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RECONCILIATION IMPERATIVES FOR SRI LANKA

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CONTENTS

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Editor's Note ... ...

This Issue of the *LST Review* contains some critical reflections on post-war Sri Lanka. We publish them in the sober expectation that much needed deliberation would be provoked thereby in regard to the profound dilemmas faced by the country as it recovers from thirty years of brutal conflict that has corroded the democratic way of life.

The first contribution by ***Dr Deeepika Udagama*** sets out the unequivocal premise that democratisation of the Sri Lankan state is a *sine qua non* for reconciliation and asks the pertinent question as to whether we have 'sufficiently invested our efforts at adopting a philosophy or fundamental principles on reconciliation that should inform our efforts in the post-war period?" She answers that question in the negative and points to the South African experience of *ubuntu* (enshrining fundamental principles of humanism and co-existence) which guided that country's transition from violent oppression to a post conflict democratic society, as eminently instructive for Sri Lanka. As is poignantly observed;

> *There were no public moments devoted to reflecting on what went wrong; on why a ruthless group like the LTTE won legitimacy even for a moment; on why Sri Lankans killed each other for nearly three decades; on whether indeed there can be a victor at the end of a war that could only be described as a national tragedy; on why generations of political leadership could not address the causes of conflict through political means. There were no moments of silence or days of mourning to remember the thousands of citizens killed on both sides of the conflict. There were the good ones and the bad ones; a clear victor and a vanquished; patriots and traitors.*

From these basic failures in the post war period stemmed the egregiously offensive 18th Amendment to the Constitution which entrenched presidential power and further weakened the independent functioning of public institutions. This is correctly characterized by Udagama as a 'flag bearer of a pattern of erosion of democracy and the rule of law in the post-war period' rather than as an ill- conceived and isolated measure. Elaborating on this discussion, a set of immediate demands is put forward, framed within a policy of 'letting a thousand flowers bloom' and with the restoration of the 17th Amendment to the Constitution as a pivotal feature.

These thoughts precede an examination of international resolutions and pledges relevant to Sri Lanka. The paper concludes with an apt warning that 'weak citizenship and the absence of sustained social movements in Sri Lanka are twin factors that have failed to move governance in the right direction.'

The second contribution that this Issue publishes is a contemporary analysis of Rule of Law failures in Asia by ***Basil Fernando.*** The first segment of this paper draws from practical experiences in the field of policing to conceptualize fundamental difficulties in understanding the nature of the problem. Interestingly, the term 'order enforcement' is used as contradistinguished from the term 'law enforcement.' The essential difference between these two terms is that the first posits the concept of order with or without the rule of law while the second is founded on the notion of order according to law or the Rule of Law as we commonly understand it. From this discussion, Fernando outlines several different responses to ordinary situations that arise within the policing system as well as the criminal justice system. As is emphasized, Sri Lanka is not unique in facing these problems in South Asia although the problems may assume different characteristics in each country.

As much as in the first contribution to this Issue, this paper also emphasizes the necessary democratization of systems as a basic pre-condition to wider and more ambitious goals that are sought to be achieved. It cautions moreover that, given existing dysfunctional systems of law and order in Asian nations, monitoring engaged in by the international human rights institutions becomes pointless and ineffective due to the fact that this proceeds on assumptions of basic functionality which are deeply flawed.

In the second segment of this paper, Fernando explores the plight of judges, legal practitioners and others tasked with upholding the integrity of the legal system and who are compelled to function in a system which has lost the basic meaning of the Rule of Law. This discussion, which may perhaps be extraordinarily relevant in the Sri Lankan context presently, outlines the features of such a system and emphasizes the following;

> *From a holistic point of view, lawyers lose sight of the traditional role that they used to play within a rule of law system. The very assumption, on which the legal profession functions, is the supremacy of the law and the independence of the judiciary. Within a dysfunctional system both these important aspects are, to varying degrees, absent. This*

creates confusion among the lawyers as well as society in general as to the role that lawyers could legitimately play under the changed circumstances. With time, there is also the problem where both the lawyers and the public tend to forget the role previously played by lawyers when the system was functional. One of the major problems within the legal profession itself when the system becomes dysfunctional is the emergence of divisions among the lawyers themselves. Quite a large section of the legal profession adjusts to the changed situation and learns to survive under these adverse circumstances. Within a very short time, the habits that are acquired through such adjustments may even be looked upon as acceptable behaviour. As a result, a serious crisis in ethical standards takes place. What were once considered ethical standards, to which legal professionals should adhere to, begin to be looked upon as unrealistic and as demanding an impossible performance under the changed circumstances.

Similarly, divisions become apparent within the judiciary itself. Needless to say, all these developments become extremely detrimental to the value attached to the notion of law, public respect towards judges and lawyers and ultimately the legal system itself.

In the final instance, we publish a relatively recent Communication of Views by the United Nations Human Rights Committee, acting under the Optional Protocol to the International Covenant on Civil and Political Rights. This is in regard to a complaint brought by the widow of Sugath Nishantha who, (after repeated violence by named police officers acting in concert with army deserters in order to deter him in proceeding with a complaint against those police officers), was ultimately shot dead on 20th September 2008.

On the facts of the case, it was observed that despite receiving several direct threats from the police, i.e. agents of the State party and notwithstanding continued complaints to the authorities, the victim and his family were not protected. The Committee concluded *inter alia* that the death of the victim must be held attributable to the State party itself and reiterated its commonly held principle that States parties have a positive obligation to ensure the protection of individuals against violations of Covenant rights which may be committed not only by its agents, but also by private persons or entities.

Kishali Pinto-Jayawardena

DEMOCRATISATION AS A PRE-CONDITION FOR RECONCILIATION

Nelum Deepika Udagama[♦]

1. Introduction

> " ... if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law..."

With that simple yet elegant phrase the preamble of the Universal Declaration of Human Rights captures the essence of a timeless truism. As I survey the political debates and events unfolding in post-war Sri Lanka, the wisdom of those words constantly comes to mind.

Where the human spirit can soar free there is very little inclination to rebel. Where it is suppressed through tyranny and oppression, rebellion is inevitable. Salvation lies in protecting human dignity and liberty through a political system that is based on the will of the people. If governance is bullish and not sensitive to the human condition, we cannot expect anything other than unrest and turmoil. I am convinced more than ever, that our actions in this crucial period will come to nought unless we recognise that democratisation of the state and polity should be our first priority. Demanding a wish list of post-war goals will be a futile exercise if we fail to set the correct political backdrop or framework within which we can work effectively to achieve those goals.

2. Absence of a National Ideology of Reconciliation

There are many views about what we must achieve in post-war Sri Lanka. There appears to be a general acceptance that reconciliation among the various ethnic groups in the country is the top most priority. Some think that for reconciliation to be realised we must primarily focus on economic development; others think that we must focus on a political solution; yet others think that what is of crucial importance is the investigation of alleged war crimes and establishing the truth; some are of the opinion that all those measures are necessary. There are indicators and benchmarks developed to measure reconciliation. Most are about specific deliverables —devolution of power, resettlement of IDPs, demilitarisation, equitable land policy, depoliticisation of institutions and so on.

But have we, as a society, sufficiently invested our efforts at adopting a philosophy or fundamental principles on reconciliation that should inform our efforts in the post-war period? I do not think so. We

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♦ Dr. Udagama is currently Head, Department of Law, University of Peradeniya. This is a keynote address at the FORUM FOR DEMOCRACY & SOCIAL JUSTICE: Inaugural Public Forum —Post-War Sri Lanka: Toward Reconciliation & Social Justice, 2 June, 2012, Russian Cultural Centre).

have only the same fragmented and hackneyed political rhetoric of our troubled past. There is a palpable absence of a national ideology that guides us in our efforts today. Even if the goal posts for reconciliation are identified, I wish to pose the question whether we can meaningfully achieve any of those goals absent the establishment of a dominant ideology of reconciliation? Can there be reconciliation in an ideological vacuum? Can reconciliation be achieved through clinical and technical policies not accompanied by an overarching spirit of reconciliation? I think not.

Recently I was asked by a multi-ethnic group of Sri Lankan expatriates in Australia what reconciliation really means. The dictionary informs us that reconciliation is — to cause to be friendly or harmonious again. What exactly is the measure though I was asked. My gut response was that it is about creating a genuine sense of equal belonging. Reconciliation is a process that should address the psychological than the physical. It is not about the written agreements, handshakes or the visuals. It is about, especially in the context of societies with cleavages, a process whereby collectively and individually people feel a visceral sense of equal belonging to a given society —a sense of genuine acceptance by others as equals who belong. It is this belief that drives me to say that adopting an ideology of reconciliation, with clearly identified constituent principles, should have been our first priority.

3. South Africa: The Transformative Power of "*Ubuntu*"

Millions around the world were intellectually and emotionally swayed by the South African revolution. It saw the state transiting from a racist entity to one which sought to create that sense of equal belonging among all racial groups. The South African transition moved and inspired us because those who sought change, in particular the ANC, did not do so only through hard-nosed politics. There was a lyrical quality to their politics —humane, inclusive and vibrantly democratic. When the transition was negotiated and Nelson Mandela was sworn in as president of the now multi-racial republic, the ANC functionaries did not go on triumphant victory romps displaying black power. As Albie Sachs, the prominent South African jurist and legal brains of the ANC, once famously said at the Harvard Law School

> "I hate it when people call the South African transition, a miracle. It was not a miracle; it was hard work. Especially so, to convince the young ANC cadres that when change comes we have to build an inclusive society, a rainbow nation, not one of black power."

That vision was translated into constitutional terms in the Transitional Constitution of South Africa (1993) through the following memorable lines:

> "This Constitution provides a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex. The pursuit of national unity, the well-being of all South African citizens and peace require reconciliation between the people of South Africa and the reconstruction of society.

> The adoption of this Constitution lays the secure foundation for the people of South Africa to transcend the divisions and strife of the past, which generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge.
>
> These can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for *ubuntu* but not for victimisation...
>
> With this Constitution and these commitments we, the people of South Africa, open a new chapter in the history of our country."

That Section of the Constitution entitled National Unity and Reconciliation articulated the ideology of reconciliation in South Africa. The concept of *ubuntu* which encapsulates African traditional ideas on humanism and co-existence, though eluding precise definition, has now become a constitutional principle that guides judicial philosophy in interpreting the constitution. In the ground-breaking *Makwanyane* judgment (1995), Justice Langa of the South African Constitutional Court found the death penalty to be unconstitutional because, among other grounds, it was against the values encompassed in *ubuntu*. That concept, not explicable in tangible terms but rich in symbolism, nonetheless created the texture and tone for reconciliation.

