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THE CRIMINAL JUSTICE SYSTEM IN SRI LANKA; CONTINUING CHALLENGES AND ASPIRATIONS

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CONTENTS

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Editor's Note ... ...

For decades, the failure of justice has had a direct impact on the perpetuation of a culture of violence in Sri Lanka. A specific feature of the pervasive breakdown of the rule of law was the failure of the justice system to bring to brook, perpetrators of human rights violations both in times of ordinary law and order and in periods of emergency.

This failure of justice is evident at all levels, from the highest to the lowest courts and is afforded close scrutiny in the paper on **The Criminal Justice System in Sri Lanka; Continuing Challenges and Aspirations"** by **Dinushika Dissanayake** which the Review publishes in this instance. The paper was written as part of the research work engaged in by the Civil & Political Rights Programme of the Law & Society Trust during 2009 and 2010.

Undoubtedly, the failure of the justice system has been an important factor in the deterioration of constitutional governance, including proper law enforcement, resulting consequently in pervasive violence. In this context, the phrase 'the justice system' infers much more than theoretical judicial pronouncements; rather, it is used to span the entire gamut of the legal system from prosecutions to decisions and thence to practical implementation of those decisions. Safeguarding of the independence of the judiciary as well as preservation of the credibility of the prosecutorial system is therefore a central point of concern.

At one level, we see this failure evidenced through bare statistical data, as for example the fact that there is only 4% of convictions for grave crimes as disclosed by none other than a committee appointed by the government itself to examine laws delays, namely *'The Eradication of Laws Delays'*, Committee Appointed to Recommend Amendments to the Practice and Procedure in Investigations and Courts, Final Report, 2nd April, 2004".

Then again, the fact remains that under specialized laws such as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Act, No 22 of 1994 (aimed at reducing the prevalence of grave human rights violations such as torture), the conviction rate has been a mere three convictions during the near sixteen years that have passed since its enactment. While the detailing of such statistics is not to press for quick and summary justice at the expense of the accused, as the paper that is published in this Issue aptly observes, yet, there is clearly something gravely wrong in a system that can speak to such an unimpressive record of achievements.

The analysis in the paper incorporates several perspectives of senior legal practitioners on the malfunctions in the system, which brings a fresh perspective to bear on some of the problems examined therein. The role and

function of the police, (the primary problem being the ensuring of an effective and proper recording of the first information, deficiencies in the investigation process, (politicization of the police, lack of human resources, lack of material resources), fabricating of statements, false accusations and forced confessions, torture and intimidation of suspects, are of some of the initial problems examined.

This is followed by a scrutiny of the question of fair trial and the concept of the Presumption of Innocence as well as the impact of emergency regulations on these safeguards. The judicial response to the prevalence of extraordinary grave crimes such as torture and enforced disappearances during the past decades when Sri Lanka was witnessing armed conflict comprise a significant part of the analysis. International standards relating to the prohibition of these crimes and relevant constitutional standards are looked at. Factors that impede the proper working of the criminal justice system, including laws' delays and the absence of a witness protection system are discussed by the author. In this context, it is interesting that the following observation is made as stemming from practical perspectives of legal practitioners who confront these questions on a daily basis;

> *Practitioners note the urgent need to implement a proper witness protection program in Sri Lanka, which must begin with legislative recognition. They also note that while judges do take action against intimidation of witnesses, the number of occasions on which the courts interfere have reduced over the past few years. Judicial abhorrence of intimidation of witnesses is seen by practitioners as a vital factor in fighting witness intimidation, which eventually can disrupt the entire trial process, further reducing the number of convictions.*

The writer outlines a number of recommendations as a culminating focus of this research, subdivided into Reforms to the Law, Recommendations in terms of International Treaties and Reforms to Practice, Procedure and Policy.

In an era of greater politicization of entities such as the Attorney General's Department, some of these recommendations, as for example, the creation of the office of an Independent Prosecutor to look into and direct investigations into allegations of human rights violations, especially where the accused are police officers, clearly do not have much chances of being implemented into law. Yet it is the duty of civic conscious lawyers, academics and judges to revisit these questions of accountability at least in the hope that the future may see some improvements in this regard.

Kishali Pinto-Jayawardena

THE CRIMINAL JUSTICE SYSTEM IN SRI LANKA; CONTINUING CHALLENGES AND ASPIRATIONS

Dinushika Dissanayake [*]

Enthroned upon the mighty truth,
Within the confines of the laws,
True Justice seeth not the man,
But only hears his cause.

Unconscious of his creed or race,
She cannot see, but only weighs;
For Justice with unbandaged eyes
Would be oppression in disguise.

'Justice' - By Paul Laurence Dunbar

01. Introduction

'Justice'; a concept that pervades the human being, from early childhood to adulthood, from an unarticulated sense of injustice in childhood, to the drafting of complex laws and systems to preserve justice in adulthood. Where a crime is committed, the criminal must be found, convicted, punished and rehabilitated, the victim must be compensated (and avenged in some societies) and witnesses must be protected; this is the essence of any criminal justice system. The witnesses to the crime, the investigator, the judge, all are actors in this great play that is called a criminal justice system. And as Dunbar so simply points out, justice without impartiality would be nothing but oppression in disguise[1].

The flipside of the coin of the right to justice is the right to be free from impunity. Impunity has been defined as "The impossibility, *de jure* or *de facto*, of bringing the perpetrators of human rights violations to account - whether in criminal, civil, administrative or disciplinary

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[*] Attorney-at-law, project officer, Civil & Political Rights Programme, Law & Society Trust, February 2010- June 2010. The author is currently reading for her Masters in Law at the New York University School of Law, United States of America. This paper was written following several months of action research conducted on the functioning of the country's criminal justice system during 2009 and early 2010 in Sri Lanka for which fifteen criminal law practitioners and ten judges were interviewed. While being grateful to all those interviewed who preferred to remain anonymous following personal requests made to the author, she specifically acknowledges attorney-at-law Kishali Pinto-Jayawardena who gave guidance on the research focal points. The three main analytical documents used as a base for this paper were de Silva, Samith, *Some thoughts on the current crisis affecting Sri Lanka's Criminal Justice* Process, LST Review, Vol. 18, Joint Issue April and May 2008, de Silva, Samith, *A Critique of the Prosecutorial/Judicial System and the Role of the Attorney General in respect of Prosecutions for Grave Human Rights Violations*, LST Review, Vol. 17, Issue 234 and 235, April/May 2007, both published by the Law & Society Trust, Colombo and Pinto-Jayawardena, Kishali, *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 in Sri Lanka*, published by The Rehabilitation and Research Centre for Torture Victims (RCT), May 2009, Denmark. CORDAID provided the financial assistance for the conducting of the action research.

[1] *Justice*, by Dunbar, P.L, available at http://www.libraries.wright.edu/special/dunbar/poetryindex/justice.html

proceedings – since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties, and to making reparations to their victims"[2]. Every State has a duty with regard to the administration of justice, and any failure thereof affects the right to justice of every individual. Principle 1 of the Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity[3], defines the circumstances in which impunity arises as follows;

> *"Impunity arises from a failure by States to meet their obligations to investigate violations, to take appropriate measures in respect of perpetrators, particularly in the area of justice, by ensuring that they are prosecuted, tried and duly punished, to provide victims with effective remedies and reparation for the injuries suffered, and to take steps to prevent any recurrence of such violations."*

The justice system of a country affects the very existence of law and order in its society. As such, in a bid to revive the rule of law in the country, the criminal justice system in Sri Lanka has been subjected to much scrutiny over the past decades. The undulations in this system are correspondingly mirrored in the increasing number of crimes as well as the degradations wrought upon the rule of law over the last decade. The Committee Appointed to Recommend Amendments to Investigations and Court Procedures and the Eradication of Law's Delays, in its Final Report, notes the drastic reduction of the conviction rates in Sri Lanka to a mere 4% in 2002[4].

The criminal justice system of Sri Lanka will be analysed below in three segments; the role and function of the investigators, i.e. the police, the trial process and some of the key principles that affect the trial process, and finally the role and function of the prosecutor. The paper also looks at several decisions of the High Courts in respect of prosecution of the crimes of torture and enforced disappearances, and the manner in which the criminal justice system deals with such grave offences. Finally conclusions and recommendations are proposed in terms of addressing specific shortcomings in the system.

02. Role and Function of the Police

The role and functions of the police force, in the context of the criminal justice system, cannot be underestimated. The police play the earliest and perhaps the most vital role in ensuring the strength and vitality of any criminal justice system. The contours of its independence and efficiency shape the rule of law in any society.

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[2] Addendum to the Report of the Independent Expert to Update the Set of Principles to Combat Impunity, Diane Orentlicher, E/CN.4/2005/102/Add.1, 8 February 2005, Commission of Human Rights, Sixty First Session

[3] *Id.*, section 1, Principle 1

[4] '*The Eradication of Laws Delays*', Committee Appointed to Recommend Amendments to the Practice and Procedure in Investigations and Courts, Final Report, 2nd April, 2004, p. 5, hereinafter referred to as Committee Report, 2004

First Information and Rights of Complainants

Winfield defines a crime in the following manner;

> *"What is a crime? Something the Crown alone can pardon. What is it that the Crown alone can pardon? A crime"*[5]

This circular argument applies suitably to a criminal justice system riddled by false entries, false accusations, and false evidence. In reality, what is a crime, really, appears to depend on the definition of a crime given by a police officer, rather than the legal definition of a crime, with innocent suspects often languishing in remand custody for several years while the police continue with investigations. It can be suggested that by the time the suspect is indicted, charged and perhaps sentenced, he/she has already served more than the maximum sentence prescribed for the offence, languishing in remand custody for several years.

The first complaint or first information is the first step in an investigation, with a complaint made/ information made available to the police, alleging the commission of a crime. The first complaint must be reduced into writing as per the statutory requirement[6], and while the complainant is not entitled to a copy of the complaint, the defense is entitled to a copy of such complaint if the accused is later indicted[7].

The issues that affect Sri Lanka's criminal justice system, both in general as well as in instances of gross human rights violations such as enforced disappearances, are evident at the initial stage of obtaining the first evidence and complaint itself. As extensively documented, complaints are not reduced to writing by the police or the police officers record statements in their own words and the narrative is adjusted to suit what they think best[8]. Classic examples are statements made by rape victims[9]. Senior practitioners allege that, often, similar patterns

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[5] Winfield, P.H.,"Province of the Law of Tort", 1931, Macmillan, The University Press in New York, Cambridge, England Ch. VIII, at page 197, cited in Smith and Hogan, *Criminal Law*, 10th Edition, at p. 20, Butterworths Lexis Nexis, Great Britain

[6] See section 109(2) of the Code of Criminal Procedure Act, No. 15 of 1979, hereinafter referred to as the Criminal Procedure Code

[7] In terms of section 444 (1) of the Criminal Procedure Code, *id.*

[8] But see the statutory requirement in terms of the Criminal Procedure Code, section 109(2), *"If such information is given orally to a police officer or to an inquirer, it shall be reduced to writing by him in the language in which it is given and be read over to the informant;"*, Criminal Procedure Code, *ibid.* A senior criminal lawyer expressed the view that the police do not take down statements accurately, sometimes write it down to suit the charges they have in mind, statements are not read out to the complainant before taking down his/her signature, and in some cases, the police re-write the complaint. Another senior criminal defense counsel stated that in his experience, police write down their own understanding of what happened, and not necessarily the complainant's version *ad verbatim*. He stated that police also do not, in general, read out the statement to the complainant before obtaining her/his signature. Advocacy Discussions, LST, 2010; also see, de Silva, Samith, *Some thoughts on the Current Crisis affecting Sri Lanka's Criminal Justice* Process, LST Review, Vol. 18, Joint Issue April and May 2008, Law & Society Trust, Sri Lanka (hereinafter referred to as de Silva, S., LST Review, April/May 2008) .

[9] de Silva, S., LST Review, April/May 2008, *id.* However, some practitioners, when interviewed, disagreed with this particular view.

are seen in statements of all rape victims, wherever they are recorded[10]. Practitioners note that some Sri Lankan judges are inclined to acquit suspects in rape cases with much lesser hesitation than in other cases, perhaps due to the inconsistencies in the statements provided by the police[11].

Corruption, lethargy, inefficiency and incompetence pervade the process of police investigations[12]. There are multiple reasons for these shortcomings which are discussed more fully below, and include issues such as lack of cadre, lack of motivation due to little or no incentives, corruption, overwork etc. The use of police officers for the provision of security services for VIP's as a primary function as opposed to investigation of crimes, especially in the Western Province, is a further factor.[13]

Investigation Process

The perception among many legal practitioners in Sri Lanka is that police officers are both incompetent and corrupt[14]. It is a common conception that the incompetence of police officers is mainly due to lack of discipline and training. As stated above, over estimation of authority, ignorance, corruption and lack of impartiality of police officers are some of the other main factors that have impacted adversely on the investigation process[15].

Senior practitioners agree with this view to the extent that the system itself, from recruitment to disciplinary action against police officers, is implemented in such a way as to provide many avenues for the unscrupulous, including those holding political office, to influence the independence of the police. Where salaries are inadequate to support extravagant lifestyles, where one's security of tenure is dependent upon pleasing those in high political office, when one's transgressions are only subject to scrutiny based on the whims and fancies of those in power, the existence of wide-scale corruption in the police force is no cause for surprise.

The inefficiency of police action is attributed by some practitioners[16] to the lack of human resources in the force. Police officers themselves have agreed with this view[17]. In 2004 the

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[10] Advocacy discussions by this author with practitioners, February-March 2010, hereinafter referred to as Advocacy Discussions, LST, 2010; see also de Silva, S., LST Review, April/May 2008 *ibid.*

[11] Advocacy Discussions, LST, 2010

[12] de Silva, S., LST Review, April/May 2008, *ibid*

[13] Committee Report, 2004

[14] Advocacy Discussions with senior state lawyers, police officers, officers of the National Human Rights Commission, National Police Commission, conducted by the Civil and Political Rights Programme, Law & Society Trust, 2004, hereinafter referred to as Advocacy Discussions, LST, 2004

[15] de Silva, S., LST Review April/May 2008, *ibid.* Though attempts were made to obtain official interviews with senior police officers to discuss some of these matters during 2010, these were unsuccessful due to the reluctance of the officers of the Police Department now under the Ministry of Defence, to engage in discussions, in contrast to the year 2004 when such discussions were, in fact, engaged in by LST.

[16] Advocacy Discussions, LST, 2010

[17] See Advocacy Discussions, LST, 2004. The constant transfer of police officers, from special units which investigate allegations against police officers themselves, to mainstream police duties, hampers independent investigations and the taking of disciplinary action against such officers, according to interviews with senior police officers.

Committee Report on the Eradication of Laws Delays[18], recommended the increasing of human resources in the force[19]. The Report notes that, while a little over 42 percent of crimes are committed in the Western Province, the province is manned by just 14 percent of the force. The Report further notes that of this 14 percent, a large percentage is utilised for providing security services for VIP's[20].

The lack of material resources has also been identified as a cause for inefficient investigative methods, with basic materials such as polygraph (lie detector) machines not being available, as well as logistical support for transport of police officers being inadequate[21]. Other issues such as the lack of space for the functioning of some units of the force are practical considerations which clearly would affect the work ethic of the force[22]. The Committee Report in 2004 recommends improvements to be made in both respects[23].

Practitioners also note that the delays in investigations can also be due to inefficiencies by other departments, notably the Government Analyst[24]. In 2004 the Committee Report noted that 41.8 percent of vacancies in the Government Analysts' Department remained unfilled, thereby causing huge backlogs and delays in the provision of information both to court and to the police. The Committee at the time recommended a review of the present scheme of recruitment and promotion at the department, and immediate recruitment of suitable officers to the department[25].

The failure on the part of the Government Analysts' Department to provide expert evidence in a timely manner, effects not only the speed with which the investigation can be concluded, but also the quality of the investigation, since vital information which can lead to a conviction are not available to the police for years.

