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A SOCIOLOGICAL EXPLORATION OF DISAPPEARANCES IN SRI LANKA

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Editor's Note... ..

This Issue of the *LST Review* contains excerpts from a study by *Jane Thomson-Senanayake* examining the manner in which disappearances served as an integral part of a system of state power and patronage in Sri Lanka during 1971-2002. Her reading of history peels away the skin of ideological preoccupations and exposes the truth for what it is; an appropriation of ancient mistrusts and convenient mythologies to serve the political purposes of governments and oppositions, enabling cynical use of the tool of disappearances by the political elite 'to immobilise all political opposition.' As she says, 'disappearances served a national security imperative to nation building.'

This recollection of the dismantling of democratic systems, imploding from the 1970's illustrates how impunity is deeply imbedded in our history. The Southern insurgency of 1971 pitted Sinhalese youths against state power and gave rise to Sri Lanka's first enforced disappearances, much before conflict exploded in the North and East between the Liberation Tigers of Tamil Eelam (LTTE) and the State. By that time, Sri Lanka's systems had already commenced its ruinous slide into decay. Political tit for tat had crippled the public service and imperiled an independent judiciary.

One illustration is the replacement of the traditional village headman system by politically appointed village level administrators (*grama sevaka niladharis*) in 1963. *Thomson-Senanayake* remarks that the 'nationalist ideology of the ruling elite of which political violence was an outward manifestation' conflicted with an 'alternate ethos represented by the country's rural youth', Sinhala as well as Tamil. Indeed, one may well question if Sri Lanka's post independent political leadership and intellectual leadership possessed any commitment to the fundamentals of democracy, beyond a cynical bowing to labels unlike Indian constitutional reformists and social leaders across the Palk Straits.

As this study recapitulates, power was transferred at the turn of Sri Lanka's independence from colonial rule to a 'Western educated, highly urbanized high class elite' with the consequent absence of any genuine cultural or socio-political transformation. Gradual departures thereafter from the Rule of Law carefully put into place by the departing colonial rulers in the Independence Constitution of 1948 were calculated and contrived.

Decades later, Sri Lanka fails to interrogate many of these contradictions and perversities. In breaking with the colonial past, the 1972 Constitution clearly indicated its contempt for the independence of the judiciary and the public service. It departed from protections for the country's minorities in no uncertain terms. Yet this Constitution is still referred to with a hint of pride by some as an 'autochthonous' (home-grown) constitutional document. Given the constitutional ravages that were perpetuated through this device, one may well question the logic of this highly misplaced boast. Sri Lanka's second Republican Constitution in 1978 continued this trend. In later decades, subversion of the constitutional document to the utter detriment of the minorities and in fact, the majority, is scarcely surprising.

A further important focus of this study is its challenging of the 'ethnic conflict construction of violence, which remains the official position on the conflict with the LTTE, by recognising it in the contexts of the political elite and their manipulation of political constituencies, particularly middle class fear and anxiety.'

Indeed, this is the most recent in a growing body of work which urges a broader re-conceptualization of what is commonly termed as Sri Lanka's accountability problem. For decades, the preference to limit the issue to a narrow ethnic prism on the part of the international community, including some non-governmental organizations, had stultified the proper understanding of the country's historic culture of impunity.

Even more damagingly, radical Tamil nationalists used the conceptualization of the Sinhala-Buddhist 'hegemonic State' (a term burrowed from other historical contexts to which it is perhaps far better suited) to contend that Sri Lankan nation building need not concern the Tamil people. Rather, as they argued, the Tamil people should be concerned by the Tamil nationalist identity alone. In unnerving respects, such arguments only reflected sentiments of Sinhala nationalists and the xenophobic ethos of Sri Lanka's post-war political leadership. Caught between these two unhappy extremities, there appears to be little hope for discussion informed by moderation and compromise. Ironically, this rationale has only helped Sri Lanka's majoritarian governments to avoid an inconvenient problem of overarching state impunity.

One challenge to this unhealthy dichotomy came from a somewhat unexpected source, namely the 2011 report of the Lessons Learnt and Reconciliation Commission (LLRC). Its focus on Sri Lanka's post-war crisis of the Rule of Law rattled the political leadership

and to some extent, transformed local debates from sound and fury over which was bloodier, the LTTE or the Sri Lankan State to a far more constructive engagement with national institutions and processes benefitting the majority and the minorities.

In that respect, Thomson-Senanayake's analysis is useful for the broader approach that it adopts. The dominant theme of her exploration is about the human pain of Sinhalese, Tamils and Muslims subjected to state abuse. Crucially, the examination is also about the political project of the survivors of political violence themselves, from the North to the South, of the exploitation of this project by the political elite and its ultimate – some would fittingly term it, inevitable – failure.

This thesis also looks briefly at the failures of the law and of the legal systems in responding to enforced disappearances. The institutionalization of political violence encompasses the centralization of the Office of the Executive President, the overtaking of normal law by the emergency State, the investigation and prosecution of disappearances, the failure of *habeas corpus* and the achievements/failures of the disappearances commissions. The politicization of civil society movements forms an important part of the critique.

Similarly, it may be a worthy effort for another time to critically examine the politicization of Sri Lanka's legal elite. While this factor was always subtly present in independent Sri Lanka, it became pronounced following a grossly problematic appointment of a former Attorney General as Chief Justice by the Kumaratunga Presidency in 1999. The undermining of the neutral role of the Supreme Court during the decade that followed and the general silence of the legal community in that regard is a remarkable feature of this period. Post-war, the subversion of the judicial institution under successive Chief Justices appointed by the Rajapaksa Presidency continued. Crippling the judicial institution was in fact, a primary and phenomenally successful target of state power minimally cloaked in the form of democracy. As history records, the responsibility for this vests not only in the political leadership but also in the country's intellectual leadership.

This study will undoubtedly be useful for students as well as seasoned analysts for the critical insights that it brings to this discussion.

Kishali Pinto-Jayawardena

A Sociological Exploration of Disappearances in Sri Lanka

"Not even a person, not even a word..."

*Jane Thomson-Senanayake**

Disappearances as Political Competition

The Political Construction of Violence

The hypothesis of this study is that political competition was the driving force behind the enforced disappearance of tens of thousands of Sri Lankans carried out by the state in the context of two Marxist insurgencies and conflict with Tamil separatists over three decades from 1971 to 2002. In the Sri Lankan context, disappearance has served as an integral part of a system of state power and patronage. Under this regime, political violence was sanctioned by the political elite with impunity and normal law did not apply leaving no effective means of legal redress for affected families. To understand the manner in which disappearance served a political purpose, this study explores the history of disappearance from 1971, providing an account of the political, legal and socio-economic framework that allowed for the establishment of a 'shadow state' under which disappearances were carried out. While this study focuses on the state's response to the 1971 Marxist insurgency as its starting point, intolerance to political opposition including public protest emerged as a central characteristic of governance well before the 1970s. Given this fact and the long historical roots of political violence, this study details some of the characteristics of the state's response to public protest and dissent during the 1950s and 1960s to the extent that they inform discussion about state violence and its inextricable connection to political patronage. The study's historical scope extends to the 2002 peace process, which resulted in a suspension of direct hostilities between the state and Liberation Tigers of Tamil Eelam (LTTE) but did not halt the disappearances and other abuses perpetrated both within and outside the context of the conflict.

In an attempt to deconstruct the pervasive effects of disappearance as a mechanism of terror, the second part of this study considers the experiences of affected families who embody the convergence of the political project and its socio-cultural consequences for communities. Disappearances were highly effective in demobilising all forms of political opposition to the regime—shown by the experience of these families whose own attempts to re-establish the socio-legal identity of the disappeared was exploited by the political elite leaving them socially ostracised within their own communities and without any effective remedy. By achieving two primary objectives—rendering individuals permanently silent and neutralising social mobilisation against the state—disappearance enabled the ruling elite to

* The author completed her PhD in 2013 at the University of Sydney. Her doctoral research explored enforced disappearances over three decades in Sri Lanka and involved extensive fieldwork across eight districts. The *LST Review* features excerpts from the research which was published in totality by the Asian Human Rights Commission, May 2014.

manipulate local grievances and tensions which led to greater violence in the permanent removal of local enemies and rivals while heightening mistrust.

Young rural men comprised the overwhelming majority of people who disappeared in Sri Lanka from 1971. These rural youth, with no stake in a political system that excluded them, a system that was nevertheless upheld within their own communities, formed the respective Marxist insurgencies and Tamil separatist movement—triggering violence between as well as within communities. The political elite perceived the country's rural youth to be such a serious political threat to itself and the political establishment supporting its vested interests that it took drastic action. It devised an alternative 'shadow state' to secretly suppress the youth movements under the guise of a counter-insurgency operation and disassemble all forms of political opposition while subjugating the rural population under the banner of national security and economic prosperity. While centralising political power and deliberately undermining the legislature and judiciary, the ruling elite's shadow state operated with impunity, targeting and eliminating rural youth considered a political threat and overpowering the rural majority. The United National Party (UNP)'s campaign of political violence conducted over 17 years of rule and recognised as the most violent in the country's history before the events of 2009 was justified in the name of state building but had the effect of state disintegration. The UNP's overall objective was to establish a one party state which would bring about national stability and rapid modernisation. But the coherence of this aim was undermined by its methods including the subjugation and disappearance of the country's rural youth, the displacement of ethnic Tamils in the north and east, and the total repression of regions under Janatha Vimukthi Peramuna or People's Liberation Front (JVP) and LTTE influence. The underlying nationalist ideology of the ruling elite of which political violence was an outward manifestation came into direct conflict with an alternate ethos represented by the country's rural youth who allegedly stood in the way of the country's future. In this sense, disappearance served a national security imperative to nation building.

The politicisation of Sri Lankan society—fuelled by political violence, dependent on state resources and patronage and coupled with deep mistrust about the sources of violence—created conditions whereby communities were effectively coerced by or became complicit with the regime's political project. Such coercion was made possible through interference in the public service recruitment process, politically driven decisions about the use of state funds, and the undermining of legislative and judicial independence. At the same time the democratic process was circumvented and control was consolidated by referendum, media censorship and bans on opposition parties, public gatherings and trade unionism. Many Sri Lankans were forced into polarised political camps and became complicit in the political project of the ruling elite to avoid their own disappearance. Some believed the state propaganda that any measure (including disappearance) was necessary to deal with terrorism. In an environment in which everyone was seen potentially as an enemy, disappearance served as a control mechanism to produce a consensus based on fear.

At the same time the disappearance of individuals became evidence of the threat of subversion and simultaneously normalised death as the price of political activism and opposition to the state. Indeed, the military defeat of the LTTE in 2009 did not result in an end to the 'white van phenomenon', the

ubiquitous modus operandi for the abduction and disappearance of people across the country. The fact that disappearances continue to be regularly reported only confirms that the act has been far more than merely a counter-terrorist tactic but rather an institutionalised method of dealing with all forms of political opposition upon which labels such as 'terrorist', 'subversive', 'Tamil militant', 'criminal' are then imposed. Within this context of continuing terror conducted by the shadow state, official transitional justice mechanisms including prosecutions, truth commissions and reparations were strictly controlled and managed to serve political ends and confirm political divisions rather than provide a common path towards restorative justice, national unity and reconciliation.

The characteristics of political violence in Sri Lanka reflect the specific characteristics of election violence, which became an entrenched feature of Sri Lankan political life. People with a grievance generally have not directed their aggression at the politicians who have historically used state resources to reward their own with jobs and other resources but rather at villagers and locals who were provided those jobs and resources.¹ Similarly state and non-state groups, including the JVP and LTTE, directed their violence largely at civilians rather than enemy combatants. And even though families of the disappeared generally recognised that the state most likely carried out the disappearance of a loved one, they directed blame towards local tensions within their own communities. The illogical nature of the targeting of violence reflects how power was expressed and ordered through political hierarchies and patronage, affirming the socio-political division between the political elite and the rest.

The overall impression on the part of many families interviewed for this study is that the system exists to serve the narrow interests of the political elite who are untouchable. At the same time there is a tacit agreement between those wielding power across the political landscape that they have common vested interests to uphold. This sentiment was echoed by one interviewee, Mrs S, whose son disappeared in Jaffna in 1996. She said it was a big injustice that LTTE activists who denounced the movement were released by the army while "harm has taken place to our sons [and we get no justice or recognition]".² Counter-insurgency served to centralise political power in the state, consolidating competition for access to resources, political office, and patronage. Consequently the state became intensely paternalistic and interventionist. Sri Lankan politics became transfixed with the resolution of who gets what.³ And paradoxically, therefore, the very institution upon which the majority of the population depended increasingly became the very source of its grievances. While Sri Lankan society became highly politicised, most of the population was excluded from political power structures on which they depended. A paradigm of dependence and exclusion within a framework of violence served as a means of coercing and subjugating the population. Under this schema, rural youth represented the greatest threat not only to the vested interests of the political elite but also to the preservation of the social conditions that sustained

¹ Höglund, K & Piyaathne, A (2009) 'Paying the Price for Patronage: Electoral Violence in Sri Lanka' in *Commonwealth and Comparative Politics*, Vol 47 (3), July, pp. 297-298.

² Mrs. S, Jaffna District: Interview 2.

³ Uyangoda, J (1992) 'Political Dimensions of Youth 'Unrest' in Sri Lanka' in ST Hettige (ed) *Unrest or Revolt, Some aspects of youth unrest in Sri Lanka*. Colombo: Goethe-Institut-Colombo & American Studies Association, p. 43.

the urban middle class to which the rural majority aspired to become.⁴ Moreover, as the political elite harnessed state resources for its own vested interests while upholding a system of access based on patronage, everyone was “vulnerable because he or she had something to lose” and became complicit in the violence.⁵

Beyond the Human Rights Dimension

While disappearance is framed under the International Convention for the Protection of All Persons from Enforced Disappearance (the convention) as a serious abuse of human rights carried out by the state, its influence and power extend well beyond that of a human rights abuse. However, to date, research on disappearance particularly in the Sri Lankan context has been approached almost exclusively from a human rights and legal perspective as a crime against the person. The convention, to which Sri Lanka is not a signatory, defines a disappearance as the arrest, detention, abduction or any other form of deprivation of liberty by agents of the state or persons/groups acting with the authorisation, support or acquiescence of the state. By definition, such detention is followed by a “refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which places such a person outside the protection of the law” (Article 2). The United Nations Working Group on Enforced or Involuntary Disappearance (UNWGEID) noted in 1983 that “a reading of the Universal Declaration of Human Rights and the International Covenants on Human Rights show that to a greater or lesser degree practically all basic human rights of ... a person [who suffers enforced or involuntary disappearance] are infringed”.⁶

Recognition that disappearance entails a plethora of abuses against the person implies that the act might violate a range of socio-cultural and political norms. Also, the concept of state denial upon which disappearance is based sets this violation apart from other human rights abuses as relatives will remain silent in the hope that such action will keep the disappeared person alive. However, ambiguity regarding the socio-legal status of the disappeared person makes it impossible for families to secure pensions, purchase land, take out a loan, or even enrol children in school let alone seek justice, demand accountability and secure compensation. Such matters are made even more complicated when state officials question the very existence of the individual victim. Furthermore, the concept of disappearance as an “ongoing crime” so long as the fate or whereabouts of the disappeared person remains unknown indicates that its reach goes beyond the individual affecting not only the fundamental relationship between citizenry and state but also the very foundations on which societies are based and ordered—foundations such as safety, stability and trust. Perhaps more than any other violation the act of disappearance is not only directed at the individual but also their community with the purpose of totally

⁴ Nesiah, V and Keenan, A (2004) ‘Human Rights and Sacred Cows: Framing Violence, Disappearing Struggles’ in N Gordon (ed) *From the Margins of Globalization: Critical Perspectives on Human Rights*. New York: Lexington Books, p. 11.

⁵ Cohen, S (2001) *States of Denial. Knowing about Atrocities and Suffering*. Cambridge: Polity Press, p. 155.

⁶ United Nations Working Group on Enforced or Involuntary Disappearance (1984), *Report of the Working Group on Enforced or Involuntary Disappearances*, E/CN.4/1983/14, 21 January, p. 47.

rupturing and undermining social and cultural norms and replacing any sense of normality in everyday life with fear, insecurity and mistrust.

While the concept of disappearance as an ongoing and therefore unresolved crime is inextricably linked to the ongoing and unresolved trauma experienced by the relatives of those disappeared, it is also directly associated with the ongoing impunity and untouchable status of those in power who resist efforts to establish the truth and justice for victims. Disappearances enable a state to turn the world on its head, the normal into the abnormal and the extraordinary into the routine by providing a means to act against its own citizenry, which conceals the identity and motive of the perpetrators and victimises the victims. Non-violent institutions such as the courts otherwise responsible for safeguarding rights and protecting victims are complicit in the process, upholding the impunity of the perpetrator, and serving the interests of the ruling elite against the population. Within this context, concepts of human rights and their realisation in the traditional sense exist in the abstract.⁷

The impact of disappearance, as a socio-political phenomenon, assaults any sense of community, shared identity or trust and dismantles communities. Social cleavages based on class, caste, power and patronage are exploited by the act of disappearance, by simultaneously deepening such divisions and creating new grievances. The presence of dumped corpses in public places serves as both a reminder of the power and impunity of the regime as well as the costs of political activism. The absence of the disappeared body does likewise, but also perpetuates an endless psychosis of terror which can suspend individuals and their communities in a state of acquiescent silence for fear of inadvertently killing off their missing loved one or being abducted themselves.

At the same time, disappearance assaults social and cultural norms in both application and consequence as funeral and mourning are permanently suspended, concepts of natural justice are totally quashed, the socio-legal status of surviving relatives remains ambiguous while social relations are distorted by mistrust and open to manipulation and exploitation. Normalcy of daily life is completely disrupted with culturally proscribed boundaries between public and private, victim and perpetrator, life and death eroded. Relatives of the disappeared as the nexus between the state and the disappeared are marked as both politically suspect and socially polluting. A consensus of fear is produced as entire communities become complicit in a ritual of conspiracy against the victims to avoid their own disappearance. Inadvertently, their silence serves as a form of sanction in the denial of state terror and protection of those responsible for it. In the Sri Lankan experience, the families of the disappeared have become the polluted excuse with which the state is able to constantly remind the population of the price of political opposition.

To identify the reasons why disappearance became a central feature of state terror and to consider its implications for those immediately affected and for their communities, this study provides a comprehensive account of political violence in Sri Lanka and its aftermath. As a political history of the phenomenon of disappearance, it is the first study of its kind to establish the connection between the

⁷ Coomaraswamy, R. (1993b), 'The Civil Liberties and Human Rights Perspective' in KM de Silva (ed) *Sri Lanka: Problems of Governance*. Colombo: International Centre for Ethnic Studies, p. 155.

causes for disappearances, the means by which they were carried out and the social impact in the Sri Lankan context. It considers how disappearances on such a significant scale could take place under what appeared to be a functional democracy and considers the characteristics of the state which facilitated and concealed such abuses over decades. It also explores the consequences for families and communities, surveying and drawing on political, socio-cultural, legal and economic factors that contributed to and engendered disappearances.