4. Post-War Sri Lanka: Politics Without Poetry

Unlike in South Africa, however, there was no political transition in Sri Lanka when hostilities between the armed forces and the LTTE ended in May 2012. The armed forces decisively defeated the LTTE destroying its military capability. There was then a clear victor and a vanquished. Instead of change, the political *status quo* at the centre got further entrenched. If there was hope for a progressive vision for reconciliation and reconstruction, such a vision did not emerge following the euphoria over the military victory. The imagination of the political establishment seemed to go only so far as embracing triumphalism. No lyrical politics here. No poetry in the heart.

There were no public moments devoted to reflecting on what went wrong; on why a ruthless group like the LTTE won legitimacy even for a moment; on why Sri Lankans killed each other for nearly three decades; on whether indeed there can be a victor at the end of a war that could only be described as a national tragedy; on why generations of political leadership could not address the causes of conflict through political means. There were no moments of silence or days of mourning to remember the thousands of citizens killed on both sides of the conflict. There were the good ones and the bad ones; a clear victor and a vanquished; patriots and traitors. In such a polarised political backdrop, the creation of a new constitutional order enabling reconciliation was certainly not in the cards; nor was a well thought out vision on reconciliation.

Instead, what we got was the Eighteenth Amendment to the 1978 Constitution. Even those jubilant over the war victory were troubled both by the Amendment's contents and the process followed for its adoption. The Amendment, as we all know well, further concentrated power in an already powerful executive presidency. The presidential term limit was removed, and the president got virtually unlimited authority to decide on the composition of the higher judiciary, the Election Commission, the Human Rights Commission, the Police Commission and other institutions the independence of which is crucial to providing checks and balances in government. Further, the powers of some institutions were diluted. The Eighteenth Amendment Bill was rushed through parliament as an urgent Bill, thereby denying consultation and debate. Mysteriously, around that time several opposition parliamentarians joined government ranks swelling its parliamentary majority to the required two-thirds majority. All those events left a bad taste in the mouth of the alert citizen, whether belonging to the majority or a minority. The international community got worried. Things were moving fast, but in a very problematic direction. The historic Moment was being squandered on hard politics.

What was the message that the Eighteenth Amendment sent to the people, especially the minority communities? Certainly not one that instilled confidence in the state as an entity that would ensure democratic safeguards, display a willingness to share power and respect different points of view. The state seemed even more monolithic and unyielding than before. Where were the messages of humanism, democratic guarantees, of confidence building and healing? The Eighteenth Amendment was the very antithesis of all those ideals.

5. Our hour of *ubuntu* was yet to come.

Political idealism is imperative for positive change. I have always wondered why, for example, the Charter of Rights already drafted and awaiting public debate and presentation to parliament was ignored by the government? If it was keen to grasp this historic Moment that arose after the war, presenting the draft Charter for public debate and adoption by parliament would have been a warm and meaningful political gesture. It would have gone a long way in confidence building among the various communities.

The Charter of Rights was envisioned by the Mahinda Chinthana (2005) and was drafted by a sub - committee appointed by the then Minister of Constitutional Affairs & National Integration, D.E.W. Gunasekara. It was an expansive Charter that incorporated international human rights norms and the best features of comparative constitutions--such as those from South Africa and India. It guaranteed not only civil and political rights, but also economic, social and cultural rights; and not only individual rights but also group rights. A commitment on the part of the government to expansive protection of rights through a constitutional amendment would have sent just the right type of message to facilitate reconciliation. Instead it was to choose a path that would only give rise to insecurity and suspicion. The Draft Charter must be lying in some bureaucrat's drawer gathering dust.

Unfortunately for us, the Eighteenth Amendment was not an ill-conceived measure that stood in isolation. It was clearly a flag bearer of a pattern of erosion of democracy and the rule of law in the post-war period.

The creation of a monolithic executive presidency and the weakening of independent institutions through the Eighteenth Amendment took place in a backdrop of public violence and impunity. Continued abductions ('whitevanning' as it is called today) and involuntary disappearances, assaults on journalists and media institutions, assaults on opposition political personalities and gatherings--and all accompanied by a daring degree of impunity – had created a sense of public fear and insecurity that ought to have belonged only to the dark days of the war. Admittedly, the people are greatly relieved at the silencing of the guns of war and the dreaded suicide bombs, and a large proportion is glad the LTTE was dismantled. But the expectation was that there would be a sustained consolidation of democracy and the rule of law once the war ended. That was the peace we wanted.

Nonetheless, a major problem facing the citizenry today is the lack of faith in public institutions. People constantly pose the question as to who they can turn to for redress with confidence. For those who do not depend on political patron saints the choices are very limited. Weakening of public institutions through systematic politicisation, coupled with fear in an environment of intolerance, does not speak of a healthy system of governance. Civil society institutions registered strong protests, for example, when the Attorney-General's Department was brought under the office of the president, but to no avail. Partisan actions of the Department that followed confirmed public fears. Similarly, serious doubts remain about the credibility of other institutions which are expected to be independent in a functioning democracy. That is so not only in regard to institutions pertaining to administration of justice and law enforcement, but also with regard to regulatory bodies.

6. Reconciliation without Democratisation?

In this climate of intolerance, impunity and political brashness can one expect reconciliation? Is it possible to create a sense of equal belonging when the rule of law, which operates on the principle of equality of all, is constantly under attack? When people feel particularly vulnerable because they believe that there are no public institutions to protect them, and the law is not enforced with an even hand, can they view the future with confidence?

For example, even though the rehabilitation programs for LTTE cadres including child soldiers have drawn positive responses from various quarters, there are serious concerns about the problematic circumstances they return to upon completion of the programs. Problems faced on return home are not limited to economic deprivation and social dislocation; issues arising from heavy military presence, violence unleashed by political goons with patronage, a culture of impunity and tight control over many aspects of life by the centre plague the lives of the returnees. The ensuing sense of personal insecurity and lack of political agency is hardly conducive to entertaining hopes for a bright future.

It is this stark reality that makes me maintain that democratisation of the state and governance should be our primary goal today. Without democracy and the rule of law, there can be no effective reconciliation. Assurances given by democracy are the glue that holds fractious parts together. An ideology of reconciliation cannot be built without the basic ingredients of democracy and the rule of law. Economic

development is important, but that process alone cannot achieve reconciliation. In the first place, all communities must have the ability to meaningfully engage in the decision making process in order for development to touch the lives of the people. That is why the likes of President Mandela first invested in a vibrant democratic constitutional order that guaranteed equal protection of rights through the rule of law.

What is interesting in the context of Sri Lanka, however, is that demands for post-war justice (read in a broader sense), whether at the national or international level, have almost assumed democratic guarantees. As I read it, the major demands are threefold—

a) resettlement of IDPs and their protection; b) investigation of alleged war crimes; and c) working towards a political settlement to address minority grievances.

It is almost as if those goals could be achieved effectively in the existing political climate. The primary demand does not appear to be the need to consolidate democracy. When, for example, issues of institutional independence arising under the Eighteenth Amendment or attacks on media institutions and personnel are raised, they are raised as a parallel or secondary set of issues/demands. In other words, the demands do not make the necessary linkage with democracy as a prerequisite.

But can alleged war crimes be locally investigated and prosecuted effectively without the required democratic institutions and guarantees? Can weakened institutions and processes suddenly come alive and become robust for that purpose? Recall what happened to the Udalagama Commission of Inquiry. Will political manipulations suddenly disappear? Similarly, can a meaningful dialogue be conducted to reach a political agreement on minority demands in a backdrop of intolerance and intimidation? Perhaps, it could be said that the need for democratic institutions and processes are inherent in those demands. But the point I wish to make is that democratisation should be the primary demand, because it is that that will set the stage for achieving post-war goals meaningfully. Without a commitment to democratisation can we construct a pathway to reconciliation?

My own set of immediate demands as a citizen are as follows —roll back the Eighteenth Amendment; restore the Seventeenth Amendment and the Constitutional Council with improvements; guarantee judicial independence and independence of all oversight bodies; stop political interference in and politicisation of public institutions; take strong measure to prevent discrimination based on ethnicity, gender, language and religion; let law enforcement (meaning the ordinary law--not exceptional laws) take its own course, do not provide protection to erring political favourites; respect and protect free expression, association and assembly-- adopt a policy of let a thousand flowers bloom; adopt a zero tolerance policy on torture, abductions and involuntary disappearances; permit free and fair elections and respect the people 's will.

That is already asking for a great lot. But without those fundamentals I doubt very much that we can progress in the right direction, both nationally and internationally. My own view is that if the government could have demonstrated a genuine commitment to fundamentals of democratisation in the post-war

period, most probably the recent Human Rights Council Resolution on Sri Lanka (A/HRC/19/2 of 3 April, 2012) may not have gone through.

7. Post-War Advocacy: Championing "Local Solutions"

Advocacy of post-war demands by civil society organisations and the international community have generally elicited defensive or confrontational responses from the government. Often there is recourse to rhetoric invoking national sovereignty or references made to national or international conspiracies. There is constant reference to 'local solutions' as the acceptable path. Therefore, it is important to examine and refer to, as extensively as possible, voluntary undertakings made by the government when making our demands. Perhaps, we may get a better hearing that way.

First, we must take a close look at the Human Rights Council Resolution (A/HRC/S¬11/2) adopted at a special session on 27 May, 2009 in the immediate aftermath of the end of the war. The Permanent Mission of Sri Lanka to the UN in Geneva openly declared the resolution as a victory for Sri Lanka (as it edged out a critical resolution sponsored by the EU), and even hinted at responsibility for its drafting. If so, the government cannot quarrel with its contents. The resolution contains, among others, the following:

> "2. Welcomes the continued commitment of Sri Lanka to the promotion and protection of all human rights and encourages it to continue to uphold its human rights obligations and the norms of international human rights law;
>
> 11. Welcomes the resolve of the Sri Lankan authorities to begin a broader dialogue with all parties in order to enhance the process of political settlement and to bring about lasting peace and development in Sri Lanka based on consensus among and respect for the rights of all the ethnic and religious groups inhabiting it, and invites all stakeholders concerned to actively participate in it; "

The resolution makes it clear that the government of Sri Lanka had assured the Council of its "continued commitment" to the promotion and protection of all human rights and also of its "resolve" to begin broader dialogue with all parties.

Secondly, the voluntary undertakings of the government made to the international community in 2008 in the UPR (Universal Periodic Review) process are significant. The UPR process is a novel mechanism employed by the United Nations (pursuant to adoption by the General Assembly) to review the human rights situation of every UN member state under the auspices of the Human Rights Council. It involves peer review by fellow member states and is meant to be constructive in approach rather than confrontational.