It is observed by some senior criminal lawyers that investigations are ordinarily completed within a reasonable time[26] (i.e within six to 12 months), while others disagree, stating that in

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[18] '*The Eradication of Laws Delays*', Committee Appointed to Recommend Amendments to the Practice and Procedure in Investigations and Courts, Final Report, 2nd April, 2004 hereinafter referred to as the Committee Report, 2004

[19] Committee Report, 2004, *id.*, at p.6, 1.1(a)

[20] *id.*

[21] Some practitioners note that they themselves have provided vehicles for the police to obtain expert evidence etc, when police officers plead that the lack of vehicles prevents their obtaining evidence in a timely manner. The Committee Report of 2004 has also identified this as a serious problem. Advocacy Discussions, LST, 2010

[22] The Special Investigations Unit which investigates disciplinary allegations against police officers for example, has 80 officers, and has only 2 to 3 cubicles to house the unit (as at 2004); Advocacy Discussions, LST, 2004 *op cit.*

[23] Committee Report, 2004 at p. 7, 1.1(b), (c)

[24] One criminal defense attorney for example, stated that the delays in sending IB extracts in a timely manner can be attributed to the delays occasioned by the Government Analysts' Department and the delays in the sending of reports by medical experts. Advocacy Discussions, LST, 2010

[25] Committee Report, 2004, at p. 8, 2.0

[26] Advocacy Discussions, LST, 2010; one practitioner stated as follows; "Our investigation techniques are very primitive. No facilities are little facility for DNA and forensic investigations are available for the police. By the time the CID takes over, a large time has passed. Even in the CID, the officers may not be sufficiently trained."

their experience some suspects remain in remand custody for over seven years, due to pending investigations[27]. They further note that this is not only in complex investigations such as those under the Prevention of Terrorism Act[28], but also in regard to simpler investigations such as those for theft and simple hurt. It must be noted however, in this regard, that expedited conclusion of an investigation does not mean that it is a successful investigation which will eventually result in a conviction.

Often, the police are only interested in recording statements from witnesses and instituting criminal cases against a person where some evidence can be found or suspicion exists[29]; the outcomes of the cases being immaterial to them. According to senior practitioners, on average, the likelihood of police obtaining sufficient evidence to obtain a conviction currently stands at less than 50 percent in their estimate[30].

In other words, the officers are not competent, are rendered incompetent due to external factors, or are influenced by interested parties, which prevents the carrying out of a proper and well planned investigation. Often the method adopted is to subject the suspect to torture and coerce him to admit the offence and to then seek evidence based on these admissions[31]. According to senior criminal law practitioners, the likelihood of the police in Sri Lanka, obtaining forced confessions in the course of an investigation using this method, is high[32].

Interviewees among the legal fraternity agreed that torture takes place more often in cases where the suspect is to be charged in terms of the PTA or the Emergency Regulations[33]. However, at the same time, it has been documented that even in cases of organized robbery for instance, suspects are often kept in remand custody for long periods of time, and then released for lack of evidence[34]. Often, the only evidence upon which the police moves to remand suspects is the fact that their names have transpired in the course of statements made by other suspects[35]. Practitioners observe that under severe torture, suspects often provide wildly fanciful information, or confess their own guilt or ultimately agree to any suggestion made by the police in order to escape torture or cruel treatment.

The remanding of suspects for long periods of time while the police allegedly continue investigations is legendary in Sri Lanka. The *modus operandi* of the police in such cases has been documented[36]. The police, as is commonly known, move for further time from the magistrate each time the case is called in Court, on the grounds that the investigation is incomplete. The investigation, after a lapse of substantial time during which the suspect

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[27] Advocacy Discussions, LST, 2010
[28] Prevention of Terrorism Act No. 48 of 1979, hereinafter referred to as PTA
[29] de Silva, S. , LST Review, April/May 2008
[30] Advocacy Discussions, LST, 2010
[31] *id*
[32] *id.*
[33] Practitioners note that it is more likely for Police Officers to fabricate evidence when the suspect is charged in terms of the PTA. They agree that while the likelihood of forced confessions are high, the likelihood of false , *id.*
[34] de Silva, S., LST Review, April/May 2008, *op cit.*
[35] *id.*
[36] *id.*

languishes in remand custody, produces insufficient evidence for a conviction. The case is then withdrawn by the police for lack of evidence. As is pointed out, this results in innocent persons languishing in jail while the actual criminal escapes court scrutiny, and perhaps conviction, thereby contributing to a culture of impunity[37].

At the same time, both state counsel and thereby the police, are increasingly held accountable by the Supreme Court where it appears that persons are found languishing in remand custody for sometimes over two years, while investigations are continued by the police. Especially in the recent past, a laudable trend by the judges of the apex Court, is to severely reprimand and hold accountable, the officers who occasion such delays, and to order final reports to be submitted to Court in such cases. The oft resorted to plea of awaiting IB extracts, awaiting the Government Analysts' Report or Medical Reports is no longer viewed with complacence by the Court. This trend is encouraging and urges one to hope for the true protection of the right to liberty of persons in Sri Lanka, even where they have been charged in terms of the PTA or Emergency Regulations[38].

Fabricating of Statements, False Accusations and Forced Confessions

According to senior practitioners, the likelihood of police introducing false evidence and charges is high, depending on the type of offence. They note that for offences in terms of the PTA or Emergency Regulations, the probability of such incidents is higher than for offences in terms of the general criminal law. On average practitioners find that there is a medium likelihood in terms of the possibility of an introduction of false evidence[39]. According to senior defense lawyers, the likelihood of false entries being introduced by the police is also high[40].

The instances of police incompetence and interference in evidence extend to the very notes that are to be made at the crime scene[41]. These notes, it is alleged, are often made at the police station, some days after the survey of the crime scene. Garbled notes and missing evidence are obvious results of such practices.

Practitioners note that police resort to fabricating evidence for several reasons. One of these is the need to close the investigation as soon as possible, another is that at times the police are convinced of the guilt of the accused and therefore introduce evidence that they feel will contribute to a conviction[42]. Practitioners agree that in rare cases, personal vendettas against

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[37] *id*

[38] Several fundamental rights applications have been filed in the Supreme Court of Sri Lanka, by persons in remand custody, alleging the violation of their fundamental rights due to extended detention without indictment. There is however anecdotal evidence to the effect that judges are less tolerant of state counsel who plead that further time is required to investigate the crime, even where three or four years have lapsed since the time of the arrest. Both state counsel and police are increasingly held accountable for these lapses, which affect the right to liberty and equality of persons. Anecdotal, Advocacy Discussions, LST, 2010

[39] *id.*

[40] *id.*

[41] de Silva, S., LST Review, April/May 2008, *op cit.*

[42] Advocacy Discussions, LST, 2010

the accused and orders from politically strong persons, also contribute to the introduction of false evidence[43]. Overall it appears that police officers are more often induced to introduce false evidence due to factors beyond their control such as understaffing, overburdening of cases to investigate and finalise, and at times, interference by politically or financially strong parties[44]. They seem to be less influenced by an innate wish to flout the rule of law. Nevertheless, whatever the motives, the end result is the same; the creation of a culture of impunity.

Meanwhile, disciplinary action taken against police officers where false entries or false evidence has been found, has lessened in recent years[45]. While in the past the courts took a serious view where such an allegation was proved, the number of times when the court has taken disciplinary action against such officers had begun to lessen.[46] In *Caldera* v. *Liyanage*[47] a classic case where the police had altered police records, the Supreme Court held thus;

> *"...the manner in which the GCIBs, RIBs etc have been altered with impunity and utter disregard of the law makes one wonder whether the supervising ASPs and SPs are derelict in the discharge of their duties or in the alternative condone such acts. In my view, it is unsafe for a Court to accept a certified copy of any statement or notes recorded by the police without comparing it to the original."*[48]

At the same time, the manufacturing of false evidence and fabrication of evidence is encouraged by the lack of training[49], the low motivation[50], the lack of forensic investigative techniques[51] and of course, punishment transfers in the police force. Practitioners observe that in politically charged cases, orders from superior officers also contribute to the introduction of false evidence. Other reasons include the need to convict a suspect at all costs, to expedite closure of investigations, and in rare instances, personal vendettas against the suspect. Human resources issues in the police force substantially affect the ability of officers to carry out a successful investigation, especially in gathering evidence that would result in a conviction.

Lack of recognition of competent officers and punishment transfers for refusal to acquiesce in corrupt practices taken together; sends the wrong signals to the force. It transfers the allegiance of police officers, the primary criminal investigators in this country, from respect

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[43] *id.*

[44] Pinto-Jayawardena, writing in 2009, notes that in Sri Lanka, not even one case of fabricating false charges has been pursued against the responsible officers. Pinto-Jayawardena, Kishali, *The Rule of Law in Decline, Prevalence, Determinants and Causes of Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment in Sri Lanka*,, The Rehabilitation and Research Centre for Torture Victims (RCT), May 2009, Denmark, (hereinafter referred to as RCT Study), at p. 120

[45] de Silva, S., LST Review, April/May 2008, *op cit.*

[46] *id.*

[47] *Kemasiri Kumara Caldera* v. *Somasiri Liyanage and others,* SC (FR) App. No. 343/99, 06.11.2001

[48] *id.*

[49] Committee Report, 2004, p. 7, 1.1.(e)

[50] *id.*, p. 7, 1.1.(d)

[51] *id.*, p. 7, 1.1.(f)

for law and order to respect for those who hold the reigns of power and wealth. The fact that political authority is fleeting and transient makes the problem even more complex, damaging the rule of law in society to its very root, for the fealties of the police are then dependent on those transient and temporary persons in power, creating a culture of impunity. This also encourages police officers to take refuge in easier tactics such as introduction of false evidence and false charges against individuals in order to not only close investigations expeditiously, but also to maintain their security of tenure[52].

The public perception regarding corruption of the police force in Sri Lanka is evidenced in a household survey conducted by Transparency International in December 2002 which revealed that the public perception rated the police as the most corrupt public institution[53]. Other institutional lapses such as the failure to appoint the National Police Commission[54] further corrode both public confidence in the police and the integrity and efficiency of police officers themselves.

Torture and Intimidation

Torture, it is openly said by some senior practitioners, is a widely used method of obtaining information from suspects[55]. In their opinion, while torture may be unlawful, it is at the same time a successful method of obtaining evidence[56]. Others however state that suspects will literally say anything to escape their persecutors, including confessing guilt or involvement in terrorist programs[57]. This method of interrogation is also believed to be quicker as opposed to a conventional method of obtaining evidence. In theory, while it is acknowledged that better training and better resources including forensic facilities may be the best option, the cynical view of many is that, this will never happen due to the lack of political will. Therefore, the short term solution is to go for brutal interrogation methods. It has been documented that the drastic decline in discipline and the overall desensitisation of the police force to enforced disappearances and torture took place since the terror regime of 1987-1991[58] when state law

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[52] Advocacy discussions with senior practitioners reveal that the introduction of false evidence and false charges primarily depend on the type of case (for example where it is under the emergency regulations, there is a high likelihood of false accusations, false entries and forced confessions by the police), Advocacy Discussions, LST, 2010

[53] *National Integrity Systems*, Transparency International Country Study Report: Sri Lanka, 2003, Transparency International Secretariat, Berlin, Germany, at p. 22.

[54] The National Police Commission (NPC) is a body appointed in terms of the 17th Amendment to the Constitution of Sri Lanka, and was charged with the appointment, transfer and disciplinary control of police officer. It is now defunct due to the absence of the appointment of the Constitutional Council, its appointing authority. Pinto-Jayawardena has noted that the NPC in its first term of office was respected for the gains it occasioned in terms of interdicting police officers charged with tortured, and for preventing politically motivated transfers of police officers. During its second term of officer the NPC allegedly lost public credibility due to the unconstitutional appointment of its members. She notes that its' work in the second term of office was also unsatisfactory, thought it did initiate a public complaints procedure against police officers. RCT Study, *supra*, at p. 198

[55] Advocacy Discussions, LST, 2010

[56] Though some practitioners disagree, stating that suspects agree to any suggestions made by the police or provide fanciful information in order to escape the torture, *id.*

[57] Advocacy Discussions, LST, 2010

[58] de Silva, Samith, *A Critique of the Prosecutorial/Judicial System and the Role of the Attorney General in respect of Prosecutions for Grave Human Rights Violations*, LST Review, Vol. 17, Issue

enforcement officers were in constant conflict with Southern insurrectionists[59] as well as during the conflict in the North and East with the Liberation Tigers of Tamil Eelam (LTTE).

Yet, information obtained through torture, apart from being a grave abuse of human dignity that is unacceptable to both international and municipal law, is also an unreliable form of obtaining evidence[60]. In simple terms, torture would force a suspect to provide any information in order to escape his/her persecutors, whether the information is accurate or otherwise.

Some practitioners claim that the incidents of fundamental rights applications filed alleging police torture have reduced over the past few years[61]. They attribute this to two reasons; actual reduction in torture incidents, as well as new methods used by the police such as asphyxiation using plastic bags, which cannot be detected by a medical officer after the incident since it rarely leaves physical manifestations[62].

A third reason, however, may be the threats and intimidation directed towards both witnesses and lawyers by interested parties. In the case of Sugath Nishanta Fernando, a victim of torture who succumbed to his injuries, the victim, Sugath Fernando, was a witness and the complainant in a fundamental rights petition alleging torture. Fernando was subsequently assassinated after having received several death threats compelling him to withdraw the fundamental rights petition filed in the Supreme Court. His lawyer, representing Fernando in conducting the inquiry into his death, was threatened and his office burnt down on January 30, 2009[63]. In this case, the lawyer had also been threatened by one of the respondents in the fundamental rights application filed by him, against 12 police officers. The alleged act of intimidation took place in front of the Negombo Police Station, in the presence of several other police officers[64].

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234 and 235, April/May 2007, Law & Society Trust, Sri Lanka, hereinafter referred to as de Silva, S.,LST Review, April/May 2007, at p. 40

[59] See for example the case of *The Democratic Socialist Republic of Sri Lanka* v. *Samarasinghe*, HC Hambantota 80/98, decided 12.12.2002, where the chief witness gives evidence that there was a state of tension and warfare between the villagers and the police officers of the area.

[60] See for example the recently decided case of Zhao Zuohai case in China, where a man was convicted in 1999 for the crime of killing his neighbour largely based on a confession made, allegedly as a result of torture. The accused was dramatically discharged, when the murdered neighbour re-appeared in the village in April 2010. The Henan Higher People's Court in the province of Henan Province awarded compensation in May 2010. The case is a pressing reminder of the unreliability of forced confessions. *Murder Convict Set Free After Victim 'Turns Up'*, by Wang Jingqiong and Li Yuefeng, China Daily, 10th May 2010, available at http://www.chinadaily.com.cn/china/2010-05/10/content_9826537.htm

[61] Advocacy Discussions, LST, 2010

[62] *id.*

[63] *The State of Human Rights in Sri Lanka in 2009*, Asian Human Rights Commission, AHRC-SPR-009-2009, International Human Rights Day 2009, available at http://material.ahrchk.net/hrreport/2009/AHRC-SPR-009-2009-Sri-Lanka-HRReport2009.pdf.

[64] See *SRI LANKA: Human rights lawyer's office burnt down*, Asian Human Rights Commission, AHRC-PRL-008-2009, Hong Kong, January 31, 2009, available at http://www.ahrchk.net/pr/mainfile.php/2009mr/608/

Conclusions

Clearly, disciplinary action against police officers is as much a part of improving the efficiency of the police force, as much as the availability of resources and the increasing of cadre are important aspects of such an overhaul. Where a disciplinary allegation is made against a police officer, for example in a case of torture, the allegations are investigated by either the special investigations unit set up in 1980 for investigating disciplinary allegations against police officers, the CID or a special team. These units function only upon a referral by the Inspector General of Police[65]. However, it appears that disciplinary inquiries against police officers are hardly ever completed, and the time taken to complete range from 6 months to 3 years at a time[66].

In terms of investigations carried out 'by the police for the police', a senior officer of the Attorney General's Department when interviewed in 2004 stated that there is a lack of competent officers or any other authority (other than the police) to carry out investigations against police officers[67]. This, he stated, was a handicap in handing over such investigations to another authority. However his suggestion was that such investigations be directed by an independent authority, in order to ensure that the investigations are fair and independent.

A Special Investigations Unit in the police force investigates disciplinary allegations against police officers, reports to the Inspector General of Police (IGP) and acts upon referrals by the IGP[68]. An interviewed police officer, also a member of the special investigation unit, stated that the lack of cadre hampers the ability of the officers to carry out functions efficiently. For example, an Assistant Superintendent of Police must oversee field visits for investigations, and with only three such ASPs in the unit (at the time of interviewing[69]), efficiently investigating and disposing of cases is clearly hampered.

Other issues cited include the paltry maintenance allowance (called the *'batta'*) provided, which barely covers the cost of food and accommodation for officers engaged in field investigations. The fact that police officers attached to the unit are not permanently posted, often being transferred to other divisions where they themselves may have carried out investigations against fellow officers, would naturally affect the ability of the officers to carry out impartial and effective investigations.

The officer interviewed in this instance also stated that due to the transitory nature of their postings, it is difficult to recruit police officers to the Special Investigations Unit (SIU). It was also revealed that in many investigations, sometimes even after the files have been forwarded to the Attorney General's Department, victims withdraw their complaints by way of

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[65] Advocacy Discussions, LST, 2004
[66] *ibid.* Also see Annual Reports of the National Police Commission 2003, 2004, 2005, 2006 and 2007, and Pinto-Jayawardena, K., RCT Study, *op cit* at p. 182
[67] Advocacy Discussions, LST, 2004
[68] Advocacy Discussions, LST, 2004
[69] *id.* 2004

affidavits[70]. While they provide statements that the withdrawals were done voluntarily, the possibility of withdrawal due to pressure from the perpetrators is palpably high according to the interviewees, both from the police force and from the Attorney General's Department. Other issues include the fact that in the North and East, investigations into torture allegations were hampered due to victims living in un-cleared areas, a few victims preferring to pursue relief in terms of fundamental rights before the Supreme Court and therefore neglecting possible criminal action, and still others having left the country.