The central tenet of the thesis is that, the underlying intention behind disappearance is political competition which has served as an integral part of a political project directed at preserving the interests and power base of the country's political elite. This study reveals that a democratic system based on the rule of law was transformed through the imposition of legal and political measures that served the interests of the powerful elite intent on demobilising alternative politics and destroying the 'other' regardless of the costs. As democratic practices were curtailed and due process was politicised and dismantled, an alternative political apparatus or shadow state flourished. As an expression of the benefits of winning, disappearances served as a constant reminder of the untouchability of those in power while amplifying for political rivals the costs of political activism. As an integral part of a national project to demobilise collective politics by destroying all possible alternatives, disappearances were carried out to eliminate rivals and politicise prevailing divisions within communities to exclude, repress and target particular categories of society.

Transitional Justice Forgone

This study considers the experiences of families of the disappeared in relation to the state and their communities to establish an understanding of the impact of the political project at the societal level. It also considers the various transitional justice mechanisms in relation to disappearance including prosecutions, presidential commissions of inquiry into disappearances and reparations including compensation, as well as efforts to establish the truth and prevent further abuses as expressed by mothers' movements and disappearance organisations. In placing disappearance within the framework of a highly politicised and divided Sri Lankan society, this study determines that transitional justice mechanisms were systemically politicised to the point where they confirmed social divisions, widened mistrust, further polarised communities and victimised the victims. Such mechanisms merely served a political imperative to uphold the legitimacy of the ruling party, ensuring that neither unification nor political inclusion was achieved.

In the field of transitional justice, disappearance as a serious and ongoing violation against the individual and their families became a catalyst for local protest, international mobilisation and the creation of the convention. The introduction of human rights into international politics though these mechanisms made accountability for such crimes a condition of international respectability. However, in the Sri Lankan experience, human rights were manipulated as the commissions of inquiry into disappearance established by the ruling elite served a political rather than reconciliatory purpose. The commissions enabled the ruling elite to maintain a façade of accountability while tightly controlling the commissions' work,

politicising their findings to delegitimise opponents and ignoring their recommendations for legislative and political reform.

Commissions of inquiry, which have become the state's preferred means of transitional justice discourse, have served as a forum to silence victims and ridicule opponents. Situated between state and non-state violence on the one hand, and the state and the disappeared on the other, the families of the disappeared have been positioned as guilty by very fact of their victimhood. Further, any appeals for national reconciliation were politically motivated and designed to polarise Sri Lankan society by emphasising that aspirations such as the decentralisation of political power or separatism had to be totally abandoned as the prerequisite for reconciliation.

The theoretical approach of this thesis is inductive. It investigates the disappearance event and its aftermath through the experience of individual survivors in order to theorise the logic, aims and consequences of the practice. The event of disappearance and both institutional and societal responses including the failure of accountability as well as intimidation, silencing and ostracism provide the empirical basis for developing a grounded theory on disappearance in Sri Lanka. By detailing the various legislative provisions that facilitated disappearance and its concealment including the emergence of a shadow state, the study builds a body of evidence to demonstrate that disappearances were carried out with the intention of producing impunity.

Scope and Methodology of this Study

Studies on political violence in Sri Lanka usually mention disappearance but without providing insight into how or why disappearance became so widespread.⁸ Most studies rarely go beyond outlining the way the emergency powers provided impunity for the perpetrators and overlook the social impact of the phenomenon. The focus has largely rested on the legislative mechanics rather than the political intent behind the abuse. However this thesis, by recognising and contextualising disappearance as a counter-insurgency strategy deployed in response to the violence of the Marxist JVP and separatist LTTE, analyses the wider political landscape of which disappearance was an integral part. It contributes to a more comprehensive understanding of its impact on individuals, communities and their relationship with the state.

⁸ Ponnambalam, S. (1983), *Sri Lanka: National Conflict and the Tamil Liberation Struggle*. London: Zed Books Ltd; Chandraprema, C. A. (1991), *Sri Lanka: The Years of Terror. The JVP Insurrection 1987–1989*. Colombo: Lake House Bookshop; Wijesinha, R. (1991), *Sri Lanka in Crisis 1977-88. JR Jayawardene and the erosion of democracy*. Colombo: Council for Liberal Democracy; de Silva, K.M. (1998), *Reaping the Whirlwind, Ethnic Conflict, Ethnic Politics in Sri Lanka*. Colombo: Penguin Books; Gunaratna, R. (2001), *Sri Lanka—A Lost Revolution? The Inside Story of the JVP*. 3rd Edition. Kandy: Institute of Fundamental Studies; Dias, P. (2003), *Disappearances in Sri Lanka and the available legal remedies*. Colombo: Women and Media Collective; Human Right Watch (2008), *Reoccurring Nightmare. State Responsibility for "Disappearances" and Abductions in Sri Lanka*, Vol 20 (2)(C), March, <http://www.hrw.org/reports/2008/03/05/recurring-nightmare> (accessed 19 June 2012).

However this study does not attempt a comparative analysis of disappearance in the Sri Lankan context with its practice in Latin America or elsewhere. It focuses specifically on the Sri Lankan experience to address the lacuna of the lack of comprehensive study of disappearance in that country which needed to be filled. By locating the study of disappearance in the experiences of the families of the disappeared who served as the nexus between the state, affected communities and the disappeared individual, this study contributes to an understanding of the sociology of disappearance. It attempts to provide the fullest account of how and why the practice of disappearance became widespread in an otherwise apparently functional democracy together with its legacy on individuals, communities and democratic institutions.

The research methods applied in this study include 87 open and semi-structured interviews in eight districts across Sri Lanka with people whose relatives had disappeared over three decades. As the overwhelming majority of disappearances occurred in two specific contexts, the JVP insurgency centred in the southern, western and central provinces from 1987–1990 (commonly referred to as the south) and the conflict with the LTTE focused in the north and east from 1983–2002, interviews were conducted in four districts in the south, west and central provinces and four districts in the north and east provinces. The appendix provides an overview of the interviews. While women and men of all ages have been subject to disappearance, overwhelmingly the disappeared comprise young rural men. This fact is reflected in the interviews conducted for this study, which focuses on the disappearance of this demographic group.

Disappearances affected all communities across Sri Lanka including that of the Muslim community primarily located in the east. However, this study is focused on those that took place in Sinhalese and Tamil communities. The last national census in 1981 revealed that the Sinhalese comprised 74 per cent of the then population of 14.8 million (which is now estimated at 21 million), Sri Lankan Tamils 13 per cent and Muslims 7 per cent.⁹ Sinhalese were concentrated largely in the southwest and central parts of the island while Tamils primarily occupied the north and east of the country and Muslims the east. While impacting all ethnic groups, disappearances were almost exclusively carried out in rural communities where, according to a 2001 census, 80 per cent of the Sri Lankan population resided.

There is no official estimate of the number of people who have disappeared in Sri Lanka since 1971. The reports of the Presidential Commissions of Inquiry into the Involuntary Removal or Disappearance of Persons established by the People's Alliance government in 1994 serve as the official record of disappearances carried out from 1 June 1988. The four commissions established the disappearance of 23,087 persons. However, estimates provided by disappearance organisations including the Organisation of Parents and Family Members of the Disappeared (OPFMD) suggest that over 60,000 people disappeared between 1987 and 1991 alone.¹⁰

⁹ International Crisis Group (2011) *Reconciliation in Sri Lanka: Harder than Ever*, Crisis Group Asia Report No. 208, 18 July, <http://www.crisisgroup.org/en/regions/asia/south-asia/sri-lanka/209-reconciliation-in-sri-lanka-harder-than-ever.aspx> (accessed 19 June 2012), p. 1.

¹⁰ Kumarage, KDC (2005), 'A Series of Unfortunate Events' in *Healing Wounds, Mending Scars*, Diliman Quezon City: Asian Federation Against Involuntary Disappearances.

This study serves as a series of counter-narratives to that of the official version offered by the respective political parties and the elite of what happened during a period of political violence. While it deals with a specific period of 1971 to 2002, it challenges the simple ethnic conflict construction of violence, which remains the official position on the conflict with the LTTE, by recognising it in the contexts of the political elite and their manipulation of political constituencies, particularly middle class fear and anxiety. Given the fact that it was men who disappeared and women who were left to deal with the ramifications, these counter-narratives reflect a collective memory of a gendered crime. However, with a few key exceptions including within the country's leadership, Sri Lankan women have not been recognised in the country's history outside the symbolic as mothers in a master narrative of the nation.¹¹

Rather than focus on some of the more well-known and therefore well documented cases of disappearance such as that of Richard de Zoza or the Embilipitiya disappearances, this study documents the experiences of people whose stories had yet to be documented or heard. Such stories, which remain ignored, undermined or overlooked in the anthology of political violence in Sri Lanka, are central to understanding both the impact of the violence and its aftermath. Interviews were conducted in 2004 and yet, the modus operandi for disappearances which continue to be reported has remained largely the same while the victims continue to be criminalised and demonised and their surviving relations socially ostracised. As an institutionalised form of repression which continues to be used against political opposition, disappearances are still carried out with impunity under the cover of anti-terrorist legislation and on the pretext of re-establishing law and order...

Institutionalisation of Political Violence

The first decade of the 17 years of UNP rule was characterised by the institutionalisation of political violence which fuelled social radicalisation and culminated in an explosion of non-state violence. During this period, the UNP established an alternative political apparatus under which terror was unleashed to destroy legal and democratic political opposition. While maintaining an appearance of a democratic and functional state, the political elite's alternative apparatus or 'shadow state' existed outside the normal legal framework to extend a system of patronage and power. A radical program of economic liberalism that coincided with the centralisation of political power enabled the UNP to abolish the welfare system and establish new lines of patronage which largely excluded the rural poor. Dismantling of the democratic process and political violence enabled the UNP to discipline, coerce and exclude anyone perceived as a threat to its economic liberalisation agenda. However, by ultimately widening the gap between the affluent political elite and the rest, the UNP's policy agenda caused widespread social instability and perpetuated the radicalisation of educated Sinhalese and Tamil youths denied opportunities of social mobility and to express their grievances through the democratic process.

¹¹ de Alwis, M (1995), 'Gender, Politics and the 'Respectable Lady' in P Jeganathan & Q Ismail (eds) *Unmaking the Nation: The Politics of Identity and History in Modern Sri Lanka*. Colombo: Social Scientists' Association; de Mel, N (2001) *Women and The Nation's Narrative. Gender and Nationalism in Twentieth Century Sri Lanka*. Colombo: Social Scientists' Association.

This chapter details elements, laws and policies, which, when considered in isolation, violated, deviated from or undermined a democratic, legal or political norm and when used in combination, set the conditions for an apparatus of terror or 'shadow state' which operated behind the façade of a democracy.¹² Many of these laws were put in place before the LTTE and JVP amounted to a threat to national security. Under this new political framework, of which key aspects have remained in place under successive governments, all traditional forms of legal and political recourse which would normally apply were rendered totally ineffectual. Ironically, however, in its efforts to institute total power, the UNP's program inadvertently created the political space and social justification for militant resistance.

Supremacy of the Executive President over the Legislature and Judiciary

In February 1978 a new constitution was promulgated, establishing a presidential system of governance under which the centre of power shifted to an Executive President whose powers were almost untouchable and virtually dictatorial.¹³ Immune from legal proceedings both in his official and private capacity while holding office, President JR Jayewardene became both head of state and cabinet with powers to appoint and dismiss ministers and deputy ministers, the Attorney-General and all public officials under the constitution.¹⁴

Given the considerable parliamentary majority enjoyed by the UNP, such powers provided the distinct possibility that Parliament would serve as the President's rubber stamp.¹⁵ Indeed, the objective of the 1978 constitution was to provide the President with what President Jayewardene termed as power "not subject to the whims and fancies of an elected legislature".¹⁶ By-elections were abolished under the new constitution with any member of the same party being able to fill a post rendered vacant.¹⁷ In this manner, the government circumvented the democratic process and undermined the principle that democratically elected representatives should act according to their conscience and on behalf of their constituents given

¹² William Reno's definition of the 'shadow state' in the context of post-colonial Africa is informative. This form of personal rule is characterised by control over the state to "write laws and manipulate regulations to reward loyal political allies" while maintaining a façade of a functional state to enable, among other things, receipt of foreign aid and military assistance (2003:3-4).

¹³ Sieghart, P (1984), 'Sri Lanka: A Mounting Tragedy of Errors', Report of a Mission to Sri Lanka in January 1984 on behalf of the International Commission of Jurists and its British Section, JUSTICE, March, p. 7; Warnapala, WA (1994), *Ethnic Strife and Politics in Sri Lanka. An Investigation into Demands and Responses*. New Delhi: Navrang, p. 162; Coomaraswamy, R (1993), 'The Constitution and Constitutional Reform' in KM de Silva (ed) *Sri Lanka: Problems of Governance*. Colombo: International Centre for Ethnic Studies, p. 136; de Silva, KM (1981), *A History of Sri Lanka*. Chennai: Oxford University Press, p. 559.

¹⁴ Hyndman, P (1985), *Democracy in Peril Sri Lanka: A Country in Crisis*, Report to the LAWAASIA Human Rights Standing Committee, June 7, p. 81.

¹⁵ Warnapala, WA (1994) *Ethnic Strife and Politics in Sri Lanka. An Investigation into Demands and Responses*. New Delhi: Navrang, p. 162; Wijesinha, R (1991) *Sri Lanka in Crisis 1977-88. JR Jayawardene and the erosion of democracy*. Colombo: Council for Liberal Democracy, pp. 26 - 27.

¹⁶ Dissanayake, N (2002) 'Navin Dissanayake looks at forthcoming constitutional amendments' in *The Island*, 29 September, <http://www.island.lk/2002/09/29/featur07.html> (accessed 11 November 2003).

¹⁷ Wijesinha, R (1991) *Sri Lanka in Crisis 1977-88. JR Jayawardene and the erosion of democracy*. Colombo: Council for Liberal Democracy, p. 33.

that any seat left vacant when an MP resigned or was expelled would be filled by a (President-endorsed) nominee.¹⁸

By making the Executive Presidency supreme, the 1978 constitution undermined the independence of the judiciary and curtailed its powers. It granted the President the power to appoint and reappoint the Chief Justice and judges to the Supreme Court, Court of Appeal and High Courts.¹⁹ Under Article 163, all judges ceased to hold office when the new constitution was promulgated and almost immediately, the UNP moved to stack the judiciary by removing 13 judges and rapidly promoting their replacements ahead of more experienced judges.²⁰ Furthermore, by requiring judges to take an oath to uphold and defend the constitution, the UNP placed the question of the constitution's legality outside judicial review.²¹ Having politicised the judiciary, the UNP also limited the power of the courts to provide checks on executive action as presidential decisions including amendments to the ERs were imposed without judicial review.

At every stage, the judiciary was "intimidated by executive authority".²² Any challenge by the judiciary to state-sponsored human rights abuses or the legal framework in which they took place would have amounted to challenging government policy and the basis on which the legitimacy of the state rested.²³ Moreover, during its tenure, the UNP government directly defied the judiciary by ignoring its rulings, promoted officials who had been convicted of violating fundamental rights, and subjected judges and high ranking officials to "indignities which affect the honour and prestige of office".²⁴ By November 1982 the Chief Justice stated that executive action had eroded the position of the Chief Justice and judges of the Supreme Court to the point whereby they were unable to act as the bulwark of justice for the country.²⁵

The promulgation of the 1978 constitution coincided with the implementation of draconian anti-terrorist legislation and recourse to almost continuous imposition of ERs which further consolidated political power in the President. ERs were in force nationwide from 1971 to 1977, reimposed in late 1978 and applied almost continuously to 2001.²⁶ When laws were enacted as an ER, the normal legislative process

¹⁸ Civil Rights Movement of Sri Lanka (1979) 'The People's Rights' in *Documents of the Civil Rights Movement of Sri Lanka 1971 to 1978*. Colombo: Civil Rights Movement of Sri Lanka, p. 129.

¹⁹ Wijesinha, R (1991) *Sri Lanka in Crisis 1977-88. JR Jayawardene and the erosion of democracy*. Colombo: Council for Liberal Democracy, p. 32; Hyndman, P (1985) *Democracy in Peril Sri Lanka: A Country in Crisis*, Report to the LAWAASIA Human Rights Standing Committee, June 7, p. 81.

²⁰ Civil Rights Movement of Sri Lanka (1979) 'The People's Rights' in *Documents of the Civil Rights Movement of Sri Lanka 1971 to 1978*. Colombo: Civil Rights Movement of Sri Lanka, p. 132; Wijesinha, R (1991) *Sri Lanka in Crisis 1977-88. JR Jayawardene and the erosion of democracy*. Colombo: Council for Liberal Democracy, p. 32.

²¹ Ponnambalam, S (1983) *Sri Lanka: National Conflict and the Tamil Liberation Struggle*. London: Zed Books Ltd, p. 198.

²² Pinto-Jayawardena, K (2010) *Still Seeking Justice: Rule of Law, the Criminal Justice System and Commissions of Inquiry since 1977*. Geneva/Bangkok: International Commission of Jurists, p. 32.

²³ Fernando, B (2010) 'Sri Lanka: The Politics of *habeas corpus* and the Marginal Role of the Sri Lankan Courts under the 1978 Constitution' in *Law and Society Trust Review*, 21 (275-276), September-October, Colombo.

²⁴ Presidential Commission on Youth (1990) *Report of the Presidential Commission on Youth*. Sessional Paper No 1, March. Colombo: Department of Government Printing, p. 2.

²⁵ Ponnambalam, S (1983) *Sri Lanka: National Conflict and the Tamil Liberation Struggle*. London: Zed Books Ltd, p. 167.

²⁶ Weerakoon, B (1994) 'Sustaining Democracy in Sri Lanka Opportunities and Challenges' in B Weerakoon & S Wanasinghe (eds) *Reflections on Governance*, Colombo: Marga Publications Development Review Series, p.

was waived and the President became, in effect, the legislator in place of Parliament.²⁷ The role of Parliament to debate and pass laws and the role of the judiciary as a safeguard against executive action were eroded.²⁸ The President had the power, without needing parliamentary approval, to introduce regulations authorising any action deemed necessary or expedient in the interests of “public security, the preservation of public order and the suppression of mutiny, riot or civil commotions, or for the maintenance of supplies and services essential to the life of the community, including the detention of persons” (Ordinance, sec. 5). The UNP and later administrations used this provision to impose a diverse range of regulations, many of which had nothing to do with national security.

