

PROTECTION AND PARTICIPATION

SOUTH ASIA LEGAL REFORMS AND HUMAN RIGHTS

Vol. 4 No 1 2007

**SALUTING PAKISTAN AND NEPAL AND
BEMOANING SRI LANKA; THE IMPORTANCE OF
PROTEST IN SOUTH ASIA**

Editorial: Pakistan, Nepal and Sri Lanka; a Study in Contrasts

Pakistan: Exploring the Extent of People Power in regard to safeguarding the Independence of the Judiciary.

- 1. Affidavit by suspended Chief Justice Mr. Iftekhhar Choudary**
- 2. Statement by Mr. Muneer Malik, President of Supreme Court Bar Association on the separation of powers and judicial independence in Pakistan**
- 3. Statements of the Asian Human Rights Commission on the tussle between the Executive and the Judiciary in Pakistan**

Articles:

Some Reflections on the Nature of Extinct Legal Systems
Basil Fernando

A Grisly Dance of Non-Accountability; Critically Examining Sri Lanka's 2006 Presidential Commission of Inquiry to Investigate Grave Human Rights Violations
Kishali Pinto-Jayawardena

Statements and Open Letters – Sri Lanka's Crisis of the Rule of Law

Human Rights Awards

Award of Sri Lanka's Woman of Courage

Award of the 2007 Gwangju Prize for Human Rights

Book Announcement

Sri Lanka: A new booklet - The Delgoda Family Massacre and Confronting Lawlessness

EDITORIAL; Pakistan, Nepal and Sri Lanka; a Study in Contrasts

Throughout Pakistan, public demonstrations in support of Chief Justice Mr. Iftekhar Choudary in recent months have demonstrated the strength of people power. The magnitude of these demonstrations is being described by observers as being of a similar nature to some of the great popular protests of the 1970's in support of Zulfikar Ali Bhutto, the country's most popular democratically elected prime minister.

This is the first time in the history of Pakistan that a non political figure, and for that matter a judicial officer, is attracting such large crowds of people from all walks of life. Such groups include Supreme Court judges and other judges of various ranks and also retired judges. One of the most prominent factors is the very large participation of lawyers from all over the country.

The support that the Chief Justice is finding in the streets of the country has been far beyond the imagination of the organisers of the event that the Chief Justice was to attend. The overwhelming numbers that have gathered in support have actually delayed the movements of Chief Justice and his supporters for hours at many places. Such an overflow of popular participation is very rare in Pakistan. In any country, such popular demonstrations would be regarded as being the final resort to bring about great change. The issue involved is the very survival of the independence of the judiciary. If the military regime achieves what it wants by successfully ousting the Chief Justice it will silence the Supreme Court and all other judicial organs for a long time to come. The military regime that has attacked all aspects of democracy in Pakistan is now faced with their final challenge. If the regime wins, not only the Supreme Court but the entire legal fabric of the country will suffer.

The courage that the lawyers and people of Pakistan are now showing to stop the military regime is of significant historical importance. Its momentum can stop General Musharraf's bid for further time in office unhindered by restraints from the judiciary, media or by public intervention. The Supreme Court of Pakistan made an order on May 7 suspending the judicial panel hearing into the accusation made by the military regime against the country's suspended Chief Justice Mr. Iftekhar Chaudhary, pending a decision on a challenge to the panel filed on his behalf. The Chief Justice has challenged the decision of the military regime to refer him to the Supreme Judicial Council (SJC). This reference to the SJC is widely seen as a political move on the part of the military regime to attack the independence of the judiciary and to ensure a more compliant Supreme Court which will in the future support the military regime unconditionally (for details about the petition of the Chief Justice please see [AA-002-2007](#)).

The Asian Human Rights Commission has repeatedly called on those who care for democracy and human rights in Pakistan and internationally to defend the Chief Justice and to resist the attempt to destroy the independence of the judiciary. Now as this confrontation is gaining pace it is the duty of the international community and the UN agencies to intervene strongly to ensure that the military regime is not allowed to proceed against the people of Pakistan by misuse of emergency laws or by declaring martial law.

The people power thus evidenced in Pakistan reflects the importance of public protest in safeguarding of the governance process and resembles a similar movement of people power in Nepal not so many months ago which brought down an unpopular monarchy.

In contrast, despite Sri Lanka illustrating as great a crisis as Pakistan in regard to the independence of the institution of the judiciary, there has been an absence of even a quarter of public protest manifested in Pakistan and Nepal. The shameless complicity of the current leadership of the Bar Association of Sri Lanka (BASL) in regard to the process of politicization of the judiciary and the political nature of the current Chief Justice of Sri Lanka, Sarath N. Silva has been remarkable. While in Pakistan, lawyers took to the streets to protest, in Sri Lanka, lawyers concentrated only on earning money and on obtaining official positions, powers and perks with only few exceptions.

The number of retired judges and lawyers who have competed with each other to obtain appointments to commissions on the police and the public service as well as the National Human Rights Commission despite President Mahinda Rajapakse flouting a specific constitutional provision requiring the prior approval of the Constitutional Council to make the appointments, showed very well the degenerative depths to which persons belonging to the legal and judicial services had fallen.

The Asian Human Rights Commission has focused on this crisis affecting Sri Lanka's judiciary in an extensive manner. In this edition of Protection and Participation, we publish the most recent Written Submission on Sri Lanka's Crisis of the Judiciary which was submitted, (in collaboration with Colombo's The Law and Society Trust), to the United Nations Human Rights Council for its fifth session in mid June. We publish as a contrasting example to this state of affairs in Sri Lanka, a series of documents on the vigour and strength of the peoples' movement in Pakistan in responding to executive attempts to muzzle the judiciary.

We also publish two articles by *Basil Fernando* and *Kishali Pinto-Jayawardena* respectively on the nature of extinct legal systems and on Sri Lanka's recently set up Presidential Commission of Inquiry to Probe into Grave Human Rights Violations. While the first article affords a useful reflection into the manner in which legal systems become extinct much in the way of an extinct species, with obvious parallels in regard to many aspects of the current rule of law crisis in Sri Lanka, the second article critically analyses the country's latest effort to investigate serious human rights abuses and concludes that all these efforts are of no value if Sri Lanka's deficient judicial and prosecutorial systems remain un-addressed.

The direct relevance of the failure of the justice system is put in focus in regard to the ongoing conflict in the North-East in the recently released Special Report No. 25 - *From Welikade to Mutur and Pottuvil: A Generation of Moral Denudation and the Rise of Heroes with Feet of Clay* - of the University Teachers for Human Rights (UTHR- Jaffna) which states as follows;

Particularly insidious is the apparent compact between the executive and judiciary to undermine the 17th Amendment to the Sri Lankan Constitution. The 17th Amendment was intended to restore a measure of independence to the system, but it has been subverted. The two together control the Supreme Court and the Judicial Services Commission (JSC) and have dismantled all meaningful checks on abuse of power. There has been disappointingly little protest from the parliamentary opposition, which presumably hopes to take control of the existing system, with all its permitted abuses.

This is perhaps the first time the Chief Justice has been personally and directly involved in subverting the course of justice when it comes to grave violations that are a matter of international concern. Magistrates' efforts to expose and punish serious crime by agents of the State should be appreciated and supported; instead they face potential removal from controversial cases and exile in professional limbo. This effective arm-twisting by the executive has the power to push most magistrates to toe the line in a cover up.

..... By no stretch of the imagination could the Supreme Court in Sri Lanka now be judged independent. The executive has secured a compliant Parliament by enticing crossovers and being munificent with the perks of cabinet. Power is exercised recklessly without regard for the spirit of constitutional government. With words having no relation to facts, the Government could simply remove a magistrate who was doing his utmost to get at the truth. Both the President and the Chief Justice appear to dismiss any outside or multi-lateral criticism of their actions from a human rights and rule of law standpoint as unwarranted interference, though all such criticism originated from within Sri Lanka.”

The UTHR Special Report echoes concerns that the Asian Human Rights Commission had been expressing for many years together with few dedicated lawyers from within Sri Lanka. We hope that, at least, in the coming months, Sri Lanka would see a rise of people power similar to what was evidenced in Pakistan and Nepal, to bring back the country's constitutional institutions, including most importantly, the office of the Chief Justice to the level of public respect and intellectual integrity that such an office demands.

Exploring the Extent of People Power in Pakistan in regard to safeguarding the Independence of the Judiciary

- 1. Affidavit by suspended Chief Justice Mr. Iftikhar Choudary**
- 2. Statement by Mr. Muneer Malik, President of Supreme Court Bar Association on the separation of powers and judicial independence in Pakistan**
- 3. Statements of the Asian Human Rights Commission on the tussle between the Executive and the Judiciary in Pakistan**

1. PAKISTAN: The affidavit of the suspended Chief Justice, Iftikhar M. Chaudhry

We are forwarding the full text of the affidavit filed by the suspended Chief Justice, Iftikhar Muhammad Chaudhry regarding the ordeal he suffered at Army House on March 9, 2007 when he was restrained inside the premises when some other judge was made to take oath as an acting Chief Justice.

IN THE SUPREME COURT OF PAKISTAN

(Original Jurisdiction)

In Re:

Constitutional Original Petition No: ___21___/2007

Chief Justice of Pakistan,

Mr. Justice Iftikhar Muhammad Chaudhry, Chief Justice House, Islamabad

Petitioner

VERSUS

The President of Pakistan, The Referring Authority,
Presidency, Islamabad

AND OTHERS

Respondents

AFFIDAVIT OF THE PETITIONER,

MR. Justice Iftikhar Muhammad Chaudhry,

Chief Justice of Pakistan,

I, Mr. Justice Iftikhar Muhammad Chaudhry, The Chief Justice of Pakistan (hereinafter referred to as the "deponent") do hereby solemnly affirm and state on oath as follows:

That the deponent has filed the titled petition in this Hon'ble Court under Article 184(3) of the Constitution of Islamic Republic of Pakistan 1973, inter alia, assailing the Reference No.43/2007 dated March 09, 2007; Notification No. F.1 (2)/2005.A.II dated 09-03-2007, whereby the deponent was illegally and unlawfully restrained to perform his constitutional functions as a judge of this Hon'ble Court and as Chief Justice of Pakistan; Order dated March 09, 2007 passed by the Supreme Judicial Council; Notification No.F.1(2)2005.A.II dated 15-03-2007 whereby the deponent was sent on compulsory leave with retrospective effect and the constitution and competence of the Supreme Judicial Council as well as the mode and manner of the proceedings before the Council.

2. This affidavit is being filed in support of the contentions, assertions and pleas raised in the above titled petition. The deponent verifies that the contents of the titled affidavit are true and correct to the best of his knowledge, information and belief and nothing has been concealed. In addition to the facts narrated in the titled petition; the deponent states that:

A. On March 09, 2007, the deponent headed Bench No.1 of this Hon'ble Court as Chief Justice of Pakistan and heard several cases till about 10.30am. The Bench rose briefly and had to reassemble for the day except the deponent who left for the Army House, Rawalpindi to meet the President of Pakistan (hereinafter referred to as "Respondent")

B. The deponent arrived at Army House, Rawalpindi at about 11-30am along with his staff/protocol staff. The deponent was shown to a waiting room/visitors room. After five minutes of his arrival, the Respondent, wearing his Military Uniform came into the room along with his MS and ADC. As soon as the Respondent took his seat, a number of TV cameramen and photographers were also ushered into the room. They took several pictures and made movie footage.