The following voluntary UPR undertakings by Sri Lanka are significant:

"89. Sri Lanka will take necessary measures to enable the reconstitution of the Constitutional Council which will facilitate the strengthening and effective functioning of national human rights mechanisms, including the National Human Rights Commission.

90. A Witness and Victim Protection Bill will be introduced in Parliament shortly and measures will be taken to implement the legislation including the establishment of the necessary institutions.

93. Sri Lanka has commenced work on drafting a constitutional charter on human rights that will strengthen the human rights protection framework in the country and bring Sri Lanka's constitutional human rights guarantees in line with its international obligations. The process includes engaging in consultations with civil society. The draft charter and the process of consultation will foster a national discourse on human rights

94. As a part of its commitment to guarantee civil and political rights as well as economic, social and cultural rights of its people, Sri Lanka will continue to align its development strategy within the larger framework of promoting local values and social protection for women, children, elderly and differently-abled people and other vulnerable groups in society and respect for human rights and good governance.

103. Sri Lanka will take measures for the effective implementation of the 13th Amendment to the Constitution.

104. Sri Lanka will continue to work towards the economic development of the Eastern Province [note: in 2008 the government forces had secured only the Eastern Province], which will uplift standards of living and the realisation of social, economic and cultural rights, and also assist strengthening and smooth functioning of democratic institutions. Sri Lanka will also promote the dissemination and inculcation of best practices, good governance and political pluralism, as well as take measures for the rehabilitation and reintegration of ex-combatants, particularly children and young persons.

105. Implementation of the official languages policy and continuing encouragement of bilingualism, in particular in the security forces, police and within the public service."

(See Report of the Working Group on Sri Lanka on Universal Periodic Review, A/HRC/8/46. The paragraphs above carry numbers assigned in the original report.)

Sri Lanka is due to go through the second cycle of UPR review in October, 2012 and will have to report on measures taken to implement the previous cycle's undertakings.

Thirdly, there are the recommendations made by the Commission of Inquiry on Lessons Learnt & Reconciliation (LLRC) appointed by the president himself. Belying expectations to the contrary, LLRC has made a series of strong recommendations in regard to achieving reconciliation. They are based on the premise that reconciliation and democratic governance are intrinsically interlinked. The report notes that

> "[i]t was stated that lack of good governance, and non-observance of the Rule of Law coupled with a lack of meaningful devolution were causes for creating tension between communities"(para 8.185).

LLRC recommendations on reconciliation pertain to:

"• Political responsiveness to grievances of various communities

- Rule of law/human rights protection
- Governance issues/political culture
- Institutional reform
- Devolution of power
- Language policy
- Equal opportunities
- Religious freedom
- Cultural activities to promote reconciliation
- National Anthem"

(Report of the LLRC (2011) 288-325)

We are not quite certain about which LLRC recommendations have been accepted by the government for implementation. However, the LLRC itself was constituted as a "local solution" to counter calls from the international community for an international commission of inquiry. In the long run, the government will be hard pressed to reject its own local solution.

8. The Need to Rediscover Citizenship

The above sources provide a rich reservoir of recommendations and public undertakings by the government that can be used by citizens to buttress calls for change. But the question is, are we doing enough about it?

I do honestly believe that Sri Lanka is losing the Moment not only because of the undemocratic nature of the state and government, but also to a great extent because we, as citizens, have failed to take the lead in setting the post-war agenda. Unlike in neighbouring countries, political apathy within the Sri Lankan polity is legion. Some of us view social movements taking place elsewhere with envy and longing.

On the whole, the public agenda of Sri Lanka is essentially based on the whims of powerful political personalities. We, as citizens are mostly content to respond to whatever agenda that is set. Except for public advocacy by a few Non Governmental Organisations and citizen groups there is not much organised civil society engagement on public issues. Our political culture then is a classic case of the tail wagging the dog.

Weak citizenship and the absence of sustained social movements in Sri Lanka are twin factors that have failed to move governance in the right direction. Over the years, especially after the crushing of the trade union movement in the early 1980s, we have been content to be mere voters. It is time that we set our minds to rediscovering full blown citizenship and our own worth. Through organisational strength and public debate we must set our own public agenda. We must now work toward demanding democratisation of the state, acquire our own democratic spaces and get down to work. We must set the post-war agenda. We must create an ideology of reconciliation. We must work toward establishing the truth. We must contribute to establishing the contours of a political solution.

The need for us to empower ourselves cannot be more keenly felt than in the post war period. Failure to do so will make us add another failed Moment (an extraordinarily unique one at that) to a long list of missed opportunities.

ORDER WITH OR WITHOUT LAW; THE RULE OF LAW IN ASIA

Basil Fernando[*]

1. Introduction

This paper is based on the actual experiences of policing and the rule of law in Asia in recent times. The discussion in this paper is informed by the provisions in Article 2 of the International Covenant on Civil and Political Rights (ICCPR). It strives to place the discussion on policing in Asia within the framework of the obligations of state parties under the provisions of the ICCPR. Later, it proceeds to examine the role of lawyers in countries that exhibit dysfunctional governance.

The paper proceeds on the assumption that people in traditional democracies will find it extremely difficult to understand the experience of what occurs in the name of the rule of law and policing in countries falling outside the category of traditional democracies. The difficulties in understanding suggest the experiential differences of people coming from these two categories of countries of origin. It is presumed that these two experiences are fundamentally different and that serious difficulties in understanding are inevitable. A worthwhile discourse between people from these two backgrounds can take place only with an appreciation of these difficulties. The classification of North and South suggests a territorial division. The classification of traditional democracies and others suggests historical, social and political differences, pointing to the development of institutions of rule of law, and policing in particular.

The reference to "recent times" in the first paragraph in this paper is to limit the discussion to present-day reality and to avoid entering into other debates. One such claim is the argument that long before the rise of what are now known as traditional democracies, vibrant models of democracies had prevailed in other places. For example, the political model of Asoka's time in India in the third century B.C. is rightly held as a rich period of democracy under the conditions of those times. However and without in any way undermining the importance of such discussions, this paper will concentrate on the actual realities that the peoples of Asia are now experiencing in terms of the rule of law and policing.

There is also a need for caution regarding the use of terms,[1] which in these two contexts may have different meanings. For example, a police officer may be described as a law enforcement officer. However, a reference to law needs to be part of a description of a policeman in some jurisdictions. For

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[1] The difference in understanding of common terms because of the experiences of one's context is elaborated in "Judicial and Legal Reform: Preparing the Field,"*Rule of Law, Human Rights and Legal Aid in Southeast Asia and China: Report of the Practitioners Forum* (Hong Kong: International Human Rights Law Group and Asian Human Rights Commission, 2000), pp. 1–5.

instance, in post-Pol Pot Cambodia, there is hardly much law in existence by way of legal enactment.[2] Thus, the activities of police officers are not guided by the laws that people are supposed to observe. Police officers improvise their role and duties according to circumstances and the policy guidance given to them from above. Even in circumstances where comprehensive laws exist, as in Sri Lanka, these laws can be suspended without much difficulty, and police officers can be required to engage in mass killings as, for example, when they are called upon to cause the disappearance of a large number of people (officially estimated as 30,000 people).[3] Moreover, in all Asian countries, police officers are expected to use coercion, including torture, in criminal investigations. Furthermore, the definitions contained in legislation and the available possibilities of enforcement are often so different that it can lead to serious difficulties if one goes by the legislation alone.

In most instances, the concepts of order are not understood as order according to the law, but as order with or without the law.[4] Thus, keeping a person in detention for 26 years without trial was not considered illegal in the case of Chia Thye Poh in Singapore.[5] Anwar Ibrahim of Malaysia was kept in prison on the basis of a trial condemned as unfair all over the world. Such acts are justified on the basis of keeping order, and law enforcement officers have to carry out these orders irrespective of the legal issues involved. The military coup in Pakistan in 1999 was also justified on this basis, and law enforcement officers are now expected to act on the basis of this assumption. The justification for torture in many Asian countries is also based on the view that it is necessary for maintaining order. What follows from this situation is that the rule of law is often sacrificed under the pretext of maintaining order. Police officers are thus seen more as order-maintaining officers rather than law enforcement officers.

Thus, the starting point for a meaningful discussion on the rule of law and policing, I believe, is to draw a distinction between order enforcement officers and law enforcement officers. The main differences are as follows:

(1) The central issue in law enforcement under the rule of law is criminal investigations and to prove that crimes have been committed through the submission of evidence. Order enforcement, however, does not require investigations or proof according to the law. This distinction has huge implications for the understanding of policing functions.

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[2] *Problems Facing the Cambodian Legal System* (Hong Kong: Asian Human Rights Commission, 1998).

[3] Asian Human Rights Commission, *Sri Lanka: Disappearances and the Collapse of the Police System* (Hong Kong: Asian Human Rights Commission, 1999). For further details on disapperarances, see www.disapperarnaces.org

[4] Basil Fernando, "Disappearances of Persons and the Disappearances of a System," in *Sri Lanka: Disappearances and the Collapse of the Police System.*

[5] "Singaporeans Demand Repeal of ISA," *Human Rights Solidarity*, Vol. 9, No. 1 (January 1999); Chee Soon Juan, "Looking into the Past and Struggling for the Future: Prospects for Democracy in Asia," *Human Rights Solidarity*, Vol. 9, No. 10 (October 1999).

(2) Criminal investigations require training. Training requires basic education which makes participation in this training possible. Investigations also require facilities, such as forensic facilities. These are not requirements though for maintaining a police force to keep order by whatever means.

(3) It is possible through law enforcement under a system based on the rule of law to eliminate the use of torture and degrading punishment. Among order-enforcers, this is not possible, and such officers have even been used for committing extrajudicial killings—sometimes on a large scale.

(4) In law enforcement under the rule of law, policing is a function subordinated and controlled by the judiciary and prosecutors. Officers who are mobilised to maintain order, however, are free from such controls.

(5) The concept of an order enforcement officer is not derived from the concept of the rule of law. The concept of a law enforcement officer, on the other hand, is based on the concept of the rule of law.

(6) Law enforcement under the rule of law presupposes the acceptance of equality before the law. Order enforcement does not need such a prerequisite, and unequal treatment, in fact, is inherent in the system of order enforcement.

(7) Order enforcement is associated with impunity while law enforcement is not.

(8) Law enforcement can be a transparent process, and the transparency can be maintained by procedural means, such as keeping the required records. Order enforcement does not have such a requirement. Indeed, often an order enforcement officer is discouraged from keeping records.

(9) The communications between the hierarchy and subordinates in a law enforcement agency is usually based on written codes of ethics and discipline. Order enforcement does not require such codes, either written or unwritten.