Suspension of Rights and the Powers and Immunities of the Security Forces

Although it recognised human rights, the 1978 constitution also provided for wide restrictions to those rights in the interests of national security, public order, the protection of public health and morality, and other matters²⁹ with the effect that the limitations on rights provisions were given the same prominence and level of constitutional protection as the rights themselves.³⁰ Even non-derogable rights (that is, rights that cannot be suspended even in a state of emergency, as set out in the International Covenant on Civil and Political Rights) such as freedom from torture could be limited in the name of the “general welfare of a democratic society”.³¹ Indeed, because they could be suspended by the ERs, fundamental rights guaranteed under the constitution were severely restricted for prolonged periods. The combined effect of such provisions and repeated government declarations of the need to wipe out terrorism was a general acceptance that excesses on the part of the security forces were unavoidable, and even acceptable, to preserve national security, regardless of the context in which they were carried out. At the same time, with power being centralised in the hands of an Executive President immune from prosecutorial action and the scope for state violence widened, the judiciary’s ability to provide the checks and balances on the use of force were deliberately weakened to the point where the judiciary could provide “only a marginal

39; Coomaraswamy, R (1993) ‘The Constitution and Constitutional Reform’ in KM de Silva (ed) *Sri Lanka: Problems of Governance*. Colombo: International Centre for Ethnic Studies, p. 133; Tamilnation (2007) ‘Sri Lanka’s Laws’, *Tamilnation*, 15 November, <http://www.tamilnation.co/srilankalaws/index.htm> (accessed 12 April 2012); Asian Tribune (2011) ‘Emergency Regulations Lifted in Sri Lanka’ in *Asia Tribune*, 25 August, <http://www.asiantribune.com/news/2011/08/25/emergency-regulations-lifted-sri-lanka> (accessed 2 July 2012); Coomaraswamy, R and los Reyes, C (2004) ‘Rule by emergency: Sri Lanka’s postcolonial constitutional experience’ in *International Journal of Constitutional Law*, 2 (2) New York: Oxford University Press and New York University School of Law, p. 272.

²⁷ Weliamuna, J.C. (2002) ‘Emergency Regulations’ in R Wijesinha & MP Kulatunga (eds) *Conflict—Causes and Consequences*. Colombo: The Council for Liberal Democracy, p. 13.

²⁸ Coomaraswamy, R (1993) ‘The Constitution and Constitutional Reform’ in KM de Silva (ed) *Sri Lanka: Problems of Governance*. Colombo: International Centre for Ethnic Studies, p. 133.

²⁹ Civil Rights Movement of Sri Lanka (1979) ‘The People’s Rights’ in *Documents of the Civil Rights Movement of Sri Lanka 1971 to 1978*. Colombo: Civil Rights Movement of Sri Lanka, p. 126.

³⁰ Coomaraswamy, R (1993b) ‘The Civil Liberties and Human Rights Perspective’ in KM de Silva (ed) *Sri Lanka: Problems of Governance*. Colombo: International Centre for Ethnic Studies, p. 149.

³¹ *Ibid.*

role in the protection of civil liberties". The Executive President was at liberty to pursue "whatever objective and policies he thinks fit".³²

The pervasiveness of ERs further weakened the judiciary's ability to provide safeguards in relation to detention practices and conditions given that indefinite detention could take place without reference to the courts and additional regulations could be promulgated under the ERs in secret.³³ The ERs often operated in unison with the *Prevention of Terrorism (Temporary Provisions) (Amendment) Act No. 10 of 1982* (PTA) introduced in 1979 and made permanent law in 1982, despite the term "temporary" within its title. The PTA violated international standards pertaining to arrest and detention procedures by effectively placing the detainee and the arresting authority outside the reach of the courts. Under the PTA, any person involved in any unlawful activity, or even suspected of connection with it, could be detained for a successive period of three months and up to a maximum of 18 months at the discretion of the minister and at a location and in conditions determined by the minister without the need to bring the detainee before a magistrate.

When the PTA first came into force in July 1979, a state of emergency was declared in Tamil areas under the Public Security Ordinance. Thereafter, the government sent an army battalion under the command of the President's nephew, Brigadier Weeratunge, to Jaffna to "wipe out the terrorists" by the end of the year.³⁴ Within the course of a month, 12 Tamil youth disappeared after arrest. The bodies of six were later recovered, of which four had been mutilated and dumped for public display.³⁵ Thereafter a pattern of arbitrary arrest and detention began to evolve in which torture was used systematically.³⁶ By 1984, despite the fact that a Parliamentary Select Committee had recommended in July 1982 further investigation into the disappearance of six of the youths documented by the International Commission of Jurists, no action had been taken with regard to the disappearances and killings of the Tamil youth.³⁷ Instead, one of the police officers named in the inquest into the death of one of the six was promoted.³⁸ Indeed, promotion of state officials responsible for or implicated in the violation of human rights became a hallmark of the

³² Fernando, B (2010) 'Sri Lanka: The Politics of *habeas corpus* and the Marginal Role of the Sri Lankan Courts under the 1978 Constitution' in *Law and Society Trust Review*, 21 (275-276), September-October, Colombo, p. 25.

³³ Civil Rights Movement of Sri Lanka (1979) 'The People's Rights' in *Documents of the Civil Rights Movement of Sri Lanka 1971 to 1978*. Colombo: Civil Rights Movement of Sri Lanka, p. 111.

³⁴ Ponnambalam, S (1983) *Sri Lanka: National Conflict and the Tamil Liberation Struggle*. London: Zed Books Ltd, p. 10; Hoole, R, Somasundaram, D, Sritharan, K, and Thiranagama, R (1990) *The Broken Palmyra. The Tamil Crisis in Sri Lanka—An Inside Account*, University of Jaffna. Claremont: Sri Lanka Studies Institute, p. 26.

³⁵ Ponnambalam, S (1983) *Sri Lanka: National Conflict and the Tamil Liberation Struggle*. London: Zed Books Ltd, pp. 10 & 203; Hoole, R, Somasundaram, D, Sritharan, K, and Thiranagama, R (1990) *The Broken Palmyra. The Tamil Crisis in Sri Lanka—An Inside Account*, University of Jaffna. Claremont: Sri Lanka Studies Institute, p. 26; Sieghart, P (1984) 'Sri Lanka: A Mounting Tragedy of Errors', Report of a Mission to Sri Lanka in January 1984 on behalf of the International Commission of Jurists and its British Section, JUSTICE, March, p. 51.

³⁶ Ponnambalam, S (1983) *Sri Lanka: National Conflict and the Tamil Liberation Struggle*. London: Zed Books Ltd, p. 203.

³⁷ Sieghart, P (1984) 'Sri Lanka: A Mounting Tragedy of Errors', Report of a Mission to Sri Lanka in January 1984 on behalf of the International Commission of Jurists and its British Section, JUSTICE, March, p. 81.

³⁸ Nissan, E (1996) *Sri Lanka: A Bitter Harvest*. London: Minority Rights Group International, p. 16.

UNP administration, along with payment of compensation, court costs and fines imposed on such individuals by the courts.³⁹

The 1979 incidents were the first reported cases of disappearance in the context of Tamil militancy in the north and east. While at this stage such incidents were isolated, within five years, disappearance would be an integral component of a counter-insurgent strategy against Tamil militants in the north and east provinces. The PTA effectively facilitated disappearance, providing the security forces wide powers to arrest without a warrant and without any obligation to inform relatives of the arrest or place of detention. Moreover, because detainees could be held at any location determined by the relevant minister, without charge or judicial review, or access to a lawyer or relatives, they were effectively placed outside the reach of normal legal processes.⁴⁰ The PTA further permitted police officers to remove people from prison for interrogation without judicial oversight, and confessions extracted by the police under such circumstances were admissible in evidence. Upon release, anyone previously held under the PTA could be subject to a range of restrictions by the relevant minister.⁴¹ Once the ERs were introduced in July 1979, police could dispose of the bodies of people who had died in custody without any official procedure or notification of any authority about their identity or location of their burial. Together, the ERs and PTA allowed authorities to arbitrarily arrest, deprive liberty, place individuals outside the protection of the rule of law and dispose of the bodies without revealing their fate or whereabouts. When considered in isolation, each action constituted directly or through its interpretation, a violation of human rights under normal law. When committed in combination by politicised personnel, such a series of actions could constitute an act of disappearance under the International Convention for the Protection of All Persons from Enforced Disappearance as detailed in chapter 1. Indeed, the pattern of disappearance that emerged in the mid-1980s was consistent with such actions and while the regulation permitting the disposal of dead bodies was revoked shortly after introduction in July 1979, during its short life, a number of disappearances and custodial deaths were reported.⁴²

The establishment of an alternative political apparatus or shadow state was strengthened by the existence of a politicised police force whereby officers took orders directly from politicians. The extension of the life of Parliament in 1972 and 1982 by referendum rather than election gave elected MPs an additional six-year term without having to lobby their constituents and further centralised political power in the hands of an elite few. While appointments and promotions were subject to political interference in the 1960s,⁴³ the respective referenda led to the institutionalisation of political influence which was an integral

³⁹ Pinto-Jayawardena, K (2007) 'Focus on Rights- Assessing Sri Lanka's Presidential Commission of Inquiry' in *Sunday Times*, 4 February, Vol 41(36), <http://sundaytimes.lk/070204/Columns/focus.html> (accessed 1 October 2009).

⁴⁰ Sieghart, P (1984) 'Sri Lanka: A Mounting Tragedy of Errors', Report of a Mission to Sri Lanka in January 1984 on behalf of the International Commission of Jurists and its British Section, JUSTICE, March, p. 8; Ponnambalam, S (1983) *Sri Lanka: National Conflict and the Tamil Liberation Struggle*. London: Zed Books Ltd, p. 9.

⁴¹ Nissan, E (1996) *Sri Lanka: A Bitter Harvest*. London: Minority Rights Group International, p. 16.

⁴² Civil Rights Movement of Sri Lanka (1979b) 'Human Rights Day Review', Reference 03/12/79 in *Civil Rights Movement of Sri Lanka (CRM) documents 1979 to 1990s*. Colombo: Civil Rights Movement of Sri Lanka.

⁴³ Police Commission (1970) *Report of the Police Commission*. July, Colombo.

part of police investigations, appointments and promotions.⁴⁴ Indeed, the politicisation of the police force enabled politicians to subvert the police service in the name of law and order under the guise of political and vested interests. A politicised police force could also be drawn on to serve individual politicians' interests including that of death squads. At the same time, the Executive President was provided constitutional power to appoint the heads of the armed forces and all other public officers. In February 1985, moreover, the President used his constitutional powers to assign himself the functions of a number of ministries including Defence, Higher Education, State Plantations and Power and Energy.⁴⁵ The country effectively came under the control of a single individual who was, during his term of office, totally immune from prosecution.

Compounding the granting of extraordinary powers to (politicised) security and police personnel, indemnity legislation was introduced which established a culture of impunity. The *Indemnity Act, No.20 of 1982* provided immunity from legal proceedings for violations that took place in the course of law enforcement activities by the security forces, MPs, civil servants and anyone operating alongside them. The legislation provided that no legal proceedings, whether criminal or civil, could be instituted for an act done or purported to have been done by a Minister, Deputy Minister, member of the security forces or any public servants "whether legal or otherwise" for the purpose of restoring law and order from 1 August to 31 August 1977.⁴⁶ Resort to indemnity legislation contributed to arbitrary violent behaviour on the part of the security forces and further undermined the power of the judiciary.⁴⁷ The violence of 1977, for which the indemnity was imposed, had taken place in the context of a parliamentary election and broke out immediately after the UNP had been declared the winner.

While over 5,600 complaints of election violence were reported against UNP supporters for attacks directed at SLFP supporters, the newly established UNP government initially suspended law and order, providing scope for accumulated resentment to be unleashed before finally imposing a state of emergency some days later.⁴⁸ In 1988, the *Indemnity Act, No. 60 of 1988* was introduced to extend the period of immunity from 31 August 1977 to 16 December 1988 to cover the July 1983 anti-Tamil pogrom and lead up to the 1988 presidential elections. Such legislation provided not only a guarantee of protection from prosecution for past abuses but also served as a signal to state officials that they operated above the law and had the political backing and licence to engage in extrajudicial measures to preserve the government's vested interests. The legislation was introduced at a time when regulations permitting the

⁴⁴ Police Committee (1995) *Police Service Report*. Sri Lanka Police Service, Suggestions for improving its efficiency and effectiveness. Report of the committee appointed on 24 February 1995, part V, p. 2.

⁴⁵ Hyndman, P (1985) *Democracy in Peril Sri Lanka: A Country in Crisis*, Report to the LAWAASIA Human Rights Standing Committee, June 7, p. 81.

⁴⁶ Pinto-Jayawardena, K (2010) *Still Seeking Justice: Rule of Law, the Criminal Justice System and Commissions of Inquiry since 1977*. Geneva/Bangkok: International Commission of Jurists, p. 25.

⁴⁷ Kloos, P (1999) 'Democracy, Civil War, and the Demise of the *Trias Politica* in Sri Lanka' in H Antlov & Tak Wing Ngo (eds) *The Cultural Construction of Politics in Asia*. Richmond: Curzon Press.

⁴⁸ de Silva, KM (1993b) '1970-1991: The Political System under Severe Stress' in KM de Silva (ed) *Sri Lanka: Problems of Governance*. Colombo: International Centre for Ethnic Studies, p. 56; Warnapala, WA (1994) *Ethnic Strife and Politics in Sri Lanka. An Investigation into Demands and Responses*. New Delhi: Navrang, p. 168; Gunasekara, P (1988) *Sri Lanka in Crisis: A Lost Generation. The untold story*. Colombo: S. Godage & Brothers, p. 7.

disposal of dead bodies without inquest remained in force. Moreover, given the extent to which government officials were involved in the orchestration and implementation of the July 1983 pogrom including prominent UNP MPs, the government recognised the necessity for such legislation to protect its own from prosecution.

The fact that no single conviction was made under the PTA from 1978 to 1981 demonstrates the extent to which the indemnity provision was relied upon and the arbitrary manner in which the PTA was applied.⁴⁹ The ERs and PTA allowed practices including arrest without a warrant, failure to provide identification and to inform families of those arrested of the location of detention, and use of plain clothes as well as vehicles without number plates during arrests to disguise the arresting authority from detainees and their families. Such measures became synonymous with disappearances under the UNP and the People's Alliance regime that followed it. Furthermore, despite the likelihood that state officials would use their considerable and unchecked powers to abuse and abduct individuals within their custody, impunity was provided to security force personnel under Article 26 of the PTA which stated: "No suit, prosecution or other proceedings, civil or criminal, shall lie against any officer or person for any act or thing done in good faith done or purported to be done in pursuance or supposed pursuance of any order made or direction given under the Act". Such legislation facilitated and effectively justified human rights abuses by the armed forces while enabling the ruling party to subvert the rule of law for its own political advantage.

Curtailment of Freedom of Expression

In response to growing support for autonomy within the Tamil community which discriminatory government policies inadvertently fuelled, the UNP took the decision early in its rule that the "Tamil problem" could be resolved by a low-risk military solution rather than high-risk and potentially longer-term political engagement and compromise. The introduction of the PTA provided the means for that policy to be realised. Described as the "most draconian law ever to enter the statute book of Sri Lanka", the PTA enabled the government to ban any party or group that advocated but didn't actually engage in violence.⁵⁰ Proscription could be imposed on any group and any protest against the ban (for example, by requesting a hearing) amounted to engaging in an activity connected with or related to the proscribed organisation, and was therefore an offence. The intention behind the PTA was to provide ruling party MPs with the means to detain suspected Tamil militants unconditionally.⁵¹ However, the legislation was later used more widely to undermine the democratic process by proscribing three leftist parties including the JVP and to detain any suspected opponents of UNP rule.

⁴⁹ Leary, VA (1981) 'Ethnic Conflict and Violence in Sri Lanka', Report of a Mission to Sri Lanka in July-August 1981 on behalf of the International Commission of Jurists, p. 50.

⁵⁰ Ponnambalam, S (1983) *Sri Lanka: National Conflict and the Tamil Liberation Struggle*. London: Zed Books Ltd, p. 9; Civil Rights Movement of Sri Lanka (1979) 'The People's Rights' in *Documents of the Civil Rights Movement of Sri Lanka 1971 to 1978*. Colombo: Civil Rights Movement of Sri Lanka, p. 118.

⁵¹ Ponnambalam, S (1983) *Sri Lanka: National Conflict and the Tamil Liberation Struggle*. London: Zed Books Ltd, p. 9.

Other legislation providing the executive with greater powers than the judiciary included the *Criminal Procedure (Special Provisions) Act, No. 15 of 1978*. It was introduced along with the PTA and imposed compulsory prison sentences and restricted bail rights. According to the CRM, the legislation was a clear attempt on the part of the state to interfere with the exercise of freedom of expression as any form of discontent or disaffection with the government was grounds for arrest.⁵² The legislative measures introduced in 1979 were a clear affront to civil and political rights and demonstrated the state's intent to protect itself against the people rather than provide protection to the population against excesses by the state. Indeed, such legal remedies were imposed to instil fear and silence dissent under the guise of law and order.⁵³ Whereas previously, democratic norms were abandoned in isolation and for a specific period on the grounds of national security and terrorism, under the PTA and related legislation, such a departure became itself the norm and any voiced discontent with government policies could be interpreted as anti-state and therefore a threat to national security.

Provisions denying the right to engage in peaceful assembly, contained in the 1978 constitution and complementary legislation were designed to quash demands for Tamil separatism and any other potential source of dissent including the trade union movement.⁵⁴ While the courts upheld the right to association as a fundamental right, the trade union of the ruling party dominated working class politics. Independent and opposition-sponsored trade unions were increasingly undermined by the prevalence of the UNP's union and supremacy of its patronage networks. In 1979, the *Essential Public Service Act* was introduced to provide the government with "sweeping powers" to outlaw trade union activity in the state sector which cemented the position of the UNP union.⁵⁵ Membership and patronage of the UNP's union, the *Jatika Sevaka Sangamaya* (JSS), became an important determinant for employment and promotion.⁵⁶

Efforts by the opposition party trade unions to challenge state authority (given their inability to voice opposition to the government in Parliament) led to a series of strikes which prompted the UNP to dismiss hundreds of public sector employees who had taken part. In response to one of the largest strikes held in July 1980 opposing rising inflation and failure on the part of the government to substantially increase public sector salaries since 1978, a state of emergency was declared and the army mobilised.⁵⁷ The UNP deployed the JSS, which was progressively used for political thuggery and came under the direct authority of the extreme Sinhala-Buddhist nationalist and MP, Cyril Mathew. Because the JSS kept services operating the strike collapsed. However, more than 40,000 employees were subsequently dismissed and

⁵² Civil Rights Movement of Sri Lanka (1979) 'The People's Rights' in *Documents of the Civil Rights Movement of Sri Lanka 1971 to 1978*. Colombo: Civil Rights Movement of Sri Lanka, p. 121.

⁵³ Civil Rights Movement of Sri Lanka (1979b) 'Human Rights Day Review', Reference 03/12/79 in *Civil Rights Movement of Sri Lanka (CRM) documents 1979 to 1990s*. Colombo: Civil Rights Movement of Sri Lanka.

⁵⁴ Coomaraswamy, R (1993b) 'The Civil Liberties and Human Rights Perspective' in KM de Silva (ed) *Sri Lanka: Problems of Governance*. Colombo: International Centre for Ethnic Studies, pp. 152-3.