C. While discussing the SAARC Law Conference, SAARC Chief Justices Conference and the concluding session of the Golden Jubilee ceremony of the Supreme Court, the Respondent said that a compliant against the deponent had been received by him (Respondent) from a Judge of the Peshawar High Court. The deponent replied that it was not based on true facts as his case had been decided by a two member bench and that attempts were being made to maliciously involve the other member of the Bench as well. On this the Respondent said that there are a few more complaints against the deponent as well. After saying so, he directed his staff to call the other persons.

D. On the direction of the Respondent, the 'other persons' entered the room. They included the Prime Minster, DG MI, DG ISI, DG IB, COS and another official. All officials (except DG, IB and COS) were in uniform.

E. The Respondent started reading from small pieces of paper with notes on them which he had in his hand. There was no single consolidated document. The allegations which

were being put to the deponent had been taken from the contents of a notorious letter written by Mr. Naeem Bukhari with absolutely no substance in them. The deponent strongly refuted these allegations as being baseless and engineered to defame him personally and the judiciary as a whole. The deponent promptly denied the veracity and credibility of these allegations as well.

F. On this the Respondent said that the deponent had obtained cars from the Supreme Court for his family. The allegation was vehemently denied by the deponent. The Respondent went on to say that the deponent was being driven in a Mercedes, to which the deponent promptly replied 'here is the Prime Minister, ask him, he has sent the Car himself'. The PM did not reply to this answer even by gesture. Surprisingly the Respondent went on to say that the deponent had interfered in the affairs of Lahore High Court and had not accepted and taken heed of most of the recommendations of the Chief Justice of Lahore High Court.

G. The Respondent insisted that the deponent should resign. The Respondent also said that in case of deponent's resignation, he (the Respondent) would 'accommodate' him (the deponent). He also said in case of refusal to resign, the deponent will have to face the reference which could be a bigger embarrassment for the deponent. The deponent finally and more resolutely said 'I wouldn't resign and would face any reference since I am innocent; I have not violated any code of conduct or any law, rule or regulation; I believe that I am myself the guardian of law. I strongly believe in God who will help me'. This ignited the fury of the Respondent; he stood up angrily and left the room along with his MS, COS and the Prime Minister of Pakistan, saying that others would show evidence to the deponent. (This has now been admitted by the Respondent in his interview given to AAJ TV). The meeting continued for not more than 30 minutes.

H. The DG MI, DG ISI and DG IB remained behind and continued to sit with the deponent. They did not show the deponent a single piece of evidence. In fact, no official except DG ISI had some documents with him but he also did not show any thing to the deponent. They, however, said that the deponent had secured a seat for his son in Bolan Medical College when the deponent was serving as a Judge of Balochistan High Court. They (except DG, IB) insisted that deponent resign while the deponent continued to assert strongly that the allegations were baseless and for a collateral purpose.

I. During the subsequent hours, the deponent was forced to stay in that room. Sometimes, all the persons would leave the deponent alone in that room but would not allow the deponent to leave it. It was obvious that the deponent was being watched by a close circuit camera because whenever he tried to open the door to go out, he was confronted by an officer who prevented the exit of the deponent; several times the deponent expressed the desire to leave but was told by military officials to stay/wait. Once the deponent was even told that respondent would be seeing him again. At one point, the deponent requested that at least his staff/protocol officer be called inside the room as the deponent wanted to talk to him but was told that he could not come inside. The deponent then requested that his staff/protocol officer be told to pass on the message to the

deponent's family that he was at Army House, Rawalpindi and that his programme to go to Lahore had been cancelled.

J. Despite several attempts to leave the room and the Army House, the deponent was made to stay there on one pretext or the other. His request to bring his car to the porch for departure was also denied. After the first meeting with the Respondent which lasted for not more than 30 minutes, the deponent was kept there 'absolutely against his will' till past 5pm.

K. After 5pm, DG MI came in again and told the deponent that his car was outside to drive him 'home'. DG, MI came out of the room and once outside told the deponent, 'this is a bad day, now you are taking a separate way and you are informed that you have been "restrained to work as a judge of the Supreme Court or Chief Justice of Pakistan"'.

L. When the deponent saw the car of the Chief Justice of Pakistan, he discovered that his car had been stripped of both the flag of Pakistan and the emblem flag. The staff officer of the deponent informed him that Mr. Justice Javed Iqbal had taken oath as Acting Chief Justice and it had been shown on TV. The driver also informed the deponent that he had been instructed not to take the deponent to the Supreme Court while on way to the residence of the deponent.

M. While on the way, the deponent directed the driver to go to Supreme Court but an Army official prevented the deponent's car near the Sports Complex from proceeding further. In the meanwhile, Mr. Tariq Masood Yasin, SP, also appeared; He ordered the driver to come out of car so that he could drive the deponent and also asked the deponent's gunman to come out of the car as well. The deponent said 'okay, I will not go to the Supreme Court but my driver will drive my car and my gunman will escort me home'. Only then, did Mr. Tariq Masood Yasin, SP agree to let the car be driven by deponent's driver.

N. The deponent got home at about 5.45pm and was shocked to see police officials and agencies personnel without uniform all over his residence. The deponent also discovered that landline phones had already been disconnected; Cell Phones, TV, Cables and DSL had been jammed or disconnected. The deponent and his family were completely cut off for several days from the outside world.

O. By 9pm, March 09, 2007, the vehicles which were in official use of the deponent including a Mercedes had been taken away by means of a lifter. Latter on, the same night, one vehicle was brought back but the key was not handed over to the deponent or someone on his behalf.

P. On March 10, 2007, the deponent received a 'Notice' from Supreme Judicial Council ("Council") whereby the deponent came to know that a Reference (No.43/2007) had been filed by the Respondent before the Council. There was also a copy of the Order passed by the Council whereby deponent had been restrained to function as a Judge of the Supreme Court and or Chief Justice of Pakistan. The copy of the aforesaid Reference had also been

appended with the Notice with without any annexure or supporting documents for perusal of the deponent.

Q. It was also surprising for the deponent to note that the aforesaid reference came up for hearing on March 9, 2007 after 6pm in indecent haste. Two members of the Council as was evident from news published in daily Nawa-i-Waqt dated March 10, 2007, had been flown to Islamabad in special flights, from Lahore and Karachi simply to participate in a meeting of the Council. In fact, no meeting had been called by the Secretary of the Council namely Mr. Faqir Hussain. No one had issued either agenda for the meeting or notice thereof.

R. The Council, rather than merely scrutinizing the material, if at all and serving notice on the deponent (without prejudice to the rights and interest of the deponent as averred in the titled petition), went ahead and passed an order very detrimental to the interests of the deponent as well as the interests of the institution. The deponent was restrained to perform his functions as a Judge of the Supreme Court Judge and or Chief Justice of Pakistan.

S. The deponent further states that he had been detained along with his family members including his infant child of seven years from the evening of March 9, 2007 till March 13, 2007. The personal and private life of the deponent and his family suffered a great shock and the concept of privacy appeared as if it was an impotent word. The deponent could not use any vehicle since there was none. The deponent had to walk till the other end of the road when the police officer confronted him and manhandled him as has now been established by a judicial enquiry.

T. The Supreme Court staff attached to the deponent was reportedly missing and had been kept at an unknown place. An attempt was being made to fabricate the evidence through them by coercive means against the deponent. Even other employees working at the residence of the Deponent were taken and made to appear before some agency officials. They were released after 2/3 days. The grocery man was not allowed to go to collect grocery; he was made to wait till an agency official accompanied him to the market and back.

U. The chamber of the deponent was sealed and certain files laying therein were removed and some of them had been handed over to the ISI under the supervision of the newly appointed Registrar. Such an act was contrary to all norms and practices of judiciary. The deponent being the CJP was entitled to occupy his chamber along with his staff.

V. On account of deployment of heavy contingents, no one was allowed to meet the deponent freely, in as much as his colleagues were not allowed access to meet him. Even a retired judge of this Hon'ble Court Mr Justice (R) Munir A Sheikh was not allowed to meet the deponent.

W. The deponent was not all alone to suffer this agony. Even his children were not allowed to go to school, college and university. The deponent and his family members were deprived of basic amenities of life, i.e. medicines and Doctors, etc.

X. Even when ordered by the Council, the deponent was deprived of the assistance of his counsels to seek legal assistance regarding legal and factual issues involved in the reference. The deponent and his family have been made to go through a lot of mental, physical and emotional agony, torture and embarrassment and words could never be enough to properly and adequately express that.

Y. All these tactics were used to put pressure on the deponent so that he may tender his resignation from the office of the Chief Justice of Pakistan. But after March 13, 2007 when the deponent succeeded in establishing at least some contact with his lawyers team during a brief appearance before the Council and after March 16, 2007, the on going pressure to 'resign the office' was released to some extent.

Z. The deponent now believes that his entire house has been bugged and at the Sindh House which is located right opposite the residence of the deponent, the officials of the agencies other than police have established a place therein to keep an eye on those who come and visit me, etc.

AA. On account of the facts stated hereinabove, the children of the deponents are so scared that they could not go to school or university. As a result thereof, one of my daughters failed to appear in her exams (1st year, Federal Board) whereas my other daughter who is a student of Bahria university is not being allowed to take her examination (1st semester) due to lack of attendance in internal studies. My younger son is also not in a position to attend his school because of circumstances through which I am passing.

Deponent

Verification:

Verified on oath this ___29___ day of __May__2007 at Islamabad that the contents of the above affidavit are true and correct to the best of my knowledge, belief and information and nothing has been concealed therein from this Hon'ble Court.

Deponent

FS-022-2007
May 29, 2007

A Statement from the Supreme Court Bar Association of Pakistan forwarded by the Asian Human Rights Commission

PAKISTAN: Separation of powers and the independence of the judiciary

(Following is the text of Mr. Muneer Malik's speech which he delivered on May 26, 2007 when the Supreme Court Bar Association held a seminar on "separation of powers and judicial independence". The suspended Chief Justice Mr. Iftikhar Choudary was the chief guest of the seminar).

SEPARATION OF POWERS

Welcome to this defining moment in the defining moment of our lives. The great American jurist, Benjamin N. Cardozo said, 'The great tides and currents which engulf the rest of men do not turn aside in their course and pass the judges by'. We are all caught in that same tide today and only our own actions now will determine whether we sink or swim. Those that do not learn from the past are condemned to re-live it. After all, history is the transformation of tumultuous conquerors in to silent footnotes. (Ai khakh nasheeno uth baitho wo waqt kareeb aa pohancha hai- Jub taj uchalay jain gai jub takht girain jain gay. Barthay bhi challo kuttay be challo, bazooo be behot hain sur be behot, up daairay manzil he pay daalainay jain gay". Hum daikhaayn gay hum daikhaayn gay.

