supports the result in that case, the chief justice's adjudication of the legality of his own actions again raises deep concerns about both the appearance and the substance of judicial neutrality. For a thorough and thoughtful treatment of the complex legal issues, see Rohan Edrisinha, "President Kumaratunga's 'Second Term': An unconstitutional beginning?", *Moot Point* (2000), p.41.

³¹⁹ Crisis Group interview, lawyer, Colombo, 12 November 2008.

³²⁰ Crisis Group interview, former Supreme Court justice, Colombo, 12 November 2008.

³²¹ "SC judgment has made executive Presidency less over-mighty", *The Nation*, 12 October 2008.

have been ad hoc and unlikely to have enduring effect. In cases implicating core powers or policies, the court has refrained from issuing any order which would entail direct conflict with the government. The court has thus avoided issuing a judgment in the fundamental rights application challenging the president's failure to appoint the Constitutional Council, although it did grant leave to proceed in those cases in July 2008 and proceedings are ongoing.³²²

When the stakes are high, the executive has simply ignored the court's rulings. One case in which the government declined to enforce the court's judgment concerns the clearance of slums in the Slave Island neighbourhood of Colombo in July 2007 in preparation for a meeting of the South Asian Association for Regional Cooperation conference. Even though the court issued an injunction against the slum clearance, the Urban Development Authority and the defence ministry continued to destroy about 47 houses and evict about 400 people, protesting that, "Nobody informed us of the Supreme Court order".³²³ While the Supreme Court issued subsequent orders requiring resettlement of those displaced, the damage to the court's authority was already clear.³²⁴ In a 2009 case involving oil hedging contracts, the government flatly refused to obey Supreme Court orders. The Court backed down.³²⁵

VII. Conclusion

"The independence of the judiciary can be regained—by following the rules".³²⁶

With the end of the military conflict with the LTTE and the appointment of a new chief justice there is, in principle, a real opportunity for significant judicial reforms. The willingness of the president, parliament, the attorney general and the chief justice to make the necessary changes will go a long way towards deciding whether or not Sri Lanka will grasp its current unique chance to forge a sustainable and just peace.

A first step toward restoring judicial independence would be a return to an orderly appointment and transfer of judges in both the lower and appellate judiciary. For the higher courts, restoration of the constitutional council is necessary to reduce the courts' politicisation. President Rajapaksa, however, has demonstrated unwavering opposition to appointment of the council, accurately seeing that body as a potentially significant constraint on presidential power. International and domestic advocacy should be focused on ending this rejection of the constitution's clear command. One of the first tests of the new chief justice will be how he handles the litigation on this issue currently before the court.

³²² Kishali Pinto-Jayawardena, "Why is the government so terrified of the 17th Amendment?", *Sunday Times*, 8 March 2009; Sandun A. Jayasekera, "Interim report on CC dispute", *Daily Mirror*, 9 June 2009.

³²³ Asif Fuard, "...and their homes came tumbling down", *Sunday Times*, 20 July 2008; "Slave Island eviction: politicians and civil societies condemn", *Daily Mirror*, 25 July 2008; and Crisis Group interview, Colombo, November 2008.

³²⁴ S.S. Selvanayagam, "SC grants time for settlement", *Daily Mirror*, 31 July 2008.

³²⁵ "Sri Lanka: Govt ignores Supreme Court", Inter Press Service, 29 January 2009.

³²⁶ Crisis Group interview, former magistrate judge, 19 November 2008.

Reconstituting the constitutional council is only the first step. The appointment mechanism for judges ought to be disentangled from political considerations. Once the council is again functioning, parliament should negotiate an amendment to the Seventeenth Amendment to reduce political parties' involvement in the constitutional council, and include in their stead members of the Supreme Court selected by lot; president's counsel of long standing; and representatives of civil society with demonstrated knowledge of constitutional law and fundamental rights. The aim of such a body would be to mitigate political influence in judicial appointments. It should adopt a strong presumption of promotion by seniority for all appointment, with written explanations for when a decision is made not to appoint from the lower judiciary. Appointments from the attorney general's office should be reduced and limited to senior department lawyers only.