⁵⁵ Dunham, D and Jayasuriya, S (2001) 'Liberalisation and political decay: Sri Lanka's journey from welfare state to a brutalised society', Institute of Social Studies Working Paper 352, October, <http://repub.eur.nl/res/pub/19097/wp352.pdf> (accessed 11 July 2012), p. 6.

⁵⁶ Bastian, S (1987) 'Plantation Labour in a changing context' in C Abeysekera & N Gunasinghe (eds) *Facets of Ethnicity in Sri Lanka*. Colombo: Social Scientists Association, p. 175.

⁵⁷ Wijesinha, R (1991) *Sri Lanka in Crisis 1977-88. JR Jayawardene and the erosion of democracy*. Colombo: Council for Liberal Democracy, p. 43.

the trade union movement never recovered.⁵⁸ While the JSS became synonymous with political violence in the lead up to and during the 1983 pogrom,⁵⁹ the involvement of Mathew ensured that complaints to the police were almost always totally ineffective.⁶⁰

Other independent civil bodies came under direct government control. UNP supporters infiltrated the Press Council so that by 1978 it was staffed by government nominees. In universities, a dramatic rise in complaints of infringement of academic freedom by way of interdiction, transfer of academics and administrative staff and the arbitrary suspension of students reflected the UNP's encroachment into the academic environment.⁶¹ From 1982, state-sponsored thugs disrupted and attacked meetings by opposition parties and religious groups with greater frequency, in an environment in which organised violence became a feature of life.⁶² Thus, violence by politically-sponsored thugs including the JSS was increasingly relied on to persistently disrupt or break up peaceful demonstrations, meetings and strikes.

Circumvention of the Democratic Process

The consolidation of centralised power made possible under the 1978 constitution not only perpetuated a growing chasm between the political order and politicised youth but also represented a total rejection of demands for the devolution of power which might otherwise have helped address common grievances.⁶³ The 1978 constitution destroyed any last remaining hope that the country's power structure could be opened up and systems of governance restructured in favour of decentralised and democratic power. Moreover, as the 1978 constitution was an instrument of the ruling party like that of its 1972 predecessor, a series of amendments to it began which "circumvented the democratic process and amounted to a process of delegitimisation".⁶⁴ Each amendment was designed to strengthen the political position of the UNP by undermining the relative power of opponents.

The first amendment to the 1978 constitution enacted on 16 October 1979 put in place legal provisions which enabled the ruling party to deprive the Leader of the Opposition and former Prime Minister of her

⁵⁸ Moore, M (1990) 'Economic Liberalization versus Political Pluralism in Sri Lanka?' *Modern Asian Studies*, Vol 24 (2), London, p. 364.

⁵⁹ Spencer, J (1990) *A Sinhalese Village in a Time of Trouble, Politics and Change in Rural Sri Lanka*. Oxford: Oxford University Press, p. 95.

⁶⁰ Hyndman, P (1985) *Democracy in Peril Sri Lanka: A Country in Crisis*, Report to the LAWAASIA Human Rights Standing Committee, June 7, p. 193.

⁶¹ Civil Rights Movement of Sri Lanka (1979) 'The People's Rights' in *Documents of the Civil Rights Movement of Sri Lanka 1971 to 1978*. Colombo: Civil Rights Movement of Sri Lanka, pp. 140-1.

⁶² Hyndman, P (1985) *Democracy in Peril Sri Lanka: A Country in Crisis*, Report to the LAWAASIA Human Rights Standing Committee, June 7, p. 99.

⁶³ Bastian, S (1999) *The Failure of State Formation, Identity Conflict and Civil Society Responses—The Case of Sri Lanka*, University of Bradford Department of Peace Studies, Working Paper 2, September, <http://www.brad.ac.uk/acad/confres/assets/CCR2.pdf> (accessed 24 September 2004), p. 15; Uyangoda, J (1992) 'Political Dimensions of Youth 'Unrest' in Sri Lanka' in ST Hettige (ed) *Unrest or Revolt, Some aspects of youth unrest in Sri Lanka*. Colombo: Goethe-Institut-Colombo & American Studies Association, p. 44.

⁶⁴ Coomaraswamy, R (1993) 'The Constitution and Constitutional Reform' in KM de Silva (ed) *Sri Lanka: Problems of Governance*. Colombo: International Centre for Ethnic Studies, pp.143-4.

civic liberties for seven years, effectively neutralising the opposition.⁶⁵ Given that the SLFP was already in a weak position having only retained eight seats at the 1977 election, the effect of the amendment crippled the party and strengthened the relative position of the UNP.⁶⁶ The second amendment gave members of the SLFP the right to join the government while denying reciprocal rights to government MPs to join the SLFP opposition.⁶⁷ The third amendment introduced in 1982 enabled the President to seek re-election for a second six-year term only four years into his first term.⁶⁸ Given the weakened position of the judiciary from sustained political interference, when the UNP flouted the electoral process and substituted the general election with a referendum, the Supreme Court upheld the government's decision.⁶⁹ Following the presidential elections, the ruling party enacted a fourth amendment and used its parliamentary majority to hold a referendum under a state of emergency to extend the life of Parliament for an extra six years thereby overriding the need for parliamentary elections otherwise due in August 1983.⁷⁰

President Jayewardene claimed that the referendum was necessary to ensure that the undesirable leftist parties including the "Naxalite" SLFP (a term used pejoratively to refer to militant Communist groups) did not enter Parliament.⁷¹ At the time of the parliamentary referendum, stringent censorship was already in place under the ERs which provided for the pre-censorship of material before publication and banning of publications.⁷² Many newspapers, radio broadcasting and the country's two television channels all operated under the control of the state regardless of the emergency laws.⁷³ Before the referendum, moreover, Jayewardene held that any UNP MP unable to ensure a win in their constituencies would lose their posts leading many of them to deploy all means available to ensure victory. UNP supporters were given free licence to intimidate those opposed to the referendum.⁷⁴ After the referendum Jayewardene demanded undated letters of resignation from all UNP MPs with a view to dating and dispatching them as

⁶⁵ *Ibid.*

⁶⁶ de Silva, KM (1993b) '1970-1991: The Political System under Severe Stress' in KM de Silva (ed) *Sri Lanka: Problems of Governance*. Colombo: International Centre for Ethnic Studies, p. 56.

⁶⁷ Wijesinha, R (1991) *Sri Lanka in Crisis 1977-88. JR Jayawardene and the erosion of democracy*. Colombo: Council for Liberal Democracy, p. 35.

⁶⁸ Sieghart, P (1984) 'Sri Lanka: A Mounting Tragedy of Errors', Report of a Mission to Sri Lanka in January 1984 on behalf of the International Commission of Jurists and its British Section, JUSTICE, March, p. 8.

⁶⁹ Pinto-Jayawardena, K (2007) 'Focus on Rights- Assessing Sri Lanka's Presidential Commission of Inquiry' in *Sunday Times*, 4 February, Vol 41(36), <http://sundaytimes.lk/070204/Columns/focus.html> (accessed 1 October 2009).

⁷⁰ Wijesinha, R (1991) *Sri Lanka in Crisis 1977-88. JR Jayawardene and the erosion of democracy*. Colombo: Council for Liberal Democracy, p. 26-27; Vijayalakshmi, E (ed) (2001) *Crisis Commentaries: Selected Political Writings of Mervyn de Silva*. Colombo: International Centre for Ethnic Studies, p. 149; Sieghart, P (1984) 'Sri Lanka: A Mounting Tragedy of Errors', Report of a Mission to Sri Lanka in January 1984 on behalf of the International Commission of Jurists and its British Section, JUSTICE, March, p. 8.

⁷¹ Wijesinha, R (1991) *Sri Lanka in Crisis 1977-88. JR Jayawardene and the erosion of democracy*. Colombo: Council for Liberal Democracy, pp. 61-2.

⁷² Civil Rights Movement of Sri Lanka (1983) 'Communal Violence July 1983'. Statement by the Civil Rights Movement, July. Colombo: Civil Rights Movement of Sri Lanka, p. 27.

⁷³ de Silva, KM (1993b) '1970-1991: The Political System under Severe Stress' in KM de Silva (ed) *Sri Lanka: Problems of Governance*. Colombo: International Centre for Ethnic Studies, p. 56.

⁷⁴ Wijesinha, R (1991) *Sri Lanka in Crisis 1977-88. JR Jayawardene and the erosion of democracy*. Colombo: Council for Liberal Democracy, pp. 65-6.

and when required,⁷⁵ providing further confirmation of the total lack of separation of powers between the executive and legislature.

The referendum, which was beset by widespread malpractice, election violence and the intimidation of political opponents, secured for the UNP its two-thirds majority in Parliament.⁷⁶ The JVP's leader, Rohana Wijeweera, challenged the results in court but was forced a year later to go underground as the JVP was proscribed and the case dismissed.

The extension of Parliament using a rigged referendum effectively brought the legitimacy of the entire election process into question.⁷⁷ Public confidence in the electoral process was totally shattered and the manner in which the referendum was won eroded the credibility of the party in power and its mandate to govern.⁷⁸ Because the referendum, as the only avenue available for the non-violent transfer of power, was severely undermined and as key institutions including the judiciary and legislature were seen to be subject to political influence, the argument that the only viable means of change was the violent overthrow of the state gained legitimacy or at least sympathy.⁷⁹

Indeed, a growing number of the country's youth now believed that political power had to be taken by force as political parties themselves had resorted to unwarranted methods to retain political power.⁸⁰ While the rules and norms of electoral politics had effectively been re-written to suit the party in power, there was an upsurge in organised violence "in the shadow of the state", posing an additional threat to democratic politics in the country.⁸¹ The 1982 parliamentary referendum, like that which extended the term of office of the previous UF administration in 1972, was a key event triggering a rise in extra-parliamentary unrest and violence in the south in the late 1980s. It also demonstrated to the Tamil community how a referendum could be used to deny concessions to ethnic minorities.⁸²

⁷⁵ Wijesinha, R (1991) *Sri Lanka in Crisis 1977-88. JR Jayawardene and the erosion of democracy*. Colombo: Council for Liberal Democracy, p. 34.

⁷⁶ Gunasekara, P (1988) *Sri Lanka in Crisis: A Lost Generation. The untold story*. Colombo: S. Godage & Brothers, pp. 7-8; Bastian, S (1999) *The Failure of State Formation, Identity Conflict and Civil Society Responses—The Case of Sri Lanka*, University of Bradford Department of Peace Studies, Working Paper 2, September, <http://www.brad.ac.uk/acad/confres/assets/CCR2.pdf> (accessed 24 September 2004), p. 15.

⁷⁷ Presidential Commission on Youth (1990) *Report of the Presidential Commission on Youth*. Sessional Paper No 1, March. Colombo: Department of Government Printing, p. 2.

⁷⁸ de Silva, KM (1993b) '1970-1991: The Political System under Severe Stress' in KM de Silva (ed) *Sri Lanka: Problems of Governance*. Colombo: International Centre for Ethnic Studies, p. 58.

⁷⁹ Presidential Commission on Youth (1990) *Report of the Presidential Commission on Youth*. Sessional Paper No 1, March. Colombo: Department of Government Printing, p. xvii.

⁸⁰ *Ibid.*

⁸¹ Spencer, J (1990) *A Sinhalese Village in a Time of Trouble, Politics and Change in Rural Sri Lanka*. Oxford: Oxford University Press, p. 11.

⁸² Coomaraswamy, R (1993) 'The Constitution and Constitutional Reform' in KM de Silva (ed) *Sri Lanka: Problems of Governance*. Colombo: International Centre for Ethnic Studies, p. 141.

State Responsibility to Protect and the Buddha Sasana

The 1978 constitution drew on a tradition of Sinhalese monarchical society whereby kings were advised by the *Sangha* (Buddhist clergy) directing the state to “protect and foster the Buddha Sasana” (Buddha's teachings). The status accorded to Buddhism in the 1972 constitution and upheld in the 1978 constitution implied that the state had a special role in relation to both the religion and its clergy. Politicians and military leaders publicly secured the blessing of the clergy before elections and military campaigns, a ritual which symbolically represented a form of spiritual justification for their actions. At the same time, such rituals gave the clergy a legitimate role in politics as the custodians of the Buddhist religion and thus the Sinhala-Buddhist nation. Sacred Buddhist space became the domain of ruling party politicians and the military hierarchy as both sought symbolic acceptance as defenders of the Buddhist nation and thus popular acceptance as the righteous leaders and moral crusaders of the country. Army regiments began to name themselves after ancient Sinhalese kings famous for having defeated (Tamil) invaders.⁸³

By allowing the military hierarchy to take up an increasingly active public role in events including Buddhist festivals, the intention of the government was to establish an understanding that their actions (extrajudicial or otherwise) were instituted for the greater Sinhala-Buddhist cause and unquestionably honourable. Anyone who did question them was thereby rendered as politically and morally suspect. The military's growing presence in public life also reflected the government's dependence on state violence to repress and control the wider community. Finally, the strong association between the military and Buddhism indicated that the forces had undergone an almost complete process of Sinhalisation with 90 per cent of all armed personnel ethnic Sinhalese.⁸⁴

The 1978 constitution upheld religious rights but made them conditional on not being in conflict with the secular objectives of the state and populist Buddhism—the two becoming largely indistinguishable.⁸⁵ The 1978 constitution did however contain three elements which were an attempt to meet Tamil grievances. Firstly, special status was provided to Tamil as a national language (even though Sinhala remained the sole official language). Secondly, the distinction between citizens by descent and registration was removed thereby providing the same fundamental rights to the latter, including the right to participate in local government elections.⁸⁶ Thirdly, the new system of proportional representation introduced with the constitution was seen as an assurance that minority parties would have a greater voice in national politics. Moreover, the strengthened fundamental rights provisions within the constitution gave minority communities some hope that their rights would be safeguarded.⁸⁷ This hope was further strengthened by

⁸³ Bastian, S (1999) *The Failure of State Formation, Identity Conflict and Civil Society Responses—The Case of Sri Lanka*, University of Bradford Department of Peace Studies, Working Paper 2, September, <http://www.brad.ac.uk/acad/confres/assets/CCR2.pdf> (accessed 24 September 2004), p. 12.

⁸⁴ *Ibid*, p. 13.

⁸⁵ Warnapala, WA (1994) *Ethnic Strife and Politics in Sri Lanka. An Investigation into Demands and Responses*. New Delhi: Navrang, p. 8.

⁸⁶ de Silva, KM (1981) *A History of Sri Lanka*. Chennai: Oxford University Press, p. 560.

⁸⁷ Bastian, S (1999) *The Failure of State Formation, Identity Conflict and Civil Society Responses—The Case of Sri Lanka*, University of Bradford Department of Peace Studies, Working Paper 2, September, <http://www.brad.ac.uk/acad/confres/assets/CCR2.pdf> (accessed 24 September 2004), p. 15.

the fact that the Supreme Court was given jurisdiction over alleged violations. However, such provisions were to be systematically undermined by the extensive powers granted to the security forces in the north and east, coupled with the prolonged suspension of a number of constitutional safeguards against rights abuses by way of extraordinary provisions in the wake of growing Tamil militancy...⁸⁸

Politics of Intolerance and Polarisation

The Tamil-dominated Tamil United Liberation Front (TULF) had become the main parliamentary opposition at the 1977 election, winning 18 parliamentary seats. However, the anti-democratic approach of the UNP and its politics of intolerance effectively neutralised the TULF's role.⁸⁹ Because the TULF advocated separatism, the UNP found that the most effective response to any form of opposition was to claim that such parties sought to destabilise the country as a requisite for separation.⁹⁰ Thus, parliamentary confrontations were promptly polarised between the Sinhalese government and minority Tamil opposition which both perpetuated and reflected the ethnic polarisation of the country.⁹¹ At the same time, mounting UNP antagonism towards Tamil demands in Parliament coincided with increasingly frequent incidents of organised violence against the Tamil community.⁹² The first outbreak of such violence took place within weeks of the 1977 election as a direct reaction to Tamil demands for separation and consequent warning not to undertake any action to separate the country.⁹³

The violence was triggered by Tamil youth killing two policemen in the north and led to widespread attacks on Sri Lankan Tamil and Plantation Tamil communities and property over a period of two months, leaving thousands dead and hundreds of thousands displaced.⁹⁴ However, both the government and the Sansoni Commission responsible for investigating the violence concluded that the rioting was a consequence of Tamil demands for separation and sheeted the blame onto the Tamil community. The imputation was that such violence could be avoided if demands for separatism were abandoned.⁹⁵ Not

⁸⁸ Nissan, E (1998) 'Historical Context', *Accord*, August.

⁸⁹ Ponnambalam, S (1983) *Sri Lanka: National Conflict and the Tamil Liberation Struggle*. London: Zed Books Ltd, p. 193; Nithiyandanan, V (1987) 'An analysis of economic factors behind the origin and development of Tamil nationalism in Sri Lanka' in C Abeysekera & N Gunasinghe (eds) *Facets of Ethnicity in Sri Lanka*. Colombo: Social Scientists' Association, p. 147.

⁹⁰ Ponnambalam, S (1983) *Sri Lanka: National Conflict and the Tamil Liberation Struggle*. London: Zed Books Ltd, p. 194.

⁹¹ Bastian, S (1999) *The Failure of State Formation, Identity Conflict and Civil Society Responses—The Case of Sri Lanka*, University of Bradford Department of Peace Studies, Working Paper 2, September, <http://www.brad.ac.uk/acad/confres/assets/CCR2.pdf> (accessed 24 September 2004), p. 14.

⁹² Thangarajah, CY (2002) 'Youth, Conflict and Social Transformation in Sri Lanka' in ST Hettige & M Mayer (eds) *Sri Lankan youth-challenges and responses*. Colombo: Friedrich Ebert-Stiftung, p. 12; Sieghart, P (1984) 'Sri Lanka: A Mounting Tragedy of Errors', Report of a Mission to Sri Lanka in January 1984 on behalf of the International Commission of Jurists and its British Section, JUSTICE, March, p. 15.

⁹³ Leary, VA (1981) 'Ethnic Conflict and Violence in Sri Lanka', Report of a Mission to Sri Lanka in July-August 1981 on behalf of the International Commission of Jurists, p. 20.

⁹⁴ Orjuela, C (2011) 'Understanding power and change in the context of armed conflict and post-war reconstruction' in C. Orjuela (ed) *Power and Politics in the Shadow of Sri Lanka's Armed Conflict*. Sida Studies No. 25, p. 15;

Nissan, E (1998) 'Historical Context', *Accord*, August.

⁹⁵ Wijesinha, R & Kulatunga, MP (2002) *Conflict, Causes and Consequences*. Colombo: Council for Liberal Democracy, p. 3.

only were the police and army complicit in the violence against Tamil civilians but in the period following the violence, security provided to Tamils in the south significantly declined.⁹⁶

Discriminatory state policies were upheld in a context of growing intolerance and antagonism not only towards Tamil demands for separatism but also in relation to the rights and entitlements of the Tamil community. The UNP's preference for a military response to what was gradually perceived as a "Tamil problem" rather than genuine grievances from within the Sri Lankan community found expression in various government policies—policies which magnified rather than understated the differences between the two communities on the basis of language, religion and ethnicity. The widely held perception within the Tamil community was that the UNP was committed to promoting Sinhalese interests at its expense.