The lack of a proper policy in the Police Department regarding the indictment, charging of and other disciplinary action against officers is unfortunate. At the same time, some officers are clearly perturbed by the fact that junior officers are often subjected to disciplinary inquiries whereas senior officers who flout the law are ignored. A senior member of the (now defunct) National Police Commission on the other hand, when interviewed in 2004, stated that *"The taking of action regarding higher ranking officers is with us. But most of the offending officers are of lower ranks"*. When a criminal action is filed against a police officer, the Department does not institute a disciplinary inquiry until the conclusion of the case[71].

Interviews with police officers reveal that some officers who have been found guilty of torture by the Supreme Court continued to occupy the same position in the same police district[72]. On the one hand, the stance of a senior member of the NPC in relation to disciplinary action against police officers in cases of torture, in 2004, was as follows;

> *"We are gravely concerned about torture by police officers. We hold a very serious view. It should warrant dismissal and should not be permitted as an activity. Our policy (on torture) is that if it [sic] comes to our notice we consider it irregular and illegal. The law does not permit police officers to commit such acts.[73]"*

On the other hand, a Deputy Inspector General of the police stated as follows (in 2004);

> *"Torture is not really a big problem anymore. Now the police have been educated about it. However they are not aware of the consequences because of the lack of policy with regard to disciplinary action.[74]"*

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[70] Both police officers and officers of the AG's Department have noted this phenomenon, Advocacy Discussions, LST, 2004

[71] *id.* It was however on the NPC's own directive (in its first term) that disciplinery control over lower ranking officers was handed to the Inspector General of Police (IGP). Later, this delegislation was revoked following concerns raised by activists monitoring the NPC. An unconstitutionally appointed NPC in its second term, again handed this power back to the IGP. Now, the NPC is no longer functioning due to the appointments not being made by by the President.

[72] For example, interviewed police officers alleged that in the torture case of Gerard Perera, the Wattala police was found to be guilty of torture, the state being ordered to pay Rs. 800,000 as compensation. However the officer found guilty by the Court, allegedly continued to hold his position as at the time of being interviewed in 2004. *ibid*

[73] Advocacy Discussions, LST, 2004

[74] *id.*

Other allegations include the fact that friends or relations of politically powerful persons are often exempted from any type of disciplinary inquiry. These incidents clearly effect the efficiency, integrity and commitment of the force, and therefore clearly, the lack of policy level changes makes itself felt, negating the upholding of the rule of law.

In terms of the overall mental makeup and desensitisation of police officers in respect of the commission of torture which extends beyond merely extracting information to the sadistic enjoyment of the suffering of another, it appears that the police force is not equipped to deal with such issues. Police psychiatrists are not available, according to a DIG[75]. The focus appears to be on criminal liability, or the escaping of such liability. These are therefore important aspects of reform which warrant immediate attention.

03. Fair Trial and Presumption of Innocence

The successful balance of the rights of the accused against the rights of the victim and the society at large comprises the core of any criminal justice system; and this importance makes the tilting of the case towards the rights of one party to the detriment of the other, all the more abhorrent. The right to liberty of all persons is a sacred right of every individual[76], and in recognition of its importance, several rights emanate from the right to liberty; the right to be afforded a fair trial within a reasonable period of time, and the right to be presumed innocent until proven guilty are two such important rights.

The Right to a Fair Trial

Article 13(3) of the Constitution protects the right to fair trial:

> *"any persons charged with an offence shall be entitled to be heard, in person or by an attorney at law, at a fair trial by a competent court".*

However, the constitutional protection afforded in terms of the right to a fair trial demands a closer analysis of its implications; in Sri Lanka, the right to be represented by an attorney at law is limited to those who are charged with an offence. Suspects, in police custody or even in judicial custody, may languish in jails without recourse to the right to retain counsel, until he/she is formally charged with an offence. As has been noted in treatises on the subject[77], the

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[75] *id.*

[76] For judicial recognition of the importance of the right to liberty of the individual, see Fernando J.'s dicta in *Weerawansa* v. *The Attorney General*, (2000) 1 Sri L.R. 387, "...the State must [likewise] respect international law and treaty obligations in its dealings with its own citizens, particularly when their liberty is involved."

[77] See RCT Study, p.52 and also Report of the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Nowak M., Mission to Sri Lanka, 1-8th October 2007, A/HRC/7/3/Add.6, 26 February 2008 at para 36, cited in RCT Study, at Ft. nt. 195. It must also be noted that in terms of a special category of offences, in terms of the Code of Criminal Procedure (Special Provisions) Act No. 15 of 2005 and No. 42 of 2007, suspects arrested in terms of the Act are entitled to retain counsel of his/her choice, and to communicate with friends or relatives during the period of detention. On the other hand the period of detention has been extended to 48 hours in terms

Criminal Procedure Code, which embodies the general law in terms of criminal procedure, is silent with respect to the right of a suspect to retain counsel.

The Criminal Procedure Code is also silent on the conditions of interrogation of a suspect, the requirement to inform the family members of the suspect of the fact of his/her incarceration, and the right to have the presence of a counsel and an interpreter during interrogations[78]. Detainees arrested in terms of the Prevention of Terrorism Act No 48 of 1979 (as amended) (PTA) or the Emergency Regulations promulgated under the Public Security Ordinance No 25 of 1947 (as amended).

The complainant in a criminal investigation is also not entitled to a copy of his or her own statement as a matter of right. Practitioners state that this may not necessarily curtail the right to fair trial of an accused, since discrepancies between the complaint made by the complainant and his eventual testimony in court may be in favour of the accused, as opposed to allowing the complaint an opportunity to refresh his/her mind[79]. On the other hand one must also note that, where trials take many years to conclude, the likelihood of discrepancies due to forgetfulness or delay is also high[80]. The defendant however is entitled to obtain a copy of the complaint made, as of right[81], mainly due to developments in case law. Our law, as judicially interpreted, has attempted to secure some of these rights, at least at the stage of trial, to the accused.

In the case of *Danwatte Liyanage Wijepala* v. *The Attorney General*[82], the case involved an appeal to the Supreme Court on a conviction by the High Court of culpable homicide. The 1st accused had allegedly killed one Don Sarath Sirilal, and the sole eye witness to the incident was the father of the victim. The case is important in terms of its interpretation of Article 13(3) of the Constitution. Article 13(3) is as follows;

> *"Any person charged with an offence shall be entitled to be heard, in person or by an attorney-at-law, at a fair trial by a competent court."* In *Wijepala*[83] it was found that the first information had not been disclosed to the accused. Supreme Court found that the first information by the father of the victim,

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of this Act for the said special category of offences. For the stance of the Government of Sri Lanka (GOSL) on this subject, see RCT Study, pp. 52-53.

[78] Pinto-Jayawardena, K., RCT Study, at p. 52

[79] Advocacy Discussions, LST, 2010

[80] See for example the cases discussed below in terms of enforced disappearances

[81] Section 44 of the Criminal Procedure Code assures an accused the right to evidence such as the first evidence, statements made to the police by witnesses or even statements by him/her self. Practioners note however that often State Counsel provide these documents in the light of a favor to the defense counsel rather than a right of the accused to have access to all information. They further note the increasing number of reports handed over under 'confidential cover' to the judge, without allowing either the defense counsel or the accused himself, the right to peruse such information. They point out that such practices eats into the right to a fair trial of an accused, and provides the possibility of being convicted on information that he is unaware of, and therefore is unable to refute. Advocacy Discussions with senior practitioners, 23/4/2010 and 26/4/2010

[82] SC Appeal No; 104/99, SCM 12.12.2000, Judgement of Ismail J and Fernando J (with Wadugodapitiya J. agreeing), reported in (2001) 1 Sri L.R. 46, hereinafter referred to as *Wijepala*

[83] *id., Wijepala*

that he had made a statement to the police at 9.30 pm, that he saw the stabbing and could identify the assailants, was a vital document which should have been made available to the accused. Fernando J., held as follows;

> *"...the failure to disclose to an accused, the existence and contents of the first information-which might have cast serious doubt on the informant's credibility-may well result in a miscarriage of justice. Rule 52 of the Supreme Court (Conduct of and Etiquette for Attorneys-at-Law) Rules, 1988, requires an Attorney- at-Law appearing for the prosecution to bring to the notice of the Court "any matter which, if withheld, may lead to a miscarriage of justice." That is a professional obligation founded on a right to a fair trial."*

Furthermore, interpreting Article 13(3) of the Constitution, the Court held that the right to be heard, at a fair trial, included not only the right to be represented and tried before a competent court, but also the right to information which goes to the root of the case. In this case, while the evidence was clear and established, the entire case hinged on the evidence of the sole eye witness. The Court found that even where the evidence seems to be clear and impressive, it must be corroborated if there is any challenge to such evidence. Ismail J. held as follows;

> *"The evidence of a single witness, if cogent and impressive, can be acted upon by a Court, but, whenever there are circumstances of suspicion in the testimony of such a witness or is challenged by the cross-examination or otherwise, then corroboration may be necessary."*[84]

Ismail J.'s dictum in terms of the credibility of witnesses would also prove to be important in terms of giving the benefit of the doubt to the accused. The Court states as follows;

> *"In a trial before a judge sitting alone, while his decision on questions of fact based on the demeanour and credibility of witnesses carry great weight, an appellate court has a duty to test the evidence by a careful and close scrutiny and if it entertains a strong doubt as to the guilt of the accused, the benefit of that doubt must be given to him."*

In *Wijepala*, the Court finds that unlike where a Court of Appeal is considering a charge against a jury, where the charge is against a trial judge sitting alone, the Court of Appeal must closely scrutinise the evidence and credibility of witnesses.

In this case, Justice Fernando also looks to South African case law, and goes so far as to note that although Sri Lanka does not recognise the Right to Information, as South Africa does, nevertheless, the accused has a right to information that is necessary for ensuring the right to a

[84] *id., Wijepala* at p. 57

fair trial. He refers to the decision of *R* v. *Stinchcombe*[85] in which case it was held that information in the police docket belongs to neither the police not the prosecution but to the public; to see that justice is done. Fernando J. cites an important principle arrived at in *Stinchcombe*; 'there is a general duty on the state to disclose to the defense all information which it intends adducing and also all information which it does not intend to use and which could assist the accused in his defense. This is not an absolute duty, but one which is subject to the discretion by the state to withhold privileged information and to delay disclosure if the investigation is not yet complete.[86]' He concludes that according to South African case law, all statements made by witnesses, even *notes* made on statements made by witnesses, must be made available to the accused. These principles are implicit in the right to a fair trial recognised by Article 13(3), that such principles are not inconsistent with the Criminal Procedure Code, and that no derogation can be permitted from these principles. At page 50 of the judgement, he states as follows;

> *"The fact that in South Africa there is an independent right to information, makes little difference, because in my view the right to a fair trial recognized by Article 13(3) necessarily includes, inter alia, the ancillary right to information necessary for a fair trial (subject, of course, to exceptions such as privilege).*[87]"

It has been observed that this decision brought in the concept of quality of arms in a novel way[88]. As is evident from the extracts quoted above, the Court was also clear in its directive on the professional obligations of counsel representing the prosecution, to bring to the notice of court, any information that may assist the court when coming to a decision.

Practitioners note that there is no specific statutory provision for information to be given to the defense, except with regard to statements. Specifically in relation to bribery and drugs, practitioners point out that police notes are not generally made available to the defense. The right to information is however limited by certain criteria such as the exclusion of privileged information, information not available to the prosecution etc.[89].

This case has now achieved the proportions of a land mark judgement, with the result that due to this case, prosecuting counsel are obliged to make available important documents such as first information, to the defense[90]. In *Wijepala*, the Court concludes as follows;

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[85] *R* v. *Stinchcombe* (1992) Law Reports of the Commonwealth (Crim.) 68, hereinafter referred to as *Stinchcombe*

[86] *Op cit, Wijepala,* Fernando J. at p. 50

[87] *id., Wijepala*

[88] de Silva, S., LST Review, April/May 2008, citing Pinto-Jayawardena, Kishali *'Ensuring Due Process in Sri Lanka in the Context of Life and Liberty Rights; Domestic and International Efforts'* in LST Review, Volume 15 Joint Issue 203 & 204 September & October 2004

[89] *ibid*

[90] Advocacy Discussions, LST, 2010

"The failure to disclose to an accused, the existence and contents of the first information will result in a violation of Article 13(3) which is the right to a fair trial by a competent court."

This liberal interpretation of Article 13(3) is therefore a watershed principle in terms of criminal jurisprudence in Sri Lanka.

Presumption of Innocence

The presumption of innocence is an ancient principle, traced beyond English Law, the ancient Roman Empire and Greek Civilisation to Deuteronomy[91]. In the case of *Coffin* v. *The United States*[92], the United States Supreme Court found that this ancient principle is two fold, the accused is presumed innocent, and the prosecutor must prove his guilt beyond reasonable doubt. The Court in that case, (decided in 1895) held as follows;

"The principle that there is a presumption of innocence in favour of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.[93]*"*

The application of the presumption is not limited to the confines of the courtroom. Its application begins from the moment that a person is investigated[94].

In Sri Lanka, the presumption of innocence is constitutionally recognised by Article 13(5) of the Constitution, which reads as follows;

"Every person shall be presumed innocent until he is proved guilty:

Provided that the burden of proving particular facts may, by law, be placed on an accused person."

The presumption of innocence necessarily involves the notion of the superior probability of innocence as opposed to the superior probability of guilt. Yet, when it comes to the investigators in Sri Lanka, the dominant principle appears to be that of a superior probability of guilt[95]. Thus the large number of incidents of torture of suspects in police custody, the fabrication of evidence in order to obtain convictions, the inclusion of false entries etc., are explained.

The conviction rate of a country is dependent on several factors, and understandably changes from jurisdiction to jurisdiction. In Japan for example, the conviction rate has been assessed at

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[91] *Coffin* v. *United States*, 156 U.S. 432; 15 S. Ct
[92] *Id.*, hereinafter referred to as *Coffin*
[93] *Coffin, op cit.*
[94] de Silva, S., LST Review, April/May 2008
[95] Id.

99 percent[96], and this is attributed to the fact that the prosecution is so understaffed they may only indict in the strongest cases, while on the other hand, judges may allegedly be biased from a career perspective, to convict[97]. Interestingly, it has been found that judges in Japan who are more prone to acquit have worse career records[98]. On the other hand it has been documented, in 2008, that the conviction rate in Sri Lanka has fallen from 40 percent to 4 percent[99]. With regard to the number of acceptable convictions in a single jurisdiction, Wills puts the matter as follows (with reference to England);

> *Generally the number of convictions exceeds the acquittals, and more persons who are accused of crime are guilty than innocent. But according to statistics a considerable number of persons who are put on trial are legally innocent. In any particular case, therefore, a party may not be guilty, and it is impossible without a violation of every principle of justice, to act upon the contrary presumption of a superior probability of guilt. It is for this reason the law provides as a settled and inviolable principle, that until the contrary is proved, the accused shall be considered to be innocent, and his case shall receive the same dispassionate and impartial consideration, as if he were really so.*[100]

This brings us to the question of where the fault lies. It may be that the police and the prosecutors in Sri Lanka, unlike the prosecutors in Japan who indict only the strongest cases, indict where there is some probability of obtaining a conviction. Others allege that the Sri Lankan police, due to several reasons, are only interested in beating or torturing a suspect until he produces some material on which he/she can be indicted for the alleged crime[101].

Conviction rates are inherently handicapped in several ways, and therefore cannot be used as a convincing barometer of the competence of prosecutors. If prosecutors, like in Japan, were to indict only in the strongest cases, then many criminals would escape the net of the criminal justice system while the high conviction rates will suggest an extremely competent and efficient prosecution system. On the other hand if judges were to periodically convict, then the conviction rates would shoot up, suggesting a healthy criminal justice system, whereas in actual fact, the right to a fair trial in that jurisdiction would be severely compromised. The correct path lies in taking the middle way, i.e. conducting an efficient and timely investigation, and indicting in cases where there is a strong likelihood (as opposed to a bare possibility or, on the other hand, the opposite extremity of a certainty) of obtaining a conviction.

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[96] In 2001

[97] Ramseyer, J Mark & Rasmusen, Eric B, 2001. *Why Is the Japanese Conviction Rate So High?*, Journal of Legal Studies, University of Chicago Press, vol. 30(1), pages 53-88, January.