Recent history also suggests that the removal of judges "should not be left to the politicians".³²⁷ Reforming the removal system would not necessarily require constitutional change, only new legislation. There is a constitutional, as well as a practical, need to amend the process by creating a special court to hear such cases.³²⁸ That court could be composed of three judges of the Supreme Court drawn by lot, obviously excluding by law any judge implicated in the charges.

Appointments and removals in the lower judiciary also need reform. Even if the constitutional council is restored, and the two members of the JSC are appointed through that mechanism, the JSC should issue clear schedules and rules for appointments, transfers and disciplinary proceedings. The JSC's decisions against a judge should be open to appeal to rotating panels of Supreme Court justices drawn by lot. Separate procedures should be crafted for instances where the chief justice is subject to investigation.

With the decisive military defeat of the LTTE, there is both the need and opportunity for a fundamental reform of Sri Lanka's extensive and often abused emergency laws. Provisions in the emergency laws concerning arrest, detention and derogation from routine criminal procedures (eg, the handling of confessions) and those that criminalise free speech and the exercise of associational rights should be removed immediately. The application of the PTA should be suspended pending thorough parliamentary review of all emergency regulations. The administration of the legal framework set out in emergency regulations and the PTA should be moved from the defence ministry to the justice ministry, with clear civilian oversight over the national security apparatus, especially with regard to detentions and detainees' access to justice.

Problems in the application of routine criminal laws also arise due to the close nexus between lawyers, judges and the police around the magistrate courts. Minimising torture requires dissolving this network. To start, the presence of state counsels in the magistrate courts

³²⁷ Crisis Group interview, lawyer, Colombo, 14 November 2008.

³²⁸ In 1984, Chief Justice Neville Samarakoon pointed out that a provision of the 1978 constitution guaranteed that the judiciary would hear all matters except those concerning parliamentary privileges. Suriya Wickremasinghe, *Of Nadesan and Judges*, op.cit., pp.15-16. Logically, this means that the constitution requires the judiciary to be involved in the removal of judges.

should be required. These government lawyers could prosecute cases instead of police, as well as being tasked with winnowing out weak cases. The state should also invest more in making free legal counsel available to criminal defendants in the magistrate's courts. Currently, detainees have no option but to turn to private lawyers. The Legal Aid Commission provides funds only in civil cases; its lawyers look at criminal cases with disdain.³²⁹ Assigning legal aid lawyers to magistrate courts with a mandate to ensure fair representation, and in particular to identify and provide counsel in cases in which torture or coercion has led to confessions, would be an important remedial step.