The theme of our Seminar, 'Separation of Powers and the Independence of the Judiciary' has always been an age-old favourite of jurists and constitutionalists. But only today, is a true appreciation of its paramount importance being felt throughout the land.

The struggle for the separation of powers and the independence of judiciary is of ancient origin. One of its early foot-soldiers was Sir Edward Coke, Chief Justice of England from 1613 to 1616. Coke was not always an angel. As a lawyer, he had remained Attorney General of England and prosecuted many cases against innocent people who had incurred the displeasure of King James I. Those poor innocents had no hope of justice and a fair trial. The judiciary was spineless and completely under the influence of the King and his courtiers. The historian Macdowell has described this state of affairs as follows:

'If a Judge in those days had frankly charged a Jury according to the facts of the situation it would have been in such terms as this: 'If you acquit the prisoner, I shall be dismissed and you will go to prison. Consider your verdict.'

But this bitter experience of blatantly rigged trials left Sir Edward Coke a changed man. He spent the rest of his life wiping off that stain from his reputation. When appointed to the Bench, his judicial independence brought him into direct conflict with the government. King James I was in the habit of interfering with judgments passed by the courts of law; asserting that he was entitled to do so in exercise of his royal prerogative. When Coke refused to yield this power he was summoned by King James I and reminded that the King was supreme and that the King's word was final in all matters. Coke was not to be cowed down. He bluntly replied that 'His Majesty was not learned in the laws of

England' and that it was only the Judges who could interpret the law. As far as the question of the King's supremacy was concerned, he said: 'The King himself should be under no man, but under God and the Law.' These words heralded the beginning of England's transition from a nation under the rule of men to a nation under the Rule of Law.

Thereafter, the King wrote to all of the Judges asking them to refrain from hearing and determining a particular matter until the King's pleasure was known. When Coke proceeded with the hearing in disregard of the King's instructions, all the Judges were summoned to a meeting with the King. Under pressure, the other Judges buckled down and conceded to the King's directions; but Coke stood firm in denying the King's authority to interfere with judicial proceedings. For his impertinence, Sir Edward Coke was dismissed as Chief Justice. Later, at almost seventy years of age, he was thrown in jail. But, today, his legacy forms the bedrock of the Constitutions of every civilized nation.

The doctrine of separation of powers rests upon the recognition that the concentration of absolute power in one man or one body will inevitably lead to exploitation and tyranny. U.S. President Abraham Lincoln recognized the temptation of even good men to succumb to the temptation of too much power when he said: 'Nearly all men can stand adversity, but if you want to test a man's character, give him power.' The fundamental premise of our Constitution is never to put anyone to that test. The framers of our Constitution were well aware of Lord Acton's dictum, 'Power tends to corrupt; and absolute power corrupts absolutely'. Therefore they delegated the different powers of the State to different organs namely; the executive, the legislature and the judiciary. Each of them has separate and strictly delineated functions.

This trichotomy of powers, as an essential feature of our Constitution, has been repeatedly emphasized by our superior Courts. In his oft-quoted judgment in the celebrated Sharaf Faridi case (PLD 1989 Karachi 404), Saleem Akhtar J. (then a Judge of the Sindh High Court) observed: 'In a set-up where the Constitution is based on trichotomy of powers, the Judiciary enjoys a unique and supreme position within the framework of the Constitution as it creates balance amongst the various organs of the State and also checks the excessive and arbitrary exercise of power by the Executive and the Legislature... The jurisdiction and the perimeters for exercise of powers by all three organs have been mentioned in definite terms in the Constitution. No organ is permitted to encroach upon the authority of the other and the Judiciary by its power to interpret the Constitution keeps the Legislature and the Executive within the spheres and bounds of the Constitution.' He further stated: 'Therefore justice can only be done if there is an independent Judiciary which should be separate from the Executive and not at its mercy or dependent on it.'

Similarly, our Supreme Court has frequently stressed the importance of an independent judiciary, particularly in reference to Article 175 of the Constitution. It observed, *inter alia*, in the Al-Jehad Trust case (PLD 1996 SC 324) and the Mehran Ali case (PLD 1998 SC 1445) that 'the independence of judiciary is inextricably linked and connected with the process of appointment of Judges and the security of tenure and other terms and

conditions,’ and that the ‘framers of the Constitution were mindful of the fact that in the absence of security of tenure no Judge can function impartially and independently.’ In the absence of an independent judiciary that is able to freely exercise its judicial functions and enforce the law without interference, the Fundamental Rights guaranteed to citizens under our Constitution are illusory and not worth the paper they are written on. Saleem Akhtar J held as much in the case of Govt. of Balochistan v. Azizullah Memon (P LD 1993 SC 341) when he observed: ‘Separation of judiciary is the corner-stone of the independence of judiciary and unless the judiciary is independent, the fundamental right of access to justice cannot be guaranteed.’

Now the main danger facing Pakistan today is the tendency towards monopolization and concentration of all state power in one body. This lust for unrivalled power and ultimate authority destroys all those institutions that form the foundations of a modern civilized state. Baron de Montesquieu, one of the first proponents of the doctrine of separation of powers, was of the view that: ‘In the infancy of societies, the chiefs of state shape its institutions; later the institutions shape the chiefs of state.’ Charles De Gaulle had paraphrased it somewhat differently when he said “that some countries need an army but some armies need a state”. What is at stake here? Is it the future of my two children, Sheherezade and Ehsan or the children or grandchildren of every one sitting in this room and beyond? I beg you, I implore you, that let every man look into his inner self and ask “Is my conscience on a higher plane than 30 pieces of silver?” Pakistan needs to make that transition urgently. We must strengthen our institutions so that we are ruled by law and not by men. We can no longer afford to remain an infant state. A failure to move on could be fatal.

Revolutions, in every age stem from the same causes. However, the American Revolution was unique in that the revolutionaries actually listed the causes of the Revolution in their Declaration of Independence. I was taken aback to find the following passage in the American Declaration of Independence (remember, this is back in 1776): ‘The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States... He has made Judges dependent upon his will alone, for the tenure of their offices and the amount of their salaries’. If we want to ward off similar revolutions in different parts of our country, if we want to avoid a further break-up of the nation, if we want to prevent a decline into anarchy; we must learn our lessons from history.

Fortunately, our nation has woken up to this peril. There is unanimity within the legal community and the general public that the ideals of the separation of powers and independence of judiciary are worth preserving. That the Rule of Law is not merely an empty slogan; but a reality worth striving towards. Montesquieu had warned, ‘The tyranny of a prince in an oligarchy is not so dangerous to the public welfare as the apathy of a citizen in a democracy.’ We have averted the greater danger. We are only left with the lesser threat. And now that the people are woken from their slumber and apathy; their will shall prevail. As Justice Sandra Day O’Connor of the U.S. Supreme Court pointed out, ‘Constitutions and statutes don’t protect judicial independence, people do.’ But the people Justice Sandra Day O’Connor referred to were not simply members of the general

public. She was also referring to people who practice at the Bar. She was also referring to the people who man the Bench. Judges, like the rest of us, also form a part of Pakistan's civil society. There is a mutual covenant between all sections of civil society to uphold the Rule of Law and secure the independence of the judiciary. Any section that betrays this mutual trust, in addition to injuring the others, also imperils itself.

Benjamin Cardozo had ventured to reflect that judges do not live in ivory towers protected against tides in the affairs of men. Moreover, unlike the executive branch of government, the judiciary has no coercive apparatus to ensure the enforcement of its writ. Rather, its strength, its prestige, its power and hence its very existence, rests solely upon the confidence reposed in it by the public. That confidence is not to be lightly risked. I dare to dream the impossible dream and to run where the brave dare not go. This is our quest- no matter how hopeless no matter how far. Remember that every long journey begins with a single step. My Lord, the Chief Justice who would have thought that after the 9th of March you would in our midst today in this very auditorium presiding over this seminar? May the wind be always at your back and may the road rise up to meet you and may Allah Almighty hold you in the palm of His hand. It does not take rocket science to understand the no arm y, no matter of which breed, can stop the march of an idea the time for which has come.

Pakistan Zindabad, Pakistan Paindabad!

Muneer A. Malik, President, Supreme Court Bar Association

Islamabad, 26 May 2007

3. Statements of the Asian Human Rights Commission on Pakistan

AS-110-2007

May 30, 2007

A Statement by the Asian Human Rights Commission

PAKISTAN: AHRC condemns the death threats to Karachi journalists and calls for inquiries

On Tuesday, May 29, 2007, three senior journalists received death threats in the city of Karachi, Sindh province. Envelopes containing live bullets were found attached to the driver's side of the windscreen on two cars. In a third, a bullet was found on the driver's seat.

The journalists who received the first bullets are, Mr. Mazhar Abbas, Secretary General of the Pakistan Federal Union of Journalists and correspondent of the French news agency AFP, Mr. Zarrar Khan, a correspondent of the USA news agency AP and a photographer, Asif of AFP. The names of the three correspondents were included in a list of 18 threatened journalists which was issued last week by an organisation called the

Muhajir Rabita Council (MRC), allegedly a sister organisation of Mutehda Qaumi Movement (MQM), a coalition partner the government of President Musharraf. The list declared 18 journalists as the chauvinists and threatened them to change their reported views against general Musharraf and the chief of MQM, Mr. Altaf Hussian. The list appeared after the mayhem of May 12, 2007 in Karachi in which more than 50 persons were killed during the visit of suspended Chief Justice Mr. Iftekhhar Choudary.

The Asian Human Rights Commission (AHRC) strongly condemns the death threats against the journalists as an alleged effort of the government and its coalition partners to curb the freedom of media and a blatant act of intimidation. Putting the live bullets in the cars, wrapped in envelopes is a clear threat that in the near future the recipients will be targeted through bullets. The making of death threats is a serious act in itself whether or not they are intended to be carried out. The AHRC further demands that the perpetrators of the threats be brought to justice, the journalists be provided with protection and that the government should take action against the organisation, the MRC, which issued the list of 18 journalists that they declared to be chauvinists.

Freedom of expression and publication are the most fundamental freedoms. These are not just the freedom of journalists but the peoples' right to information can only be realised through the freedom available to journalists, publishers and other to present information to the people. Information is the basis of understanding and proper relationships within society. Suppression of information benefits only persons who are corrupt and those who abuse power. The attempt to intimidate the journalists can only be the work of those who are bent on benefiting from corruption and abuse of power.

Pakistan is now facing critical times and as one leading lawyer has put it, 'defining times.' What is at stake is the defense of the very fundamental elements of a society based on democracy and rule of law. The fight that it being fought now is to defend the separation of powers, independence of the judiciary, checks and balances and constitutional governance. Freedom of expression, freedom of publication and freedom of association are also very integral parts of the defense of constitutional governance. In fact, in the United States the first amendment to the constitution which is on freedom of expression is given pride of place. The military government that has been portrayed as defenders of democracy is in fact undermining this most basic element of a democratic society. The duty of a government is to defend and to protect the freedom of expression and thereby to maintain a climate of sanity within society. The inflaming of violence results in creating an insane society. The present attacks on the journalists only contribute to this same social insanity. The people who are now fighting to protect their fundamental freedoms must make it a common cause to defend freedom of expression and those who exercise this freedom such as the journalists concerned.