[98] *Id.*, survey of 321 Japanese judges

[99] Committee Report of 2004, *ibid*, also de Silva, S., LST Review, April/May 2008, quoting a public statement by the then Chief Justice.

[100] Wills, "Principles of Circumstantial Evidence", 7th Ed., 1937, Butterworths and Co. Ltd., London, p. 265, referred to by de Silva, S., LST Review, April/May 2008

[101] de Silva, S., LST Review, April/May 2008

Some practitioners note that a 24 hour window is insufficient for a police officer to obtain information from a suspect under normal circumstances. Therefore, the officer resorts to torture and assault. This view is unacceptable for several reasons, not the least of which is that torture is illegal. Torture, it has been established in international jurisprudence, is not a successful method of gaining information. While it is natural for most people to admit guilt after a few blows by a police officer, this does not mean that she/he speaks the truth.

Practitioners suggest that a forty eight or seventy two hour window be made available to police officers to keep suspects in custody before production before a Magistrate. This is currently available for a limited category of offences in terms of the Criminal Procedure Code Amendment Act[102]. Practitioners contend that this will remove the urgency with which police must extract information from a suspect and therefore will reduce the number of incidents of torture. One could argue on the other hand though, that for a desensitised police force which often resorts to the easy method of torturing a suspect to gain information, a longer period of police custody may easily frame a larger window of opportunity to torture and assault those in their custody.

Instead, the answer may lie in either a more controlled form of police custody such as production before a Magistrate every twenty four hours, with a maximum duration of police custody for seventy two hours, or on the other hand better training and equipment for police officers, enabling them to extract information efficiently and without resorting to torture within the current legal framework.

It has been noted[103] that there have been instances where the Magistrates pressure the accused to plead guilty, thereby considerably shortening the trial. The practice of the police of obtaining a forced confession of guilt, and then indicting the accused, even though the probability of a conviction is low has been commented upon[104]. Oft times the suspect is then discharged, after languishing in remand custody for several years[105]. As a practice, this type of forced confessions of guilt, severely undermine the strength of the criminal justice system[106].

In terms of sharing of information with the defense, some senior practitioners concede that the prosecutors do share information with defense counsel[107] while others qualify this to selected officers of the Attorney General's Department. Practitioners state that some officers do co-operate with the defense counsel, and affirm that the lack of a code of ethics within the department and the lack of a positive requirement to share information encourages some officers to be less than forthcoming with information that is necessary to the defense. In this aspect therefore it can be stated that the right to a fair trial of the accused is protected to some extent, though a uniform code of ethics and professional conduct within the Attorney

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[102] *op cit*
[103] de Silva, S., LST Review, April/May 2008
[104] *id.*
[105] *id.*
[106] Advocacy Discussions, LST, 2010
[107] *id.*

General's Department would possibly improve the relationship between defense and prosecuting counsel.

However another area in which the right to a fair trial is suspended in terms of the right to representation by counsel of one's choice from the moment of arrest. A suspect taken into police custody in Sri Lanka is not accorded a right to contact counsel at the time of arrest. His rights are not read out to him at that time, nor are the charges made known to him[108]. The application of the Emergency Regulations, which replace the general law in several instances, further erode the rights of suspects. In the opinion of senior practitioners, the advent of the emergency regulations have had a deleterious effect upon the speedy production of suspects before a Magistrate[109], the extension of periods of detention[110], and on the admissibility of confessions[111]. The judicial mind is not brought to bear on the condition and necessity for the suspect to be further detained when suspects are brought before Court, and that the extension of detention is almost an automatic process[112].

The presumption of innocence also requires recognition of the right of persons in pre-trial detention to be released (subject to guarantees to appear for trial) as a practice; as opposed to detention of all persons as the general rule. This right emanates from the fundamental principle of the right to liberty of the individual at all times. Article 9(3) of the International Covenant on Civil and Political Rights[113] (ICCPR) clearly provides that it is only as an exception to the general rule that a person should be detained in custody while awaiting trial, while the United Nations Human Rights Committee has held that pre-trial detention should be as short as possible[114].

The norm in Sri Lanka, especially in the recent past, has shown a disturbing trend of opting for extensive pre-trial detention as the general rule[115]. Practitioners note that this is seen especially in the High Courts[116]. Pre-trial detention of suspects as a general rule therefore, is

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[108] *id.*

[109] In terms of the Emergency Regulations, a suspect must be produced before a Magistrate within 30 days of arrest. After production before a Magistrate, he/she may be further detained for another ninety days; in terms of Reg. 21(2) of the Emergency Regulations, a person may be held in preventive detention for a period not more than 90 days (i.e three months), after which the suspect must be released if he/she is not produced before a Magistrate. Upon production before a Magistrate, he/she will be placed in fiscal custody. In terms of section 7(1) of the PTA a person may be detained for 72 hours without being produced before a Magistrate.

[110] In terms of section 9 of the PTA, a suspect may be detained in preventive detention for upto eighteen months (i.e. one and a half years) on a ministerial order which is extendable every three months. Further, in terms of section 7(1) and (2), a Magistrate 'must' remand a suspect produced in terms of the PTA, until the conclusion of the trial.

[111] In terms of the Emergency Regulations, a confession made to a police officer above the rank of ASP is admissible in a court of law.

[112] See RCT Study, at p. 57. Advocacy Discussions, LST, 2010 further confirmed this view.

[113] Hereinafter referred to as ICCPR, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976

[114] See RCT Study, referring to General Comment 8 of the UNHRC, at p. 57, see also at ft. nt. 230

[115] In terms of section 16 of the Bail Act, No. 30 of 1997, pre-trial detention can be extended to a period of one year. Section 115(2) of the Criminal Procedure Code requires that persons in pre-trial detention be held in fiscal custody (i.e Superintendent of Prisons) as opposed to police custody. For a detailed analysis of the domestic guarantees see RCT Study p. 58

[116] Advocacy Discussions , LST, 2010

not only contrary to internationally accepted norms on pre-trial detention and a further burden on an already overcrowded prison system, it is also a significant de-recognition of the right to liberty of the individual, where persons who had already been granted bail for bail-able offences are remanded pending trials[117] by the High Court.

Rights to a Fair Trial and Emergency Regulations

Several safeguards to protect the right to a fair trial of every accused in Sri Lanka is inbuilt into the criminal law and the general law. For example, in terms of Article 13(1) of the Constitution of 1978, every person who is arrested must be informed of the reason for his/her arrest[118]. Courts have further interpreted this right to mean a recitation of 'the particulars of the reason and the substance of the warrant'[119]. The Emergency Regulations provide for the arrest of individuals both as preventive detention[120] as well as for vague offences which 'threaten or endanger the sovereignty or the territorial integrity' of Sri Lanka[121]. There is no requirement under the Emergency Regulations to inform the suspect of the reasons for his/her arrest[122].

Another internationally accepted facet of the presumption of innocence is the right not to be forced to confess one's guilt or the 'privilege against self incrimination[123]'. The general criminal law in Sri Lanka does not admit confessions as admissible evidence[124] in several circumstances, including confessions made whilst in police custody. This safeguard firmly recognizes the ground level reality of forced confessions whilst in police custody. However in terms of the Emergency Regulations of 2005[125], confessions made to an Assistant Superintendent of Police or an officer above that rank, is admissible in a court of law[126].

These changes in the application of the general law by the advent of emergency laws further erodes the principles of fair trial and presumption of innocence in Sri Lanka, and paves the way for the use of torture as a mechanism for obtaining confessions from suspects. Statutory provisions for the judicial recognition of such confessions, which may be obtained through

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[117] Advocacy Discussions, LST, 2010

[118] However, see Pinto-Jayawardena, K., RCT Study, at p. 118, where she states as follows; "The legal guarantee that reasons should be given for arrest is not observed in practice in a vast majority of the documented cases".

[119] RCT Study, at p. 49, referring to *Dharmatilleke* v. *Abeynaike*, SC 156/86, SCM 15.2.1988

[120] Regulation 19, Emergency Regulations of 2005, *op cit.*

[121] See RCT Study, at p. 50

[122] The Emergency (Miscellaneous Provisions and Powers) Regulation No. 1 of 2005, as contained in Gazette No. 1405/14 as sought to be amended by Gazette 1651/11 of 5 August 2008, and the Emergency (Prevention and Prohibition of Terrorism and Specified Terrorist Activities) Regulation No. 7 of 2006 as contained in Gazette No. 1474/5 of 6 December 2006, hereinafter referred to as Emergency Regulations; Also see, *Legal Limbo*, Human Rights Watch, 2nd February 2010, available at http://www.hrw.org/en/node/88031/section/5

[123] See RCT Study, at p. 54

[124] The Evidence Ordinance Act No. 14 of 1895. In terms of sections 24, 25(1)-(2) and 26 (1)-(2), confessions made due to inducement, threat or promise, confessions made to a police officer, forest officer or excise officer, or confessions made while in the custody of either of the three categories of persons described above, are inadmissible in a court of law.

[125] *op cit.*

[126] Section 16(1) of the PTA

torture[127], further aggravate the problem by institutionalizing the use of torture in criminal investigations.

04. Torture in custody

The Constitution of Sri Lanka is clear and unambiguous in its wholehearted abhorrence of torture, articulated in Article 11 of the 1978 Constitution as a fundamental right. Though the right to life is not expressly protected in the Constitution of Sri Lanka, a pro-active judiciary has extended the law in Sri Lanka to embrace a limited recognition of the right to life[128]; that is, no person shall be punished with death or imprisonment except by order of a competent court, decided according to the procedure laid down by law[129]. The Convention against Torture Act[130] as well as the International Covenant on Civil and Political Rights Act[131] and the Penal Code, make torture a criminal offence, carrying a sentence of a minimum of seven years imprisonment of either description and/or a fine[132].

The CAT Act goes so far as to absolutely prohibit torture, even where there is a state of war or a declared public emergency[133]. Therefore, in a country where emergency regulations suspend several laws which govern the criminal justice system, the absolute prohibition of torture in all circumstances is a step in the right direction, in terms of statutory safeguards of the right to be free from torture.

In terms of compensation for victims of torture, the CAT Act does not contain a specific provision for the payment of compensation to victims. However, even here, the law has been extended due to judicial activism[134], and the payment of compensation for victims of torture is now well established in Sri Lankan law. These directions however are mostly in terms of the fundamental rights jurisdiction of the Supreme Court; Pinto-Jayawardena comments (writing in May 2009) that none of the three High Court convictions under the CAT Act included an order for payment of compensation to the victims[135]. The State argues though, that Court is entitled to order compensation under section 17(4) of the Criminal Procedure Code[136], and therefore, by extension, there is no necessity for specific provisions in the CAT Act in relation to grant of compensation to victims of torture.

The Attorney General's Department, in a bid to expedite the investigation and prosecution of torture cases, created a special unit to handle such cases, called the Prosecution of Torture Perpetrators Unit (PTPU). However, the existence of such a unit was more as a administrative

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[127] *id.*
[128] *Sriyani Silva* v. *Iddamalgoda*, (2003) 2 Sri L.R. 263
[129] Article 13(4) of the Constitution, Also see Pinto-Jayawardena, Kishali, RCT Study, at p. 37
[130] Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment Act, No. 22 of 1994, hereinafter referred to as CAT Act
[131] International Covenant on Civil and Political Rights Act No. 56 of 2007, hereinafter referred to as ICCPR Act
[132] Section 2(4), CAT Act
[133] Section 3 of the CAT Act
[134] See *Sriyani Silva* v. *Iddamalgoda, op cit.*
[135] RCT Study, *ibid.*
[136] RCT Study, *op cit.*, at p. 42

arrangement, than a special and separate unit, as at 2004[137]. A senior officer of the Attorney General's Department, during advocacy discussions with the LST in 2004, explained the procedure followed by the Department in handling such cases as follows;

> *"Firstly, when a file comes, (i.e. complaint about torture), we forward it to the SIU of the police, who does the investigation. Secondly, the file is then referred back to the AG for consideration as to whether there is sufficient evidence to charge the person on not... The advice we have given our State Counsel is to deal with torture files in the same manner as any other file. i.e. the yardstick used is the same,"*[138]

It was revealed during these discussions that, the Department considers several matters when deciding whether to indict in a torture case;

a. Whether there is a *prima facie* case

b. Whether there is at least 50 percent chance of success and

c. Whether it is in the public interest to indict

The senior officer continued thereafter to explain that in torture cases (c) is already fulfilled since torture is totally unacceptable.

The senior officer revealed that, if there is a disagreement within the team on the proposed indictment, then the file is sent to another senior Deputy Solicitor General (DSG), who him/herself, depending on his/her recommendation, will send the file to the Solicitor General (SG). Therefore four senior officers of the Department screen a file in any alleged torture case before deciding not to indict.

It must be noted that the Department appears to advocate a position of dealing with torture cases the same way it deals with any other case. i.e, with no special treatment, neither in order to increase prosecutions or convictions due to international pressure, nor to succumb to local pressure from the police department by refraining from indicting or by representing accused police officers in torture cases. However, though this stance may be looked upon as justifiable, at the same time, the end result may well be that torture, as a crime, is not accorded the special place it merits in which swift and effective distribution of justice is required.

This brings us to the issue of enforced disappearances, which is yet to be recognised as a specific offence in Sri Lanka[139]. The Attorney General's Department has a missing persons'

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[137] Advocacy Discussions, LST, 2004

[138] *id.*

[139] The right to life however has been impliedly recognized by the judiciary as a fundamental right in Sri Lanka. See *Sriyani Silva* v. *Iddamalgoda, op cit., Wewalage Rani Fernando*(wife of deceased

unit (MPU) for which staff were recruited especially, to handle the thousands of disappearance cases which occurred[140] over the past two decades. Some of the relevant prosecutions are discussed in the analysis below.

The Crime of Enforced Disappearance of Persons

> *"No one shall be subject to enforced disappearance"*[141]

The enforced disappearance of persons is often an effective method of suppression and terror, whether it be perpetrated by a legally appointed regime or by extra judicial groups. Sri Lanka fully experienced the trauma, the social upheaval and the lingering effects on society that an organised spate of enforced disappearance of persons creates. Internationally, the crime of enforced disappearance is recognised as a grave violation of human rights and a denial of the purpose of the Charter of the United Nations and the Universal Declaration of Human Rights[142].

Though Sri Lanka is not a signatory to the International Convention for the Protection of All Persons from Enforced Disappearance[143], it is clear that as a member of the United Nations and having ratified all relevant international treaties[144], Sri Lanka carries a positive obligation not only to recognise the crime of enforced disappearances but also to impose sufficient penalties and to discourage impunity by positive action.

General Comment 3 issued by the Working Group on Enforced Disappearances[145], on the Declaration on the Protection of All Persons from Enforced Disappearances[146], categorically states that the duty of states to 'take effective legislative, administrative, judicial or other measures to prevent and terminate acts of enforced disappearance in any territory under its jurisdiction' is of a positive nature, and creates an obligation to take action. Therefore a

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Lama Hewage Lal) *and others* v. *OIC, Minor Offences, Seeduwa Police Station, Seeduwa, and eight others*, SC (FR) App. No. 700/2002, SCM 26/07/2004, and *Kanapathipillai Machchavalan* v. *OIC, Army Camp, Plantation Point, Trincomalee and Others*, SC appeal No. 90/2003, SC (Spl) L.A. No. 177/2003, SCM 31.0.2003. In *Machchavalan* the right to life was interpreted to include the right not to be disappeared. Initial Reports of State Parties due in 2004: Sri Lanka, International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Committee on the Protection of the Rights of All Migrant Workers and Members of their Families, CMW/C/LKA/1, 19 June 2008, available at *www2.ohchr.org/english/bodies/cmw/docs/.../CMW.C.LKA.1.doc*

[140] *id.*

[141] Article 1, International Convention for the Protection of All Persons from Enforced Disappearance, New York, 20 December 2006. India is a signatory to the Convention, though Sri Lanka is not a signatory as yet.

[142] Article 1(1) of the Declaration on the Protection of All Persons from Enforced Disappearance, General Assembly resolution 47/133 of 18 December 1992

[143] *ibid.*

[144] Including the Universal Declaration of Human Rights (UDHR), adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948, and the ICCPR, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, *ibid.*

[145] WGEID report 1995 (E/CN.4/1996/38)

[146] General Assembly resolution 47/133 of 18 December 1992

restrictive interpretation would not be acceptable in terms of the international obligations of states to protect persons from the crime of enforced disappearance.