Although the first calls for succession made in response to the 1972 constitution enjoyed support only among a small band of young Tamil extremists, there is a clear correlation between separatism becoming the principle objective of the main Tamil party and state policies and practices. In short, the demand for separation grew in parallel with state repression as Tamil radicalisation was a response to government policy.⁹⁷ Tamil youth groups challenged the traditional strategies of political engagement employed by Tamil parliamentarians such as compromise and accommodation through the parliamentary process, and thereby agitated not only against the government but also against their own leaders.⁹⁸ But because the TULF and the militant movement shared a common goal, perception in the north grew that the political leadership was complicit with the militants.⁹⁹ It also provided the scope for militants and particularly the LTTE, once it secured a monopoly over the separatist cause to justify its violent, anti-democratic and autocratic methods as the means to achieving the goal of Tamil Eelam.

While there had been a number of low-scale incidents of violence and theft as well as minor confrontations between the militants and security forces in the north in the 1970s, the first major incident was the assassination of the pro-SLFP Jaffna Mayor, Alfred Duraiappa in Jaffna on 27 July 1975 whom militants had condemned to death as a traitor to their cause.¹⁰⁰ In response, the security forces rounded up more than 100 Tamil youths, holding them in custody for more than a year without charge or trial under the 1971-imposed emergency which had remained in force.¹⁰¹ For its part, the TULF had declared a commitment to resolve the "Tamil question" by advocating autonomy of land use and settlement in Tamil

⁹⁶ *Ibid*; Ponnambalam, S (1983) *Sri Lanka: National Conflict and the Tamil Liberation Struggle*. London: Zed Books Ltd, p. 196.

⁹⁷ Kloos, P (1997) 'The Struggle between the Lion and the Tiger' in C Govers & H Vermeulen (eds) *The Politics of Ethnic Consciousness*. London: MacMillan.

⁹⁸ *Ibid*.

⁹⁹ Hoole, R, Somasundaram, D, Sritharan, K, and Thiranagama, R (1990) *The Broken Palmyra. The Tamil Crisis in Sri Lanka—An Inside Account*, University of Jaffna. Claremont: Sri Lanka Studies Institute, p. 13.

¹⁰⁰ Wijesinha, R (1991) *Sri Lanka in Crisis 1977-88. JR Jayawardene and the erosion of democracy*. Colombo: Council for Liberal Democracy, p. 25.

¹⁰¹ Ponnambalam, S (1983) *Sri Lanka: National Conflict and the Tamil Liberation Struggle*. London: Zed Books Ltd, p. 184; Amnesty International (1975) Report of an Amnesty International Mission to Sri Lanka, 9-15 January 1975, London: Amnesty International Publications, p. 22.

areas.¹⁰² However, the UNP's determination to solve Tamil demands militarily provided the opportunity to eradicate all potential threats to the government's reform agenda across the Tamil community. Such aspirations found expression in the PTA and complementary legislation under which thousands of rural male Tamil youths were arbitrarily arrested, detained and disappeared. Only a small proportion of educated unemployed Tamil youths joined the separatist movement. Similarly, only relatively few Sinhalese youth joined the ranks of the JVP in the late 1980s. However, as the prospect of a radicalised generation of Tamil and Sinhalese youths posed a threat to the ruling elite and the prevailing political structure, the militant movements themselves merely provided the UNP with a pretext to crack down on an entire generation.

While Tamil militancy continued to spread, by mid-1983 state intelligence established that the number of militants stood at a mere 2,000.¹⁰³ However, when a series of interventions by the central government to impose political control in Jaffna and break the power base and prestige of the TULF totally backfired, the UNP held that the TULF leader, Mr Amirthalingam MP, was acting against the interests of the country and brought a no-confidence motion against him.¹⁰⁴ The no-confidence motion led to a walk out of TULF, SLFP and CP MPs but was passed with the UNP's majority in Parliament on 24 July 1981.¹⁰⁵ The Tamil community now more readily recognised that the UNP was disingenuous in its efforts to address Tamil grievances and that without democratic representation, the state would be used as an instrument of the party in power to violently suppress their national democratic rights...¹⁰⁶

Politicisation of due process and other official mechanisms of inquiry

*"The only voice here is that of a gunshot"*¹⁰⁷

Efforts by families of the disappeared to achieve justice through the legal machinery demonstrates a series of failings at every stage of the legal process brought about by the politicisation of the investigation and prosecutorial functions on the one hand and the prolonged imposition of emergency legislation which effectively replaced criminal procedure and evidence laws on the other. This chapter reveals that the justice system not only failed survivors of political violence during the period of review, including the

¹⁰² Hoole, R, Somasundaram, D, Sritharan, K, and Thiranagama, R (1990) *The Broken Palmyra. The Tamil Crisis in Sri Lanka—An Inside Account*, University of Jaffna. Claremont: Sri Lanka Studies Institute, p. 23.

¹⁰³ Swamy, MRN (1996) *Tigers of Lanka From Boys to Guerrillas*. 2nd Edition. Colombo: Vijitha Yapa Publications, p. 97; Gunaratna, R (2001) *Sri Lanka—A Lost Revolution? The Inside Story of the JVP*. 3rd Edition. Kandy: Institute of Fundamental Studies, p.238.

¹⁰⁴ The UNP tried to rig the District Development Councils (DCC) elections by deploying 300 police personnel and 150 UNP loyalists to replace election officials to supervise the polls. When the UNP candidate for Jaffna and supporters were shot and the TULF secured all DDC six seats, the security forces went on a rampage which lasted for days destroying the historically significant Jaffna Library, shops, houses and TULF headquarters. The DCCs found themselves with little power and subject to continual government interference (Nissan 1996:16; Ponnambalam 1983:206; Bastian 1999:16).

¹⁰⁵ Ponnambalam, S (1983) *Sri Lanka: National Conflict and the Tamil Liberation Struggle*. London: Zed Books Ltd, p. 209.

¹⁰⁶ Rupesinghe, A (2000) 'Principled peace, democratic development' in *New Routines*, Vol 5 (1-2), p. 21.

¹⁰⁷ Mrs. P, Amparai District: Interview 10.

families of the disappeared, for reasons of political interference and the politicisation of the police and judiciary but actively conspired against them to deny state terror and protect those responsible for it.

The underlying premise of this chapter and wider thesis is that the subordination of the rule of law and politicisation of those responsible to uphold it are both cause and effect of a culture of impunity that prevailed. In considering the failings to prosecute perpetrators of disappearances and provide a remedy in *habeas corpus* cases, this chapter identifies the characteristics of impunity evident in the investigation and prosecution of offences which have a direct bearing on why disappearances became prevalent in the first place. The state's reliance on an alternative political apparatus outside the formal legal framework and grounded on arbitrary violence undermined the integrity of the formal process. It also brought about a collapse of the rule of law leading to a total loss of community cooperation with and confidence in due process and the rapid growth of the country's underworld. By focusing on abuses of the previous regime and compensation, the ruling party manipulated the work of the presidential commissions on disappearance as part of a ritual of conspiracy against the victims to deny state terror and protect those responsible for it.

In the late 1970s, normal criminal procedure was replaced by extraordinary legislation while the institutions responsible for upholding it were systematically weakened, politicised and corrupted by an alternative political framework—all of which was brought about by the centralisation of power made permissible under the 1978 constitution. Under this framework, the Executive Presidency was able to impose a state of emergency under *Public Security Ordinance No. 25, 1947* (PSO) and issue (and re-issue amended) emergency regulations with a parliamentary rubber stamp unconstrained by any form of judicial review. At the same time the ERs granted legal immunity to the president for such declarations made in good faith.¹⁰⁸ Under the PSO, fundamental rights set out in the 1978 constitution were subject to restriction in the interests of national security including equal treatment before the law; freedom of association, assembly, movement, and procedural requirements in arrest and detention.¹⁰⁹ As the ERs and PTA, which facilitated the state's policy of disappearance, were presented as necessary to ensure national security and stability, the legal and political basis of the policy could not be challenged by the courts, parliament or the public. Therefore, any attempt by the courts to enforce the rule on producing a body or ascribing responsibility for the failure to do so on state agents would pose a direct challenge to a policy of the state that allowed and encouraged disappearances to take place. At the same time, as the administration of justice was largely captured by political authorities intent on ensuring that perpetrators of disappearances avoided legal responsibility, the legal process became one characterised by a systemic pattern of delays in proceedings, blanket denials of arrest and detention, a consistent reluctance to investigate and prosecute perpetrators and total disregard for the families of the disappeared and other survivors of political violence. The combined effect was a continuation of impunity for those responsible, victimisation of petitioners and the perpetuation of uncertainty about the fate of the disappeared and suffering for their families.

¹⁰⁸ Coomaraswamy, R and los Reyes, C (2004) 'Rule by emergency: Sri Lanka's postcolonial constitutional experience' in *International Journal of Constitutional Law*, 2 (2) New York: Oxford University Press and New York University School of Law, pp. 276-7.

¹⁰⁹ *Ibid*, p. 277.

Successive governments justified the continuation of a counter-insurgency campaign, of which disappearance was a central pillar, on the grounds of curtailing violence perpetrated by non-state actors and thereby maintaining national security. Indeed, prolonged recourse to emergency powers and to abuses was justified on the basis of doing what was necessary to preserve the nation. In reality, they had the opposite effect. As noted in the previous chapter, moreover, any efforts to curtail the extraordinary powers granted to the police and security forces, such as the introduction of safeguards in relation to arrest and detention procedures, were carried out to appease the international community and were not implemented or enforced and sanctions for non-compliance were not imposed.

Emergency Legalisation: A Policy of the State against its own People

Since 1971, successive Sri Lankan governments have almost continuously proclaimed or extended a state of emergency. From the first declaration of a state of emergency in 1958 to 2001, Sri Lanka had experienced more years of “authoritarian power, under the guise of emergency powers, than that of democratic governance” with the longest period of emergency rule lasting from 1983 to 2001 with the exception of a five-month suspension in 1989.¹¹⁰

The apparatus responsible for carrying out disappearances reported directly to politicians and operated under the ERs promulgated under Section 5 of the PSO and PTA, which could not be challenged by the courts and provided state officials with impunity from prosecution.¹¹¹ The ruling party initially justified establishing this framework and the legislation that underpinned it to provide the security forces with greater powers of arrest and detention in key geographical areas in the face of what it called a genuine threat to national security. In reality, however and as Chapter 3 detailed, the UNP did so before the LTTE and JVP had taken up arms against the state. Furthermore, its prolonged nationwide utilisation facilitated widespread and arbitrary rights abuses which had no political origin.

The system that operated under the ERs and PTA had a number of characteristics. The most common features of the PTA, which was amended to become a permanent measure in 1983, included the authority given to police and security forces to arrest without a warrant and detain a person for 72 hours without being brought before the courts (section 7) and thereafter for up to 18 months on the basis of an administrative order issued by the Minister for Defence (section 9). Under the draconian legislation, the state was not obliged to inform the detainee the reason for their arrest, and the lawfulness of the detention order issued by the Defence Minister could not be challenged in court. Judges were not empowered to order bail or impose a suspended sentence under the PTA and the burden of proof was placed on the accused to demonstrate that a confession was obtained under duress. Under the Emergency (Miscellaneous provisions and Powers) Regulations enacted under a declaration of emergency, Regulation 17 authorised the defence secretary to make a detention order and under an amendment which

¹¹⁰ *Ibid*, pp. 272-3.

¹¹¹ Presidential Commission of Inquiry into the Involuntary Removal or Disappearance of Persons in the Western, Southern & Sabaragamuwa Provinces (1997b). *Final Report of the Commission of Inquiry into the Involuntary Removal or Disappearance of Persons in the Western, Southern & Sabaragamuwa Provinces*, Vol 1, Sessional Paper No. V, Department of Government Printing, Colombo, p. 41.

remained in effect from May 2000 to June 2001, the requirement to produce evidentiary material was removed leaving it to the defence secretary's "opinion" that the detention was necessary.

Regulation 18 permitted any member of the security forces or police to make an arrest without a warrant on suspicion and up until May 2000, detainees in the north and east could be detained for up to 60 days compared to seven days for detainees elsewhere. After May, all detainees around the country could be detained for an initial 90 days, extendable to a maximum of 270 days and the requirement that the Inspector General of Police (IGP) publish a list of authorised places of detention was removed. Arresting authorities were under no obligation to document or record the arrest and although many people were arrested on the pretext of having a statement recorded, there was generally no such record of the arrest, statement or detention.

The extraordinary provisions contained in the ERs and PTA not only infringed upon rights enshrined in the Constitution¹¹² but were also totally incompatible with international human rights standards as laid out in the International Covenant on Civil and Political Rights (ICCPR) and Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).¹¹³ Moreover, while many people who disappeared were detained under provisions of the ERs and PTA, others were simply abducted without reference to any legal provision. The existence of this alternative framework was exemplified by the *Indemnity Act No. 20 of 1982* and *Indemnity Act No. 60 of 1988* which provided immunity from prosecution to the security forces, members of government and public servants involved in enforcing law and order from 1 August 1977 to 16 December 1988 proved that their actions were carried out in "good faith". Similarly, Section 26 of the PTA provides for immunity from prosecution for "any officer or person for any act or thing in good faith" and sections 9 and 23 of the PSO confer similar immunity.¹¹⁴ As noted in Chapter 3, such legislation not only provided scope for the ruling party to subvert the rule of law for its own purposes but also served to facilitate and justify rights abuses.

Available evidence including the various commissions of inquiry suggests that if disappearance did not amount to state policy, it was at the very least a practice sanctioned by the political leadership. However, to give the impression of a functional and legitimate democracy founded on the rule of law, the state both simultaneously facilitated and denied disappearances and other abuses carried out under the guise of counter-insurgency operations and national security. Behind a smokescreen of emergency legislation, the authorities disavowed any knowledge of the disappeared claiming that they had been killed during an

¹¹² Coomaraswamy, R and los Reyes, C (2004) 'Rule by emergency: Sri Lanka's postcolonial constitutional experience' in *International Journal of Constitutional Law*, 2 (2) New York: Oxford University Press and New York University School of Law, p. 272.

¹¹³ United Nations Human Rights Committee (2003) *Concluding observations of the Human Rights Committee: Sri Lanka: Sri Lanka. 01/12/2003. CCPR/CO/79/LKA* (Concluding Observations/Comments), 1 December, [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/CCPR.CO.79.LKA.En?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/CCPR.CO.79.LKA.En?Opendocument) (accessed 17 November 2004)

¹¹⁴ Pinto-Jayawardena, K (2010) *Still Seeking Justice: Rule of Law, the Criminal Justice System and Commissions of Inquiry since 1977*. Geneva/Bangkok: International Commission of Jurists, p. 25; Pinto-Jayawardena, K (2009) *The Rule of Law in Decline; Study on Prevalence, Determinants and Causes of Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment (CIDTP) in Sri Lanka*. Rehabilitation and Research Centre for Torture Victims, p. 107.

armed altercation with the security forces or had simply run away. In this manner, emergency legislation was used by successive ruling parties to sanction violence against their own people which was both politically justified on the basis of fighting terrorism and legally concealed. Ironically, however, the extraordinary became the norm as the state became reliant upon the very conditions and forces that provided for the establishment and maintenance of this alternative political framework, including the politicisation of the police force, to maintain law and order.

Without legal capacity, other state institutions such as the Attorney-General's Department were compromised and institutional breakdowns brought about by patronage, politicisation and the effective abandonment of due process, perpetuated a vicious cycle whereby the state totally relied on extralegal solutions (Dr Deepika Udagama, Head of Department of the Faculty of Law, Colombo University, *personal communication*). Such solutions facilitated by extraordinary legislation became an entrenched part of the political culture, bringing about decades of violence perpetrated by non-state actors and a loss of faith in the rule of law among the citizenry. The prevailing view that came into being was that the system was corrupt and worked only for the politically connected and wealthy. Such a view justified people's determination to get what they could out of the system regardless of the consequences. In such a context, their aspirations for justice found expression outside of the legal context, resorting to spiritual forces and a growing reliance upon Sri Lanka's powerful and well-connected underworld.

Investigation and Prosecution of Disappearances

The history of the Sri Lankan police force is one of political interference. Such interference was an integral part of the manner in which due process was dismantled and discarded in favour of an alternative political process which provided for extralegal action. The Southern Commission observed that during the late 1980s, police recruitment was conducted to control political opponents rather than eliminate crime with substantial rewards paid in contravention of the Police Ordinance.¹¹⁵ Examples include the rapid promotion of junior officers to the rank of Chief Inspector and above on grounds other than merit, promotion of officers against whom court cases or departmental charges were pending, and the ridiculing of diligent officers overlooked for promotion by senior figures newly appointed on the basis of influence rather than merit.¹¹⁶ Premadasa Udugampola, for example, was rapidly promoted through the ranks of the police force over the heads of at least 180 officers, from Inspector in 1977 to Deputy Inspector of Police in 1988, despite having been convicted of human rights abuses by the Supreme Court in 1987.¹¹⁷ The politicisation of the police force enabled politicians to take a commanding role in relation to police

¹¹⁵ Presidential Commission of Inquiry into the Involuntary Removal or Disappearance of Persons in the Western, Southern & Sabaragamuwa Provinces (1997) *Interim Report of the Commission of Inquiry into the Involuntary Removal or Disappearance of Persons in the Western, Southern & Sabaragamuwa Provinces*, Vol II, Sessional Paper No. V, Colombo: Department of Government Printing, p. 31.

¹¹⁶ Police Committee (1995) *Police Service Report*. Sri Lanka Police Service, Suggestions for improving its efficiency and effectiveness. Report of the committee appointed on 24 February 1995, part VI, p. 1.

¹¹⁷ Presidential Commission of Inquiry into the Involuntary Removal or Disappearance of Persons in the Western, Southern & Sabaragamuwa Provinces (1997b). *Final Report of the Commission of Inquiry into the Involuntary Removal or Disappearance of Persons in the Western, Southern & Sabaragamuwa Provinces*, Vol I, Sessional Paper No. V, Department of Government Printing, Colombo, pp. 35-40.

functions through interference at every stage and at every level. In this way, police operations were totally subverted to serve the interests of local MPs and their influential constituents.

The investigation and prosecution of disappearances during the period of review can be defined by two features. First, formal procedures such as inquest and investigations, which are an otherwise integral part of the normal operation of the rule of law, were suspended under the ERs enabling the security forces to dispose of bodies without any report to the courts or inquest. Second, the very authorities that carried out disappearances and other abuses were also charged with investigating them, without the constraints of any impartial or independent review. As the majority of prosecutions were initiated against the police and security force personnel, the combined effect of these two features resulted in few prosecutions.