AS-097-2007
May 10, 2007

A Statement by the Asian Human Rights Commission

PAKISTAN: The military's violent suppression of the protest against interference of the judiciary needs to be vigorously resisted

As the movement to defend the suspended Chief Justice and the independence of the judiciary in Pakistan has gathered momentum in all part of the country as demonstrated by mammoth crowds congregating to greet him in the streets, the military regime has begun to use violent tactics to suppress this movement.

An organised attempt is now being unleashed against the lawyers and the people who have openly showed their dissatisfaction with the military regime and the suppression of their rights. Now lawyers are being attacked, media stations have been silenced and severe restrictions are imposed on the discussion of the military's reference against the Chief Justice before the Supreme Court.

In this way the military is trying to wrestle with the biggest challenge it has faced so far to its authority since it came to power through the coup in 1999.

The house of Mr. Munir Malik, the President of Supreme Court Bar Association (SCBA) and the lawyer of the suspended Chief Justice Mr. Iftexhar Chaudhry, was attacked in the early hours of the morning of May 10, by unknown persons who arrived in a car. The assailants fired so many rounds that 20 bullets struck within the house. His daughter survived as she was studying in her room. Several glass windows were broken and marks of the bullet strikes were found on the outside of his house.

This happened just 20 hours after the office of Mr. Malik was sealed by the Building Control Authority of the Sindh government. It was later ordered opened by the Sindh High Court.

The house of another senior lawyer, Mr. Akhter Hussien, former president of the Sindh High Court Bar Association also came under attack by unknown persons who fired at the house. This attack came at about the same time as the one of the house of Mr. Malik.

The Supreme Court of Pakistan yesterday issued a new Code of Conduct for the media regarding the discussion, analysis and coverage of the presidential reference against Chief Justice. As a result a ban has been imposed on debates by media over the presidential reference. The chanting of slogans in the premises of the Supreme Court during the proceedings of the reference has also been banned. Furthermore, any reports which show the issue in a bad light will be regarded as contempt of court.

The Sindh government has asked the Supreme Court to delay the visit of the suspended Chief Justice to Karachi on May 12, to prevent a clash between government and opposition parties. The Interior Secretary of the Sindh government, Brigadier Ghulam Muhammad Mohtrem, wrote to the Supreme Court Registrar on May 9, requesting him to delay the visit of the Chief Justice since the MQM, a government party, and opposition parties had scheduled rallies on the same day, which might result in clashes between them.

The lawyers and other organisations that are spearheading the movement to defend the suspended Chief Justice and the independence of the judiciary will now have to develop their strategies to counter the repression of the military regime. The cause which gave rise to the protests was the legitimate demand to protect the Supreme Court from being humbled by the regime. The attack on the Chief Justice was aimed at creating a completely subservient Supreme Court. If the protest regarding this matter is defeated it will mark the final victory of the military, not only against the judiciary in Pakistan but also over the entire legal process. Thus, the violence that is now being unleashed by the military, which is known for its extreme use of violence against the population, needs not only to be condemned but resisted by civil society as well as the international community.

Given the fundamental importance of the defence of the independence of the judiciary, the role that is being played by some Supreme Court judges themselves to become subservient to the military needs to be severely condemned. The silence imposed on discussions and debates on the military's reference made to the Supreme Court have no legitimate basis. Such suppression of discussion is neither a matter of sub-judice or contempt of court as is claimed by the Supreme Court which has imposed a code of conduct against such discussions. What is before the people now is one of the most vital political problems that will have enormous repercussions for the future. On such matters the duty of the Supreme Court is not to suppress public debate but to encourage it.

The present moves to impose such restrictions on discussions by the Supreme Court will be seen by the people as open subservience of the court to the military regime. Such a perception can only alienate the people from any faith in the judiciary. The greatest loser in that process will be the judiciary itself. The challenge to the lawyers now is not only just the violence unleashed on some of the leaders like the president of the SCBA, but about the suppression of the legal profession itself. If the military finally silences the judiciary the legal profession will have little validity or credibility before the people.

If the military regime is unleashing violence against peaceful protests the people have the right for non-violent disobedience. The matter of the survival of the judicial process and the independence of the judiciary are fundamental to any nation. Before such a threat the people of the country have a right to resist the regime through non-violent but active disobedience.

AS-086-2007
April 25, 2007

A Statement by the Asian Human Rights Commission

PAKISTAN: Attack on independence of judiciary is now extended to freedom of expression and information

In the midst of the judicial crisis the government has opened yet another front in the hopes of exercising damage control in an attack on a television station that has been

airing open discussions on the latest developments with regard to the political situation and also the judicial crisis.

For the past several weeks the AAJ Television station has been airing discussion programmes and talk shows on various issues including the latest situation to arise out of the country's judicial crisis. This television station has now been issued with a Show Cause Notice by the Pakistan Electronic Media Regulatory Authority (Sindh Region) (PEMRA), a central government agency, informing the management of this station that they have violated four clauses of the PEMRA code of conduct which denies any party the right to criticize the government. The management of AAJ Television has been given three days to show cause as to why they should not be prosecuted.

Political leaders, lawyers and experts on different disciplines including representatives of the government have been taking part in the programmes which have received wide audience participation. Various opinions were expressed during the broadcasts which allowed each participant to have a say.

The action by PEMRA is male fide in that out of the four charges only one pertains to the technical aspect of the broadcast and the remaining three are political in nature and a direct interference in the freedom of expression of any media agency. It is quite evident that the government is unhappy and irritated with the openness with which AAJ has allowed various opinions to be aired.

Discussing the independence of the judiciary is a matter on which society has a paramount concern and an attack on the Chief Justice is of such gravity that society cannot expect to be able to safeguard its basic rights without getting involved in his defense. Having discussions or debates on the rule of law and constitutional matters is a right guaranteed by the Constitution of Pakistan and no party, be they pro or anti state has the right to refuse any other party permission to express their views. This is an unalienable right guaranteed not only by the Constitution but by international norms and standards.

The Asian Human Rights Commission expresses concern of this action by the government of General Musharaff through PEMRA as a ploy to avoid their responsibility in the crisis that they themselves have created by making the Chief Justice of the country, Mr. Iftekhar Choudry non-functional. Furthermore, this is a blatant attempt by the government to curtail media freedom and freedom of expression.

The government appears to have lost all rationale in dealing with this crisis and must get back on track by taking the first step of reinstalling the Chief Justice. Secondly they must retract their Show Cause Notice served on AAJ television.

PRESS RELEASE

AHRC-PL-015-2007

PAKISTAN: AHRC calls for support for Chief Justice who has filed a petition for his own defense in Supreme Court

(Hong Kong, April 19, 2007) “When the Chief Justice of a country has himself to file action before the Supreme Court to get his rights vindicated, that is what you call a really serious constitutional crisis,” said Basil Fernando, Executive Director of the Asian Human Rights Commission (AHRC), commenting on the case filed by Mr. Justice Iftikhar Choudry, the Chief Justice of Pakistan who has been made dysfunctional and who filed a petition in the Supreme Court yesterday, April 18, 2007 challenging General Musharaff’s move to file a reference against him.

This historic petition by an incumbent Chief Justice was filed by him raising 132 questions on the competence of the Supreme Judicial Council (SJC) to try him on the issue of the reference. These grounds include the constitution of the SJC without the Chief Justice, personal bias and prospects of advancement of some members of the council, the alleged bad faith of the referring authority, which is the president (General Musharaff) and the haste with which he has acted, illegal suspension and forced leave of the Chief Justice, illegal assumption of office by the acting Chief Justice, the assault on the independence of the judiciary and in-camera proceedings of the SJC instead of allowing open court proceedings that will make it possible for the people of Pakistan to follow the proceedings.

The Chief Justice in his petition has requested the court to declare that the SJC is not lawfully constituted in the absence of the Chief Justice and that an acting Chief Justice could not preside over the council. He has further requested the court to declare the reference filed against him as mala fides and for a co-lateral purpose. And he has also requested the orders against the Chief Justice preventing from functioning and sending him on leave be declared illegal.

The Supreme Court has been asked to declare that the decision of the SJC to hear the case behind closed doors is unconstitutional, violates fundamental rights and amounts to a travesty of justice and fair play.

“When the Chief Justice of a country himself becomes a desperate litigant having to go before his own court to find justice it is hard to imagine the situation of an ordinary litigant in Pakistan,” said Fernando. “The eyes of the country and the international community must at least now be open to see not just the problem of the Chief Justice but the justice system in totality which has collapsed completely. How can the so-called free world support a military regime that can even treat its Chief Justice in this manner and still claim that this military regime is needed for the protection of democracy and rule of law? The cause of the Chief Justice needs to be supported whole-heartedly as at least a

last minute attempt to undo the colossal damage that the military regime has done to the justice system and the people of Pakistan.”

AS-083-2007
April 17, 2007

A Statement by the Asian Human Rights Commission

PAKISTAN: Lawyers warn of possible imposition of martial law - call for support in their struggle for democracy and independence of the judiciary

The Supreme Court Bar Association (SCBA) has warned that General Musharaff appears to be trying to ‘drive the country towards civil war just to perpetuate his rule.’ Referring to certain incidents of violent confrontations the SCBA said that this was ‘an attempt by the general to create chaos in the country, resulting in civil war which will justify the imposition of emergency in the country.’ The SCBA further said that the lawyers will not allow this move to succeed and nobody will be allowed to declare martial law in the country.

The active resistance put up by lawyers supporting the now dysfunctional Chief Justice Iftikhar Choudry is spearheading the struggle for the very survival of constitutionalism, independence of the judiciary, democracy and human rights in Pakistan.

All these institutions are not just under threat but are facing possible extinction under the massive attacks of the military regime of General Musharaff. These lawyers and many others who support them are today at the forefront of a struggle and their victory is essential if totalitarianism is not to completely submerge the country making recourse to law and the independence of the judiciary completely alien experiences for the people.

The forced out Chief Justice is reported to have stressed the need for the supremacy of the constitution and the law. ‘Deviations from the constitution,’ he has said ‘lead to anarchy and bad governance while complete obedience to the constitution by everyone ensures rule of law.’ He has further said that unless all citizens had access to justice and are able to resolve their disputes by legal means they would be at the mercy of the strong and the oppressors.

In an earlier statement the Asian Human Rights Commission has pointed out that the attack on the Chief Justice and the lawyers have encouraged those who promote Shariah law as against civil law to push their agenda. A complete overhaul of Pakistan’s legal fabric is now a real threat. Perhaps it is the perception of this threat by the lawyers that propel them to demand the reinstatement of the Chief Justice and to demand ‘go Musharaff, go’.