The Declaration is clear in its requirement that the crime of enforced disappearance should be considered an offence in terms of the criminal law. Article 4(1) of the Declaration is as follows;

> *"All acts of enforced disappearance shall be offences under criminal law punishable by appropriate penalties which shall take into account their extreme seriousness."*

The granting of amnesty to perpetrators of this crime is prevented by Article 18. The General Comment on the Article explains that some measures, even if they are not contained in an amnesty law, are considered contrary to the requirements of the Declaration[147]. The suspension of investigations into an alleged disappearance on the alleged basis of failure or inability to identify the perpetrators, or the trial of perpetrators as a part of a scheme to acquit them or impose insignificant sanctions, which would in fact amount to impunity, are both considered to amount to the granting of an amnesty to the perpetrators of the crime of enforced disappearance. Most importantly, the General Comment states with regard to the role of truth and reconciliation commissions;

> *"In States that have gone through deep internal conflicts, criminal investigations and prosecutions may not be displaced by, but can run parallel to carefully designed truth and reconciliation processes"*

Complaints made by the families of victims in Sri Lanka to the state appointed Presidential Commissions[148], have led to limited, albeit belated, investigations and prosecutions. However

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[147] Working Group on Enforced or Involuntary Disappearances (hereinafter WGEID), WGEID Report 2005 (E/CN.4/2006/56)

[148] See, the Final Report of Commission of Inquiry into the Involuntary Removal or Disappearance of Persons in the Northern and Eastern Provinces, Sessional Paper No. VII, P.O. No. SP/6/N/193/94, September 1997, Final Report of the Commission of Inquiry into Involuntary Removal and Disappearance of Certain Persons (All Island), Warrant No. SP/6/N/214/97 of 30 April 1998, March 2001, Final Report of the Commission of Inquiry into Involuntary Removal or Disappearance of Persons in the Western, Southern and Sabaragamuwa Provinces, Volume I, Sessional Paper No. V – 1997, P.O. No. SP/6/N/192/94, September 1997, Final Report of the Commission of Inquiry into Involuntary Removal or Disappearance of Persons in the Western, Southern and Sabaragamuwa Provinces, Volume II, Sessional Paper No. V – 1997, P.O. No. SP/6/N/192/94, September 1997, Final Report of the Commission of Inquiry into the Involuntary Removal or Disappearance of Persons in the Central, North Western, North Central and Uva Provinces, Sessional Paper No. VI – 1997, P.O. No. SP/6/N/191/94, Final Report of the Presidential Commission of Inquiry into the Kokkadicholai Incident, Warrant No. P.O. No. PPA/6/N/174/91, 9th March 1992, Interim Reports of the Commission of Inquiry into the Involuntary Removal or Disappearance of Persons in the Central, North Western, North Central and Uva Provinces, Sessional Paper No. III, September, 1997, PRESIDENTIAL COMMISSION OF INQUIRY INTO INVOLUNTARY REMOVALS: PRESIDENT WIJETUNGA (1993), PRESIDENTIAL COMMISSIONS OF INQUIRY INTO INVOLUNTARY REMOVALS OF PERSONS: PRESIDENT PREMADASA (1991, 1992, 1993), Report of the Commission of Inquiry into the Establishment and Maintenance of Places of Unlawful Detention and Torture Chambers at the Batalanda Housing Scheme, Sessional Paper No. I – 2000, Warrant No. SP/6/N/206/95, 2000, Report

several cases analysed below, show that the belatedness of the inquiries and recording of statements strikes at the root of successful prosecutions. Often the accused are acquitted for lack of evidence.

Sri Lanka, as stated above, is yet to recognise the crime of enforced disappearance of persons as a specific offence in terms of the criminal law. Prosecutors therefore resort to charging accused persons based on the crime of abduction with intention to secretly and wrongfully confine, the crime of wrongful confinement etc. as alternative grounds upon which persons can be charged; whereas the real crime appears to be the extremely grave crime of enforced disappearance of persons. The crimes of abduction and wrongful confinement are also inadequate as alternative charges since they fail to recognise the fear psychosis associated with a spate of enforced disappearances, the delays in making complaints where the persecutors are also the investigators, the intimidation of witnesses, the presumptions that should apply, etc.

The next section analyses some of the decided case law dealing with several cases of enforced disappearance where the accused are charged with the crimes of abduction and enforced disappearance, which amply illustrate the above mentioned inherent handicaps.

Fair Trial and the Impact of Decades of 'Enforced Disappearances'

It has been commented that the crime of enforced disappearances is worse than even the crime of manslaughter due to the intense mental (and often physical) agony that a victim undergoes prior to being 'disappeared'[149]. The trauma experienced by the family members of the disappeared have been well documented by the Presidential Commissions of Inquiry, appointed to investigate the disappearances and allegations of torture during the terror era of 1987-1991[150]. There have been recommendations that enforced disappearances be made an offence in Sri Lanka[151], but progress in this regard has not been forthcoming. The following assertion is interesting in this regard;

> *"It is well known that a drastic decline in the standards of discipline of the police service took place during the Southern insurrectionist disturbances (from '87-'91). Abductions, disappearances and killings were evidenced without proper inquires and in some cases, no inquiries at all. The police gave no explanations for these disappearances. No officers were held*

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of the Presidential Commission of Inquiry into incidents that took place at Bindunuwewa Rehabilitation Centre, Bandarawela on 25 October 2000, Warrant No. SP/6/N/221/2001, November 2001 (unpublished), Report of the Presidential Commission of Inquiry into Incidents which Took Place between 13th August and 15th September, 1977, Warrant No. P.O. No. N. 143/77, Report of the Presidential Truth Commission on Ethnic Violence (1981 - 1984), Warrant No. SP/6/N/223/2001, September 2002, Report to His Excellency the Governor-General by the Commission Appointed in Terms of the Commissions of Inquiry Act to Inquire into and Report on Certain Matters Connected with the Assassination of the Late Prime Minister Solomon West Ridgeway Dias Bandaranaike , Warrant No. G.-G. O. No. N. 101/63, March,1965

[149] LST Review, April/May 2007, p. 45

[150] *supra,* See Reports of the Presidential Commissions of Inquiry, at n.148

[151] LST Review, April/May 2008

responsible for abductions, disappearances or killings. A large number of high ranking police officers as well as junior officers were involved in these acts. Many of these cases are still pending in courts. This same pattern was evidenced in cases involving the conflict in the North-East."[152]

As discussed above, due to the lack of statutory recognition of the crime of enforced disappearances, the accused is often charged with the crime of abduction and wrongful confinement instead. Clearly, these offences barely encompass the gravity of the crime of enforced disappearance of persons.

The courts, when faced with the issue of enforced disappearances, often apply the general rules of criminal procedure, and the burden of proof is often improperly discharged by the prosecution, due to several factors ranging from lapse of time which affects the credibility of witnesses, to the influencing of witnesses by the accused or other interested parties. Some of these cases examined below are indicative of this trend.

In case No. HC Hambantota 62/98, decided on 12th December 2002 by the High Court of Hambantota, the charge was that of abduction and wrongful confinement in terms of section 359 read with section 356 of the Penal Code[153]. The victim had been abducted in broad daylight, in front of the Hambantota *Kachcheri*[154], and five witnesses gave evidence on behalf of the prosecution. The alleged crime was committed in March 1992, and was found, some days later, hanged from the bars of a cell in the Angunukolapalassa police station; the accused were four police officers attached to the same station.

The first eye witness, (though he testified that the victim had been abducted by four persons in police uniform), could not identify the abductors as being the accused. This is despite his having exchanged words with some of the alleged abductors. The second eye witness, a police officer at the Hungama Police Station, gave evidence that a person had been brought to the station by a group of police officers in civil clothing, and he could not identify the police officers nor the person who was thus brought to the station, who had exchanged words with another prisoner, named Siripala at the station. The Court holds that with respect to the third eye witness, Siripala, his evidence establishes that he could and did identify the victim, who was in the custody of seven or eight police officers at the Hungama Police Station, but that his evidence does not prove that the four accused police officers were present. The fourth eye witness, another suspect in remand custody at the Angunukolapalassa police station, identified the victim, establishes that the victim was brought to the station, that the victim was later seen hanging from the bars of his cell. Her evidence establishes that the second accused brought the victim to the station, and also that the fourth accused was present in the station at the time of the death of the victim.

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[152] *id.*, p. 48
[153] Penal Code, Ordinance No. 2 of 1883
[154] i.e. local government office

However the Court holds that her evidence does not establish that the accused in anyway confined the victim wrongfully or in a secretive manner[155]. The Court also notes that a number of years have passed since the incident, and that she had a personal grudge against the 2nd accused (who had arrested her), which therefore renders suspect the credibility of her evidence against the 2nd accused. The Court concludes that therefore there is no clear evidence against the 2nd and 4th accused, and none at all against the 1st and 3rd accused.

The last eye witness in the case gave evidence that the 2nd, 3rd, 4th accused brought the victim to a cell in the Angunupalassa police station whilst he himself was detained as a suspect in the same station. His evidence also establishes that the 1st, 3rd and 4th accused police officers were attached to the same station during that period. The Court however holds that his evidence does not establish that the 1st to 4th accused were culpable, since it is not clear, on his evidence, whether the accused brought the victim to the station with the intention of abduction and/or wrongful confinement. Court therefore holds that his evidence does not directly implicate the accused. The Court also notes that the witness had seen the accused after 20 years, and therefore, his identification of the victim was suspect[156]. The final witness for the prosecution was an officer of the Criminal Investigation Division of the police. The Court opines that while his evidence proves that the accused were attached to the relevant police station at the time, there is no evidence linking them with the alleged crime.

The Court finally concludes that there is evidence that the victim was taken away by unidentified persons in police uniform, but that there is no evidence whether he was taken away according to law, or whether he was unlawfully abducted for the purpose of wrongful confinement. Court holds that whilst there is evidence that the victim was held at the alleged police station, that there is no evidence that he was secretively or wrongfully confined. The Court further holds that the complaint in this case had been lodged in 1994, two years after the incident, and the prosecution had failed to adduce reasons for such delay. The Court is of the opinion that the evidence given by the third and fourth witnesses are not established due to the delay in obtaining their statements. The Court also finds that;

1. Both the 3rd and 4th witnesses were suspects in the murder of the 3rd witness's husband, and therefore detained at the alleged station

2. the 3rd witness allegedly harboured a grudge against the 2nd accused for having arrested her for her implication in her husband's murder, and therefore had a serious reason for implicating the 2nd accused in the present crime

Therefore, these reasons were opined render the evidence of the 3rd and 4th witnesses, suspect.

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[155] At p. 5 of the judgement
[156] At p. 11 of the judgement

On this basis, the Court holds that there is no *prima facie* case and, in terms of section 200 (1) of the Criminal Procedure Code Act No. 15 of 1979, the Court acquits the accused. Section 200(1) reads as follows;

> *"When the case for the prosecution is closed, if the judge wholly discredits the evidence on the part of the prosecution or is of opinion that such evidence fails to establish the commission of the offence charged against the accused in the indictment or of any other offence of which he might be convicted on such indictment, he shall record a verdict of acquittal; if however the judge considers that there are grounds for proceeding with the trial he shall call upon the accused for his defense."*

The process by which the Court discredits each and every witnesses' evidence appears to be problematic. The Court accepts that it is established that the victim was taken away by a group of unidentified police officers, that the victim was seen in the custody of unidentified police officers in civil clothing, that the victim appears to have been brought to the alleged police station by three of the accused police officers, identified by eye witnesses, and that the victim was subsequently seen dead, in the same police station. It is noted that, the question of credibility of witnesses, the question of whether such taking away of persons amounted to abduction and/or wrongful confinement, whether the victim was at anytime detained in terms of a lawful authority, are questions to be answered in trial. Each of the witnesses testimonies are dismissed as being either unreliable or failing to establish the crime, when the only requirement at that stage was for the Court to decide whether all evidence can be wholly discredited warranting the acquittal of the accused. It is noted that judicial discretion does not exist in a vacuum, but must be exercised with the utmost caution, and the use of the term "wholly discredit" requires that the evidence be not merely suspect, but wholly irrelevant or unreliable, warranting the acquittal of the accused.

Therefore the stance taken by the Court itself is a cause for concern in light of the terror, trauma and grave consequences that are inflicted upon families whose members are the victims of enforced disappearances. The delays in lodging of complaints, the fear psychosis in the community, are very much a part of the crime of enforced disappearances. In fairness to the Court, it must be remembered that the crimes of abduction and wrongful confinement fail to recognise these features, result in courts requiring a higher standard of proof; a standard which fails to recognise the special requirements of the crime of enforced disappearance of persons. It is noted that, similar to statutory rape, the enforced disappearance of persons is a grave crime which requires special standards of proof, which standards would be inapplicable in terms of the general crimes of abduction and wrongful confinement. Therefore these cases emphasise the need for an urgent amendment in the statutory recognition of the crime of enforced disappearance of persons.

For a judgement in a similar vein, see the case of HC Galle 2073, decided on 29th July 2004 by the High Court of Galle. The Court, at page 2 of the judgement, makes a number of findings, with total disregard for the problems and issues faced by the families of victims of enforced disappearance during the terror era of 1989-1991. The victim in this case was

abducted on 24th December 1989. The Court criticises the delay of 5 years occasioned before the complaint was made against the accused police officer by the chief witness, the mother of the victim. The Court rhetorically asks the question, 'if the mother of the victim was so well versed with the police and the police station, why did she not make a complaint for five years?'[157] This insensitivity is displayed by the Court despite the fact that the witness had explained her delay in making a complaint, due to the terror and chaotic atmosphere in the country at the time.

Such judicial reasoning points to the need for recognition of the features of the crime of enforced disappearance of persons. The fact that the crime itself is yet to be recognised results in judges themselves proving to be insensitive to and intolerant of, the social and political upheavals within which abductions and disappearances took place during an era of terror and violence.

The Court further comments that while it appears that the witness was well aware of who abducted her son, where he was confined and for how long he was confined, that she did not make any official complaint until 1994, five years after his abduction and disappearance[158]. The other witnesses have made their statements ten years after the alleged incident[159]. The Court further records that this curious fact of delay affects the very root of the case[160]. The Court then presumes that this delay was due to the fact that the witness was not aware of the identity of the person who abducted and wrongfully confined her son.

However at the same time, the Court notes that there are no contradictions in her evidence, and that the evidence shows her son was confined at the Hikkaduwa Police Station where she had seen and spoken to him. On the other hand, the failure of the complainant to name the accused in her complaint was found to show lack of consistency, thereby rendering the complaint unreliable[161]. The witness's allegation that she had named the accused in the first complaint and in subsequent complaints, but that it had not been recorded, is not dealt with by the Court[162]. The Court also relies on the following dicta in *Jayawardena and Others* v. *The State*[163] , in support of this line of thinking;

> *"the incident has taken place on 28.12.1989 and the 1st complaint was made in 1995..., it is common knowledge that by 1991, conditions had improved and it was possible for any citizen to lodge a complaint at any police station. It would be dangerous to act on the evidence of the complainant in view of the long delay which has not been satisfactorily explained."*

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[157] In contrast, see the far more tolerant and sensitive attitude taken by the Court in the Case of *Tikiri Banda*, HC Kandy 1284, discussed below.
[158] p. 3 of the judgement
[159] p. 7 of the judgement
[160] p. 4 of the judgement
[161] Following *Jayawardena, op cit.*
[162] p. 5 of the judgement
[163] (2000) 3 Sri L.R 192

The Court finally concludes its decision based on the fact that there was 'extreme' delay in making the complaint, and the fact that the accused had rigidly stood by his stance despite vigorous cross examination. The accused was the officer in charge of the relevant police station. The Court records that the evidence of the chief witness shows that the victim was seen in the police station. The only basis on which the evidence for the prosecution is seen to be unreliable is because of the delay; not because of any contradictions, lack of corroboration or lack of truthfulness. The Court dismisses the evidence of other witnesses for the prosecution on the basis that they only establish the evidence of the chief witness[164]. The High Court appeared to have misled itself, in thus dismissing the evidence of the witnesses chiefly on the basis of the delay in making a statement, especially given the explanation provided by the witness, and taking into consideration the situation in the country at the time. The fact that other decisions, such as that of *Tikiri Banda*[165] discussed below, where the complaint was made four or five years after the incident, wherein Court has found the accused to be guilty based on such evidence, suggests that the High Court gravely misled itself in this instance in basing its decision on the delay in making the first complaint.

The case of *The Democratic Socialist Republic of Sri Lanka* v. *Tikiri Banda*[166], on the other hand, decided by the High Court of Kandy on 13th August 2000, follows a different approach to dealing with the evidence and witnesses in cases which clearly contemplate an incident of enforced disappearance, though the charges are based on abduction and/or wrongful confinement[167]. The Court is sensitive to the issues of the period during which the incident took place, and notes, at page 9 of the judgement, that the delay of 4 years after which the statement of a witness was recorded, must be understood in the light of the atmosphere prevalent during the time the victim was disappeared. Further, the Court also appears to consider and make provision for the fact that a number of years have passed before the witnesses were required to give evidence before a court of law[168]. The fact that the complainant was not able to make a complaint at the time is also considered by the Court in light of the atmosphere prevalent that during this era.