Table 1: Problems Facing the Rule of Law: A Few Sample Explanations from Asia

India	A rule of law model exists, and a strong judiciary upholds it. However, this model is ineffective in dealing with violations against minorities, such as Dalits, consisting of 160 million people, indigenous people and others. Also in some states, such as Bihar, the rule of law has completely broken down.
Pakistan	Military regimes have held power for a long time. Despite the transition to

	democracy, the adverse impact of militarism remains. The system of the rule of law has broken down. In some major cities, a chaotic state exists.
Sri Lanka	Although Sri Lanka had a similar model in the 1950s to that of India, the system of the rule of law was discontinued through the 1978 Constitution. Law has broken down both in the North and the South. More than 30,000 disappearances, endemic torture, an enormous increase in crimes, a lack of accountability of the police and other agencies and an ineffective system of prosecutions functioning under the institution of the Attorney General are the evidence. The civil war, though aggravating the situation, is not the cause of this collapse of the rule of law.
Cambodia	A concept of the rule of law does not exist yet; existing laws are very few and often contradictory. There is a policy-level opposition to the development of the law. Criminal investigation facilities hardly exist. There is no criminal investigation training. The quality of prosecutors and judges do not meet basic levels of competency. The monthly salaries of the police, prosecutors and judiciary are very low (U$20). Extra-judicial punishments, such as beating thieves to death in public places, are common.
China	During the last two decades, the theory of the "rule of law over the rule of man" has been commonly accepted. There is an increase in the body of law. However, an absence of the separation of powers does not leave room for the rule of law. The structural development of basic legal institutions is likely to take quite some time.
Thailand	The country accepts the rule of law approach and takes many measures to enforce it. Problems arising from the feudal past still exist. Impunity is preserved through attitudes which prevent an efficient enforcement of the law.

The distinctions made above will help us understand some of the contemporary problems relating to the rule of law and policing in Asia. First of all, there is often resistance to development of the law. For example, in Cambodia, even more than seven years after the U.N.-sponsored elections, the country has no penal code or criminal procedure code. The reasons for this deficiency are more political than technical. Development of the law is seen as disruptive to the type of social order maintained in the country. Such a development can be destructive to types of property ownership, which have developed since the Pol Pot era. Many activities carried out by the newly rich will become impossible if there is an expansion of the law and law enforcement. Secondly, in some countries, development of the law is confined to some areas, such as commerce, but restricted in regard to personal liberties—Malaysia and Singapore are good examples of this.

A third category is where basic laws are suspended under the pretext that such laws are detrimental to order. In Sri Lanka, laws relating to the reporting of deaths to the courts were suspended to allow the police to engage in acts of large-scale murder and the disposal of bodies. Moreover, the national and internal security laws of almost all Southeast Asian countries have resulted in suspending many laws that give protection to people from illegal arrest, detention, privacy, the protection of their living quarters and other matters.

Another factor that militates against the rule of law is globalisation. In Asia, multinational companies demand a system where local people cannot protest against the ill-effects of their policies and actions. They want repressive regimes which protect their interests rather than democracies in which people enjoy the rule of law. The more misery that new economic developments bring to people, the less sympathy there is by those who wield political and economic power to the rule of law. Often advocacy of the rule of law becomes dangerous, and people who work for democracy are exposed to assassination and other risks.

Thus, all in all, the most fundamental distinctions between police officers maintaining law and security guards keeping order have been lost. They have been lost to such an extent that in Cambodia's capital of Phnom Penh "police officers" from July to December 2000 handed over at least 10 criminals to be beaten to death by mobs. In Sri Lanka at a detention centre known as the Bindunuwewa Rehabilitation Centre, at least 26 inmates were chopped to death in October 2000 while 60 policemen with guns were present and watched the gruesome massacre. Unfortunately, it is not that rare for special riot squads to attack people who engage in peaceful protests in almost all countries in Asia

2. Actions to Monitor Police Behaviour

It is with this background in mind that we can discuss some of the suggestions that have been made to enforce the rule of law and to define policing in terms of the rule of law. One of the popular demands in Sri Lanka today is for the appointment of an independent police commission to control the affairs of the police. The protest in Sri Lanka is against the political control of the police by politicians.[6] This is quite a common South Asian and, indeed, an Asian phenomenon. Thus, the link to the concept of the police as enforcers of order is political control of the police. The assumption on which the call for an independent police force is based is an assumption that is delinked from political control: the police will confine their duties to law enforcement under the rule of law. However, in Singapore, there is no belief that the police will have any independence vis a vis the ruling political party. This is also the case in Malaysia. In these situations, there are demands for comprehensive political reforms as preconditions for developing a police force that respects the rule of law.

However, others have pointed out that the mere independence of the police is insufficient and that the functions of investigation of the police must be more closely linked with the work of prosecutors. For

[6] Asian Human Rights Commission, *Suggestions for Police Reforms in Sri Lanka: Final Statement of the Consultation on Police Reforms in Sri Lanka* (Hong Kong: Asian Human Rights Commission, 1999).

example, it has been pointed out that when the police are left to do criminal investigations by themselves they often fail to do so, particularly when the police themselves are involved in criminal activity. The police then claim that they do not have sufficient evidence to prosecute the criminals. It has thus been suggested that the police must report all serious crimes to the prosecutors from the time they receive the first complaint and that prosecutors must share responsibility for ensuring the satisfactory conduct of investigations. Thus, the police's practice of neglecting to comply with the law may be negated by supervision by the prosecutors, and the "no evidence excuse" can then be rejected. Control exercised by prosecutors over the police can also help to eliminate torture and degrading punishment and illegal detention. Therefore, the principle that is sought to be established is that, while the police must be made independent of the politicians, they must also be made accountable to other legally established institutions.

In addition to the prosecutors, the other institution that is most relied upon to ensure that the police act within the rule of law is the judiciary. In this regard, a most positive contribution has been made by the Indian Supreme Court. This court in numerous cases has intervened to prevent the use of the police for illegal purposes by some governments. Of particular importance is the manner in which the Supreme Court of India has intervened to break the authoritarian inroads attempted by the government of the late Indira Gandhi. The use of emergency regulations was systematically opposed by the Supreme Court, and thereby, the court established for itself a prestigious place as the guardian of human rights and the rule of law in this country. Even on such day-to-day affairs as arrests and detention, this court has intervened to ensure police discipline. One famous case is that of *D. K. Basu v. State of West Bengal*[7] in which the court issued the instructions set out below. The court also sought the assistance of the media to broadcast these instructions repeatedly throughout India. In many public places in India, these instructions are still displayed. They are as follows:

> "(1) The police personnel carrying out the arrest and handling the interrogation of the arrestee should bear accurate, visible and clear identification and name tags with their designations. The particulars of all such police personnel who handle interrogation of the arrestee must be recorded in a register.
>
> (2) The police officer carrying out the arrest shall prepare a memo at the time of arrest, and such memo shall be attested by at least one witness, who may be either a member of the family of the arrestee or a respectable person of the locality from where the arrest is made. It shall also be countersigned by the arrestee and shall contain the time and date of arrest.
>
> (3) A person who has been arrested or detained and is being held in custody in a police station or interrogation centre or other lock-up shall be entitled to have one friend or relative or other person known to him or having interest in his welfare being informed as soon as practicable that he has been arrested and is being detained at the particular place,

[7] *D.K. Basu v. the State of West Bengal* (Reported in All India Reporter 1997, 610 S.C to 628 S.C).

unless the attesting witness of the memo of arrest is himself such a friend or relative of the arrestee.

(4) The time, place of arrest and venue of custody of an arrestee must be notified by the police where the next friend or relative of the arrestee lives outside the district or town through the legal aid organisation in the district and the police station of the area concerned telegraphically within a period of 8 to 12 hours after the arrest.

(5) The person arrested must be made aware of this right to have someone informed of his arrest or detention as soon as he is put under arrest or is detained.

(6) An entry must be made in the diary at the place of detention regarding the arrest of the person which shall also disclose the name of the next friend of the person who has been informed of the arrest and the names and particulars of the police officers in whose custody the arrestee is.

(7) The arrestee should, where he so requests, be also examined at the time of his arrest, and major and minor injuries, if any are present on his/her body, must be recorded at that time. The "inspection memo" must be signed both by the arrestee and the police officer effecting the arrest, and its copy must be provided to the arrestee.

(8) The arrestee should be subjected to a medical examination by a trained doctor every 48 hours during his detention in custody or by a doctor on the panel of approved doctors appointed by the director of health services of the concerned state or union territory. The director of health services should prepare such a panel for all provinces and districts as well.

(9) Copies of all the documents, including the memo of arrest referred to above, should be sent to the magistrate for his record.

(10) The arrestee may be permitted to meet his lawyer during interrogation.

(11) A police central room should be provided in all districts and state headquarters where information regarding the arrest and the place of custody of the arrestee shall be communicated by the officer causing the arrest within 12 hours of effecting the arrest; and at the police central room, the information should be displayed on a conspicuous notice- board."[8]

[8] Asian Human Rights Commission, *Suggestions for Police Reforms in Sri Lanka: Final Statement of the Consultation on Police Reforms in Sri Lanka.*

In Sri Lanka too, the Supreme Court has tried to intervene in matters relating to violations of human rights by the police under the constitutional provisions which allow complaints against fundamental rights violations to be lodged before the Supreme Court.[9] This has become a popular form of litigation, and thousands of cases have been filed under these provisions, the respondents of whom are mostly the police. The courts in numerous cases have declared that citizens' rights have been violated and have ordered compensation. Despite many limitations placed on this form of legal redress, such as the time limit allowed for filing cases, this mode of litigation is a useful device that may be introduced elsewhere with suitable modifications. In many countries in Asia, for example, Thailand, Cambodia, Singapore and Malaysia, there are no special provisions under which a violation of fundamental rights can be justifiable under local laws. Singapore and Malaysia are not signatories to ICCPR, and therefore no obligations under treaty law exist for protection of human rights. Though Cambodia has ratified all UN conventions relating to human rights and recognised them in the Constitution itself, there is no legal provision for a citizen to come to court to complain against the state. In these countries there are no known cases where citizens have sought redress from local courts for human rights violations under treaty law or customary law.