These protests are also directed at the release of lawyers and others who have been arrested while protesting against the actions of the regime against the Chief Justice. Senior lawyers representing associations of lawyers have demanded that ‘all those who

were behind the reference against the Chief Justice should be unmasked and brought to justice.' They have also demanded that all disappeared persons should be accounted for and all illegal detentions should be brought to book.

Meanwhile the Pakistan Bar Council (PBC) has urged professional parties and organisations including the Pakistan Federal Union of Journalists, The Medical Association, the Medical Council, the Engineering Council and associations of chartered accountants and architects to support the struggle of the lawyers. This call was made at a PBC meeting held on Sunday (15 April). The PBC has also called for strikes, boycotts and other activities in relation to the ongoing struggle. The PBC has been backed by the Supreme Court Bar Association.

The military regime of General Musharaff has gone a long way towards destroying the very fabric of the rule of law and democracy in Pakistan. Having come to power utilizing the popular dissatisfaction with an elected government due to its abuse of power and corruption the Musharaff regime has increased such abuse of power and corruption a thousand-fold. A world climate against anti terrorism has provided a good cover behind which this regime can hide the massive destruction of the entire framework of the democratic legal systems of Pakistan. This process of destruction is far advanced and that was what gave the military regime the confidence to take such drastic action against the Chief Justice himself.

The Asian Human Rights Commission supports the call of the PBC and also the struggle of all others who are taking tremendous risks in openly defying the military regime. Their struggle deserves the support of everyone throughout the world who cares for democracy and rule of law. Their loss will not only result in the extinction of what is left of the democratic constitutional and legal framework of Pakistan but also have a colossal demoralizing effect on the people of the country as well as those in neighbouring countries.

Some Reflections on the Nature of Extinct Legal Systems

Basil Fernando ♦

Introduction

The theme of this essay is that when a legal system is exposed to extremely adverse conditions for its operation and when such conditions continue to exist for a considerable length of time, the very existence of such systems may be endangered. Unless extraordinary measures are taken to reverse the process, they may well become extinct.

The basis on which this thinking proceeds is that natural resources as well as societal developments achieved in earlier times can be wiped out by the adverse actions of human beings in the course of history. This premise may be illustrated in the field of nature by some well known examples. It is today quite common talk that global warming is caused by various human activities such as extensive use of fossil fuels, deforestation and the like. Global warming is likely to be responsible for great natural disasters and these are likely to be of colossal magnitude. A much talked of loss of a natural resource is that of the Dead Sea. The recession of the Dead Sea has been the subject of much concern. It is said that among the causes is the diversion of rivers by neighbouring countries for development purposes thus reducing the amount of water that used to flow into it.

Another such resource considered lost is the Aral Sea which is located between the Uzbekistan and Kazakhstan. Following the Russian revolution, attempts were made to increase cotton production for export purposes and to this end irrigation channels were created which diverted water flowing to this land locked sea. The results were on the one hand, the drying up of the sea and on the other, the spread of industrial pollution which was the result of the chemicals use for production which flowed into the rivers and were deposited on the river beds. When the rivers dried up, these chemicals were carried by the winds to far away places, causing damage to agriculture and other environmental problems.

Similar processes have happened to societies. In this essay, we concentrate on the dangers caused to legal systems by adverse actions taken by various governments at different times. Such adverse actions referred to are the arbitrary changes of constitutions, suspension of civil liberties through various emergency and anti terrorism laws, state sponsored violence by way of disappearances, extrajudicial killings, torture, the sending of prisoners into exile, prolonged civil ways and the like. We will examine the dangers that such actions present to the entire legal system and we will examine in particular the impact on criminal justice systems.

The Evils of a ‘Free’ Executive

♦ Executive Director, Asian Human Rights Commission (AHRC)

One of the more frequent methods of displacing a legal system is through the replacement of a constitution when the newly adopted constitution does away with checks and balances which were present in the earlier constitution. Often a military dictator or even an authoritarian leader who initially came to power through an election, removes many of the powers normally available in a democracy to the parliament and the judiciary to restrain the actions of the executive. By such constitutional change, the executive which often is in the hands of one person, rises above the legislature and the judiciary and becomes 'free'. If this situation continues for a long time, people lose their knowledge about the workings of a constitutional government in a democracy and also gradually lose the habit of having recourse to parliament and or the judiciary for legal redress or for the defense of human rights.

Displacement of constitutional law affects public law. The citizen's right to challenge government actions can be restrained by various types of immunities that the executive can arrogate to itself. It can also be done by complete or partial removal of judicial review. Constitutional changes can also bring in restraints on the operation of writ jurisdiction of courts. The constitutional provisions may remove the power of the courts to intervene in matters which the courts were able to intervene on in the past. Such actions will also diminish the people's faith in the judiciary as an arm of the government that is able to restrain the abuse of powers by the executive. The very legal concept of abuse of power changes as the constitution in fact liberates the executive and allows it to do whatever it desires. At that time, whatever the executive does becomes right and ceases to be an abuse of power.

Politically speaking, an extremely ridiculous situation arises when one group or another in a country, for example, a military group declares that the constitution has been suspended. The meaning of this statement is that the paramount law of the country has no force of law anymore. When the paramount law of the country is suspended, the entire law of the country is suspended. If the law in the country is suspended, what is the basis on which the military or any other group bases its power? Obviously, the base will be sheer muscle power or the power of the gun. Much propaganda is carried out to give the appearance of a decent and harmless coup. However, the real impact of such a situation is that the people are brought under the naked power of the gun and the unrestrained power of individuals who can decide and do whatever they wish. What is the impact of this on the population that is watching this exercise? What value will they attach to a constitution whether it is the displaced constitution or the one that may be enacted in the future? The very idea of a paramount law that stands above everyone is lost and when this situation continues it can be lost for a very long time. Such loss affects the sense of law in the affected population as well as in the future generations.

Sometimes similar effects as the suspension of a constitution can be achieved in the suspension of some parts of a constitution as this is usually done in enacting emergency laws and anti terrorism laws. In essence, emergency or anti terrorism laws mean the removal of the restraints available within the normal law against arrests, detention and fair trial. The removal of such restraints paves the way to torture, extrajudicial killings

and forced disappearances. Often such emergency or anti terrorism laws also removes the judicial intervention into inquiries of suspicious deaths. The power of burial without reference to the judiciary virtually makes it possible to carry out extrajudicial killings and to dispose of bodies without leaving any trace for future criminal investigations. Such emergency and anti terrorism laws can also make habeas corpus applications futile. Thus, all basic aspects of criminal justice within a democratic and/or a rule of law system can be removed with just a few clauses of emergency regulations.

The far reaching impact of such removal of legal provisions by way of emergency and anti terrorism laws is that people lose the mentality of having recourse to judicial means for the protection of their rights. As life is controlled by the executive, the only possible means of defense is to have recourse to the mercy of the executive itself. In the minds of the people, judicial officers and others related to the judicial redress such as the criminal investigators and prosecutors diminish in value. As only marginal roles are left for the judiciary, the prosecutors and the criminal investigators also begin to be publicly perceived as unimportant and powerless figures lacking power and authority to carry out the legal functions that they are expected to carry out within a system of democracy or rule of law.

The Deleterious Impact on the Criminal Justice System

In instances where a new group of persons such as the military takes over power instead of an elected government or in the instance of even an elected government bringing substantive limitations to the normal law of arrest, detention and fair trial by way of emergency or anti terrorism laws, one particular aspect of the criminal justice system suffers above all others. This section is the criminal investigations system within the criminal justice system. Within a system operating under democracy and rule of law it is the criminal investigation system that does the most primary function that activates the other sections of the criminal justice system.

It is the investigating branch that investigates crimes including abuse of human rights and who has the task of uncovering what had actually taken place. It is the investigating branch that gathers the factual information which is the raw material on which all the evidence is built. Without the initial work of the investigating branch neither the prosecutors nor the judiciary can effectively function. It is also not possible for the government and the public to form proper opinions of what has taken place when criminal investigations do not take place in the proper manner.

When either a military group occupies power or the military gains more power under the emergency rules and anti terrorism laws, conflicts develop between civilian policing systems and the military system in the country. As the military gains more power within the new situation, it acts to diminish the power of the civilian police. All sorts of undercurrents develop in which the military exercises its dominance over the civilian police. Under these circumstances, there is often the complaint that the habits of civilian policing are being lost and that the police become militarized to some extent or the other.

This influence of the military over civilian policing is even worse when allegations of abuse of power and the commission of gross abuse of human rights are made against the military or those who are working in collaboration with the military. The civilian police is tasked to investigate such military abuses. However, the civilian police under these circumstances lack both muscle power and the legal powers to carry out effective investigations into such abuses. Daring investigators will face serious threats to their lives and liberty. The same state which authorizes the abuse of power by the military cannot provide the protection needed for investigators into crimes to conduct such investigations safely. Under such circumstances, civilian police undergo a sudden transformation in which it begins to restrain itself in order not to interfere into areas which are in conflict with the military powers. Again under these circumstances, the criminal investigating capacity of the civilian police suffers immensely.

Habits of a criminal investigating unit are formed through years of training and hard work. On the one hand, the civilian police investigating crimes have to adopt methodologies and strategies to investigate effectively. Learning these methodologies requires study in the art of investigation. Often methodologies developed all over the world are introduced through various forms of education programmes and training. Senior officers impart such knowledge on their subordinates over generations. It is through the continuity of practice that hard habits of investigation become entrenched within the investigating branch of the state. These investigators have on the other hand to learn to respect the rights of citizens and also those whom they investigate. This too requires both education of the mind as well as development of habits. Further development of all these skills also requires the adoption and adjustment to various forms of supervision. The relationship between superiors and subordinates are kept up through various forms of report writing, analysis and assessments. Both the superior offices and the subordinates have to learn many practices which ensure discipline in order to make such a system of supervision effective.

What happens when the power of criminal investigation is suspended either through change of power holders or by the suspension of laws through emergency and anti terrorism laws is that all such skills and habits can be lost to a criminal investigations branch. Over a certain period of time when the rules of responsibility for dealing with all crimes is removed, when only selected investigations are allowed and even worse when the investigations are carried out not to discover the facts but to cover up situations a criminal investigations branch goes through a metamorphosis. Once such a metamorphosis takes place it is not possible to bring it back to a normal situation even through the introduction of a new democratic constitution or the removal of emergency and anti terrorism laws. It will take another long period to reestablish professional habits and a professional mentality in criminal investigations.

Conclusion: The Facade of Justice

What all this demonstrates is that whatever might be built over a long period of time to establish the authority of courts, the capacity of criminal investigators and the functioning

of a justice system can be lost by adverse actions as mentioned above and if such action is continued over a long period, the whole system may become extinct. The names and titles, such as judges, criminal investigators, prosecutors and the like may remain the same. However, the substance of their power and capacity is so transformed that the system which they represented does not exist any more. When that transformation takes place, these names and title holders themselves are aware of their diminished status. What is worse is that the entire population also knows of their diminished status. Internally the mentalities of the bureaucracy as well as the people go through a metamorphosis. Only the façade of justice remains.