The Court must also be lauded for its clear and cogent consideration of the truthfulness of the evidence given by the witnesses, wherein at each stage the Court comments on the demeanour and credibility of each witness. The lack of contradictions etc., are duly noted, and the finding that the accused police constable is guilty is arrived at after exhaustively analysing the evidence adduced by both the prosecution and the defense.

In terms of command responsibility though, it appears that the Court does not question why the officers in charge of the police station were not charged, whereas the accused, in making his dock statement, categorically implicates his commanding officers as having authorised the arrest and detention of the victim. The Court only considers the dock statement in so far as it relates to the culpability of the accused himself, and does not question why the prosecutors

[164] At p. 7 of the judgement
[165] *Op cit*, HC Kandy 1284
[166] HC Kandy 1284, decided 13.8.2000
[167] See also, the Court of Appeal decision, discussed below
[168] See p. 9 and 11 of the judgement

have not charged the supervising officers. Where a victim who has clearly been disappeared had been confined in a police station, with no evidence to show that he was thus lawfully confined, the presumption is that those in charge of such station were well aware of and connived with the accused in the commission of the crime. The lack of an offence of command responsibility makes itself felt in these types of situations.

In HC Hambantota 94/99 decided on 4th February 2004, the alleged incident took place in April 1990. The first complaint was made in February 1998 to the CID. The three chief witnesses, sisters of the victim, corroborate each other's evidence on the essential facts, and all three provided evidence that the 1st and 2nd accused, upon leaving after the alleged abduction, had advised them that the troubles of their brother are now over, and that they may give the 7th day alms giving. However, in analysing the evidence, the Court finds that only one of the three witnesses identified her brother to a certainty as having been taken away by the police in the police jeep, while the others claim to have seen his legs protruding from the jeep. They corroborate each other's evidence on the posture of their brother within the jeep, i.e the legs protruding from the jeep.

Taken together with the statement made by the officers, their evidence appears to show a superior probability that the victim was abducted in the police jeep. However the Court notes that the first complaints were made eight years after the alleged incident. The Court, referring to several decisions[169], concludes that to wait for eight years to make the first complaint, when the situation in the country had normalised by 1991, is unjustifiable, the witnesses not having adduced sufficient reasons for such delay. While noting that an identification parade had not been conducted, the witnesses identifying the accused in the dock, the Court then concludes that to rely on the evidence of the three witnesses in these circumstances is not safe[170]. No comment has been made on the inefficiency and negligence of the investigators in not conducting an identification parade, and the failure to hold such a parade has clearly prejudiced the case for the prosecution.

Some of the conclusions of the Court raise further concerns. The Court comments that the incident took place in broad daylight, on the main road, and therefore there was nothing secretive with regard to the taking away of the victim. The Court notes that if the purpose of the abduction was the death of the victim, the charge should have been framed in terms of section 355 and not 356 of the Penal Code. It appears that the corroborative statements of three witnesses, with no contradictions, taken together with the words of the accused, have not convinced the Court that the victim was in fact abducted in a police jeep on the relevant date. The fact that the delay in complaining appears to be the chief reason for not relying on such cogent evidence, is a cause for concern.

In the case of HC Hambantota 14/2001, decided on 25th August 2003, it appears that the evidence of the witnesses, when taken together seem to suggest that the four victims were seen being taken into the police station, in broad daylight, with their faces covered. The Court

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[169] *Sumanasena* v. *The Attorney General* (1999) 1 Sri L.R. 137 and *Jaywardena* v. *The Attorney General* CA 98-100/97

[170] pp. 15 and 16 of the judgement

finds that the identification of the victims is doubtful in such a case, but also finds that if abduction and subsequent secret and wrongful confinement was the motive of such abduction, then the accused police officers in question would have abducted the victims under cover of night. The fact that the abduction was done in broad daylight seems to suggest to the Court that the abduction was lawful.

The fact that the police officers of the relevant station prevented the witnesses from entering the police station soon after the alleged abduction, the fact that the witnesses were told that the victims' statements would be recorded and then sent home, the fact that the victims were never seen again, taken holistically, seem to suggest a superior probability that the victims were in fact abducted, wrongfully confined and subsequently disappeared. On the other hand the victims were never seen within the police station since the witnesses were not allowed to enter despite visiting the station several times. The victims were allegedly seen taken into the station, with the faces covered, by one of the witnesses.

Whether the evidence could withstand the test of beyond reasonable doubt is beyond this analysis; what seems clear is the fact that for the crime of enforced disappearance, special features and a special burden of proof must be applied. The fact that more than two decades after these incidents, Sri Lanka is yet to statutorily recognise the crime of enforced disappearance of persons, is lamentable. Finally the Court holds that the delay of nine years in making a complaint, renders the statements of the chief witnesses, unreliable, relying on *Sumanasena* v. *The AG*[171]. The fact that one of the witnesses had submitted affidavits to the Tangalle Police, a few years after the incident, does not weigh the balance in favour of the prosecution. The accused were therefore acquitted on this basis.

On the other hand, a case which is exemplary in terms of judicial recognition of the problems associated with convictions in cases involving accused police officers is a decision by the late Justice Sarath Ambepitiya, decided in 2003. The case is that of *The Democratic Socialist Republic of Sri Lanka* v. *Ananda Weerasekera et al*, H. C. 1947, decided on 01st August 2003, by the High Court of Galle. The accused were charged with abduction of three persons with the intention of wrongful confinement in terms of the Penal Code[172].

In the final judgement, the Court clearly expresses itself on the inherent weaknesses of cases where the investigators themselves are accused of grave crimes. At page 12 of the judgement and at page 14, the Court recognises the fact that where police officers themselves taken down statements made against other police officers, there is a greater likelihood of the statements being recorded in favour of the accused. The Court also recognises the fact that, in this particular case, a identification parade had not been conducted, resulting in casting doubt upon the credibility of identifications made by eye witnesses. At page 14 of the judgement, the Court notes that the case involves investigations by police officers in relation to charges

[171] *op cit.*
[172] *op cit.*

against fellow police officers, and notes that the investigation have not been carried out properly[173].

Nevertheless, applying the principles of criminal law, the Court is compelled to give the benefit of any doubt to the accused. While the Court is therefore compelled to acquit the 1st to 6th accused officers due to lack of proof beyond reasonable doubt, the Court notes that the alleged abduction and wrongful confinement, followed by the disappearance of the three victims, took place in 1990. The statements were recorded by the police in 1997, seven years after the alleged incidents. The Court further notes that while courts in the past were obliged to dismiss the entire evidence of a witness where there is a single contradiction, courts could now accept any important part of the evidence (which is un-contradicted), which he proceeds to do.

On this basis the Court finds that the 7th accused, the officer in charge of the police station wherein the victims were wrongfully confined, is found guilty of that offence, in terms of section 359 of the Penal Code[174]. Unlike the case discussed above, the High Court of Galle in this instance holds that where there is clear evidence that the persons were in fact being confined at the police station in question with the clear knowledge and awareness of the accused, and where there is no proof that the persons were being confined lawfully at the police station, the presumption is that victims were being unlawfully confined[175]. The Court further recognises that the evidence of a superior officer, who had visited the station in question *after having provided due notice of such inspection 21 days in advance*, that the victims were not at the police station on two of the days in question, did not prove the innocence of the accused, since the accused then had ample time to remove all evidence of any illegal activities at the police station. This type of judicial recognition of the *modus operandi* of abductions, wrongful confinement and subsequent disappearance of persons, is refreshing, and encourages better accountability on the part of investigators.

In some cases, the culpability of state officers for the crime of abduction and wrongful confinement, has also been upheld. In the case of *Liyanadeniya Arachchilage Tikiri Banda* v. *Attorney General*[176] (the High Court decision is discussed above), a Reserve Police Constable was indicted in terms of the Penal Code on the grounds of abduction and wrongful confinement. The victim had been abducted while at lunch with his family, paraded along the streets, and had been seen in a prison cell by his father. He subsequently disappeared. The High Court rejected his defense on the ground of superior orders. In rejecting his appeal from the High Court the Court of Appeal held that the defense of superior orders is not a valid

[173] It must be noted in this regard that a special investigations unit (SIU)was established in 1980 to inquire into complaints of discipline against police officers. The unit, which directly reports to the Inspector General of Police, recruits only police officers who do not have any charge or court record against them. However the SIU was not recognized by the National Police Commission as a special branch of the police force. Advocacy Discussions, LST, 2004, *op cit.*

[174] *op cit.*

[175] At p. 23 of the judgement

[176] CA/83/2000, HC Kandy/1284, reported in ALR 2007, vol. 2, available at Law & Society Trust, at p. 40

defense. The Court further puts in perspective the inadequacy of a dock statement as a valid defense in pleading the defense of superior orders.

The Court further states "Even if he, the accused, brought the victim on the orders of the superior, the burden would be on the accused to prove it on a balance of probability". In terms of affirming the concept of command responsibility it is judicially observed as follows; "One may argue, why [sic] the Officer-in-Charge of the station is not indicted? That is not for us to answer." That this is an instance where a stern reprimand from the bench may have resulted in the commanding officer also being indicted, in an offence in which he may have been implicated. An indictment of the officer in charge was not forthcoming[177].

Loopholes in the Law

Loopholes and omissions in the law are also a cause for the visible decline in the rule of law and public confidence in the criminal justice system. Unfortunately, even where the law itself is sufficiently stringent, non-implementation of existing provisions allows for the deterioration of the system.

For example, in terms of fighting incidents of torture in Sri Lanka, the CAT Act has been hailed as a specific piece of legislation outlawing the offence of torture, in keeping with some of Sri Lanka's international obligations. While the CAT Act has been criticized for its failure to include the term 'suffering' in its definition of torture[178], it must at the same time be commended for the extension of liability for torture to persons who acquiesce in the commission of the offence. As Pinto-Jayawardena points out[179], the Convention against Torture and Cruel, Inhuman or Degrading Treatment require *mens rea* for the extension of liability to an individual, whereas the CAT Act, it may be argued, extends liability to the Officer in Charge of a police station where torture was carried out, even if he did not have the intention to commit such offence. This type of progressive legislation brings Sri Lanka on par, or even beyond its international obligations.

At the same time the failure of the prosecuting authority, i.e the officers of the Attorney General's Department, to charge officers who acquiesce in or order the commission of torture, has been noted[180]. An example cited is that of Gerald Perera, where the Officer in Charge of the police station where the complainant was tortured, was indicted and his name later withdrawn by the Attorney General's Department[181]. This action was critiqued by the High Court Judge hearing the case[182].

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[177] See *Tikiri Banda* v. *A.G.*, ALR 2007, vol 2, at p. 66
[178] See RCT Study at p. 38
[179] RCT Study *op cit*, at p.40
[180] See the case of *Republic of Sri Lanka* v. *Suresh Gunasena and Others*, HC Case No. 326/2003, *High Court of Negombo*, HC Min. 02.04.2008, cited in RCT Study, at p. 39
[181] RCT Study, at p. 40
[182] *id.*

Magistrates themselves, as judicial officers, are granted several opportunities not only to prevent opportunities for the torture of victims, but also to hold accountable those who are clearly responsible for such transgressions. In terms of the Release of Remand Prisoners Act No.8 of 1991, Magistrates are required to visit places of detention of remand prisoners at least once a month for offences over which they hold the power of release[183]. Further, in terms of section 39 of the Prisons Ordinance, judges, members of parliament and Magistrates are empowered to visit prisons at any time, and obstruction of such visits is an offence. In terms of emergency regulations promulgated under the Public Security Ordinance (PSO) by the President on 6 April 2007, a Magistrate is empowered to visit places of detention, situated within their jurisdiction, where such visits can be made without prior intimation and at least once a month[184]. This regulation has regrettably been suspended by the currently applicable Emergency Regulations[185].

Practitioners affirm that Magistrates rarely, if ever, visit prisons or other places of detention where prisoners under judicial custody are detained. They further comment on the indifference of several Magistrates to the physical conditions of some prisoners, and even others who specifically complain of assault at the hands of the jail guards or other prisoners.

International norms, as established by General Comment 20 of the UN Human Rights Committee, recognise that all places of detention must not only be known, but must also be observed in order to prevent abuses. Magistrates in Sri Lanka are clearly not aware of the nature of the responsibility and obligation they carry each time they order the remand of a prisoner; it is noted that a Magistrate should not only required to bring his judicial mind to bear on the facts of the case put before him, but also to account for and be held responsible for any atrocities committed upon the person of prisoners who are committed to judicial custody. Once a person is transferred from police custody to judicial custody, the responsibility for the well being and good health of the prisoner likewise transfers from the police to the Magistrate.

PTA and Emergency Regulations

> *"Legislation and administrative regulations and institutions that contribute to or legitimize human rights violations must be repealed or abolished. In particular, emergency legislation and courts of any kind must be repealed or abolished insofar as they infringe the fundamental rights and freedoms guaranteed in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. Legislative measures*

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[183] *id.*, at p. 72

[184] *id.*, at p. 73. However at the same time Pinto-Jayawardena notes that where suspects are detained by the Inspector General of Police (IGP) by way of Reg. 19(3) of the Emergency Regulations, places of detention need not necessarily be prisons, and there was no published list of places of detention as of May 2009.

[185] Emergency (Miscellaneous Provisions and Powers) Regulation No 1 of 2005 as contained in Gazette No 1405/14 as sought to be amended by Gazette 1651/11 of 5 August 2008, read with Emergency (Prevention and Prohibition of Terrorism and Specified Terrorist Activities) Regulation No 7 of 2006, referred to as Emergency Regulations

necessary to ensure protection of human rights and to safeguard democratic institutions and processes must be enacted. As a basis for such reforms, during periods of restoration of or transition to democracy and/or peace States should undertake a comprehensive review of legislation and administrative regulations"[186]

The relationship between the protection of the right to be free from torture and the prevention of terrorism has never been harmonious in any jurisdiction; and Sri Lanka is no exception. In a bid to restore normalcy and defeat terrorism, normalcy itself has been suspended, and the safeguards posted in the general law to prevent occasions of torture have been removed, leaving a gaping void that provides ample opportunities for the unscrupulous to engage in torturing of suspects, both under the cover of executive action and without it.

Fundamental rights jurisdiction in Sri Lankan provides for the safeguard of several rights of an accused in the criminal justice process, not the least of which is the right to be free from torture. Other rights protected include the presumption of innocence[187] and protection from retrospective legislation[188]. However in terms of Article 15(1) of the Constitution, these rights can be suspended upon restrictions prescribed by law in the interests of national security. On this basis, several rights of an accused are therefore suspended in Sri Lanka in terms of the PTA[189] and the Emergency Regulations, which are discussed below.

A statutory safeguard built into the general law in order to prevent and reduce opportunities for torture in custody is the requirement to produce all persons in police custody before a Magistrate within a reasonable time. Article 13(2) of the Constitution, section 36 of the Criminal Procedure Code and section 65 of the Police Ordinance, all contain this requirement[190]. Section 37 of the Criminal Procedure Code goes so far as to stipulate that suspects who are arrested must be produced before a Magistrate within 24 hours of arrest. Some practitioners and members of the police force express the view that 24 hours is insufficient to extract the necessary information from the suspect, and that this leads to the commission of torture by the police due to the pressure of time[191]. A senior member of the NPC, in 2004, stated as follows;

"The Police Officers think that without that [torture] they cannot do a good job of work. It is a common perception of the police that the law is too much on the side of the accused. The 24-hour rule is hampering their investigations. The maximum of only 24 hours is allowed with the suspect, and hence they thing they cannot do much (without torturing the suspect).[192]"

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[186] Principle 38, Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, *op cit.*
[187] Article 13(5) of the Constitution of 1978
[188] *id.*, Article 13(6)
[189] *op cit.*
[190] See RCT Study, at p. 50-51
[191] Advocacy Discussions, LST, 2010, Advocacy Discussions, LST, 2004
[192] Advocacy Discussions, LST, 2004

Judicial precedents have also established this requirement in a clear and unambiguous manner[193]. The Emergency Regulations of 2005 however suspend these specific time limits. In terms of Regulation 21(1) of the Regulations, the suspect must be produced before a Magistrate within a reasonable time of the arrest, not more than 30 days after the date of arrest. The Emergency Regulations further expressly suspend the operation of sections 36 and 37 of the Criminal Procedure Code.

Insofar as the Emergency Regulations are concerned vis-à-vis the requirement to produce before a Magistrate, it appears that where a person is arrested for investigative purposes (as opposed to preventive detention), there is no express procedure laid out requiring his/her production before a Magistrate[194]. Instead, the Regulations require the handing over of the person to the nearest police station within 24 hours, informing the person's family members as per procedure laid out in the Regulations, and informing the superior officers of the arresting authority of the fact of arrest[195]. One could argue however that where the regulations are silent the general law applies; therefore the police, in terms of section 65 of the Police Ordinance as well as Article 13(2) of the Constitution, is required to produce the individual before a Magistrate within a reasonable time. Since the Emergency Regulations specifically suspend the operation of section 37 of the Criminal Procedure Code, the requirement to produce the suspect within 24 hours of the time of arrest would not apply. The Emergency Regulations have then eroded the protections accorded by statute law to prevent torture and cruel, inhuman and degrading treatment of suspects arrested under the Emergency Regulations.