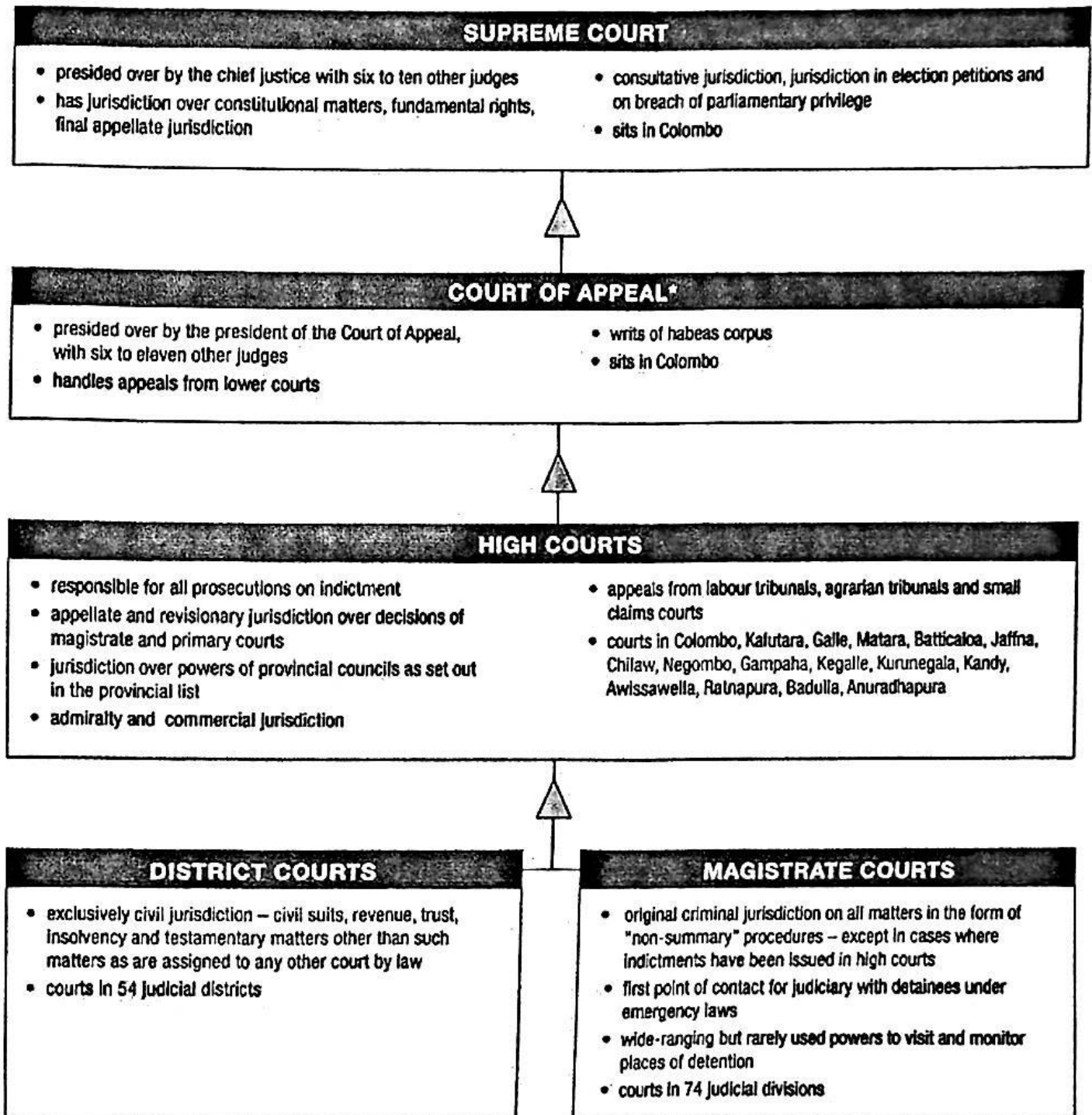
Chief Justice Asoka de Silva has the chance to make a significant and positive impact on the judiciary. To do so, he will have to decide how to deal with pending political cases, such as the Seventeenth Amendment litigation; how to manage the JSC; what signal to send to the rest of the judiciary on fundamental rights cases; and perhaps most important, how to relate to his predecessor's legacy: will de Silva continue to pursue the Sinhala Buddhist populism of the former chief justice or forge a path that helps create the space for political and constitutional accommodation of minority claims?

The current failure of the judiciary to protect fundamental rights and promote political compromise, however, is the result of both a breakdown of institutions and a failure of political will. Fixing institutions and reforming laws will therefore only have a limited effect until political actors, and especially the presidency, feel the political cost of ignoring or infringing on judicial independence. Absent a concerted effort by the bench and bar, the political costs of interfering with the judiciary will remain minimal. So long as that remains the case, Sri Lankans of all ethnicities will continue to lack access to a reliable forum for the adjudication of state violations of their basic constitutional and human rights—and a unique opportunity to forge a lasting peace may be lost.

Colombo/Brussels, 30 June 2009

³²⁹ Crisis Group interview, former legal aid commission lawyer, November 2008.

Appendix - Sri Lanka's Court System



* Beginning in 2008, there are provincial courts of appeal for civil cases in all the provinces. All new appeals in civil cases in district courts go to the relevant provinces and no longer to the Court of Appeal in Colombo. Appeals from the high courts in all provinces go to the Court of Appeal in Colombo.

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In recent years, violations of international humanitarian law, extra-judicial killings, abductions and 'disappearances', verbal and physical attacks on journalists and human rights defenders, spiraling intolerance for dissent, and wanton disregard for constitutional provisions and democratic norms have come to epitomise Sri Lanka's human rights environment.

In this context, the expectations on the National Human Rights Commission of Sri Lanka are inevitably greater; and its alarming unwillingness to recognise the urgency and seriousness of the human rights crisis, are of greater disappointment and enormous concern.

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