When the justice system goes through such a fundamental transformation it affects all areas of life including the functioning of such institutions such as parliament. One of the most common myths in recent times is that planting of a parliament can create democracy by itself. However, when parliaments cannot rely on the support of a viable justice system as needed within a system of democracy and rule of law, parliament itself becomes ineffective and often even becomes a mockery. There are more and more authoritarian systems which, while maintaining parliaments do not attribute any real power to them. When a strong justice system does not support the parliament in protecting it from the control of the executive, there is very little that a parliament can do to protect itself. Thus, despite of the existence of parliaments, a group of persons gathered as military leaders or even civilian leaders can effectively take all the control and all effective powers of ruling.

Under those circumstances a justice system which will initially be weakened and then become extinct altogether.

A Grisly Dance of Non-Accountability; Critically Examining Sri Lanka's 2006 Presidential Commission of Inquiry to Investigate Grave Human Rights Violations

Kishali Pinto Jayawardena[♦]

Introduction

This brief discussion paper will look at the following points in relation to the recent Commission of Inquiry, (CoI or the Commission), established by the Government of Sri Lanka in 2006 in order to probe into selected incidents of extra judicial killings, disappearances and other grave human rights violations, including the case of the killing of 17 aid workers of ACF in Mutur.

These cases include the assassinations of Minister Lakshman Kadirgamar, MP Joseph Pararajasingham, Kethesh Loganathan, the execution style shooting of 17 aid workers in Mutur and killings in Mutur, Trincomalee, Sancholai, Pesalai Beach, Keys Police area, Pottuvil, Kebithagollawa, Welikanda, Digapathana and the disappearance of Rev Jim Brown, all of which occurred at varying points of time during 2005 and 2006.

The Commission (which commenced its formal sittings in March 2007) is 'observed' by eleven 'eminent persons' whose functioning is also governed by a mandate issued by the Presidential Secretariat.

The Government of Sri Lanka has been strident in its assertions that this Commission will constitute an effective mechanism in re-establishing accountability for rights violations in Sri Lanka. Consequently, the mandates of both the Commission and the international observers will be analysed in detail to see whether this is indeed the case. In so doing, I will stress the fact that we have had enough of Commission Reports and Sessional Papers that have merely languished in the desks of bureaucrats. On the contrary and insofar as killings allegedly by government forces are concerned, given the pervasive climate of impunity that has prevailed for decades, (aided by extraordinary emergency laws allowing abuses), an effective pattern of prosecutions will be the only actual deterrent. Yet, is the Commission satisfactorily structured to realise this objective?

During the past three decades, we have undergone civil and ethnic conflict as a result of which, more than sixty thousand people have died. These killings have occurred both in the North due to the conflict between the separatist Liberation Tigers of Tamil Eelam

[♦] public interest lawyer & writer; Deputy Director and Head, Legal Unit, Law and Society Trust; Editorial (Legal) Consultant/Columnist, *The Sunday Times*, Colombo. This paper is based on a legal advisory opinion submitted to Action Contra L'Faim (ACF) in relation to the killings of 17 ACF aid workers in Mutur in August 2006. This is one of the cases specifically listed in the mandate of the CoI for investigation and inquiry.

(LTTE) as well as during the late eighties when there were attempts by the Janatha Vimukthi Peramuna (JVP) to capture the government through Armed force. The abuses that occurred during these periods of conflict were manifold.

While the LTTE and the JVP were responsible for countless acts of terror, the counter response on the part of the various Governments was equally ruthless. Many people were simply 'disappeared' by state agents using emergency laws that gave them extraordinary powers or by paramilitaries acting with the knowledge and concurrence of sections of government. There is no question that these deprivations of life were due to a system that allowed and even encouraged such abuses. A familiar argument of successive governments has limited responsibility to rogue elements within its ranks. One primary factor however gives the lie to this spurious defense.

This is that despite the many thousands of disappearances and extra judicial killings, the Sri Lankan State has been demonstrably unwilling to put into place, specific mechanisms of legal accountability that counter impunity for these perpetrators. Most particularly, we have seen only two successful prosecutions in so far as high profile extra judicial executions and enforced disappearances are concerned in recent times. Ironically, one case concerned brutal acts of rape and murder of a Tamil schoolgirl and members of her family by soldiers in the North (the *Krishanthi Kumaraswamy Case*) while the other concerned the no less brutal enforced disappearance of fifty three Sinhalese schoolboys in a remote village in the South (the *Embilipitiya Case*).

There are a plethora of reasons for this failure; lack of an independent and effective Attorney General's Department, compromised criminal investigations processes, absence of a witness protection system and an outdated body of penal law/rules of criminal procedure and evidence are some of these reasons. The answer to addressing impunity of perpetrators of grave human rights violations lies in redressing these failures rather than establishing commissions of inquiry. It is from this categorical standpoint that this paper will look at the functioning of Sri Lanka's latest Presidential Commission of Inquiry.

1. Background - The nature of the CoI and the deficiencies in the law under which it is established.

This is a **fact finding** Commission that has been established and, as such, does not have actual prosecutorial powers or enforcement powers of its recommendations. In the current context of decades of human rights violations in Sri Lanka (with the establishing of a pervasive climate of impunity for the perpetrators of such violations aided as this has been by a system of extraordinary emergency laws that allow abuses), an effective pattern of prosecutions will be the only actual deterrent. It is however extremely doubtful whether such an objective could be achieved by this Commission for the reasons set out in detail hereafter.

Act No 17 of 1948 (the law under which the Commission is established), was enacted in 1948 (there have been no substantial amendments since then) primarily to provide for

small local inquiries concerning the administration of any department of Government or the conduct of any member of the public service among other things. While it was suitable for that purpose, it was not meant to be used for complex inquiries such as investigations into extra judicial killings and is **manifestly inadequate** in that regard.

The fact finding nature of the Commission is very clear on page 2 of the mandate of the Commission which states that the investigations and inquiries conducted by the Commission would facilitate and enable the President “to present the relevant material to the appropriate competent authorities of the Government of Sri Lanka including the Attorney General, enabling the institution of appropriate legal action, including the consideration of the institution of criminal proceedings and efficacious prosecution of those persons” responsible. (emphasis mine). It does not automatically follow from the recommendations of the Commission, that immediate prosecutions will ensue.

Past practice of the work of similar Commissions has indicated this very well. One immediate comparative instance is the 1994 Zonal Presidential Commissions of Inquiry to investigate the Involuntary Removal or Disappearances of Persons which was appointed under the very same law in terms of which the current Commission has been appointed.

Out of the four Commissions appointed in 1994 to investigate these incidents in the relevant Provinces, the Report of the Zonal Commission investigating the Disappearances of Persons in the Western, Southern and Sabaragamuwa Provinces (hereafter the Zonal Western Province Disappearances Commission) remain the best example of the futility of the work of Commissions of this nature, even if the Commission itself functions satisfactorily.

Some 10,000 witnesses gave evidence before the Zonal Western Province Disappearances Commission and this body found the security forces responsible for 40% – 75% of the disappearances. However, the prosecutions that followed from these findings were negligible. Despite the fact that tens of thousands of such cases are thought to have occurred in the past, we have (reportedly) only 9 cases of convictions since 1998.

Even where past Commissions of this nature had conducted fairly good inquiries, their findings have not been used in the actual prosecutions relevant to those cases. This is primarily because the **standards of proof** used in both contexts differ. The commission inquiry is permitted to hear evidence of those affected *ex parte*. The provisions of Act No 17 of 1948 stipulate that hearsay evidence (statements by third parties) may also be heard which evidence would however be inadmissible in an actual prosecution. Though in some cases, the commissions that were appointed were scrupulously careful in not admitting hearsay evidence, this was not inevitably the case in all commission proceedings.

In contrast, the High Court before whom those named (if indeed, such names transpire) will be prosecuted, will consider the specific question as to whether those particular army officers specified in the indictment were responsible **beyond all reasonable doubt** for

their complicity in that particular crime. Hearsay evidence will not be admissible for that purpose.

One case which concerned the killing of schoolchildren in the South during the 1908's, namely the Embilipitiya Case, illustrates this problem very well. This was a case where the lower level soldiers who were implicated in the killings were successfully prosecuted in Court. Prior to the prosecutions, the Zonal Western Province Disappearances Commission had inquired into the disappearances and found not only a group of junior officers but the district coordinating military secretary (who was in effective charge of the military for that area) responsible.

However, when the case went to the High Court for prosecution, even though that senior army officer was indicted along with the other juniors, he was acquitted due to the Court holding that no evidence could be found directly linking him to the charges of abduction with intent to kill. The findings of the Zonal Western Province Disappearances Commission were not relevant for this prosecution and appear, in fact, not even to have been cited before the High Court.

There is a very strong possibility that this same pattern will repeat itself in the cases specified to be inquired into by the instant Commission of Inquiry. In other words, even if the inquiry/investigative process of the Commission proceeds successfully, its findings may well prove to be useless when the matter goes to actual prosecutions in terms of the existing criminal law.

Sri Lankan law does not incorporate the principle in the Rome Statute where a crime against humanity is defined to include enforced disappearances in the following manner;

Enforced disappearances of persons means the arrest, detention or abduction of persons by or with the authorisation, support or acquiescence of a State or political organisation followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time. (*Article 7(2)*)

The law also does not include the Rome Statute's specific inclusion of the responsibility of commanders and other superiors when violations of this nature happen under their command. These provisions impute responsibility where a commander either knew or should have known that such crimes were being committed by forces effectively under his or her command and failed to take all necessary and reasonable measures to prevent the commission of the crimes **or to have them investigated**. (*Article 28, emphasis mine*)

Where petitions involve issues of service responsibility as factually and immensely complicated as those relating to prosecutions for extra judicial killings, they cannot satisfactorily resolved in terms of the law and procedures as are presently applicable in Sri Lanka.

Suggestions made in the last segment of this paper could form part of long term lobbying for substantial changes in the domestic legal system that would go a long way towards ensuring that atrocities similar to that of the killing of the 17 aid workers of ACF in Mutur in August 2006 will not recur.

2. Deficiencies in its mandate

The lacunae in this respect have already been highlighted, most notably by Amnesty International and Human Rights Watch in their responses to the establishing of this Commission as well as by the Centre for Policy Alternatives in their report on the CoI.

Primarily, though the extent of the matters into which the Commissioners can inquire, are fairly broad, the provision that the President can withhold the publication of any material which is in his opinion, “prejudicial to or absolutely necessary for the protection of national security, public safety or wellbeing” deprives the work of the Commission of an important element of credibility.

The terms ‘public safety and well being’ are very general and vaguely worded terms as differentiated from the term “public order.” Curiously enough, the version of the Mandate of the International Observers furnished to me specifies only national security and public order as grounds on which objections may be raised to the release of observations of the International Observers, see pages 8 and 9).