In terms of section 7(1) and 9 of the PTA, a person arrested in terms of the PTA can be kept in police custody for 72 hours. Thereafter, when produced before a Magistrate, the Magistrate must compulsorily remand the suspect until the conclusion of the trial[196]. One of the primary tools that are employed as a safeguard against torture in custody is judicial supervision of the custody of suspects. The general law requires the transfer of suspects arrested by the police from police custody to judicial custody within 24 hours of the arrest, via production before a Magistrate, for that reason; judicial custody allows for lower opportunities for torture by police during investigations or at any other time. Special legislation have however suspended this safeguard by allowing preventive detention, under the PTA[197], allowing suspects arrested

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[193] See for example *Faiz* v. *Attorney General* (1995) 1 Sri L.R 372

[194] RCT Study, at p. 51

[195] *id.*

[196] *id.*, at p. 52, See also, Ganesalingam V.S, *Impact of the PTA on the Fundamental Rights recognized by the Constitution*, from *Sri Lanka: Prevention of Terrorism Act (PTA): A Critical Analysis*, Centre for Human Rights and Development (CHRD), Ravaya Printers and Publishers, Sri Lanka, at p. 46, (with reference to arrests in terms of section 6(1) of the PTA) "The provision that the Magistrate shall remand until the conclusion of any trial any person arrested under 6(1)... had removed the discretion of the Magistrate to overrule the Attorney General. There had not been a single reported case of [a] Magistrate refusing remand using judicial discretion". Ganesalingam also refers to the case of *Pathmanathan* v. *Sub Inspector Paranagama OIC*, (1999) 2 Sri L.R. 225, where the Supreme Court held that the decision of a Magistrate to remand a prisoner in terms of section 6(1) is a judicial decision, which is made in exercise of judicial discretion, and therefore is not amenable to the fundamental rights jurisdiction of the Supreme Court since Article 126 limits jurisdiction to executive and administrative action.

[197] Section 9, PTA

in terms of the Act to be detained for a period of eighteen months under a detention order by the Secretary to the Ministry of Defense[198], without magisterial supervision[199].

However, some safeguards do exist, even in times of emergency and in terms of arrests under the PTA. See for example the requirement in terms of the PTA for a notification to be made to an independent authority, i.e. the Human Rights Commission, in terms of arrests and detentions in terms of the Prevention of Terrorism Act, within 48 hours of arrest. The HRC must also be informed of the place of detention. This mechanism, which includes sanctions for non-compliance[200] would ensure a measure of accountability where suspects are arrested in terms of the PTA. At the same time it must be noted that a detainee is not entitled as of right to retain and communicate with independent counsel in terms of either the PTA or the Emergency Regulations.

In terms of the right to independent medical examinations, the general law as per the Criminal Procedure Code, provides for the Officer in Charge of a Police Station, if he feels such medical examination is necessary for the investigation, to order a medical examination by a government medical officer. However, the suspect is not entitled to request such an examination. Were this right available as of right, to be examined by a medical officer upon arrest, the possibility of torture while in police custody should considerable reduce due to the higher likelihood of the evidence of such torture coming to light. Currently a suspect can complain to a Magistrate of ill treatment at the hands of either the police or any other person while in custody. Pinto-Jayawardena however comments that this right is rarely availed of since suspects are constantly under a very real threat of retribution at the hands of those who supervise their incarceration. At the same time, allegations exist that Magistrates themselves do not take strict action against those accused in order to protect the complainant where such complaints are made by prisoners[201].

05. Trial process

The right to be tried without delay is one of the aspects of the right to a fair trial of an accused. It must be stated in the same breath that any detainee or suspect must be ensured the right to be tried or released within a reasonable time. Article 9(3) of the ICCPR is clear in establishing this as an international norm for all state parties. Delays in trials due to financial

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[198] Proviso to Section 9(1) of the PTA

[199] Judicial interventions have however attempted to infer a certain amount of protection to persons in preventive detention, see RCT Study, at p.52, citing *Weerawansa* v. *Attorney General* (2000) 1 Sri L.R 387.

[200] Liability for non-compliance can extend to imprisonment for a maximum of one year and/or a fine, in terms of section 28(3) of the Human Rights Commission of Sri Lanka Act, No. 21 of 1996. See also, RCT Study, at p. 52

[201] An interview with a senior practitioner in the Colombo Magistrates and High Courts (name withheld on request) revealed that on one occasion where a prisoner complained of assault at the hands of both other prisoners and jail guards at the Magazine Prison, and where the violence of such assault was evident upon his person, the Magistrate ordered that he make a complaint to the chief jail guard. The practitioner pointed out that the lethargic and indifferent attitudes such as this to the assault of prisoners while in both police and judicial custody, contributes to the likelihood of torture or cruel, inhuman and degrading treatment while in custody.

constraints or delays in investigations are unacceptable as justifications for restricting the liberty of the individual for lengths of time[202].

The jurisdiction of the High Courts is in terms of Article 111(1) of the Constitution, and its powers are as ordained by Parliament. The Provincial High Courts, in terms of the 13th Amendment to the Constitution of 1978[203], 'has original jurisdiction in respect of all prosecutions on indictment', and the CAT Act specifically confers this jurisdiction[204]. The Magistrates' Courts have the jurisdiction to hear and try, both by summary and non-summary procedure, for suits and offences committed wholly or partly within its jurisdiction.

According to de Silva, delays before the High Courts can range from three to ten years, or even more. He goes so far as to say that delays in trials take place as a matter of course[205]. These delays, it has been observed, help suspects to approach the witnesses and intimidate them[206]. For example, sometimes rape victims from poor families are offered foreign employment by suspects or their relatives[207]. On the one hand, these long adjournments obviously provide opportunities for intimidation of witnesses, resulting in witnesses failing to appear at the trial or the giving of contradictory evidence. On the other hand, long delays result in witnesses forgetting minor, or sometimes even crucial points of their evidence, resulting in undermining their credibility. The end result in both instances, is to ensure that the evidence of the witnesses are rendered suspect, and thereby of no assistance to either the prosecution or the defense.

It has been noted that where trials involve persons in power such as police or army personnel, the probabilities of witnesses being pressurised to withdraw the case are high[208]. On the other hand, delays also occasion additional costs for both witnesses and for the family of the accused, travelling etc. This is oft cited as a reason for the eventual discouragement of witnesses and complainants in pursuing criminal action.

Other delays noted by practitioners include the delays and difficulties in accessing judgements delivered by both Magistrates and High Court Judges. They note that delays of at least one month must be borne by those who wish to obtain certified copies of judgements, and this delays the appeal procedures available to appellants[209].

> *"members of the public do not have a bona fide right of access to these judgements in the absence of a Right to Information Law in Sri Lanka*

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[202] See RCT Study, p. 55, where she cites several decisions by the UN Human Rights Committee, where the Committee refused to accept such justifications for delays in trying detainees. Advocacy Discussions, LST, 2010

[203] Article 154P of the Constitution

[204] RCT Study, at p. 84

[205] de Silva, S., LST Review, April/Mary 2008

[206] This view is shared by several senior practitioners. Advocacy Discussions, LST, 2010

[207] de Silva, S., LST Review, April/Mary 2008

[208] *id.*

[209] Advocacy Discussions, LST, 2010

which is a significant obstacle in regard to maintaining accountability and transparency in the legal system"[210].

The time limit within which an appellant must appeal from the decision of a High Court exercising original jurisdiction to the Court of Appeal is 14 days; therefore delays of over four weeks severely handicap litigants.

Delays in Trials

Delays in trials in Sri Lanka are attributed to several factors, not the least of which is the lack of court resources. Not only in terms of the number of court houses, the number of judges and the amount of financial resources to equip and maintain them, but also in terms of essential services of support personnel such as stenographers and interpreters[211]. In fact, practitioners note that interpreters are rare in court houses, at times lawyers themselves being called upon to translate the evidence of witnesses[212]. Further, some lawyers note that *Mudaliyars* are now taking on the role of interpreters, resulting in disastrous and wildly imaginative records of evidence of witnesses[213]. Similarly, practitioners note instances where the absence of a stenographer brings the day-to-day work of a court to a grinding halt, the judge being forced to postpone cases to another date when stenographers will be present in court. The back log of cases in courts, the lack of management skills of the judiciary in terms of managing the roll assigned for the day, lack of a pre-trial process wherein the judge, together with the prosecution and defense counsel would agree on admitted facts and thereby save valuable time, energy and resources spent on proving evidence, lack of provision for sentence bargaining, and the lack of provision for plea bargaining, are other reasons assigned by practitioners for the long delays in disposal of cases by courts[214].

These issues clearly affect the expeditious taking up of trials in the lower courts. The Committee Report of 2004 has recommended the appointment of Court Recorders in particularly heavy courts in order to ease the work load and clear the backlog of cases[215]. The author is not aware of any implementation of this recommendation.

Another reason for delays in trials is attributed to the fact that over 95 percent of cases in terms of the Second Schedule to the Judicature Act are non-jury trials[216]. It has been noted that unlike jury trials, where the trial is heard day-to-day continuously to an end, in non-jury trials several intermittent dates are given. With this advent it has been noted that judges often fix a large number of cases for a single day, and the resultant work load limits the time spent on the trial of each individual case[217]. Witnesses who are required to attend Court on a successive number of dates are severely inconvenienced, are exposed to not only intimidation

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[210] RCT Study, at p. 144
[211] Advocacy Discussions, LST, 2010
[212] *id.*
[213] *id*
[214] *id.*
[215] See Committee Report 2004, p. 10, 9.0
[216] de Silva, S., LST Review, April/May 2007, p. 36
[217] *id.*

and pressure but are also prone to lose interest in the case[218]. When one adds to this the length of time taken for the Government Analysts' Department to send in its report, the fact that trials take several years to conclude is no matter for surprise.

Practitioners note that since early 2010 some High Courts have re-introduced the practise of day-to-day trials. However they also note that judges now remand suspects until the trial is concluded, and as this is done even where the accused had been previously granted bail, several accused now prefer to plead guilty for minor offences rather than go through the trial process[219]. Other practitioners note that several judges at the Magistrates' Court level, pressurise the accused, especially in minor offences, to plead guilty, so that court need not go through the trial process[220]. Needless to say, the latter practise is offensive to the most basic concepts of criminal justice and human rights.

Practitioners further note a disturbing trend in recent times of judges themselves absenting themselves from court proceedings, both in the lower courts and in the appellate courts, resulting in all cases scheduled to be heard in that court being postponed[221]. The lack of commitment and low prioritisation accorded to day-to-day court proceedings by both court officials and by judges is denounced by practitioners as being one of the reasons for delays in trials.

Further, it is observed that judges are far too amenable for the postponing of trials and the giving of mention dates to both the police and to lawyers on the mere request for such a postponement, without exploring whether these postponements are truly based upon exigencies[222]. See for example the following observation on the delays in trials by judges;

> *"... The usual modus operandi is to fix around six to ten trials a day, record some evidence in two or three cases and postpone the other cases, giving observers the impression that the judge is attempting to conclude a large number of cases every day. This is however far from the case..."*[223]

The amenability of judges to continuously allow calling dates not only discourages witnesses from arriving for the actual date of trial. This type of delay results in the accused either pleading guilty if the punishment is relatively minor, or proceeding on friendly terms with the victim, with both parties viewing the court system as the common enemy, or in other instances, intimidating witnesses and crippling the trial itself[224].

On the subject of the knowledge and skills of judges though, the level appears to be fairly adequate. Some instances have been recorded where the lack of knowledge of the law among

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[218] *id.*
[219] *id.*
[220] *id.*
[221] Advocacy Discussions, LST, 2010
[222] *id.*
[223] de Silva, S., LST Review, April/May 2007
[224] Advocacy Discussions, LST, 2010

On average, senior criminal law practitioners opine that there is a high likelihood of witnesses being intimidated during the investigation and trial process[238]. Whether the witness succumbs to such intimidation depends on the level of the threat, and the relationship of the witness to either the accused or the victim. Those who have a personal interest in the outcome of the trial would not succumb to intimidation the way a non-related witness would; for example a relative of the victim is less likely to succumb to intimidation[239]. At the same time, practitioners note that witnesses are reluctant to get involved in the prosecutorial process due to fear of reprisals.

The intimidation of witnesses has been well documented in Sri Lanka, and range from simple threats to abductions and torture, especially where the transgressors are police officers[240]. Pinto-Jayawardena states that intimidation of witnesses is neither an isolated practice, nor a practice confined to emergency times; instead it is the norm when it comes to criminal trials in Sri Lanka. She further documents several cases in the High Courts which illustrates patterns of witness intimidation, resulting in inconsistent statements by witnesses, which have eventually resulted in the cases falling by the wayside. This is especially evidenced in relation to allegations of enforced disappearances and extra-judicial killings in the nineteen eighties[241].

Practitioners note the urgent need to implement a proper witness protection program in Sri Lanka, which must begin with legislative recognition. They also note that while judges do take action against intimidation of witnesses, the number of occasions on which the courts interfere have reduced over the past few years. Judicial abhorrence of intimidation of witnesses is seen by practitioners as a vital factor in fighting witness intimidation, which eventually can disrupt the entire trial process, further reducing the number of convictions.

A Witness and Victim Protection Bill which has been passed by the Cabinet has been awaiting parliamentary approval for several years. In some respects, the Bill is commendably wide, extending protection to witnesses and victims from "any real or possible harm" which may emanate from his/her participation in any investigation or inquiry into an alleged violation of fundamental rights or human rights[242]. While the Bill has several points which are laudable such as prohibition of the dissemination of information relating to the identity of witnesses and victims, the opportunity for victims to complain not only to Court and other Commissions but also to National Authority and a Protection Division, critics have pointed to

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[238] Advocacy Discussions, LST, 2010

[239] *id.*

[240] See RCT Study, p. 40, referring to *The Homagama Case*, where five witnesses were tortured and one witness subsequently abducted, in Supreme Court Applications 20/90, 22-24/90 and 31/90, as well as cases documented by the Asian Human Rights Commission, available at www.ahrchk.net/ua/mainfile.php/2003, including the case of D. Pushpakumara, 14, who was tortured by the Saliyawewa Police and later threatened to withdraw his fundamental right application in the Supreme Court.

[241] See RCT Study, p. 142, referring to several cases in the High Court of Hambantota decided by (then) High Court Judge Sarath De Abrew, and a case decided in the High Court of Galle by (then) High Court judge Rohini Perera.

[242] RCT Study, p. 142, section 21 of the Witness and Victim Protection Bill

several deficiencies.[243] For example, the Protection Division is to be established as a part of the Police itself, headed by a senior Deputy Inspector General, effectively depriving the Division of its essential independence in such a case[244]. The Bill was not exhaustively discussed in the public forum before being put before Parliament. It is yet under revision. As such, an effective and strong witness protection law in Sri Lanka remains an urgent necessity.

07. Prosecutorial Role

The Prosecutorial Process

As discussed above, the criminal justice system involves the contributions of several actors; the police in recording the first complaint, arresting the accused, investigation of the crime, the Government Analyst and medical experts in providing expert evidence, the magistrate in committing the suspect to judicial custody and the prosecutor in indicting the accused and conducting the trial, the witnesses in providing credible evidence, the judges of the Magistrates or High Court in finally deciding on his/her guilt. Clearly, the conduct of a successful prosecution is no easy task.

In terms of minor crimes in Sri Lanka, the trials are conducted in the Magistrate's Court, while State Counsel, on behalf of the Attorney General, indict and conduct trials for more grave crimes before the High Court. For minor crimes, the criminal actions are instituted in the Magistrate's Court largely by the police or by other law enforcement authorities such as government authorities enabled by statute. The Attorney General retains an overarching right to intervene in any proceeding in order to remedy any injustice[245]. Practitioners have agreed that, in their experience, the Attorney General does in fact intervene in order to remedy any injustice being caused[246].

In terms of the obstacles faced by the prosecutors in terms of successfully prosecuting, especially, for example cases of torture in terms of the CAT Act, advocacy discussions with state counsel proved to be enlightening[247]. One of the chief obstacles appears to be contradicting medical reports being submitted by several doctors, undermining the allegation of torture. It is stated that victims often withdraw cases due to fear or intimidation, the reasons for withdrawal often being unclear despite questioning of the victims. Lack of evidence regarding identification has also been cited as one of the obstacles to a efficient prosecution. A senior officer of the AG's Department has framed the problem as follows:

> *"There is no point in holding identification parades when they have also seen the perpetrator after the incident but before the trial. They also do not*

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[243] RCT Study, pp. 142-143. LST was not able to obtain the 2010 version of this Bill for perusal despite querying from the Legal Draftsman's Department and the Office of the Parliament. Reportedly, the Bill is being revised in several aspects.
[244] RCT Study, p. 143
[245] de Silva, S., LST Review, April/May 2008
[246] Advocacy Discussions, LST, 2010
[247] Advocacy Discussions, LST, 2004

complain immediately because they don't know the name of the perpetrator at the time, but find it out later,"[248]

The Shortcomings in the System

The above analysis leads one to the inevitable conclusion that the system as a whole is not working to its full potential.