There were, however, other substantial constraints in relation to prosecuting disappearances. As enforced disappearance is not recognised as a discrete crime under the Sri Lankan Penal Code, prosecutions are limited to charges of abduction with intent to murder, unlawful confinement, torture and cruel, inhuman or degrading treatment or punishment, and murder. However, the very fact that bodies were never recovered made the charge of murder almost impossible to sustain. Furthermore, there is no provision in the Penal Code enforcing command responsibility which would otherwise facilitate charges against not only officers who carried out abuses but also their commanding officers who sanctioned them. Therefore, only those against whom direct or explicit criminal liability was established could be prosecuted. By treating criminal involvement narrowly, those responsible for commissioning disappearances or failing to prevent them from being carried out were placed beyond the reach of the courts.¹¹⁸ This meant UNP politicians at all levels of government and high ranking officers who conspired to cause disappearances, or who encouraged or supervised officers carrying out disappearances or who failed to divulge information about disappearances remained above the law. Given these legal limitations and deficiencies, penal provisions proved to be largely ineffective in combating disappearance.

Deficiencies in the investigation and prosecution of crimes relating to disappearances are evident at every stage of the process. As described in previous chapters, the lodgement of a formal complaint at a police station, which is the first step in the legal process, was usually made impossible by police refusing to acknowledge an offence and document a complaint. Even when a complaint was documented, however, the police resisted carrying out investigations due to the complicity of colleagues, other government officials and politicians in abuses such as that of joint police-military death squads.¹¹⁹ Moreover, anyone appointed by a local MP to serve as an officer-in-charge of a police station, a key position in the police structure, were “behold[en] to, and sometimes virtually became a hostage of, the MP”.¹²⁰ Similarly, when investigations were conducted, direct political influence was brought to bear where those responsible

¹¹⁸ Asian Human Rights Commission (1999) ‘Thousands of Disappearances Established. A Truth Commission Urged’. Posted 1 January, [http://www.disappearances.org/news/mainfile.php/articles_srilanka/13/\(accessed 2 January 1999\)](http://www.disappearances.org/news/mainfile.php/articles_srilanka/13/(accessed%20January%201999)).

¹¹⁹ *Ibid*; Mr D, Matara District: Interview I.

¹²⁰ Police Committee (1995) *Police Service Report*. Sri Lanka Police Service, Suggestions for improving its efficiency and effectiveness. Report of the committee appointed on 24 February 1995, part Vi, p. 5.

enjoyed the patronage of their local MP.¹²¹ During the investigations into the Embilipitiya disappearances of 25 school children following arrest by the army in 1989, it became evident that the Criminal Investigation Division (CID) had conducted investigations with the “object of safeguarding certain people”.¹²² Witnesses in this case testified that their statements had not been accurately recorded or were not read back to the complainants for their confirmation. In other instances, police and military personnel believed responsible for disappearances were not transferred out of the area once named as suspects and could influence proceedings by pressuring their fellow investigators or intimidating witnesses and complainants. Reports of threats, harassment and intimidation of complainants and witnesses were commonplace.

Once an investigation was taken over by the Disappearance Investigation Unit (DIU) or CID within the Police Department, a case could be aborted and the accused discharged if a complainant failed to appear, even if their non-appearance meant that they were in hiding. The DIU failed or refused to return files, particularly those relating to senior officers, and the endless delays by the police testified to the existence of a “brotherhood” where investigators sought to protect fellow officers, especially senior officers at the expense of the junior colleagues.¹²³ Furthermore, as the Asian Legal Resource Centre (ALRC) noted, the prosecution system which functioned within the Missing Persons Unit (MPU) of the Attorney General’s Department (AGD) was “defective because it depends entirely on the criminal investigation files to be made available by the police for the department to begin action on any crime”.¹²⁴ This enabled the AGD to use the excuse that it had not prosecuted crimes because the police had not provided the necessary files.¹²⁵ The close connection and collusion between the AGD and police¹²⁶ was apparent in the way the AGD frustrated *habeas corpus* petitions in the High Court,¹²⁷ failed to act impartially, misled Parliament and covered up an inquiry into deaths in state custody.¹²⁸

¹²¹ Police Committee (1995) *Police Service Report*. Sri Lanka Police Service, Suggestions for improving its efficiency and effectiveness. Report of the committee appointed on 24 February 1995.

¹²² Dias, P (2003) *Disappearances in Sri Lanka and the available legal remedies*. Colombo: Women and Media Collective, p. 30.

¹²³ Iqbal, MCM (2000) ‘The Phenomenon of Disappearances in Sri Lanka’ in *Sri Lanka: State of Human Rights 2001*, October. Colombo: Law & Society Trust, pp. 102-103.

¹²⁴ Asian Legal Resource Centre (2004) ‘Written statement submitted by the Asian Legal Resource Centre, a non-governmental organization with general consultative status’. Commission on Human Rights 56th Session, Item 11(b) of the provisional agenda, Civil and Political Rights, including the Question of: Disappearances and Summary Executions, E/CN.4/2004/NGO/63, 8 February, p. 39.

¹²⁵ *Ibid.*

¹²⁶ Francis, B (2004) ‘Asian Legal Resource Centre Proposal for UN to Study the Exceptional Collapse of the Rule of Law in Sri Lanka’ in *An Exceptional Collapse of the Rule of Law*. Hong Kong: Asian Legal Resource Centre, Asian Human Rights Commission and Families of the Disappeared, p. 143.

¹²⁷ International Commission of Jurists (2011) *International Commission of Jurists Submission to the Committee against Torture on the Examination of the combined Third and Fourth Periodic Reports of Sri Lanka Under the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, 47th Session, 31 October–25 November 2011, <http://www.icj.org/dwn/database/ICJ-CAT47Sri%20Lanka%20submission%202011.pdf> (accessed 1 February 2012), p. 14.

¹²⁸ Pinto-Jayawardena, K (2009) *The Rule of Law in Decline; Study on Prevalence, Determinants and Causes of Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment (CIDTP) in Sri Lanka*. Rehabilitation and Research Centre for Torture Victims, p. 163.

The MPU had been established within the AGD in July 1988, on the recommendation of the presidential commissions, to study the *prima facie* ('on the first appearance') evidence of responsibility in relation to an estimated 3,000 cases.¹²⁹ It initiated criminal proceedings against 500 police and armed force personnel in relation to 270 cases of disappearances.¹³⁰ However, as the AHRC observed some 12 years later, given the demonstrated lack of political will to see the prosecutions succeed, the most likely outcome was that few if any criminal investigations would be carried out and therefore few prosecutions would be instituted.¹³¹ Similarly, Iqbal concluded the same year that as they had "moved at a snail's pace and are not pursued in all earnest", it is "highly unlikely that these cases will end in convictions".¹³²

Furthermore, at least 200 police and security force personnel identified by the presidential commissions for their involvement in disappearance were not interdicted from service by either the head of the police or the army.¹³³ Demonstrating the extent to which the security forces enjoyed impunity, the Minister of Defence failed to take action against its own in contravention of a directive issued by the President.¹³⁴ Even individual officers charged by the courts were reinstated by the Inspector General of Police (IGP).¹³⁵ Repeated calls by the UNWGEID to appoint an independent body with the power to investigate and prosecute such crimes were never going to be realised as long as disappearance remained state practice and the security forces carried it out.

The power of the judiciary to deal with matters concerning individual freedom had been severely limited by emergency and national security laws. The framework imposed by emergency legislation deprived the judiciary of its normal powers to intervene in matters relating to arrest and detention while the existence of undisclosed places of detention effectively put "entire areas of the country outside the jurisdiction of

¹²⁹ Iqbal, MCM (2000) 'The Phenomenon of Disappearances in Sri Lanka' in *Sri Lanka: State of Human Rights 2001*, October. Colombo: Law & Society Trust, p. 101.

¹³⁰ United Nations Working Group on Enforced or Involuntary Disappearance (1999) *Report of the Working Group on Enforced or Involuntary Disappearances—Addendum. Report on the visit to Sri Lanka by a member of the Working Group on Enforced or Involuntary Disappearances (25–29 October 1999)*. E/CN.4/2000/64/Add.1, 21 December, <http://daccess-dds.ny.un.org/doc/UNDOC/GEN/G99/164/79/PDF/G9916479.pdf?OpenElement> (accessed 1 July 2003).

¹³¹ Asian Human Rights Commission (2000) 'The Question of Disappearances and Summary Executions. Enforced and Involuntary Disappearances in Sri Lanka', *Human Rights Solidarity*, Vol 10 (4), April, <http://www.hrsolidarity.net/mainfile.php/2000vol10no04/> (accessed 29 April 2004).

¹³² Iqbal, MCM (2000) 'The Phenomenon of Disappearances in Sri Lanka' in *Sri Lanka: State of Human Rights 2001*, October. Colombo: Law & Society Trust, p. 109.

¹³³ Iqbal, MCM (2000) 'The Phenomenon of Disappearances in Sri Lanka' in *Sri Lanka: State of Human Rights 2001*, October. Colombo: Law & Society Trust, p. 102; United Nations Working Group on Enforced or Involuntary Disappearance (1999) *Report of the Working Group on Enforced or Involuntary Disappearances—Addendum. Report on the visit to Sri Lanka by a member of the Working Group on Enforced or Involuntary Disappearances (25–29 October 1999)*. E/CN.4/2000/64/Add.1, 21 December, <http://daccess-dds.ny.un.org/doc/UNDOC/GEN/G99/164/79/PDF/G9916479.pdf?OpenElement> (accessed 1 July 2003).

¹³⁴ United Nations Working Group on Enforced or Involuntary Disappearance (1996) *Report of the Working Group on Enforced or Involuntary Disappearances*. E/CN.4/1997/34, 13 December. <http://daccess-dds.ny.un.org/doc/UNDOC/GEN/G96/144/02/IMG/G9614402.pdf?OpenElement> (accessed 1 July 2003).

¹³⁵ Dias, P (2003) *Disappearances in Sri Lanka and the available legal remedies*. Colombo: Women and Media Collective, p. 32.

the courts".¹³⁶ Therefore, abduction without recourse to any legal procedure, interrogation without records or supervision (and often conducted in secret detention centres, paving the way for torture), and the killing and disposal of the individual all took place within a policy framework approved by the Executive President—a framework underpinned by security laws and emergency powers designed and approved by the Executive President. As Fernando observed, the courts of Sri Lanka had no jurisdiction to challenge any of these policies, whatever may be the consequences for individual liberties. Although the courts have a legal obligation to uphold the rights of the individual including against the abuse of authority by the state, Fernando (2010) and others have argued that had the courts taken such an approach, they would have found themselves at loggerheads with the state because disappearance was covert state policy. Rather than affront the state, the judiciary was forced into a position of what Pinto-Jayawardena and Guneratne refer to as "judicial conservatism" and "manifest reluctance by the courts to challenge the executive" evident from pre-independence to the modern era.¹³⁷

Under article 35 of the 1978 constitution, the head of the executive, who is also the head of the government, is not answerable to the courts—and therein lay the challenge for the judiciary. Indeed, because the Executive Presidency had the power to make all policy decisions relating to national security without having to answer to the court, all decisions on the governance of the country were attributable to the President and placed beyond the reach of the judiciary. As Fernando observed, the judicial role to protect individual liberties was thereby removed because the President could initiate security and other national initiatives such as anti-terrorism without any impediment, check or control by the courts. While the scope for executive encroachment on rights increased by way of constitutional intervention, the judiciary were marginalised and left to operate only within a limited area for the protection of rights with substantial limitations.¹³⁸

At the same time, however, political pressure was brought to bear on the judiciary with death threats issued against individual magistrates and the integrity of due process was systematically undermined by a refusal on the part of the government to acknowledge and act upon orders and notices issued by the courts. In November 1991 INFORM noted that the government had deliberately blocked the implementation of over 100 decisions about fundamental human rights matters handed down by the Supreme Court.¹³⁹ At the same time, the police and security forces exercised their impunity by deliberately ignoring orders to pay compensation and failing to release people held in detention without charge. When the decisions of the Supreme Court were ignored, it being the highest court in the country and the only institution to which a person whose fundamental rights have been violated could appeal, people had no other available legal recourse.¹⁴⁰

¹³⁶ Fernando, B (2010) 'Sri Lanka: The Politics of *habeas corpus* and the Marginal Role of the Sri Lankan Courts under the 1978 Constitution' in *Law and Society Trust Review*, 21 (275-276), September-October, Colombo.

¹³⁷ Pinto-Jayawardena, K & Guneratne, J (2011) *Habeas Corpus in Sri Lanka; Theory and Practice of a Great Writ in Extraordinary Times*. Colombo: Law and Society Trust, pp. xv & 225.

¹³⁸ Fernando, B (2010) 'Sri Lanka: The Politics of *habeas corpus* and the Marginal Role of the Sri Lankan Courts under the 1978 Constitution' in *Law and Society Trust Review*, 21 (275-276), September-October, Colombo.

¹³⁹ Sri Lanka Information Monitor (1991b) *Yukthiya*, 24 November. Colombo: INFORM, p. 1.

¹⁴⁰ *Ibid.*

Exercise by the judiciary of its remaining independence was seen as a direct threat to the government's authority. Any effort by the judiciary to exert authority over state agents was undermined by its having to operate within the confines of a "constitutional document that does not include the right to life, permit public interest litigation, allow challenges of legislative acts" or permit judicial review of enacted legislation (even if unconstitutional) under article 80 of the 1978 constitution.¹⁴¹ When the PA came to power in 1994, there was no radical shift towards greater judicial independence as anticipated and in 1999 a close confidante of President Kumaratunga was appointed Chief Justice. The fact that the benches were packed ensured that decisions were consistent with the views of the political establishment. Thereafter, judges and magistrates on lower courts were controlled by transfers, disciplinary control and dismissal often "at the single nod from the chief justice". As Pinto-Jayewardene noted, the negative impact of such action on the "credibility and internal discipline of the judicial service is incalculable".¹⁴² The judiciary was further marred by "deficient record maintenance, nepotism, corruption and lack of competence".¹⁴³

Given the dysfunctions within the legal system and delays in court proceedings, bribery became a common means to expedite proceedings including "legitimate processes" or to influence a decision.¹⁴⁴ Delays in court proceedings merely extended opportunities for bribery and further undermined the integrity of the judicial system. Bribery was reported at every stage of the judicial process and tainted those before the courts, magistrates and lawyers which confirmed in the mind of the public that justice was not served and that the system existed to serve the interests of the rich. This perception is captured by the widely held view that only the poor end up in prison. In 2005 the Solicitor General stated that in 85 per cent of cases before the courts, the accused escaped liability because they were able to frighten witnesses into staying away from court to testify.¹⁴⁵ Given the lengthy delay in criminal cases, perpetrators of disappearances before the courts, who are usually police and security force personnel, have literally years to harass witnesses before being brought to trial.¹⁴⁶

Only a handful of prosecutions for crimes related to disappearance were made because of the cumulative effect of the procedural challenges at every stage of investigation and prosecution of offences, as well as long delays in the judicial process, often brought about deliberately by police and security force personnel, political interference, patronage, corruption and lack of political. Statistics on accountability of

¹⁴¹ Pinto-Jayawardena, K (2007d) 'A "Praxis" Perspective on Subverted Justice and the Breakdown of Rule of Law in Sri Lanka' in J. Joseph (ed.) *Sri Lanka's Dysfunctional Criminal Justice System*. Hong Kong: Asian Human Rights Commission; Coomaraswamy, R and los Reyes, C (2004) 'Rule by emergency: Sri Lanka's postcolonial constitutional experience' in *International Journal of Constitutional Law*, 2 (2) New York: Oxford University Press and New York University School of Law, p. 286.

¹⁴² Pinto-Jayawardena, K (2007d) 'A "Praxis" Perspective on Subverted Justice and the Breakdown of Rule of Law in Sri Lanka' in J. Joseph (ed.) *Sri Lanka's Dysfunctional Criminal Justice System*. Hong Kong: Asian Human Rights Commission.

¹⁴³ Joseph, J (2007) 'Introduction' in J Joseph (ed) *Sri Lanka's Dysfunctional Criminal Justice System*. Hong Kong: Asian Human Rights Commission, p. 7.

¹⁴⁴ Marga Institute (2002) *A System Under Siege: An Inquiry into the Judicial System of Sri Lanka*. September. Colombo: Marga Institute, p. 7.

¹⁴⁵ Asian Human Rights Commission (2005) 'Gerald Perera's murder trial may not begin for another 5-7 years'. Update on Urgent Appeal: Sri Lanka: Delay of justice, Rule of law. *Urgent Appeal*. 8 March, <http://www.humanrights.asia/news/urgent-appeals/UP-23-2005> (accessed 23 March 2005).

¹⁴⁶ *Ibid.*

the security forces released by the government are inconclusive, confusing and “hardly convincing”.¹⁴⁷ Over 10 years from 1998 to 2007, and despite the fact that the various inquiry bodies including the presidential commissions themselves provided names to the government of suspected offenders against whom there was *prima facie* evidence, only 27 police, military and civil administrative officials, all of whom were of low rank, were convicted of abductions and wrongful confinement.¹⁴⁸ Although torture became an institutionalised part of police and military operations, there were no convictions for torture from the time of the enactment of the Convention against Torture Act in 1994 to 2004.¹⁴⁹ It should be emphasised that no senior officer or politician has been indicted much less convicted for human rights abuses.¹⁵⁰ The view among Sri Lanka’s human rights community was that the prosecution of individual low-ranked officers gave the impression that their behaviour was “aberrant” thereby enabling the state to deny the phenomenon of disappearance and extrajudicial killing.¹⁵¹ Indeed, UTHR-J noted that during the trial of the accused in the Krishanthi Kumaraswamy case, the process failed to acknowledge the fact that the disappearance of Ms Kumaraswamy and her relatives took place in a context in which hundreds disappeared in Jaffna during that period and raised suspicions that those involved were engaged in a “damage control exercise”.¹⁵² By framing the offences as the actions of an undisciplined few, the opportunity to construct a “social map of violence that grapples with how the very fabric of our social divisions produced the ‘willing executioners’ who sustained the violence of the last decade” was totally lost.¹⁵³ The importance of constructing a social memory has taken on a heightened importance given the fact that both the JVP and LTTE leadership were effectively wiped out and important aspects of the violence and the various perspectives of those engaged in it cannot be investigated.¹⁵⁴

Of the successful prosecutions in relation to disappearance, two have been extremely well documented and reported upon: the Krishanthi Kumaraswamy case in which six soldiers were convicted of rape and murder following a record two-year trial and the Embilipitiya case resulting in the conviction of four

¹⁴⁷ Human Right Watch (2008) *Reoccurring Nightmare. State Responsibility for “Disappearances” and Abductions in Sri Lanka*, Vol 20 (2)(C), March, <http://www.hrw.org/reports/2008/03/05/recurring-nightmare> (accessed 19 June 2012), p. 98.