Undoubtedly, at the very minimum, “public safety or wellbeing’ as stated in the Mandate of the Commission should have been replaced by ‘public order.” The wording should have been the same in the Mandate of the Commission as it is in the Mandate of the International Observers. The discrepancy between the two is inexplicable. Different grounds therefore seem to govern the release of the reports of the Commission and the International Observers.

In any event, this is a clause that should never have gone, as it is, into the Mandate of the Commission and should not have been agreed to by the international organisations assisting in the setting up of the Commission, including the office of the United Nations High Commissioner for Human Rights.

The ambiguity of the wording in the relevant last paragraph of the Mandate leaves the publication of the Report of the Commission dependant upon yet another contingent factor; namely that the publication should be after the Attorney General decides to prosecute and files indictment for that purpose. The question then arises, what would be the situation if the Attorney General (for the reasons mentioned in segment A. of this memo) decides that there is not enough prima facie evidence to prosecute? Would the Report then not be made public? This is a further ambiguity that should have been corrected before the Mandate was finalised.

In addition, the law under which the Commission is set up empowers the President to alter or revoke the warrant in terms of which the body is set up and the Mandate issued, without giving any reason.

3. Identifying a list of indicators which can be used as a measure to point to its success or failure;

- a) Whether the Commission puts an effective and substantial witness protection system into place.
- b) Whether it orders the army/police to conduct investigations in appropriate cases of inquiries coming before it and further, rigorously monitors these investigations.
- c) Whether it investigates into cases where perpetrators are identifiable not only in terms of direct involvement in the relevant crimes but also in respect of their indirect responsibility, particularly in the sense of officers in command not taking sufficient steps to investigate abuses committed by their subordinates;
- d) Whether it allows the international observers to have access to witnesses when they are called upon to testify, whether it responds to the requests of the observers in terms of Sections 4 and 5 of the Mandate of the International Observers and whether it adheres to the recommendations of the international observers in respect of its functioning.
- e) Whether it is pro-active in its working and is available to public/media scrutiny.
- f) Whether its Recommendations take into account, the general deficiencies in the Sri Lanka that impede successful prosecutions and help to maintain the current climate of impunity for human rights violators, some of which are detailed in the concluding segment of this Memo.

4. The independence of the Commissioners;

The perennial problem in Sri Lanka has been the selection of persons as Commissioners who, not only have professional/personal integrity but also possess strong human rights commitment and have not been compromised in relation to their affiliations to any political party. There are only very few such individuals in Sri Lanka unfortunately!

The guarantee that the Commissioners are legal/judicial persons does not carry an automatic endorsement of their credibility. This observation is all the more relevant in a context where the current Chief Justice has been a prominent political actor in recent times, (with the Supreme Court delivering destabilising judgements in the past year, including the north-east demerger case), and where the country's civil/intellectual society as well as the legal profession have proved to be thoroughly ineffective in safeguarding the independence of the judiciary.

However, pressure may be exerted to enable the Commission to function better than its predecessors. The Commissioners themselves are acutely aware of the critiques that have been made of this process and may be eager to rebut these negative perceptions.

5. The procedures of the CoI as to the protection of witnesses, in particular, the manner in which these witnesses and further relevant potential witnesses could have all the guarantees needed for their safety during and after the hearing including possibilities of asking for a hearing behind closed doors, non identification of witnesses and video testimony;

The contemplated witness protection programme is still awaited. In terms of the law, *in camera* hearings could certainly be requested.

6. Whether the mandate of the international observers ensures their freedom of action and expression and allows them to go beyond the task of ‘mere observance’ in order that they are able to claim the right to speak, to interrogate the witnesses, right to have discussions with the members of the commission, right to suggest questions and so on;

The mandate of the international observers allows them to have access to information and material in the hands of the Commissioners and with the concurrence of the latter, allows the observers to have access to witnesses when they are called upon to testify. A direct right to interrogate/question the witnesses is not specified in the mandate. Perhaps this may be worked out between the Commissioners and the observers. A reluctance on the part of the Commissioners to allow this may be looked upon as a negative indicator of the Commissioners’ commitment to ensuring justice.

The conditions governing the release of the observations of the International Observers (namely the provision for objections to be made by the Chairman of the Commission or the Attorney General if they are of the opinion that such observations are prejudicial to national security or public order are also problematic.

The fact however that such observations may be published anyway (as long as they contain the objections so raised) is positive and should be used effectively by the International Observers.

In respect of the conditions governing the release of the Reports by the President, though the more vague terms of “public safety or wellbeing “(used in the mandate of the Commission) is not used here, still the use of the term of national security and public order is unsatisfactory. Equally so is the fact that the Head of the Secretariat of the International Observers is the Secretary to the Ministry of Justice which deprives the process of the appearance of impartiality.

7. The issues that the international observers (IIGEP) should address their minds to in the context of ensuring that the Commission works to its maximum efficiency within the

framework of the existing law in Sri Lanka and the applicable mandates of the Commission as well as of the observers;

The procedural functioning of the Commission

A. The mandate of the Commission refers to ‘causing independent and comprehensive investigations into incidents involving alleged serious violations of human rights arising since 1st August 2005, specifically **including** serious violations of human rights specified in the Schedule’ (see respective last sentences in the second and third paragraphs of the Commission’s mandate and also the first and third paragraph of the Mandate of the International Observers). From all accounts, there appears to be an internal debate among the Commissioners as to whether the Commission should limit itself to only the fifteen specified incidents or whether, given the use of the term ‘including’, the Commission’s investigations should extend to other incidents of grave violations of humanitarian law as well during this period. It is recommended that the IIGEP urge an expansive interpretation of the mandate. It is important to show that the deficiencies that occurred in the legal/investigative process was not limited to one or more isolated incidents but instead, is part of a systemic problem in the Sri Lankan legal/investigative/judicial process.

B. The IIGEP should push for access to the witnesses in terms of para 2 in the TOR of the IIGEP and should urge a constructive interpretation of the term ‘access’ in order that this may include provision to question the witnesses themselves.

C. The IIGEP should use to the full provision in para 11 of the TOR which relates to periodic public statements to be released by the IIGEP regarding their observations on the manner in which the investigations and inquiries of the Commission is being carried out, subject to the stipulated conditions of prior notification to the Chairman of the Commission and the inclusion of their objections, if any. It is extremely important that, given the history of past Commission processes in Sri Lanka which were held in secret whenever they concerned inquiry into extra judicial killings of particular controversy, this Commission should be mindful of being open and transparent in their sessions and should be called to account by the IIGEP in default thereof;

D. The relevant last paragraph of the Mandate of the Commission leaves the publication of its Report dependant upon not only it not offending vaguely termed ‘public security and welfare’ but also dependant upon it being only after the Attorney General decides to prosecute and files indictment for that purpose. This makes the speedy publication of the report of the Commission very doubtful as for example, what would be the case if the Attorney General decides that there is not enough prima facie evidence to prosecute? Or, for that matter, in a country where the indictments take up to two years even in the case of ordinary crimes, what would be the case if there is interminable delay in the issuance of the indictments? In contrast, the report of the IIGEP does not have these conditionalities in terms of para 13 of the TOR. The IIGEP should therefore urge its publication subject only to questions of national security and public order, strictly interpreted as they should be;

E. The substantive findings of the Commission - Paragraph 12 of the Mandate of the IIGEP is extremely important in that respect. This allows the IIGEP to place on record, its observations if the Attorney General decides not to prosecute a person or group of persons consequent to the recommendations by the Commission. The following observations are useful in that respect;

- a) The IIGEP may draw comfort from the fact that scrutiny of the lawfulness or the reasonableness of the prosecutorial decision making powers of the Attorney General is already a part of Sri Lanka's law as judicially asserted by the Supreme Court in *Ivan v Attorney General (1998] 1 Sri LR, 340, SC Application No 89/98 decided on 3rd April, 1998*). In this case, the question was whether a decision of the Attorney General to grant sanction to prosecute or to file an indictment or the refusal to do so could be reviewed. Answering this question in the affirmative, the Court discussed first the circumstances in which the discretion to grant sanction could be reviewed, concluding that such a power of review existed where the evidence was plainly insufficient, where there was no investigation, where the decision was based on constitutionally impermissible factors and so on.
- b) In terms of the TOR of the IIGEP, such negative observations can be made only if the decision of the Attorney General is unlawful or unreasonable. Analysis of both these terms are pivotal in the context that the Commission itself has been mandated to come to a finding on the 'identities, descriptions and backgrounds of persons and groups of persons who are responsible under the applicable laws and legal principles of Sri Lanka' for the commission of deaths, injury or physical harm in respect of the fifteen selected incidents.
- c) Proving the question of direct responsibility for the crimes will not be easy given the difficulties that arise on obtaining eye-witness evidence etc. On the other hand, as discussed elsewhere in this memo, the doctrine of command responsibility is not incorporated in our criminal law. So for example, if the question of culpability involves indirect rather than direct responsibility, could the Commission recommend prosecution and would the Attorney General be justified in issuing indictment? If not, would the Observers be justified in regarding this as an unreasonable or unlawful decision of the Attorney General to refrain from prosecution?
- d) It is submitted that the IIGEP should push for such an expansive interpretation of the law and use in that context, decisions of the Supreme Court that have indeed, incorporated the doctrine of command responsibility in using its *sui generis* fundamental rights jurisdiction in terms of Article 126 of the Constitution. The term 'under the applicable laws and legal principles of Sri Lanka' undoubtedly includes constitutional principles and the court's interpretation thereof. The limitations in the criminal law which stems from provisions in an old and archaic statute should not be allowed to restrict a liberal interpretation of this phrase and development in the constitutional jurisdiction could be used for that purpose. The

relevant cases that could be cited in this respect are described in Annexure Two to this paper.

8. Long term Strategies including an assessment of the probable efficacy of the Commission's Recommendations and particularly, ensuring that effective prosecutions ensue;

Now that the Commission is a *fait accompli*, the process could be used to push for strong recommendations by the Commission as outlined below.

In the short term, the call for an international monitoring mission should be maintained. However, even with such a mission, if the domestic law remains deficient, the impact of the findings of a mission of this nature will not be very strong. From a long term perspective therefore, the ongoing extra judicial executions, disappearances and abductions should be used to lobby the Sri Lankan government to amend its law and procedures relating to the prosecution of persons accused of grave violations of human rights and humanitarian law in the following manner;

- a) Sri Lanka should appoint an independent Special Prosecutor (appointed by consensus of the government as well as civil society organisations in the country) who would have specially trained staff under his/her command to inquire, investigate and prosecute all crimes, including grave human rights violations. Presently, such crimes, (when disappearances are concerned), are investigated by the Disappearances Investigation Unit (DIU), a special unit within the CID. The Missing Persons' Unit (MPU) in the Attorney General's Department is in charge of prosecutions in cases of disappearances but there are very few successful prosecutions of disappearances. Where other crimes are concerned, such as the ACF killings, they are investigated by the CID. This approach is manifestly unsatisfactory.
- b) Changes to the criminal law should incorporate the doctrine of command responsibility, statutes of limitations should not apply, the defence of superior orders should not be permissible and the full scope of liability for prosecution should apply.
- c) The prohibition against extra judicial killings/enforced disappearance should be elevated to the status of a fundamental right in the Sri Lankan Constitution. Currently, the Constitution does not include the right to life as a specific fundamental right though in some isolated and limited cases, the Supreme Court has brought in an implied right to life.
- d) Sri Lanka should be urged to ratify the Convention against Enforced Disappearances as well as the Optional Protocol to the Convention Against Torture and should be further urged to give domestic effect to the ratification of international conventions and their supervisory mechanisms, particularly the individual communication procedures in the context of the recent *Sinharasa* judgement of the Supreme Court which stated that the mere act of Presidential accession to the Optional Protocol of the International Covenant on Civil and Political Rights (ICCPR) will not be sufficient to

confer any authority on the views of the United Nations Human Rights Committee. This judgment pronounced that this act of accession itself was unconstitutional since it had not been approved by Parliament or by the people at a Referendum. It has had a gravely negative impact on the State's commitment to be bound by international treaties which the country has acceded to, in international law.