In addition to the judiciary, many other institutions have also evolved in the region for dealing with the violation of rights by the police. One such example is the Presidential Truth Commission on Suspicious Deaths in South Korea, which was inaugurated in August 2000. The Commission of Inquiry into the Involuntary Removal or Disappearance of Persons was a body with a similar purpose in Sri Lanka.[10] In fact, three commissions in terms of separate geographical areas were appointed, and a fourth was later impanelled to deal with the remaining cases. The mandate of the commissions were to inquire into (a) people who were involuntarily removed, allegedly by agents of the State (police, army, etc.) and paramilitary groups in collaboration with them or subversives or unknown persons, and who subsequently disappeared (in the sense that the present whereabouts of the person are unknown) and (b) people allegedly held in detention in unauthorised army camps or police stations and who subsequently disappeared (the present whereabouts of the person are unknown).

Another useful institution in safeguarding human rights is national human rights commissions that have become common a phenomenon in many Asian countries.[11] These commissions have the mandate to inquire into and report on human rights violations. Thus, these bodies can become a means of monitoring the police observance of the rule of law.

Another development is the Advisory Council of Jurists that was established on Sept. 9, 1998, at the third annual meeting of the Asia-Pacific Forum of National Human Rights Institutions in Jakarta, Indonesia. The council will advise the forum and its member national human rights institutions, at their request, on the interpretation and application of international human rights standards. In addition to developing

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[9] Article 126 of the Sri Lankan Constitution.

[10] For a lengthy report on disappearances in Sri Lanka, see the Cyberspace Graveyard for Disappeared Persons at www.disapperarances.org.

[11] For details about commissions, see National Human Rights Institutions at www.ahrchk.net.

regional jurisprudence on international human rights norms, the council will further strengthen the effectiveness and capacity of national human rights institutions in the region. The forum's secretariat will support the work of the council.[12] In addition, there also exist many initiatives by non-governmental organisations (NGOs) and other civil society actors to monitor human rights violations by the police and to ensure that the rule of law is respected. In almost all Asian countries, there are NGOs that engage in many activities, such as making legal representations on behalf of victims of human rights abuses, collecting documentation, maintaining databases and providing humanitarian assistance. Regionally, there are also support groups. The urgent appeals programme of the Asian Human Rights Commission (AHRC) provides a wide network for sharing information and pursuing joint actions on behalf of those who suffer abuse at the hands of law enforcement authorities.[13] There are also education programmes on human rights for law enforcement officers. The Bangalore Law School programme in India is one noteworthy example. Many NGOs also have programmes for this purpose. A noteworthy criticism leveled against these programmes however is that education is no substitute for reforms. Education can, at best, supplement needed reforms.

3. A Review of Actions to Improve Policing

The actions mentioned above and many others take place on a regular basis. What is their impact, however? Given the reality of the rapid deterioration of the rule of law in Asia and the dismal record of the police, it is difficult to reject the conclusion that the impact of the positive actions described above is very limited. These actions, done with great effort and often great courage, nonetheless have failed to address the problem and, at best, have only peripheral effects.

It can be said without the slightest hesitation that all Asian States have failed to comply with Article 2 of the International Covenant on Civil and Political Rights (ICCPR), which requires an effective remedy for the violation of rights, "notwithstanding that the violation has been committed by persons acting in an official capacity."[14]

In terms of Article 2 of the ICCPR, the problem of policing in most Asian countries can be summed up this way. The prosecution of crimes and human rights abuses fails when there is insufficient evidence to proceed. The gathering of evidence presupposes the existence of a functioning criminal investigation agency. The functioning of such an agency presupposes that the agency has the full legal powers to conduct these investigations, that such powers are not suspended arbitrarily by the law or political interference or any other means that the agency is unable to overcome, that the agency has the human resources and the technical capacity to function and that it has a system of internal controls regarding its professional duties. Most Asian countries do not have a criminal investigation system in which all or most of these requirements for the proper functioning of a criminal investigation system exist to any

[12] For more information about the Asia-Pacific Forum, see-www.apf.hreoc.gov.au.

[13] For details, see Urgent Appeals at www.ahrchk.net.

[14] Article 2 of the ICCPR.

satisfactory degree. Thus, most Asian countries do not have a functioning criminal investigation agency[15], which means that they do not have a policing system that meets the criteria for proper functioning. Another way of saying the same thing is that most Asian countries have a malfunctioning policing system.

A malfunctioning policing system is not just a deficiency of a society but also a threat to that society. It encourages crimes; it weakens and even destroys people's faith in seeking legal redress against criminals; it causes people to feel intimidated by criminals as well as by the police; it encourages links between big crime and the police; it allows political revenge against people holding opposing views; it encourages corruption; it endangers free and fair elections and thus makes the realisation of the rights enshrined in the ICCPR very difficult, if not impossible, to be achieved. This makes any expectations about the rule of law unrealistic. In fact, in several Asian countries, the police are treated as a serious threat to the rule of law. In all these cases, glaring examples can be found in most Asian countries.

Article 2 of the ICCPR makes it obligatory for all state parties to provide an effective remedy for the violation of rights. The absence of a functioning police system indicates a failure to provide an effective remedy as required by Article 2. The question then is how to address this problem?

The human rights model that exists today is not capable of dealing with this issue. The existing human rights model presumes the existence of a functioning police—at least to a satisfactory degree. The mechanisms established to monitor the compliance of state parties, such as the U.N. Human Rights Committee, the U.N. Human Rights Commission and other bodies, examine the violations of rights and make recommendations for correction where violations have occurred. When these recommendations are made, it is presumed that the state party to which these recommendations are addressed possesses the legal mechanisms, including a functioning policing system, to put these recommendations into effect. As shown above in most Asian countries, such a presumption is baseless.

This presumption is based on the experience of traditional democracies, for the existing human rights model was based on the state structures and practices of traditional democracies. While there are violations of rights in these democracies, a basic structure exists for dealing with these violations. Thus, the existing human rights model is insufficient to deal with the problems examined above, and therefore, the existing human rights model needs to be expanded. The following thoughts are some suggestions to expand the existing human rights model and ways to achieve this aim:

(1) The jurisprudence relating to Article 2 of the ICCPR needs to be explored and developed;

(2) The U.N. mechanism for human rights monitoring must scrutinise the performance of state parties regarding Article 2 of the ICCPR;

[15] Decline of Fair Trial-Statement of the seminar- Pages 1-38- An AHRC publication- available at www.ahrchk.net/publications.

(3) Human rights educational institutes must change their education curriculum to include a more comprehensive exposition of the implications of Article 2 of the ICCPR;

(4) It is more important to encourage the reform of law enforcement agencies than to provide them with human rights education;

(5) Human rights NGOs and civil society organisations must play an active role in exposing the limitations of the existing human rights model and exploring ways to initiate change. NGOs in traditional democracies must work in partnership with NGOs outside of their countries to achieve this objective;

(6) International agencies should make financial resources available for the achievement of this objective; and

(7) The U.N. human rights high commissioner's office should initiate activities and studies to promote this aim.

4. The Plight of Judges and Lawyers Caught up in a Dysfunctional System[16]

4.1. The Meaning of Dysfunctional

The dictionary meaning of being 'dysfunctional' is abnormal or impaired functioning, especially of a bodily system or social group. In modern usage and particularly influenced by the understanding of mental health, dysfunctional has come to mean the kind of mental illness which makes it impossible for the person who is suffering from it, to carry out the functions that a normal and rational person does. In the political sense it means a chaotic situation within which society cannot achieve its positive objectives. The sense in which the word is used in this presentation is a situation of a legal system which has turned against itself and within which the rule of law principles cannot operate. Aleksandr Isayevich Solzhenitsyn, in his Gulag Archipelago characterises a similar situation in Russia under Joseph Stalin as "Abysmal lawlessness."

From the civil and political rights point of view, we may describe a dysfunctional system as one in which the state parties have failed to comply with the Article 2 of the ICCPR. Under this Article the state party is obliged to provide for legislative, judicial and administrative measures to make the realisation of rights possible for the people of a nation. Where a state party substantially fails in implementing Article 2 of the ICCPR, it results in a situation within which the justice system cannot function and deliver justice. Some features of a dysfunctional system are listed below;

[16] The following segment of this paper borrows from a presentation by the writer delivered at the International Commission of Jurists' 2nd Geneva Forum of Judges and Lawyers, held in Geneva on December 5-6, 2011.

1. The shift from "the rule of law" to "law and order". The term "law and order" is used to describe any arbitrary means that may be used to keep order as understood by a ruling regime. Under this approach any illegality could be treated as legitimate if the government thinks that this needs to be done to maintain order. For example, the extrajudicial killing of those who are considered bad criminals may be considered as a means to be used for achieving order. However, this is against the rule of law approach: "The core of the existing principle is, I suggest, that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts."[17]

2. Placing the head of state above the law. This is sometimes done by constitutional provisions, as in Sri Lanka, or by treating the constitution itself as an unimportant parchment, with little or no practical value, as in Cambodia, Burma, China and several other countries.

3. Limiting the power and the scope of the judiciary. This may be done by excluding the court's jurisdiction over public law and lifting or altogether excluding the court's power to adjudicate on matters relating to the Constitution.

4. For various reasons, such as non-cooperation by state agencies and extraordinary delays, writ jurisdiction, including the writ of *habeas corpus*, becomes ineffective.

5. Creating a system of punishment without trial; this may be by way of extra-judicial killings followed by media statements that the person who was killed is a bad criminal.

6. Failure to investigate crimes, either due to defects in the investigation capacity or due to political or other extraneous reasons.

7. Manipulation of powers of arrest and detention for corruption.

8. The absence of an effective system of command responsibility within the police and the politicisation of the police.

9. The rise of the mafia and the underworld, which creates a profound effect on the entire society and on the entire system of the administration of justice.

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[17] Tom Bingham, Rule of Law. Penguin Books 2011, page 8.

10. Criminal elements have been substituted to perform functions which are usually assigned to legal agencies, such as debt collection, ejection of tenants and even providing security to VIPs.

11. Lack of independence of the prosecutor's office and political control.

12. In some instances, the civilian policing function itself does not exist, either due to rule by the military or to due prolonged militarisation, where even the memory of civilian policing is lost.

13. Fabrication of charges; usually this is done on the basis of confessions obtained through severe torture or ill- treatment.

14. Judges themselves attempt to bring pressure on lawyers and litigants in criminal trials, not to go to trial but to agree to make guilty pleas, with promises of lesser sentences and/or threats of giving harsher bail terms or even refusal of bail, if they refuse to agree.

15. Judges putting pressure on lawyers and clients to agree to compromised solutions, irrespective of the merits or adverse consequences.

16. Long delays in litigation, with trials taking 5-10 years on average and in some countries even twenty years.

17. On the other hand, sometimes cases are administratively speeded up and due process is completely ignored. 'Judgements' arrived at in this manner only reflect the version given by the executive.