¹⁴⁸ *Ibid*, p, 100; Amnesty International (2009) *Twenty Years of Make Believe: Sri Lanka's Commissions of Inquiry*, ASA 37/005/2009. London: Amnesty International Publications, <https://www.amnesty.org/en/library/asset/ASA37/005/2009/en/c41db308-7612-4ca7-946d-03ad209aa900/asa370052009eng.pdf> (accessed 10 July 2009), p. 61; Nesiiah, V and Keenan, A (2004) ‘Human Rights and Sacred Cows: Framing Violence, Disappearing Struggles’ in N Gordon (ed) *From the Margins of Globalization: Critical Perspectives on Human Rights*. New York: Lexington Books, p. 18.

¹⁴⁹ Pinto-Jayawardena, K (2007) ‘Focus on Rights- Assessing Sri Lanka's Presidential Commission of Inquiry’ in *Sunday Times*, 4 February, Vol 41(36), <http://sundaytimes.lk/070204/Columns/focus.html> (accessed 1 October 2009).

¹⁵⁰ *Ibid*.

¹⁵¹ Sri Lanka Information Monitor (1992b) Situation Report, April. Colombo: INFORM, p. 12.

¹⁵² University Teachers for Human Rights–Jaffna (1999) ‘Gaps in the Krishanthi Kumarasamy Case: Disappearances and Accountability’, *Special Report 12*, 28 April.

¹⁵³ Nesiiah, V and Keenan, A (2004) ‘Human Rights and Sacred Cows: Framing Violence, Disappearing Struggles’ in N Gordon (ed) *From the Margins of Globalization: Critical Perspectives on Human Rights*. New York: Lexington Books, p. 11.

¹⁵⁴ Kloos, P (1997) ‘The Struggle between the Lion and the Tiger’ in C Govers & H Vermeulen (eds) *The Politics of Ethnic Consciousness*. London: MacMillan.

army officers for abduction with the intent to commit murder and wrongful confinement.¹⁵⁵ In a climate in which there was almost no political will to investigate complaints of disappearance, it was only intense pressure from the domestic and international human rights community that generated sufficient will to prosecute these cases.¹⁵⁶ The prosecution of 27 individuals encompasses, therefore, the totality of justice for the tens of thousands of disappearances¹⁵⁷ and exposes the response by law enforcement agencies as completely inadequate.¹⁵⁸

Notwithstanding the thousands of sworn affidavits submitted by various local and international human rights organisations on behalf of families of the disappeared over decades which have not been acted upon, many other inquiry bodies have unearthed evidence which was never taken up for inquiry. The presidential commissions identified perpetrators in 3,861 cases of disappearance with investigations initiated in relation to 1,560 security force personnel of whom 597 were indicted.¹⁵⁹ The Human Rights Task Force (HRTF) established in August 1991 with a mandate to monitor places of detention commented on the failure to initiate inquiries into incidents such as the Eastern University disappearances of September 1990 when 158 persons were arrested and disappeared in state custody, despite the existence of credible evidence and provision of the names of suspected perpetrators in its first report.¹⁶⁰ Similarly, from its establishment in 1980 to 2001, the UNWGEID received 12,297 well-documented cases of disappearance from Sri Lanka.¹⁶¹

Habeas Corpus

Habeas corpus (literally, the right to claim and present one's body in front of a court) "curtails the exercise of arbitrary state violence by defining the body of the citizen as an integral part of the sovereign body of 'the people' and thus entitled to due process" and is recognised as one of the elements on which

¹⁵⁵ Pinto-Jayawardena, K (2007) 'Focus on Rights- Assessing Sri Lanka's Presidential Commission of Inquiry' in *Sunday Times*, 4 February, Vol 41(36), <http://sundaytimes.lk/070204/Columns/focus.html> (accessed 1 October 2009); Coomaraswamy, R and los Reyes, C (2004) 'Rule by emergency: Sri Lanka's postcolonial constitutional experience' in *International Journal of Constitutional Law*, 2 (2) New York: Oxford University Press and New York University School of Law, p. 285.

¹⁵⁶ Iqbal, MCM (2000) 'The Phenomenon of Disappearances in Sri Lanka' in *Sri Lanka: State of Human Rights 2001*, October. Colombo: Law & Society Trust, p. 109.

¹⁵⁷ Punyasena, W (2003) 'The Facade of Accountability: Disappearances in Sri Lanka' in *Boston College Third World Law Journal*, Vol 23: 115-158, <http://lawdigitalcommons.bc.edu/twlj/vol23/iss1/4> (accessed 26 June 2006), p. 150.

¹⁵⁸ Human Right Watch (2008) *Reoccurring Nightmare. State Responsibility for "Disappearances" and Abductions in Sri Lanka*, Vol 20 (2)(C), March, <http://www.hrw.org/reports/2008/03/05/recurring-nightmare> (accessed 19 June 2012), p. 101.

¹⁵⁹ Pinto-Jayawardena, K (2007e) 'A Critical Look at the Relevant Legal Context Pertaining to Sri Lanka's Commission of Inquiry to Investigate Grave Human Rights Violations', advisory opinion for Action Contre La Faim, 1 February.

¹⁶⁰ Soza, JFA (1994) *Annual Report of the Chairman of the Human Rights Task Force*. 10 August 1993–10 August 1994.

¹⁶¹ United Nations Working Group on Enforced or Involuntary Disappearance (2002) *Report of the Working Group on Enforced or Involuntary Disappearances*. E/CN.4/2002/79, 18 January, <http://daccess-ddsny.un.org/doc/UNDOC/GEN/G02/101/62/PDF/G0210162.pdf?OpenElement> (accessed 1 July 2003), p. 53.

the notion of citizenship began.¹⁶² It was in 1679 that the Parliament of England passed the *Habeas Corpus Act* which enacted the right to be protected against arbitrary detention or imprisonment and codified the procedures for issuing the writ years before the 1689 English Bill of Rights otherwise recognised as the landmark in the history of civil and political rights.¹⁶³ *Habeas corpus* is an important safeguard against disappearance as petitioners can use the remedy to find or locate an individual who has disappeared while in state custody. A person can petition a court to issue a writ of *habeas corpus* commanding the authorities to produce the corpus (that is, the person) before the court so that it can then determine the legality of the detention.¹⁶⁴ Under Article 141 of the Sri Lankan Constitution, all persons are guaranteed the right to challenge the lawfulness of their detention through the writ of *habeas corpus* and this right is non-derogable even in times of emergency. Apart from criminal prosecution, *habeas corpus* provided the only legal recourse available to establish the whereabouts of disappeared people. Mr Remadiou, a lawyer for the Centre for Human Rights and Development (CHRD), explained the application process:

“If the location where the corpus was arrested or disappeared from is known, the case can be filed in the Provincial High Court (under the 13th Amendment to the Constitution) otherwise it has to be filed in the Court of Appeal in Colombo. The petitioner must provide evidence of this location of arrest whether through the first respondent who admits arrest in the province or documented evidence. If the Provincial Council accepts the case, it notifies the respondents and if the respondents deny involvement in the arrest or disappearance, the case must go to the lower court, the Magistrate’s Court. At the Magistrate’s Court, a fact-finding inquiry is conducted. If the Magistrate is satisfied that there is sufficient evidence of the arrest or if there is any doubt created of security force involvement (that is, involvement of a government body) it is taken up.”¹⁶⁵

Thereafter the Court of Appeal will direct the respondents and the IGP to produce the corpus before the Magistrates Court or to disclose any material about its whereabouts. Although the Court of Appeal might find the respondent responsible for the arrest and custody of the corpus, such a finding does not automatically lead to criminal investigation and it is for the Attorney General to make such a decision.¹⁶⁶ However, when criminal investigations are taken up, they are carried out by the police who, as previously detailed, were far from impartial. If the court establishes the allegation of the petitioner that the respondent is responsible for the corpus, payment of “exemplary costs” can be awarded to the petitioner.

¹⁶² Hansen, T and Stepputat, F (2005) ‘Introduction’ in T Hansen & F Stepputat (eds) *Sovereign bodies: citizens, migrants, and states in the postcolonial world*. Princeton: Princeton University Press, p. 10.

¹⁶³ Lauren, P (1998) *The Evolution of International Human Rights*, Philadelphia: University of Pennsylvania Press, p. 14.

¹⁶⁴ Amnesty International (1994) ‘Summary of Human Rights Concerns’, ASA 37/09/94, London: Amnesty International Publications, p. 124.

¹⁶⁵ Mr. Remadiou, Centre for Human Rights and Development.

¹⁶⁶ Dias, P (2003) *Disappearances in Sri Lanka and the available legal remedies*. Colombo: Women and Media Collective, p. 36.

There were 2,925 *habeas corpus* petitions filed between 1988 and 1997 including over 600 in 1989 alone for people whose whereabouts were unknown and who were alleged to have been kept in unlawful detention. Of them, 272 had not been concluded by the beginning of 2000. Most of these cases took over five years to conclude and only a few of them were proven to have been of adequate merit to require court intervention.¹⁶⁷ The reasons for this relate to a number of procedural, political and economic challenges before petitioners. They found themselves up against a system focused on securing the impunity of the perpetrator and concealing the nature and extent of state terror rather than on justice and adherence to due process. Indeed, consideration of the *habeas corpus* process is an examination of the characteristics of impunity which combined to ensure that those who carried out state-sponsored abuses would not be held to account and the facts of disappearances never revealed.

In the case of *habeas corpus*, the burden of proof to establish beyond a reasonable doubt that a victim has been arrested and taken into state custody is placed on the petitioner.¹⁶⁸ *Habeas corpus* petitions that fail to identify the specific authorities responsible for an arrest or abduction leading to disappearance have, of course, little chance of success.¹⁶⁹ Given that most of those disappearances were believed to have been carried out by agents of the state, the state's denials of involvement made this burden "impossible to discharge".¹⁷⁰ As many interviewees from both contexts of violence asserted, it was extremely difficult to distinguish police personnel from army officials and in other instances, the perpetrators deliberately concealed their identity. Even when officers wore their uniform in the course of an arrest, it was almost impossible to distinguish members of the Special Task Force, deployed in the east, from army personnel. The northern commission concluded that "most of the officers and soldiers who participated in the arrests could not be identified".¹⁷¹

Moreover, even when the petitioner was able to establish the identity of the perpetrator, evidence before the various disappearance commissions revealed that the security forces transferred people from police stations to army camps to detention facilities, ensuring that it was near impossible to establish exactly where their relative was initially taken let alone their whereabouts over time. Secrecy was maintained

¹⁶⁷ Iqbal, MCM (2002) 'Disappearances Commissions of Sri Lanka' in *The Voice*, October. Manila: Asian Federation Against Disappearances, p. 112; United Nations Human Rights Committee (1990) *Consideration of reports submitted by States parties – Sri Lanka*. CCPR/C/42/Add.9, 22 March.

¹⁶⁸ International Commission of Jurists (2011) *International Commission of Jurists Submission to the Committee against Torture on the Examination of the combined Third and Fourth Periodic Reports of Sri Lanka Under the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, 47th Session, 31 October–25 November 2011, <http://www.icj.org/dwn/database/ICJ-CAT47Sri%20Lanka%20submission%202011.pdf> (accessed 1 February 2012), p. 12.

¹⁶⁹ Dias, P (2003) *Disappearances in Sri Lanka and the available legal remedies*. Colombo: Women and Media Collective, p. 37.

¹⁷⁰ International Commission of Jurists (2011) *International Commission of Jurists Submission to the Committee against Torture on the Examination of the combined Third and Fourth Periodic Reports of Sri Lanka Under the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, 47th Session, 31 October–25 November 2011, <http://www.icj.org/dwn/database/ICJ-CAT47Sri%20Lanka%20submission%202011.pdf> (accessed 1 February 2012), p. 12.

¹⁷¹ Presidential Commission of Inquiry into the Involuntary Removal or Disappearance of Persons in the Northern and Eastern Provinces (1997b) *Final Report of the Commission of Inquiry into the Involuntary Removal or Disappearance of Persons in the Northern and Eastern Provinces*. Vol I, Sessional Paper No. VII. Colombo: Department of Government Printing, p. 3.

because if the detainee was killed in custody either during or following torture, as was likely, it would obstruct efforts by relatives and others from locating their loved one and from seeking corrective measures. According to lawyer, Mr Thayaparan from Home for Human Rights (HHR) in the northern Vavuniya District, to further frustrate efforts of families and organisations such as the ICRC, security force personnel in the north would often swap the names of detainees to claim that “such-and-such a detainee is this person and is detained under different legislation etc.” (Mr Thayaparan, HHR, *personal communication*). Such strategies require complicit people, institutional support and political will. A substantial number of security force personnel and public servants were, therefore, involved at various stages in the arrest or abduction, detention and torture, disappearance and extrajudicial execution of detainees or had specific knowledge about such operations. The All-Island Commission report noted that in one incident alone, 270 state officials were implicated.¹⁷² All those involved at every level of government and within the security forces and police had a vested interest in ensuring that such crimes were not uncovered through the *habeas corpus* procedure.

Many families declined to submit a *habeas corpus* petition for fear that such action would result in retaliatory action against their disappeared relative. As Mr Kandasamy noted in relation to families in Trincomalee, Jaffna, and Amparai among other places, many families believed that their children were detained at various army camps and that if they filed a case, their child would be killed (CHRD, *personal communication*). Others felt too intimidated or were subject to threats which discouraged them from seeking an effective remedy.¹⁷³ The substantial costs and lack of legal literacy were other major impediments. Of those that chose to take legal action, some were unable to find a lawyer willing to represent them given the likelihood that they would also be subjected to death threats and intimidation for taking up the petition. Such challenges remained throughout the process as prolonged delays imposed a heavy financial and emotional burden on petitioners forcing many to withdraw their applications.¹⁷⁴

A total lack of political will to bring those responsible for the arrest and detention of disappeared people to account affected every stage of the legal process in *habeas corpus* cases, rendering it totally dysfunctional. From 1994 to 2002 *habeas corpus* cases were primarily taken up by relatives of people who had disappeared during the southern insurrection with a few during the conflict in the north and east. After 1998 most cases were from the north and east.¹⁷⁵ However, a study of 884 Appeal Court decisions between 1994 and 2002 undertaken by Pinto-Jayawardena and Guneratne revealed a pattern of impunity on the part of army and security force personnel who comprised the majority of respondents. In 390 of the 884 cases, applications were dismissed on the word of counsel for the respondent that the detainee had

¹⁷² Presidential Commission of Inquiry into Involuntary Removal and Disappearance of Certain Persons (2001). *Final Report on the Commission of Inquiry into Involuntary Removal and Disappearance of Certain Persons (All Island)*. Sessional Paper No. I-2001. Colombo: Department of Government Printing, p. 10.

¹⁷³ United Nations Human Rights Committee (2003) *Concluding observations of the Human Rights Committee: Sri Lanka: Sri Lanka. 01/12/2003*. CCPR/CO/79/LKA (Concluding Observations/Comments), 1 December. [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CCPR.CO.79.LKA.En?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CCPR.CO.79.LKA.En?Opendocument) (accessed 17 November 2004)

¹⁷⁴ Iqbal, MCM (2000) 'The Phenomenon of Disappearances in Sri Lanka' in *Sri Lanka: State of Human Rights 2001*, October. Colombo: Law & Society Trust, p. 112.

¹⁷⁵ Fernando, B (2010) 'Sri Lanka: The Politics of *habeas corpus* and the Marginal Role of the Sri Lankan Courts under the 1978 Constitution' in *Law and Society Trust Review*, 21 (275-276), September-October, Colombo.

been indicted without supporting evidence. Twenty-one petitions were dismissed upon withdrawal by counsel on the grounds that the corpus had been produced before a Magistrate or located in custody—again, decisions made on the basis of the word of counsel without supporting evidence were common.¹⁷⁶

In 411 instances the court relied exclusively on the word of the state counsel about the facts of the case without resort to any other corroborating documentation or supporting evidence. Such tactics were evident during the 1980s, as Mr G, recalled when the courts relied totally on the word of the respondent. In 1986 he went to the courts in Colombo to pursue the January 1985 disappearance of his son who vanished in STF custody in Karaitivu, Amparai District. “They didn’t take any action. They postponed the date. The second time I was called they informed me to come but I sent a letter. The court said that they didn’t arrest any boy at Karaitivu. The government said it had not arrested. Thereafter no answer!” he said.¹⁷⁷ Respondents demonstrated the extent of political influence they could exercise in various ways: by eliciting the postponement of *habeas corpus* hearings because they alleged that their absence was due to official duties,¹⁷⁸ or by delaying proceedings with requests to transfer cases to Colombo, further disadvantaging petitioners who mostly resided elsewhere and had to face the costs and risks of travelling to Colombo and through various military checkpoints along the way.

Cases were often delayed for up to three years before even the preliminary inquiry was held,¹⁷⁹ and as previously noted, *habeas corpus* cases commonly take five years to conclude while some have taken 10 years or more. Delays can threaten to undermine the purpose of the remedy. Article 9(4) of the ICCPR provides that an arrested or detained person should be brought before a judge or authorised officer “promptly”. Delays also gave respondents and their peers more opportunities to threaten and coerce petitioners, witnesses and magistrates to dissuade petitioners from pursuing cases (Mr Thayaparan, HHR, *personal communication*). It became usual practice for petitioners to remain on duty pending the determination of the petition and because Sri Lanka had no witness protection program, the risk to witnesses, petitioners and their families only increased. Delays in concluding *habeas corpus* applications also affected any criminal investigations that followed including the evidence gathering required. Delays could also diminish the interest of lawyers or the sponsoring organisation, usually an NGO, which could then change its policy and stop pursuing *habeas corpus* cases. This would result in the withdrawal of funding for legal representation provided to petitioners (Shantha Pathirana, OPFMD, *personal communication*).

¹⁷⁶ Pinto-Jayawardena, K & Guneratne, J (2011) *Habeas Corpus in Sri Lanka; Theory and Practice of a Great Writ in Extraordinary Times*. Colombo: Law and Society Trust, p. xxiii.

¹⁷⁷ Mr G, Amparai District: Interview 13.

¹⁷⁸ Presidential Commission of Inquiry into the Involuntary Removal or Disappearance of Persons in the Western, Southern & Sabaragamuwa Provinces (1997b). *Final Report of the Commission of Inquiry into the Involuntary Removal or Disappearance of Persons in the Western, Southern & Sabaragamuwa Provinces*, Vol 1, Sessional Paper No. V, Department of Government Printing, Colombo, p. 105.

¹⁷⁹ International Commission of Jurists (2011) *International Commission of Jurists Submission to the Committee against Torture on the Examination of the combined Third and Fourth Periodic Reports of Sri Lanka Under the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, 47th Session, 31 October–25 November 2011, <http://www.icj.org/dwn/database/ICJ-CAT47Sri%20Lanka%20submission%202011.pdf> (accessed 1 February 2012), p. 13.