Among the areas which are most affected in the criminal justice system, the prosecutorial process has perhaps shown the worst consequences[249]. The decline that is evidenced in regard to the functioning of the criminal justice system in Sri Lanka has been gradual, imperceptibly affecting the entire system until one reaches the point where the issues can no longer be ignored. De Silva goes so far as to state that the impartiality, knowledge and honesty of judges themselves have been compromised in recent years[250].

It is suggested that the following of day-to-day trials would solve many of the ills that currently affect the prosecutorial process.[251] However, some practitioners note that the observance of day-to-day trials is impractical, stating that the accused may not be able to afford defense counsel in such a case, judges may be absent, witnesses may not be present and thereby, only a few cases would be successfully concluded.

The Committee of 2004, as noted above, concluded that conviction rates had dropped from 40-45% to 4%[252]. De Silva quotes the previous Chief Justice as follows;

"Some time ago, the Chief Justice publicly said, that the rate of convictions has sharply fallen to a mere 4 percent from about 40-45 percent, within only a couple of years"[253]

If these conviction rates are to be taken as indicative of the efficiency of the criminal justice system, then it appears that there is a severe deterioration of the system. The reasons for such a drastic reduction could range from the large number of indictments without proper perusal of evidence, the inefficient conduct of investigations which result in few concrete, corroborated cases which would assist convictions, the delays in trials which effect witness credibility and occasion the withdrawal of cases due to influence or intimidation, the unskilled conduct of prosecutions etc. What is clear however is that even if the conviction rate were to be considered an accurate indication of the health of the criminal justice system, an overall deterioration of the system is due to a number of causes and not due to a single issue.

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[248] *id.*, Also see cases discussed in terms of enforced disappearance of persons where the lack of the holding of an identification parade undermines the entire case, *op cit*
[249] de Silva, S., LST Review, April/May 2008
[250] *id.*
[251] *id.*
[252] Committee Report, 2004, at point 13.1.
[253] de Silva, S., LST Review, April/May 2008

Practitioners agree that the overall functions of the police force are inadequate[254]. The above analysis also shows several lapses in the trial process etc. Whether the prosecutor himself contributes to the steep decline in conviction rates is the next question to consider.

The Role of the Prosecutor

The powers of the Attorney General are expansive[255] and are not only in terms of criminal trials, but also in terms of civil suits, in advising the President[256] and in interpreting the Constitution. In the area of criminal law, the Attorney General's powers range from the power to decide whether or not to indict an offender[257], to the power to tender pardon to an accomplice[258].

Indictments in the higher courts are framed by the officers of the Attorney General's Department whilst in the Magistrate's Court they are framed by the police[259]. It is a duty on the part of the officers of the Attorney General's Department to present facts in their proper perspective when they present a case before court.

One of the chief contributors to this is the lack of cadre, a problem in most government departments including the police force and the government analysts department, which effects the Attorney General's Department as well. The 2004 Committee Report records that at the time of writing, the Department assigned 60 out of 123 officers to the criminal division. In 1996, which was the last date recorded by the committee for a cadre increase in the Department, 1639 files were received; in 2003 the Department received 6000 files, to be handled by the same number of officers[260].

The issue of lack of cadre then would directly affect the time and expertise that can be devoted to each individual case by an officer of the Department. The Committee Report further notes that this seriously affects the expeditious dissemination of advice by the Department. At the same time, further aggravating the issue of an overload of work, practitioners note that the police too have now adopted a practise of referring even minor criminal matters to the Department for advice[261]. This may be due to lack of training among police officers to handle the less serious criminal offences. The Department is then, not

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[254] Advocacy Discussions, LST, 2010

[255] For more details on the powers of the Attorney General see RCT Study, p. 97

[256] Article 134 of the Constitution

[257] Sections 191(1), 193 and 400(1)

[258] Section 256(1) and 257 of the Criminal Procedure Code

[259] Where indictments are framed by the police some practitioners allege that incompetent framing leads to difficulties in convictions when the matter is eventually tried. Other however disagree, stating that the police are fairly skilled in framing indictments. Advocacy Discussions, LST, 2010

[260] See Committee Report 2004, at p.9, 3.1

[261] Advocacy Discussions, LST, 2010.

surprisingly, inundated with a large number of briefs, distributed among a small number of officers[262].

As a solution to this problem, the Committee Report of 2004 recommended the appointment of a Senior State Counsel, or a State Counsel who can advise the police, promptly and with due expertise, on the conduct of an investigation on a regional basis. This includes a recommendation that an officer be stationed in each judicial zone to coordinate with and to act in an advisory capacity to the police[263]. Delays in trials, especially in cases which are filed pending the advice of the Attorney General, would then generally be reduced. The eradication of laws delays requires this type of progressive changes in the Attorney General's Department; changes which, though simple in themselves, as far as the author is aware, are six years hence, yet to be implemented.

Another problem noted in the Department is the lack of specialised training; training which criminal law practitioners would find extremely useful when prosecuting criminal trials expeditiously and efficiently. Commercial and electronic crimes are two areas which the Committee of 2004 identified as potential areas for urgent training of counsel in the AG's Department[264].

Another area which requires urgent addressing of solutions is with regard to the allegation of the lack of impartiality of the Attorney General when handling *habeas corpus* applications in the eighties during the Southern insurrection. A special *habeas corpus* unit was created in the Attorney General's Department during the period immediately following the years of terror, in order to handle the influx of cases of disappearances of persons. De Silva, commenting on this special unit, stated as follows;

> *"To the outside world, this 'unit' had been created on order to handle the workload systematically and quickly. However, the actual truth was the unit was comprised of handpicked officers who were prepared not only to do a 'quick job' but also 'any job.' The police were coaxed to swear diabolically false affidavits to court. The police officers did so to save their skins. Later, the police mastered the art. This is the manner in which the deterioration of the prosecutorial function quickened in pace."*[265]

In terms of the independence of the officers of the Attorney General, practitioners have noted the increasing tendency of the State Counsel in visiting the chambers of the Magistrate or High Court judge before the start of the daily proceedings[266]. They note the undesirability of

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[262] *id.*; Practitioners note that timely indictment of the accused and timely conduct of prosecutions do not take place in the Sri Lankan criminal justice system, and that these lapses point to general shortcomings in the system rather than the being the sole fault of the prosecutors/officers of the Attorney General's Department.

[263] See Committee Report 2004, at p. 10, 8.0

[264] See Committee Report 2004, at p. 9, 3.2

[265] LST Review, April/May 2008

[266] Advocacy Discussions, LST, 2010

these habits, which, quite apart from reflecting on the independence of both the counsel and the judge, also affect public confidence in the judicial system itself.

Conclusions

The above critical analysis of the criminal justice system leads us to several conclusions. In terms of the police force and its role in the system, the corruption and political interference in the police force is well accepted by several authorities, including several practitioners. The lack of training and lack of manpower of police, the inefficiency and lack of commitment of police are other flaws noted among the personnel of the police department. The lack of basic technology and logistical supports are external handicaps which further cripple the Department, leading to the use of illegal investigative methods such as torture as opposed to internationally accepted methods of investigating crimes.

In terms of the law, one of the key omissions in our statute books is the failure to recognise the offence of enforced disappearance as a specific crime. The number of cases of enforced disappearances which have surfaced in recent years point to the urgency with which this offence must be brought into the penal laws of Sri Lanka. Similarly, command responsibility is not an offence in Sri Lanka, despite the number of cases in which official orders have clearly shown the responsibility of commanding officers for offences and grave crimes carried out by subordinates[267]. In terms of emergency laws, the admissibility of confessions in terms of emergency regulations is extremely problematic, and the expunging of such provisions from the applicable legal norms is both timely and urgent with the ending of the civil war. A similar change is needed in terms of the ability to detain persons for upto eighteen months without magisterial supervision in terms of the PTA and other types of detention such as preventive detention in terms of the emergency regulations

When it comes to the court system, it must be concluded that delays in trials are due to several reasons; listing too many cases in one day, judges giving dates without bringing to bear the judicial mind upon its consequences and impact on the trial, and the failure to take up day-to-day trials. Other conclusions include the allegation that judges do not take sufficient note of allegations of torture/assault by prisoners, certified copies of judgements are not available in a timely manner, and judges remanding suspects already given bail, unreasonably, while the trial is being taken up. The failure of judges to visit prisons periodically has also been commented upon.

In terms of protecting witnesses, Sri Lanka does not have a witness protection law, and practitioners allege that Judges are not so strict against those who intimidate witnesses. There are also allegations of lack of skill and courtesy among officers of the Attorney General's Department, lack of manpower in both the Government Analysts' Department and the Attorney General's Department, and the overall inefficiency with which cases are disposed of

[267] Practitioners note that command responsibility is rarely implemented in Sri Lanka in terms of charging superior officers for commands given to junior officers; *id.*

due to several reasons[268]. The close rapport that some members of the Attorney General's Department maintain with judges has also been adversely commented upon[269].

Recommendations

The above conclusions point to several flaws in the legislation and in the implementation of existing procedural safeguards in the criminal justice system of Sri Lanka. The following recommendations have been formulated with attention paid to each of the vital aspects of a criminal justice system; the role of the investigator, the protection of witnesses, the role of judges and the trial process and lastly the role of the prosecutor. They are as follows;

Reforms to the Law:

1. Magistrates to be required by law to visit prisons periodically

2. Magistrates to be accorded a supervisory role, by law, in police investigations

3. Urgent legislative enactment of a comprehensive witness and victim protection law, including severe sanctions attaching to cases of intimidation

4. Recognition of the crime of enforced disappearance of persons in keeping with internationally accepted definitions of the crime;

    a. The formulation of special legislation to deal with the disappearances, the burden of proof to be applied in such cases, the issue of delay in such cases and other pertinent issues which are unique to cases of enforced disappearances

    b. Clear differentiation of the crime of enforced disappearance of persons from the crime of abduction with the intention of wrongful confinement

    c. Recognition of the gravity of the crime of enforced disappearance as a crime that is worse than that of manslaughter, and penalties to be attached accordingly

5. Withdrawal of the Emergency Regulations and substantial reform of the Prevention of Terrorism Act No. 48 of 1979 (as amended), including;

[268] Advocacy Discussions, LST, 2010
[269] *id.*

a. The requirement that all suspects arrested by police or by the army, or any other state body, be produced before a magistrate within 24 hours

b. The repeal of sections 16 and 17 of the Emergency Regulations which provide for the admissibility of confessions made to police officers above the rank of Assistant Superintendent of Police

c. Repeal of the rules enabling the Secretary, Ministry of Defense, to make orders on preventive detention of persons, which power should be solely exercised by a judicial officer

6. The CAT Act be amended to include recognition of modern medico-legally recognised methods of torture and/or cruel, inhuman or degrading treatment.

a. Incorporation of the principle of universal jurisdiction

b. Incorporation of the term 'suffering' in terms of section 12 definition

c. Incorporation of the principle of *non refoulement*

d. Inclusion of a specific right to compensation

e. Inclusion of the principle of command responsibility

7. The urgent enactment of a right to information law, which includes the right of access to judgements of courts as of right.

8. The urgent enactment of a contempt of court law

9. Recognition of the concept of command responsibility in Sri Lanka's criminal laws.

10. The substantial reform of the ICCPR Act, bringing it more in line with the spirit as well as the substantial rights ensured by the ICCPR, which international covenant Sri Lanka has ratified.

11. The substantial reform of the CAT Act, bringing it more in line with the spirit as well as the substantial rights ensured by the Convention Against Torture and Cruel, Inhuman or Degrading Treatment, which international convention Sri Lanka has ratified.

Recommendations in terms of International Treaties

1. That Sri Lanka ratify the International Convention for the Protection of All Persons from Enforced Disappearances

2. Ratification of the Optional Protocol to the Convention Against Torture and Cruel, Inhuman or Degrading Treatment

3. Ratification of the Rome Statute of the International Criminal Court

Reforms to Practice, Procedure and Policy:

The Police Department

1. Expeditious training and skills development of the Police Department

2. Urgent appointment of an independent National Police Commission and thereby, the effective de-politicisation of the Police Department, specifically

    a. Recalling its delegation to the IGP of directing disciplinary inquiries against officers below the rank of Chief Inspector

    b. Immediately indicting officers against whom a criminal charge, which is reasonably supported by evidence, exists

3. Provision of vehicles, forensic investigation techniques and other equipment to the police department

4. Better management of reward schemes in the Police Department

5. Conducting of adequate disciplinary inquiries against police officers against whom allegations are made, including the application of necessary penalties ranging from community service to dismissal

6. Provision of budgetary allocations for the police force specifically with regard to;

    a. DNA/Forensic machinery necessary for forensic investigations

    b. DNA/Forensic investigation courses and training for police officers

c. Provision of adequate logistical support for the police force, including vehicles and transport

d. Increasing of cadre in the police force

7. Police Officers to be required to allow suspects to speak privately to the Judicial Medical Officers.

8. Judicial medical officers who are found to have connived with police officers in covering up cases of torture be immediately stripped of their official status by courts

9. Judicial medical officers be required to maintain records of suspects examined by them including the date and time, which should be made available to court if necessary.

10. Any police officers indicted in terms of the criminal law be immediately suspended and subject to a disciplinary inquiry pending the final determination of the criminal case.

11. Where police officers are found to have violated the fundamental rights of any citizen, the officer be immediately subject to disciplinary inquiry, the decision be entered in his/her personal file in order that it be considered in terms of future promotions, and the officer be removed from the station/devision/department that he/she belonged to at the time of the offence

12. Where police officers are subject to internal disciplinary inquiries due to convictions in criminal cases or in fundamental rights applications, the final determinations be carried out effectively, and made available as of public record

In all courts

1. Appointment of sufficient court recorders

2. Appointment of sufficient court staff

3. Better and longer training periods for judges

4. Higher threshold criteria for entering the judiciary

5. Higher number of day-to-day trials as a policy

6. Overall judicial policy as to the number of cases to be taken up on a single day, based on the manageability of the case load

7. Training for judges and policy level changes to ensure better management of cases, so that cases will be completed within a reasonable time

8. Postponements of trials in the Magistrates' Courts and High Courts to be the exception rather than the general rule as a judicial policy

9. Judgements and Orders, as public documents, to be available as of right to all persons acting in good faith.

10. Establishment of additional Magistrates' Courts

11. That it be universally required that compensation be paid not only by the state, but also by any public officer who is found to be guilty by a court.

12. Judgements to be made available to litigants expeditiously

At the level of Magistrates' Courts and High Courts

13. Magistrates to be encouraged, either through provision of career incentives, to visit of prisons, with failure to do so carrying a penalty in terms of career progression.

14. High courts to be established in the Central and Sabaragumawa provinces, to ease the workload of the Kandy High Court (as per Committee Report 2004 recommendation)

15. Appointment of High Court Commissioners (as per Committee Report 2004 recommendation)

16. Video recording facilities be made available to facilitate recording of confessions and police interrogations

17. The formulation of policy on compensation, especially in cases of torture and enforced disappearance, preventing anomalous situations where different cases are awarded different levels of compensation, with no policy on such awards.

At the level of the Attorney General's Department

18. Urgent measures to improve court etiquette among officers of the Attorney General's Department- perhaps a code of ethics for state law officers.

19. Procedures to be put in place to improve co-ordination between the Attorney General's Department and other department, perhaps to provide more authority to the Department in demanding crucial reports etc. from other departments in a timely manner.

20. Appointment of a senior state counsel to advise police in every district/province/judicial division in order to ensure that only persons in cases where there is a reasonable probability of resulting in a conviction, are eventually indicted

21. Specific budgetary provision to be made for the Department, specifically in the following areas;

    a. Training in specialised areas, such as forensic investigations, to be made available for state counsel

    b. Increase of cadre in the criminal law section

    c. Creation of a specific unit (as opposed to administrative arrangements) to deal with cases of torture.

22. The creation of the office of an Independent Prosecutor to look into and direct investigations into allegations of human rights violations, especially where the accused are police officers. The prosecutor would be focused on the crimes of torture and enforced disappearances as a matter of priority.

23. Those indictments be forwarded to the relevant courts within a time limit of one year of the arrest of the accused.

24. Where IB extracts are delayed by the police for more than six months of the arrest of the accused, the relevant police officer be held accountable by the court.

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