18. Judges often ignore requirements of procedural justice and often manipulate the process.

19. Often judges do not give reasons for their orders and even do not provide reasons for some judgments.

20. Judges at times sit to hear the appeals from their own judgments.

21. Law on contempt of court is often abused in order to intimidate lawyers or litigants.

22. Absence of witness protection laws and programmes.

23. Corruption affecting police, prosecution, judiciary and also other branches of government.

24. Inadequate budgetary allocations for administration of justice: policing, prosecution and prisons.

25. Absence or ineffectiveness of mechanisms to investigate and prosecute violations of human rights.

26. Absence of a perception of justice, in society, and also among lawyers, judges and police and others. This is often replaced by cynicism and negative comments about justice.

27. Threats to the independence of lawyers, arising out of the factors mentioned above.

28. Divisions among lawyers influenced by the factors mentioned above.

29. Low morale of lawyers in general- except for brave few- due to the above mentioned factors.

30. Weakening of lawyers associations, due to deep divisions as more lawyers begin to adjust to negative systemic changes.

31. Failures in professional bodies supervising the professional conduct of lawyers.

32. Heavy costs of litigation that deprives access to justice for many.

33. Lack of respect for the legal, judicial, police and other related professions due to the factors mentioned above.

34. Withdrawal of talented lawyers due to tensions arising from the above mentioned factors

What has been enumerated above describes the administration of justice in a dysfunctional system/or an abysmally lawless situation which is in operation in 'normal times.' When there are exceptional times such as times when emergency regulations and anti-terrorism laws operate, the situation becomes much more brutal. Abductions take the place of arrests, prolonged detention without court orders become possible, forced disappearances and various other kinds of extra-judicial killings often take place in large numbers, judicial inquiries into deaths can be suspended, convictions can take place solely on the basis of confessions, usually obtained through torture and ill- treatment and *habeas corpus* actions become

ineffective. Some of these factors are noted by international observers and human rights organisations due to the increasing number of complaints. However, what the international observers and human rights organisations often do not notice is that the sheer cruelty of the exceptional situation is made possible only due to routine cruelty that exists in the normal situation.

4.2. Dealing with the Problems of Dysfunctional/ Abysmally Lawless Systems

The essential problem facing judges, lawyers, human rights activists and persons concerned with the reform of dysfunctional and abysmally lawless systems concerns the nature of the public institutions of justice in any given country. There have been many attempts to articulate and to theorise about these problems and perhaps one of the more succinct explanations has been offered by an American lawyer, Gary Haugen, and his organisation, the International Justice Mission. Answering the question as to why these public justice systems so massively fail the poor (in fact, everyone), he offers the following explanation which points to a fundamental problem that lies with the international human rights project itself:

> "Two generations of global human rights efforts have been predicated, consciously or unconsciously, upon assumptions of a functioning public justice system in the developing world. But those systems clearly lack effective enforcement tools; as a result, the great legal reforms of the modern human rights movement often deliver only empty parchment promises to the poor"[18]

The global human rights project, since the Universal Declaration on Human Rights has devoted most of its time for articulating international norms on human rights and made attempts to get domestic acceptance and pass legislation relating to these international norms. However, such efforts have not resulted in the actual possibility of the people in less developed countries achieving these rights through their public justice systems. It is this distance from parchment promises to actual enjoyment of rights that is the key issue when we are talking about dysfunctional/abysmally lawless systems.

4.3. What are the Ways to Resolve this Contradiction?

In resolving this great contradiction, one strategy is to meticulously document the actual manner in which the public justice system of each country functions.[19] The method may be very similar to the one adopted by the anti- slavery movement in Britain as demonstrated by the work of Thomas Clarkson and others who meticulously documented the conditions of the slaves, for example, the manner in which they were packed and brought in ships, which subjected them to scandalous inhumanity and cruelty. This information shocked the British population and their reaction lead to great historical efforts to illegalise slavery and end the practice of slavery altogether. In proceeding on these lines, we were of the view that the meticulous documentation of the manner in which the public institutions of justice dysfunction in

[18] Gary Haugen's speech to Chicago University Law School, 2010.

[19] This has been a successful strategy adopted by the Asian Human Rights Commission.

different countries and the consequent suffering it imposes on the populations living in these countries would lead to a better recognition of the problem locally and internationally.

This documentation has been done in many ways, one of which is a close following of many cases. Cases relating to torture and ill-treatment and other human rights abuses have been followed from the very start of a complaint being made up to the cases proceeding through the courts, often for many years. Through this method it has been possible to document the manner in which the policing system in a particular country functions, the nature of its complaint mechanisms as found in legislation and how these, in fact, function. Later the case is pursued by observing how the prosecution departments conduct their affairs, how indictments are filed and trials are prosecuted. The close observance of the prosecution departments enables the observer to assess how independent the institution is and whether the actions of such institutions can be justified from the point of view of objective criteria that is acceptable from the point of view of a functioning rule of law system. The case is then pursued in the courts, from courts of first instance to the courts of appeal. By observing the courts, it is possible to document the behaviour of the judges as well as the lawyers themselves.

4.4. The Role of Lawyers Within a Dysfunctional System

There are many problems that need to be considered when discussing the role of lawyers within a dysfunctional system. From a holistic point of view, lawyers lose sight of the traditional role that they used to play within a rule of law system. The very assumption, on which the legal profession functions, is the supremacy of the law and the independence of the judiciary. Within a dysfunctional system both these important aspects are, to varying degrees, absent. This creates confusion among the lawyers as well as society in general as to the role that lawyers could legitimately play under the changed circumstances. With time, there is also the problem where both the lawyers and the public tend to forget the role previously played by lawyers when the system was functional. One of the major problems within the legal profession itself when the system becomes dysfunctional is the emergence of divisions among the lawyers themselves. Quite a large section of the legal profession adjusts to the changed situation and learns to survive under these adverse circumstances. Within a very short time, the habits that are acquired through such adjustments may even be looked upon as acceptable behaviour. As a result, a serious crisis in ethical standards takes place. What were once considered ethical standards, to which legal professionals should adhere to, begin to be looked upon as unrealistic and as demanding an impossible performance under the changed circumstances.

Besides this, the political forces that caused the system to become dysfunctional, attempt to win over a section of the lawyers, if not all, to their point of view. Ideological justifications are created as to why there was a need to change the system of the administration of justice and that therefore; there is a need to reconsider the norms and standards of a former time. The danger of this particular approach is that the dysfunctional legal system is presented as a better alternative to achieve national goals in the immediate period than the system that functioned earlier. These ideological changes, often couched in nationalistic jargon, begin to appeal to a section of the legal profession who then try to take advantage of the changed situation for their own ends. The effect of all this is that those who are committed to the profession, as

understood within a functional system, begin to become isolated and the possibility of a common front among the larger section of the legal profession to fight against the dysfunctional system becomes extremely difficult.

Added to the division among the lawyers are also the divisions among judges. In the early stages when a system is becoming dysfunctional, the majority of judges are likely to resent the change and try to reassert the earlier positions and try to return, if possible to the system as it was. However, as the dysfunctional system consolidates itself, the earlier resistance becomes less and many judges also begin to adjust to the changed system. Initially this may cause serious conflicts, but with time only those who adjust to the system survive. Political pressures play a significant role in the process of selecting those who would comply with the changes and the exclusion of those who are resisting and attempting to reassert the ways of the functional system. Thus, the change that takes place within the judiciary also affects the legal profession, particularly those who still attempt to fight against what they consider as the downfall of the system.

4.5. Inferences that Flow from this Predicament of Lawyers within a Dysfunctional System

It becomes obvious that for those who want to fight for the professional status and rights available to lawyers within a functional system are faced with an enormous task. Turning the tide and returning to the ways of a functional system is not merely a matter of trying to preserve professional integrity, but it becomes a matter for the struggle for political and social changes to displace the political and social perspectives that have led to the system becoming dysfunctional. The fight is not one of mere reassertion of values, ethical considerations and the principles on which the legal profession is based, but also finding ways to undo the compulsions which created the dysfunctional system.

The following are some useful strategies:

a. A dysfunctional system creates a vast number of persons with grievances that are not being addressed. The lawyers who may support these persons, despite their knowledge that at the end there will be very limited results by way of justice, may win the sympathy of the public and also gain a vast amount of knowledge about the actual ways a dysfunctional system works and the consequences resulting therefrom. The sense of solidarity with the litigants who are deeply frustrated due to the absence of justice may provide lawyers the insights needed to understand, as well as to fight against, this situation.

b. If the lawyers train themselves to meticulously document their experiences in the dysfunctional system, this could provide a knowledge base for both the local population and the international community in understanding the related problems. In this sense, the example of the British anti-slavery movement and the achievements that were made through the dissemination of sensitive material gathered under

difficult circumstances may be considered a role model under these circumstances. As from one incident to the next, and from one case to the next, the information increases and soon there will be credible material that those who are concerned about this problem cannot ignore.

c. Fighting against a dysfunctional system is not the sole task of lawyers. The entire society is involved in dealing with this problem. Given the fact that a dysfunctional system is a political and a societal creation, fighting against it would require close cooperation with many who may be fighting the same problem from different perspectives. A lawyer's contribution based on meticulously documented experiences could be a welcome instrument in the hands of all those who are fighting for change.

d. Even in the worst circumstances, many opportunities arise from time to time which if properly utilised could lead to positive changes. For example, there are times when there are regime changes. There are also times when there are organised mass protests demanding more justice. If a very conscious effort is not made under those circumstances, to flag the problem of the dysfunctional nature of the administration of justice system and the need for substantial changes, these opportunities can be lost. One could enumerate several countries where such opportunities were lost. The involvement of lawyers who have a comprehensive knowledge of the systemic failures and the weaknesses could contribute a lot for the articulation of reform programmes in order to ensure that a rule of law system is re-established.

Conclusion

If the benefit of the work done for many decades on the protection and promotion of human rights is to reach the people of less developed countries, the issue of creating functioning public institutions of justice should become the priority of the global human rights effort. If this happens, the fruits of that success would be even greater than all the achievements the global human rights movement has made in the past. If this does not happen, for vast numbers of people living in less developed countries, human rights will only remain "an empty parchment promise."