In almost every case, the petitioner took up a *habeas corpus* case with the expectation that during the course of their testimony, the perpetrators would reveal their involvement in the crime and provide information about the fate or whereabouts of the disappeared. Lawyers on the other hand have focused on pursuing compensation or “exemplary costs” and the issue of a death certificate on behalf of their clients. However, in the end, when the perpetrator was not forced to reveal what happened and safe in the knowledge of their own impunity, persistently denied any involvement, petitioners and their families lost faith in the system. As Mr Remadious explained:

“At the end of the cases, the families have no faith in the judicial system as the perpetrators even in torture or murder cases get off free, the families receive little compensation if any and in the case of *habeas corpus* they don’t get to establish whether their family member is alive or dead.”¹⁸⁰

For the petitioners, therefore, *habeas corpus* in the Sri Lankan experience provided neither a safeguard to protect the liberty of the corpus by forcing its production or a clear and unambiguous answer about their fate. Ironically, it was the very absence of a body that sparked hope for the families. Furthermore, petitioners often have had to endure not only intimidation from respondents or their peers but also their repeated denials of responsibility before the court. This not only undermined any faith a petitioner may have had in the process but by rubbing salt into the wounds, compounded rather than provided remedy for their anguish. Despite the dysfunction of the process and the lack of political will shown by the law enforcement authorities to investigate the petitioner’s claims, petitioners also have had to deal with the “disregard for witness protection and a manifest lack of sensitivity or concern for victims” by the police and the judiciary.¹⁸¹ The fact that the courts dismissed cases on the word of the respondent demonstrates, moreover, the degree of impunity with which respondents acted as well as the impotence of a politicised judiciary which was subordinate to “rule by politics” rather than rule of law.¹⁸²

While acknowledging these fundamental flaws in the process, many human rights NGOs encourage families of the disappeared to pursue *habeas corpus* cases. OPFMD asserts to its clients that compensation awarded to them serves as a form of state acknowledgement for wrongdoing and the writ of *habeas corpus* serves to hold the government to account (Shantha Pathirana, OPFMD, *personal communication*). Similarly, Mr Kandasamy of the CHRD explained the three basic aims of the organisation in filing *habeas corpus* applications on behalf of the relatives of the disappeared:

¹⁸⁰ Mr. Remadious, Centre for Human Rights and Development.

¹⁸¹ International Commission of Jurists (2011) *International Commission of Jurists Submission to the Committee against Torture on the Examination of the combined Third and Fourth Periodic Reports of Sri Lanka Under the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, 47th Session, 31 October–25 November 2011, <http://www.icj.org/dwn/database/ICJ-CAT47Sri%20Lanka%20submission%202011.pdf> (accessed 1 February 2012), p 10.

¹⁸² Pinto-Jayawardena, K (2007d) ‘A ‘Praxis’ Perspective on Subverted Justice and the Breakdown of Rule of Law in Sri Lanka’ in J. Joseph (ed.) *Sri Lanka’s Dysfunctional Criminal Justice System*. Hong Kong: Asian Human Rights Commission, p. 41.

“Number one: to bring the perpetrators to court in order to expose them as responsible and the complicity of the state in such abuses and to publicise internationally such responsibility.

Number two: to secure a death certificate from the District Court.

Number three: to secure compensation from the District Court.

Thus, there are two main overall directives in taking such an approach: one-human rights campaigning and two-ensuring that victims are compensated.”¹⁸³

Although such efforts are fundamentally important in seeking to bring the state to account, the process is extremely difficult for the families involved. Given, moreover, that the process does not provide what it should, petitioners are left at the end with no answers and little by way of compensation while perpetrators remain untouched. Ultimately, the process upholds the impunity of the perpetrators and victimises the victims.

Disappearance Commissions

The most prolific and long-running of all the commissions were those established by a newly-installed PA government in 1994. Fulfilling its pre-election promise to establish commissions into disappearances, the PA sought to distance itself from the former UNP regime by ending state-sponsored terror and impunity and ushering in a new era of accountability, democracy, demilitarisation and peace.¹⁸⁴ President Kumaratunga appointed three geographically focused commissions in November 1994 to consider the causes and remedies of involuntary removals and disappearances including the possibility of prosecution where credible evidence implicating specific perpetrators was uncovered. The three commissions presented their final reports to the President in July and September 1997 and an All-Island Commission was then appointed in April 1998 to consider only outstanding cases of the three previous commissions. That commission submitted its report to the president in May 2000. The commission’s findings were then made public in June 2002 despite the official date of publication listed as March 2001.

The mandates of the commissions have been criticised for deliberately avoiding the period 1984 to 1988—this period has never been inquired into. The methodology of the commissions was to investigate individual cases, identify specific laws and human rights norms that were violated and identify perpetrators of the violations. They were then to determine the specific state action required to punish perpetrators, provide reparations to the victims and put in place security sector reform to prevent a recurrence of specific crimes. The commissions were not expected to address the structural inequalities, underlying grievances, ideological structures or material conditions that gave rise to the violence. This

¹⁸³ Mr. Kandasamy, Centre for Human Rights and Development.

¹⁸⁴ Nesiah, V and Keenan, A (2004) ‘Human Rights and Sacred Cows: Framing Violence, Disappearing Struggles’ in N Gordon (ed) *From the Margins of Globalization: Critical Perspectives on Human Rights*. New York: Lexington Books, p. 1.

meant the opportunity to connect the struggle over resources with that of disappearances was lost.¹⁸⁵ The commissions certainly acknowledged the role of the political elite in directing and orchestrating the violence, but without consideration of the wider political project of the ruling party and its ideological underpinnings, they were unable to demonstrate that the roots of the violence lay in a clash between those who defended the established order and those who were against it or had no stake in it. By defining their terms of reference, the government could strenuously avoid exposing the root causes, vested interests and political framework which gave rise to disappearances. This meant the government was able to avoid implicating the political elite given that “[m]any in powerful positions politically and militarily were directly involved in or profited from the disappearances in some way and the government was unwilling to take on the elite”.¹⁸⁶

Although the commissions recommended that impunity be addressed, there was no discussion of the ideological basis of political violence which otherwise prescribed, directly led to or attempted to legitimise such acts. As the commissions’ reports were unable to expose the illegitimacy of the ideology underpinning the use of state violence against its own citizenry, the PA was not forced to defend why it perpetuated a regime of political violence. The All Island Commission report focused on the failures of state security force practices. Its recommendations detailed reforms to state institutions and legislation to address “indiscipline” within the security forces. While the commissions were mandated to focus on legal rules in relation to arrest and detention procedures, the All Island Commission’s approach in detailing legal process failed to recognise the dimensions of state power and the manner in which violence was orchestrated against various groups in the exercise of that power.¹⁸⁷

Having received written and oral evidence from thousands of complainants across the country, the commissions described the pattern of arrest, detention, disappearance and execution by primarily state officials and provided some insight into the manner in which political impunity operated from the lowest to highest levels of government. Despite the constraints before them including the lack of cooperation by the police force and armed services who were not compelled to appear, threats to complainants and efforts to interfere with the process, the commissions’ reports provide an account of the manner in which arbitrary power was systematically wielded by both state and non-state actors with the sanction of the ruling party at the highest level. The thousands of petitioners who came before the commissions revealed how disappearances were the culmination of a series of events which had their origins in threats from ruling party politicians or their supporters. Ultimately, therefore, the reports provide an official record of the state’s abuses against its own citizenry. However, in relation to the Embilipitiya and Krishanthi Kumaraswamy cases, as well as in other cases, evidence before the respective presidential commissions

¹⁸⁵ *Ibid*, p. 8.

¹⁸⁶ Mrs V, Matara District: Interview 2.

¹⁸⁷ Nesiah, V and Keenan, A (2004) ‘Human Rights and Sacred Cows: Framing Violence, Disappearing Struggles’ in N Gordon (ed) *From the Margins of Globalization: Critical Perspectives on Human Rights*. New York: Lexington Books, p. 10.

was not relevant to the prosecution and did not appear to have been noted by the High Court or Court of Appeal as a way of, at the very least, providing context to such cases.¹⁸⁸

It is logical that the courts were not able to draw on specific cases documented by the commissions because the Evidence Ordinance applies to criminal cases while the commissions were able to come to a finding based on a balance of probability.¹⁸⁹ However, what is not clear is why the courts chose not to draw on the work of the commissions to establish an understanding of the *modus operandi* used by state officials to carry out disappearances. The omission rendered the findings largely useless in a criminal justice sense. Furthermore, within such a legal framework where commission evidence was non-admissible in judicial proceedings, all that can result is the prosecution of junior officers who physically carried out the abuses while those behind them who gave the orders and indeed the system that encouraged such actions were left untouched.¹⁹⁰

As previously noted, the evidence unearthed by the commissions about perpetrators against whom there was *prima facie* evidence was handed over to the President under confidential cover for further investigation and prosecution but was not acted upon. Many of those named in the confidential annexes to the Central Commission's report included ministers of Cabinet rank and 27 other senior MPs, 14 provincial council members, 12 *Grama Niladhari*, 27 police superintendents, 51 OICs, 12 army captains and four majors.¹⁹¹ Many of these politicians remain active in the political arena including as ministers in the 2002 United Front government.¹⁹² The families of the disappeared are clear about their chances of seeing involved politicians in court as evidenced by the following statement by Mrs V:

*"All are guilty parties. MP Piyasiri was in the government party when the terror took place and now is under Mangala Samaraweera in the alliance. No minister wants to take a fellow minister to the courts. They just change the sides."*¹⁹³

A number of named security force personnel went onto hold high rank including that of major general or deputy inspect-general and others continued to serve in their posts.¹⁹⁴ The families of the disappeared

¹⁸⁸ Pinto-Jayawardena, K (2007c) 'Focus on Rights- Assessing Sri Lanka's presidential commission of inquiry' in *Sunday Times*, 14 January, Vol 41 (33), <http://sundaytimes.lk/070114/Columns/focus.html> (accessed 1 October 2009); Pinto-Jayawardena, K & Guneratne, J (2011) *Habeas Corpus in Sri Lanka; Theory and Practice of a Great Writ in Extraordinary Times*. Colombo: Law and Society Trust, p. 179.

¹⁸⁹ Iqbal, MCM (2002) 'Disappearances Commissions of Sri Lanka' in *The Voice*, October. Manila: Asian Federation Against Disappearances.

¹⁹⁰ Pinto-Jayawardena, K (2007b) 'Focus on Rights- Assessing Sri Lanka's Presidential commission of inquiry' in *Sunday Times*, 28 January, Vol 41(35), <http://sundaytimes.lk/070128/Columns/focus.html> (accessed 1 October 2009).

¹⁹¹ Vitatchi, I (1998) 'Disappearances Commissions point finger at UNP Politicos and Security Officers', *Sunday Times*, 15 March, <http://sundaytimes.lk/980315/spec.html> (accessed 1 March 2010).

¹⁹² Pinto-Jayawardena, K (2010b) *Post-War Justice in Sri Lanka. Rule of Law, The Criminal Justice System and Commissions of Inquiry*, January. International Commission of Jurists, p. 80; Keenan, A (2002) 'Exorcizing Ghosts and Disappearing Reports: Building the Political and Social Conditions for Implementing the Recommendations of the Report of the All-Island Commission of Inquiry into Involuntary Removal and Disappearance of Certain Persons', Paper presented to Law & Society Trust, 14 August, p. 5.

¹⁹³ Mrs. V, Matara District: Interview 2.

have witnessed a direct correlation between the involvement of such officials in disappearance and their promotion to higher office. Even though many recognise that prosecutions in such a context are highly unlikely, they hope for some form of recognition or acknowledgement:

*"I think if we can arrange some sort of open discussion amongst the responsible government officers and personnel and the parents and share and let open the real happenings during that period and let the parents know this is how your child was killed and we are sorry, then we can forget it on one condition that we both promise that it will never take place in the future."*¹⁹⁵

Unfortunately, some sort of acknowledgement of wrongdoing or apology are extremely remote given that such officials went on to enjoy prestigious posts rather than legal or political sanction by way of prosecution, loss of position or public shame. The message to the families of the disappeared from those in power was that their actions were at the very least justifiable...

Rise of the Underworld

As this chapter has demonstrated, Sri Lanka's investigative and prosecutorial system is seriously flawed and politically compromised. When entering the judicial system, the fundamental question for a court user is whether or not they are going to receive justice. The Marga Institute survey found, however, that 76 per cent of respondents saw the justice system as serving to some extent only the rich and powerful and 84 per cent believed that political pressures influenced the judicial system completely or partially.¹⁹⁶ The lack of independent investigation and a hostile prosecutorial and overarching legal system have "led to victims being penalized at all stages of the process", from that of attempts to lodge information at a police station to legal proceedings, resulting "in many victims and witnesses being coerced and compelled to change their testimony, again reinforcing the cycle of impunity that prevails".¹⁹⁷ The various national institutions and mechanisms that should safeguard human rights have failed to deliver adequate protection and there remains to be adequate investigation and credible public accounting for the vast majority of cases of disappearance.

Without legal accountability for human rights violations, public confidence in the rule of law has declined to the point where little public will remains. A total loss of confidence in the police, as evident in Sri

¹⁹⁴ United Nations Working Group on Enforced or Involuntary Disappearance (1999) *Report of the Working Group on Enforced or Involuntary Disappearances—Addendum. Report on the visit to Sri Lanka by a member of the Working Group on Enforced or Involuntary Disappearances (25–29 October 1999)*. E/CN.4/2000/64/Add.1, 21 December, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G99/164/79/PDF/G9916479.pdf?OpenElement> (accessed 1 July 2003), p. 9; Hoole, R (1999) 'Commissions, Political Crimes and the Question of Accountability', *Cyberspace Graveyard for Disappeared Persons, Asian Human Rights Commission*, posted 1 January.

¹⁹⁵ Jayanthi Dandeniya, *Families of the Disappeared*.

¹⁹⁶ Marga Institute (2002) *A System Under Siege: An Inquiry into the Judicial System of Sri Lanka*. September. Colombo: Marga Institute, p. 59.

¹⁹⁷ Pinto-Jayawardena, K (2010) *Still Seeking Justice: Rule of Law, the Criminal Justice System and Commissions of Inquiry since 1977*. Geneva/Bangkok: International Commission of Jurists, p. 6.

Lanka, is recognised as one of the greatest obstacles in crime prevention. Not only have the courts failed to provide any guarantee of personal security or redress against state violence but they have been more likely to “destabilise political compromises that could help mitigate Sri Lanka’s enduring social fissures”.¹⁹⁸ The ICG held that in the context of the conflict with the LTTE, the Supreme Court had “reached out to invalidate arrangements fashioned to achieve difficult political compromise” while entrenching a vision of Sinhalese nationalism, political centrality and the unitary state.¹⁹⁹ Any move towards transitional justice would require the courts to uphold civil and political rights—a remote prospect so long as successive governments recognise the potential of the judiciary to serve as an alternative apparatus of political power and bastion against executive action.

This thesis has demonstrated the manner in which state terror operated with impunity and the politicisation of public institutions including law enforcement and the judiciary, as well as public protests and movements such as the Mothers’ Front, left Sri Lankans trapped in a political system that conspired against them. Political neutrality in Sri Lanka is non-existent as everything and everyone is politicised. Although there are many political movements in the country, there is no unifying rights or peace movement which would otherwise serve as a neutral space for citizens to gather and debate free of the constraints brought about by political manipulation in the service of powerful vested interests. This is a political system where those responsible for grave human rights violations remain in power including not only the major parties but also the pro-state Tamil paramilitary groups including EPDP which entered the democratic process in 1994 without any recognition of wrongdoing or the imposition of legal sanctions. The accumulative effect of such actions coupled with the processes that brought about disappearances has produced deep cynicism within Sri Lankan society about politics and the institutions of governance:

“Politics means, the main idea of politicians is to oppress the people. In those days, politicians really wanted to lead the community but now days they want to hold onto the chair ... Never looking into the wellbeing of the community.”²⁰⁰

With little remaining faith in the rule of law and those responsible to uphold it and protect the citizenry, people lose interest or incentive to uphold the law themselves. For those who recognise such institutions as not only corrupt but also actively involved in abusing its own citizenry and concealing its actions, regard for any semblance of the rule of law has been shattered. Having a stake in the system and a sense of public good and community benefit has been replaced by a narrow focus on personal and private interests with violence providing opportunities that people would not otherwise entertain. The most common means of alternative justice are bribery and violence²⁰¹ which provide short-cuts to settling criminal, political or civil disputes. Bribery, as previously noted, is rampant in the justice system and

¹⁹⁸ International Crisis Group (2009) *Sri Lanka’s Judiciary: Politicised Courts, Compromised Rights*, Crisis Group Asia Report No. 172, 30 June, http://www.crisisgroup.org/~media/Files/asia/south-asia/sri-lanka/172_sri_lankas_judiciary__politicised_courts__compromised_rights.ashx (accessed 19 June 2012), p. 1.

¹⁹⁹ *Ibid.*

²⁰⁰ Mrs. K, Jaffna District: Interview 9.

²⁰¹ Asian Human Rights Commission (2006) ‘A Statement by the Asian Human Right Commission (AHRC) SRI LANKA: Chief justice warns judiciary is becoming a joke’, 3 April <http://www.humanrights.asia/news/ahrc-news/AS-058-2006> (accessed 4 April 2006).

summary justice by murder or assault is usually carried out with the assistance of the underworld which the AHRC noted in 2006 has increasingly replaced the courts as a means of adjudication.

Collapse of faith in the due process and political system has led to community reliance on underworld gangsters whose ranks are fuelled by army deserters with the necessary training and weapons to perform contract killings. At the same time, however, the political patronage enjoyed by the underworld has its origins in the 1970s when rampant corruption provided a space for the underworld to grow to the point where everyone “vying for a social position had to obtain the patronage of these criminal elements” and politicians and the underworld became mutually dependent.²⁰² According to Fernando, the underworld has effectively taken over the function of law enforcement agencies because it is far speedier, effective and efficient than the legal process. It has also taken over the election process which has become a contest between criminals supporting one party or another.²⁰³

Violence has become an institutionalised way of life in Sri Lanka as evidenced by the systematic torture of detainees in police custody on which the police relies to extract confessions, election violence, the dramatic rise in violent (and unsolved) crime, and constant reports of the brutal treatment of school children by teachers and principals. Without proper mechanisms to resolve dispute and grievances, disappearances and other serious violations have continued to take place. Given, moreover, that thousands of disappearances, political violence and terror were perpetrated by a range of different actors at different times—including civilians on the basis of personal rivalries and disputes—address of such abuses and the underlying structural inequalities that gave rise to violence requires much more than basic reform of the administration. Total reconstruction of the political structure directed at greater decentralisation of power would serve as a start.

²⁰² Fernando, B (2004) ‘Mass murder and constitutional impunity’ in *An Exceptional Collapse of the Rule of Law. Told through stories by families of the disappeared in Sri Lanka*. Hong Kong: Asian Legal Resource Centre, Asian Human Rights Commission and Families of the Disappeared, p. x.

²⁰³ Fernando, B (2010b) *Sri Lanka: Impunity, Criminal Justice and Human Rights*. March. Hong Kong: Asian Human Rights Commission, p. 21.

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