Human Rights Committee - Case of S.K.A. Sugath Nishanta Fernando
United Nations CCPR/C/103/D/1862/2009
http://www.alrc.net/doc/mainfile.php/un_cases/697/

- Human Rights Committee 103rd session Geneva, 17 October- 4 November 2011 Item 9 of the provisional agenda Consideration of communications under the Optional Protocol to the Covenant

- Communication No. 1862/2009
- **Views adopted by the Committee at its 103rd session, 17 October to 4 November 2011**

- Submitted by: Annakkarage Suranjini Sadamali Pathmini Peiris (represented by counsel, Asian Legal Resource Centre Ltd.) Alleged victims: The author, her deceased husband Mr. Siyaguna Kosgodage Anton Sugath Nishantha Fernando and their two minor children, Siyaguana Kosgodage Kalpani Danushi Fernando (born in 1992) and Siyagana Kosgodage Sinesh Antony Femando (born in 1997) State party: Sri Lanka Date of communication: 6 February 2009 (initial submission) Document references: Special Rapporteur's rules 92 and 97 decision, transmitted to the State party on 12 February 2009 (not issued in document form) Date of adoption of Views: 26 October 2011

The Human Rights Committee, established under Article 28 of the International Covenant on Civil and Political Rights, Meeting on 26 October 2011,

Having concluded its consideration of communication No. 1862/2009, submitted to the Human Rights Committee on behalf of Ms. Annakkarage Suranjini Sadamali Pathmini Peiris, Mr. Siyaguna Kosgodage Anton Sugath Nishantha Fernando, and their two minor children, Siyaguana Kosgodage Kalpani Danushi Fernando (born in 1992), and Siyagana Kosgocjage Sinesh Antony Fernando (born in 1997) under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The author of the communication is Ms. Annakkarage Suranjini Sadamali Pathmini Peiris. She submits the communication on behalf of her husband, Mr. Siyaguna Kosgodage Anton Sugath Nishantha Fernando, deceased on 20 September 2008, on her own behalf, and on behalf of their two minor children, Siyaguana Kosgodage Kalpani Danushi Fernando and Siyagana Kosgodage Sinesh Antony Fernando. The author claims that she and her family are the victims of violations of article 6, read in conjunction with article 2, paragraph 3; article 7, read in conjunction with article 2, paragraph 3; article 9, paragraph 1, read in conjunction with article 2, paragraph 3; article 17 and article 23,

paragraph 1 of the Covenant by the Democratic People's Republic of Sri Lanka ("Sri Lanka"). She is represented by the Asian Legal Resource Centre Ltd. 1.2 On 12 February 2009, the Committee, acting through its Special Rapporteur for New Communications, and pursuant to Rule 92 of its Rules of Procedure, requested the State party to take measures to ensure the protection of Ms. Annakkarage Suranjini Sadamali Pathmini Peiris and her family while her case was under consideration by the Committee. This request was reiterated on 15 September 2009. The State party has not responded to any of these two requests of the Committee.

The facts as presented by the author

2.1 The author and her husband, Mr. Siyaguna Kosgodage Anton Sugath Nishantha Fernando, purchased a lorry on 24 May 2003 from M.P. , then officer in charge of the Kochikade police station. The officer sold the lorry to the author and her husband, making them believe that he was the legitimate owner of the vehicle. Later, it was revealed that the lorry was a stolen vehicle, and that the officer had changed its registration plate before selling it to the author and her husband. When they learnt of his fraudulent conduct the author and her husband filed a complaint against M.P., and a disciplinary inquiry was initiated against him. Once the inquiry started, the officer and several of his colleagues tried to threaten the author and her husband, asking them to withdraw their complaint. The officer was indicted in December 2005, but died in the same month. Because of this initial complaint filed, a number of police officers started considering the author and her husband as a threat.

2.2 A fabricated complaint was made by the Negombo police against the author's husband in 2003, when he had visited the police station to register a complaint against three local thugs who had robbed him in the street. Instead of recording his complaint, the police accused him of a false crime. The author's husband filed a complaint before the Human Rights Commission of Sri Lanka (HRCSL), requesting intervention in his case, but, no action followed. The officer in charge of the Negombo police station, M.D., demanded a bribe of 20,000 Sri Lankan Rupees from the author's husband. The latter refused to pay, and instead filed a further complaint before the National Police Commission (NPC) against the officer. No action followed. On 11 June2004, the author and her husband gave a statement before the Bribery Commission. Only two years later, the Commission initiated proceedings against Officer M.D. The procedure is still pending before the Colombo High Court. According to the author; this new incident rallied several police officers close to M.D. against the author and her family,

2.3 In 2006, the Superintendent of Police in Negombo, M., summoned the author and her husband to his office, on the pretext that their statements needed to be recorded in the departmental inquiry against M.D. At the SP's office however, the author and her husband were intimidated, and threatened that unless they immediately withdrew their complaint against M.D., they would pay a heavy price for opposing the police. No statement was recorded. After this incident, the author and her husband filed a complaint against Superintendent M.

2.4 In the same year, the author and her husband went to the Negombo police station regarding a

document concerning one of their vehicles. At the police station, they met with Chief Inspector N., as well as another officer who introduced himself as an officer attached to the Crime Branch. Instead of assisting them, the two officers shouted and insulted the couple, ordering them not to come to the Negombo police station anymore if they cared for their lives. The officers also stated that if they wished to stay alive, they had to withdraw the complaints they had filed against several police officers. After this incident the author and her husband filed a further complaint against the Chief Inspector and accompanying officer of the Negombo police station before the Office of the Deputy Inspector General (DIG) for the death threats received, and asking for an investigation. To their surprise, the DIG directed this complaint to Superintendent M., against whom the couple had already filed a complaint.

2.5 In 2006, under the pretext of recording a statement related to the complaint against Superintendent M., the author and her husband were summoned to the office of the Senior Superintendent of Police, where they were verbally abused and threatened that they would be murdered if they maintained their complaints, asking them to withdraw complaints against officers M.D. and M. The couple then filed a further complaint before the DIG's office, requesting an investigation into the incident, and seeking protection for their family. No action was taken on this complaint.

2.6 On 10 September 2006, after the author and her husband had reached the market by motorcycle, they were approached by a police officer, who asked them why they were not wearing helmets. The couple replied that they did not need to, as they were not riding their motorbike. Another officer then approached them, and asked that they immediately withdraw their complaint against Superintendent M., seized the keys of the motorcycle, and threatened to arrest the author's husband. The same day, the couple was arrested, and a false case was registered against them, but they were subsequently released on bail by the Negombo Magistrate Court.

2.7 On 23 September 2007, the lawyer who assisted the author and her children to deliver their statements was threatened over the telephone by an unknown person. The caller threatened that they would murder her if she further assisted the author and her family. Similar calls were made to "the Right to Life", a local human rights organization. The author and her family started living in hiding.

2.8 On 12 November 2007, two police officers, Sub-Inspector A. and Constable D. came to the author's house, requesting her and her husband not to submit evidence against Officer M.D. at the Colombo High Court on 14 November 2007. The Officer further insulted and threatened to kill the author's husband. Officer A, then slapped the author's husband on his face. The author's husband asked his daughter to write down the number of the officer's license plate, but the officer drove in her direction and hit her with the motorcycle, which made her fall on the ground. Six additional officers were, called to the author's house. Fearing for their lives, the author immediately contacted the Bribery Commission, seeking help. The officer who attended the call informed the author that he would relay the information to the Headquarters Inspector for intervention. Headquarter Inspector S. arrived at the author's house accompanied by 50 officers, 20 of whom entered the house, and assaulted the entire family. The author's husband was attacked, fell on the ground and lost consciousness. The officers

continued hitting and kicking him, while others assaulted the author. The Headquarter Inspector hit her on the face with a pistol, and another punched and hit the face of her 10 year-old son against the wall. The author, her husband, and their daughter were then forced into the police vehicle. One officer tried to undress the author's daughter.

2.9 Following the incident, the author filed a complaint before the Supreme Court of Sri Lanka for acts of torture, and thus a breach of their fundamental rights against 13 police officers, including Senior Superintendents of the Negombo police inspectors, sub inspectors, sergeants and constables. The case is still pending before the Supreme Court.

2.10 The author and her daughter were hospitalized at the Negombo hospital. The author was hospitalized for five days, and would later need to undergo a surgery for a fractured nose. The police denied medical help to the author's husband. While the author and her daughter were in the hospital, the police charged the entire family with obstruction of police duty. The family obtained bail. The author alleges that because of the assault, she suffered f several injuries and contusions on her face, jaws and teeth.

2.11 On 23 June 2008, four persons in a lorry ordered the author and her husband to stop near Chilaw at Dalupata Bridge on the Colombo road. These included N.N. and N.M. (N.N was an army deserter with criminal antecedents), who shouted that they were under instruction by the Negombo police to kill them. The author and her husband were frightened and immediately returned home. Shortly after, they found N.N. and N.M. along with two other persons in front of their house, asking her to open the gate, threatening to kill them the next day should they refuse to withdraw their complaint. The author and her husband later went to the office of the DIG (Crimes) and lodged a complaint about the incident. The author's husband also filed an affidavit before the police the next day about the incident. The incident was reported to the Asian Human Rights Commission (AHRC), which wrote on 24 June 2008 to the Minister of Disaster Management and Human Rights in Colombo, seeking an intervention. The AHRC also submitted a communication to the UN Special Rapporteur on torture.

2.12 On 20 September 2008, while the author's husband and their son were inside their lorry at Dalupota junction near their house, two masked persons approached them and fired two shots from a small firearm at the author's husband. The first shot missed him, but the second entered his head through the ear, killing him instantly. The assassins left the scene in the same vehicle in which they arrived. The author's husband was declared dead at the hospital shortly after

2.13 On 11 November 2008, the author filed an affidavit at the Negombo Magistrate's Court, alleging that there were serious threats against her and her family in her pursuit of her complaints of bribery and torture instituted against police officers, on 7 December 2008, the author filed another affidavit at the Paliyagoda Police Station, stating that she and her children were finding it extremely difficult to live in hiding since no investigation had been carried out regarding her husband's murder, and that the same murderers were searching for the author and her children to assassinate them. The author

stressed in the affidavit that the reason why the murderers of her husband were not identified or arrested was because the murder was organised by the police officers who had threatened the author and her family on various occasions.

2.14 On 24 January 2009, the organisation "the Right to Life" received a call from Colombo; threatening staff assisting the author in her complaints of murder should they continue. The President of the organization filed a complaint to the Inspector General of Police (IGP) in this regard but no proper investigation was so far undertaken.

2.15 On 27 January 2009, while the author's lawyer was at the Negombo Police Station to file a complaint on her behalf, and to seek protection for her and her children, one of the police officers in the Supreme Court fundamental rights application filed by the author (Mr. B.) verbally abused him, and threatened that he would be also killed if he continued helping the author. The officer assaulted the lawyer, threatening him with death if he came back to the police station, and coercing him to withdraw all the complaints against the police officers, including the one regarding bribery, the fundamental rights application, and the complaints filed at various stages against police officers for threats received by the author and her family, as well as the complaint for torture. Fearing for his life, the lawyer left the police station.

2.16 After the incident, the lawyer filed a complaint before various authorities in Sri Lanka, including the Bar Association, but no investigation has been initiated. On 30 January 2009, an unknown arsonist burned his office. On 27 September 2008, two grenades were hurled into the house of another lawyer, who appears in the author's fundamental rights application. No proper investigation has been carried out on these incidents.

The complaint

3.1 The author contends that the facts described disclose violations of article 6, read in conjunction with article 2, paragraph 3; article 7, read in conjunction with article 2, paragraph 3; article 9, paragraph 1, rend in conjunction with article 2, paragraph 3; article 17 and article 23, paragraph 1 of the Covenant. 3.2 Regarding article 6, the author stresses that after the incident of 12 November 2007, when she and her family were publicly assaulted; they persistently sought help from the authorities. Even though they were filing complaint after complaint, the threats intensified, culminating in the murder of the author's husband. The author stresses that the lack of affirmative action by the State party to safeguard her life and that of her family, in particular her husband's, violates their rights guaranteed under article 6, read in conjunction with article 2, paragraph 3 of the Covenant.

3.3 Concerning article 7, the author claims that they were severely tortured on 12 November 2007, which caused her daughter's and her own hospitalization. The author stresses that in addition to these acts of torture, the family has been forced to live in hiding due to continuous threats to their lives from the police, which continued after her husband's death. Additionally, all persons having associated

themselves with the author and her family have risked their lives. The author contends that even though torture is recognized as a crime in Sri Lanka, no one has been punished in her case, and her fundamental rights application filed before the Supreme Court is pending. She alleges that the lack of redress for acts of torture suffered amounts to a violation of article 7, read in conjunction with article 2, paragraph 3 of the Covenant with regard to her family.

3.4 With regard to article.9,. paragraph 1, and stressing that her case is not an isolated incident in Sri Lanka, the author contends that by failing to take adequate action to protect her family, the State party has breached Article 9, paragraph 1, read in conjunction with article 2, paragraph 3 of the Covenant in their regard.

3.5 The author further alleges that the State party breached articles 17 and 23, paragraph 1, stressing that since 2004, they have been harassed by police officers through threatening telephone calls and visits. She contends that this has interfered with their peaceful life, and that despite several requests for protection, the threats intensified, culminating with the assassination of her husband. The author also recalls that her family life has so far been marked by financial and emotional uncertainly, and that the children have been prevented from attending school, thereby denying their right to education, and their family rights protected under article 17 and article 23, paragraph 1 of the Covenant.

3.6 Regarding exhaustion of domestic remedies, the author stresses that despite a dozen of complaints filed before various State party authorities, which include the President of Sri Lanka; the Chief Justice of the Supreme Court of Sri Lanka; the Minister of Disaster Management and Human Rights and the secretary of this ministry; the Inspector General of Police; the Deputy Inspector General of Police; the National Police Commission, the Human Rights Commission of Sri Lanka and the Magistrate's Court of Negombo, her husband was murdered, further threats continued to be received, no one has been arrested in connection with the events, nor any investigation undertaken. Human rights defenders and lawyers assisting the family have themselves been threatened. In this context, the author stresses that the lack of progress in the proceedings, together with the fact that the alleged perpetrators have pursued their functions as police officers, have resulted in a *de facto* immunity of perpetrators to any proceedings. She adds that it is highly unlikely that any credible proceedings will be initiated, in light of the subjective effectiveness and delays in the proceedings in her case, assessed in the light of the general lack of domestic remedies available for the complainant to be exhausted in Sri Lanka. The author therefore concludes that domestic remedies have been demonstrated to be ineffective, and that she should not be requested to pursue them further for her communication to be admissible before the Committee.

Further submission from the author

4.1 On 10 September 2009, the author informed the Committee that she had received a threat during her time spent in India, between 13 June and 26 August 2009, and that the danger had escalated since the family's return to Sri Lanka on the expiration of their visas. On 7 September 2009, the author's

vehicle was chased by another car, when she was driving back from a court appearance. She also received a number of anonymous phone calls, which informed her that her house would be burnt, and that her family would be murdered. The author also informed the Committee that despite her request for interim measures of protection on her behalf, the State party had not undertaken any step in this regard.

4.2 On 15 September 2009, the above-mentioned information from the author was shared with the State party, along with a reminder on the Committee's request pursuant to Rule 92 of its Rules of Procedure, for the State party to take measures to ensure the protection of the author and her family while her case is under consideration by the Committee.

State party's failure to cooperate

5.1 By notes verbales of 15 September 2009, 24 February 2010, and 24 January 2011, the State party was requested to submit to the Committee information on the admissibility and merits of the communication. The Committee notes that this information has not been received. The Committee regrets the State party's failure to provide any information with regard to admissibility or the substance of the author's claims. It recalls that article 4, paragraph 2, of the Optional Protocol obliges States parties to examine in good faith all allegations brought against them, and that they make available to the Committee all information at their disposal. In the absence of a reply from the State party, due weight must be given to the author's allegations, to the extent that they are substantiated.

5.2 The Committee further notes with regret that the State party has failed to respond to its request, made pursuant to Rule 92 of its Rules of Procedure, to take measures to ensure the protection of the author and her family while her case is under consideration by the Committee. It recalls that interim measures are essential to the Committee's role under the Protocol, and that flouting of the rule undermines the protection of Covenant rights through the Optional Protocol.

Issues and Proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with article 93 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant

6.2 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement for purposes of article 5, paragraph 2 (a), of the Optional Protocol.

6.3 In the absence of any submission by the State party on the admissibility of the communication, and

noting the author's statement that domestic remedies have proven to be ineffective, the Committee declares the communication admissible, in as far as it appears to raise issues under article 6, read in conjunction with article 2, paragraph 3; article 7, read alone and in conjunction with article 2, paragraph 3; article 9, paragraph 1, article 17 and article 23, paragraph 1 of the Covenant.

Consideration of the merits

7.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it, as provided in article 5, paragraph 1, of the optional Protocol. It recalls that in the absence of a reply from the State party, due weight must be given to the author's allegations, to the extent that they are substantiated.

7.2 Regarding the author's claim under article 6, the Committee recalls that the right to life is the supreme right, from which no derogation is permitted. It further recalls that States parties have a positive obligation to ensure the protection of individuals against violations of Covenant rights, which may be committed not only by its agents, but also by private persons or entities. The Committee observes that according to the uncontested material at its disposal, the author and her family received a number of direct threats from the police, i.e. agents of the State party, including death threats, seeking to unlawfully coerce them into withdrawing complaints filed by them against police officers. On 20 September 2008, it is reported that the author's husband was shot dead by masked men; three months after two individuals had told the family that they had been instructed by the Negombo police to kill them. After this threat, the author and her husband had filed several complaints, including those filed before the Office of the Deputy Inspector General and the police, but no action was undertaken, by the authorities to protect the family. In these circumstances, and taking into account the State party's lack of cooperation, the Committee is of the view that the facts before it reveal that the death of the author's husband must be held attributable to the State party itself. The Committee accordingly concludes that the State party is responsible for the arbitrary deprivation of life of the author's husband, in breach of article 6 of the Covenant.

7.3 As to the claim under article 7, the Committee recalls that the State party has offered no challenge to the evidence submitted by the author that on 12 November 2007, police officers broke into her domicile, beat her husband until he fell on the ground and lost consciousness, hit her with a pistol, punched her 10 year-old son against the wall, hit her daughter with a motorcycle, causing her to fall on the ground, and later sought to undress her. In the circumstances, the Committee concludes that the author, her husband and their two children were subjected to treatment contrary to article 7 of the Covenant

7.4 The Committee recalls that criminal investigation and consequential prosecution are necessary remedies for violations of human rights such as those protected by articles 6 and 7 of the Covenant. In the instant case, the Committee observes that the numerous complaints filed by the author have not led to the arrest or prosecution of a single perpetrator. In the absence of any explanation by the State

party, and in view of the detailed evidence placed before it, including the identification by name, by the author, of all alleged perpetrators, the Committee concludes that the State party must be held to be in breach of its obligations under article 2, paragraph 3, read in conjunction with article 6 and article 7 to properly investigate and take appropriate remedial action regarding the death of the author's husband, and the ill- treatment suffered by the author and her family.

7.5 Regarding the author's claim under article 9, paragraph 1, the Committee recalls its jurisprudence, and reiterates that the Covenant also protects the right to security of person outside the context of formal deprivation of liberty. The interpretation of article 9 does not allow a State party to ignore threats to the personal security of non-detained persons subject to its jurisdiction. In the present case, it appears that persons acting in an official capacity within the Negombo police station have on several occasions threatened the author and her family with death. In the absence of any action from the State party to take reasonable and appropriate measures to protect the author and her family, the Committee concludes that the State party breached the author's and her family's right to security of person, protected by article 9, paragraph 1, of the Covenant.

7.6 The Committee has taken note of the author's contention that police officers harassed her and her family in their home through threatening telephone calls and forced visits and that subsequently they feared to live in their home and were forced into hiding, and unable to live a peaceful family life. The Committee also notes the continuing harm resulting from the State party's failure to take any action in response to the Committee's request to adopt interim measures to protect the author and her family. In the absence of any rebuttal by the State party, the Committee concludes that the State party's interference with the privacy of the family home of the author was arbitrary, in violation of article 17 of the Covenant.

7.7 The Committee further takes note of the author's contention of a violation of. article 23, paragraph 1 of the Covenant, and finds that the violation of articles 6, 7 and 17, in light of the circumstances of the case, also constitute a violation of these articles read in conjunction with article 23, paragraph 1 of the Covenant. 8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts as found by the Committee reveal violations by Sri Lanka of article 6, read alone and in conjunction with article 23, paragraph 1 vis-à-vis the author's husband; article 2, paragraph 3 , read in conjunction with article 6 and article 7,vis- a- vis the author herself, her husband, and their two children; article 7, read alone and in conjunction with article 23, paragraph 1 via- a-via the author, her husband and their two children; article 9, paragraph 1 vis-a-vis the author, her husband and their two children; and article 17, read alone and in conjunction with article 23, paragraph 1, of the Covenant via- a- via the author, her husband and their two children.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, which includes ensuring that perpetrators are brought to justice, that the author and her two children can return to their domicile in safety, and ensure reparation, including payment of adequate compensation and an apology to the family. The State

party should also take measures to ensure that such violations do not recur in the future.

10. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant, and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views, to have them translated in the official languages of the State party, and widely distributed.

(Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.)[20]

[20] The full text of the Communication is available at: http://www.alrc.net/PDF/SKASugathNishanta Fernando-CommNo1862-2009.pdf

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