Statements and Open Letters of the Asian Human Rights Commission on Sri Lanka

AS-109-2007

May 28, 2007

A Statement by the Asian Human Rights Commission

SRI LANKA: Strengthening of the policing institution and not acting by ‘hook or by crook’ is the solution to lawlessness

The killing of five members of a single family at Delgoda over a land dispute, a subsequent mob attack in which three houses in the neighbourhood were burned, followed by the shooting of two alleged suspects whilst in police custody, which killing has been declared by a magistrate as justifiable homicide, has been subjected to considerable discussion in Sri Lanka.

The Asian Human Rights Commission, last week wrote an open letter to the Honourable Speaker and the Members of Parliament calling for a parliamentary debate with a view to developing a comprehensive plan of action to deal with the lawlessness that has developed in the country and acknowledged by everyone (Please refer to [http://www.ahrchk.net/statements/Open Letter to Honourable Speaker](http://www.ahrchk.net/statements/Open_Letter_to_Honourable_Speaker)). Today’s statement aims at three alarming points of view expressed in the present debate which if left unchallenged can in fact lead to a worsening of the situation. The three points of view referred to are (a) that the collapse of the rule of law has reached a point that is too big a problem for the Sri Lankan police to deal with within the framework of the rule of law, (b) that the police must resort to dealing with the problem by ‘hook or by crook’ and (c) that magistrates accept police versions of justifiable homicide without question.

The holders of the view that the maintenance of the rule of law and the curbing of lawlessness is too big a problem to deal with are many. They include the present and the former Inspector Generals of Police, a section of the media and the political establishment as a whole. The present Inspector General of Police is quoted thus:

.....In April this year Police Chief Victor Perera declared that the Police may even have to go beyond the law to combat crime.

Addressing the news conference he said, they would maintain law and order by “hook or by crook”.....

“We will not be deterred by those who are involved in these acts, whether they are from the underworld or persons with big names. We are also armed with weapons.

“We will not back down in fear of their weapons. Though you don’t have weapons we have sufficient number of weapons and also a cadre of about 77,000

to 80,000. For us the place doesn't matter.....

The Sunday Times, May 27, 2007 – Cops and Killers: Who reigns

Dealing with all great or grave problems depends on the perspectives of those whose duty it is to deal with them. The perspective that crime can be dealt with 'by hook or by crook' is in itself self defeating. It shows that the chief of the law enforcement agency does not have a perspective through which the problem of increased lawlessness can be dealt with. The moment that law enforcement officers think of dealing with lawlessness by hook or by crook or by weapons, they have already abandoned the rationality of their institution and opted for dealing with crime irrationally.

No law enforcement agency has a legitimate right to act irrationally. The term, 'by hook or by crook' itself belongs to the terminology of the criminals. To believe that criminals can be destroyed only by methods similar to their own is to abandon all the basic legal and philosophical premises on which modern criminology is based. (To declare that they will act by hook or by crook is also a statement of arrogance that no holder of a legitimate post is entitled to take). The very basis of the rule of law is that no one is above the law. This would mean that law enforcers themselves are not above the law.

There is a vast difference between the primitive methods of war lords who use gangs in order to suppress other gangs considered enemies of law and order. In that primitive state (unfortunately such a state prevails even now in countries where the rulers rule in a primitive manner), all that is needed for a gang activity to be legitimised is for the holder of the political power to sanction that activity. However, in any society which has reached the state of being based on rule of law the law enforcement officers cannot behave as a gang. The leaders of the police are not legally entitled to give orders other than those allowed by law and they are also legally obliged to treat the illegal acts of their subordinates in a similar manner as those of others. Thus, there is not one law for the police and another for everyone else. The law is the same for all. A murder remains a murder if someone is killed with the intention to kill. The intention being good or bad does not make any difference to the fact that murder is just murder. The police are not legally entitled to engage in acts which are otherwise crimes for what may be thought of as good intentions; for example the intention to maintain law and order.

What all this talk about dealing with the problem 'by hook or by crook' implies is the failure to admit that it is the weaknesses of the institution of policing in Sri Lanka that has made lawlessness possible in the country. The problem is not one of the increase of criminals, but rather the degeneration of an institution for various factors, which of course cannot be blamed on the people in positions of authority in the policing institutions at the moment. What the present authorities can be blamed for is that they are unable to act professionally to state to the government that the professional conditions necessary to deal with the law and order situation do not exist any longer within the policing system in Sri Lanka. Instead they have allowed themselves to become 'gangs' for a government that does not provide the necessary resources for the premier law enforcement agency to become one that is professionally equipped to deal with crime.

It is simply plain commonsense that those who can do things 'by hook or by crook' themselves become crooks. It is not possible to do things that crooks do without becoming a crook oneself. Can the premier law enforcement agency in the country allow anyone of its members to become a crook? The very moment this type of expression and the implied perspectives become part of the premier law enforcement agency, the cause of the maintenance of law and order is lost. If a police officer is allowed to behave as a crook what limits can the Inspector General of Police place on such crookery? If to deal with criminals a policeman acts as a crook what is there to stop such an officer from doing so for his own benefit? By adopting the philosophy of 'by hook or by crook' the police leadership has only opened a Pandora's box that should always remain closed. The possibility of a policeman becoming a crook should be avoided at all costs if the integrity of the institution is to be preserved.

Equally alarming is the manner in which the magistrates declare that deaths are due to justifiable homicide only after listening to the police version of the events. This virtually makes the police privileged persons before the magistrates. If a citizen was to go before a magistrate and claim that he killed a person who entered his property in self defense, will a magistrate immediately declare this to be an act of justifiable homicide? If this becomes possible there will be murders everywhere and the magistrates will have to take the words of those who did the killing at face value and declare all such murders justifiable homicide. On the other hand if it is only the police who can make such declarations the consequences will not be different. In recent times the claims of killings in self defense have become an almost daily occurrence. Is this one more application of the philosophy of 'by hook or by crook'?

If you kill a criminal and then add a story which may not be altogether true it is not difficult to adjust to the 'by hook or by crook' philosophy. If the magistrates do not call for complete inquiries into all murders and leave the final verdict regarding the death to the trial courts, the magistrates may have no way to escape from the 'by hook or by crook' philosophy, and thus deviate from the rule of law.

Over a period of ten years the Asian Human Rights Commission has pointed out that the problem of law enforcement in Sri Lanka is primarily the failure to invest in the development of an efficient, modern law enforcement agency in the country. Other countries which have made that investment deal with criminal elements in a much different manner and the citizens are not forced to live in bewilderment of criminals or law enforcement officers who behave under the philosophy of 'by hook or by crook'. The political crookery that uses anarchy and chaos for political and economic gains of the power holders also prevents the investment in law enforcement to make the institutions of law enforcement viable institutions that can find rational solutions to the prevention of crime within a framework of law without resorting to 'crookery.' Abandonment of the limited institutional reforms sought through the 17th Amendment has enormously contributed to the further degeneration of the rule of law situation in the country.

It is the task of the citizens of Sri Lanka including its parliamentarians to challenge the view that allowing the policing institutions to degenerate to the point where it can act outside the law can be the solution to lawlessness. Not to challenge the 'by hook or by

crook' philosophy will imperil Sri Lankan society more and more. Sri Lanka does not need crooks to enforce the law. It requires professionally competent people with integrity that can create a modern machinery of law enforcement. For that considerable investment has to be made and there is no way around this.

AS-096-2007

May 9, 2007

A Statement by the Asian Human Rights Commission

SRI LANKA: Lawlessness spills into mob killing of suspected thief

Mr. I. G. Pushpakumara (30) a navy officer said to be assigned to VIP security who was on home leave was beaten to death by a mob who believed that he was trying to escape after committing the theft of a mobile phone.

When a crowd chased this navy officer, as some people shouted 'thief' it is reported that he tried to fend off the crowd by firing his navy issue pistol into the air. However, the crowd grabbed the officer, pulled him down and thereafter he was hit with stones and poles and also stabbed in the back. The injuries at the post mortem shows serious head injuries, injuries at the base of the skull and lower jaw. The face had been severely damaged by attacks with blunt instruments. There were injuries to the buttocks which were of non-fatal nature. There were also severe injuries to the chest and back, also suggesting attacks with blunt instruments. He was brought to Kalubowila hospital where he succumbed to his injuries. The post mortem was conducted at the hospital and the investigations are being conducted the Dehiwila police.

It is reported that about 15 persons have been questioned by the police and nine persons have been arrested. At the scene of the crime heavy stones and poles suspected to have been used in the attack were found.

The Asian Human Rights Commission has in the past cautioned on many occasions that the type of lawlessness that is spreading in the country is likely to spill into mob violence and killings of suspected criminals. The 'license to kill' alleged criminals has grown in the last few years with the silent encouragement of the former Inspector General of Police for the disposal of alleged criminals by extrajudicial means. Many deaths due to alleged attempts by the suspects to escape police custody have been reported in recent times. Hardly any investigations follow after such killings. The AHRC has also earlier pointed out the growing habit of magistrates declaring justifiable homicide after inquests into such deaths, thus preventing further inquiries into the case resulting in denial of trial into such murders.

In countries where the rule of law has suffered serious setbacks killings of alleged criminals is quite a common phenomenon. In the absence of faith in the institutions of justice mobs take the law into their own hands. It has been commonly reported in Cambodia, for example, that such deaths often happen when the people themselves

decide on the fate of alleged suspects of crimes and subject them to death by stoning and other dreadful methods.

The AHRC has constantly pointed out that Sri Lanka suffers from an exceptional collapse of the rule of law. The police investigation system has suffered extreme setbacks and often the serious inquiring officers themselves become victims at the hands of some corrupt elements in the policing system itself alleged to be working together with the underground. The murder of IP Douglas Nimal and his wife has been seen as a clear demonstration of this phenomenon. No one has been arrested for these murders even after the new IGP reopened the inquiries. Long delays in courts also have alienated the people from seeking justice through legal channels. The sheer desperation that results due to the loss of faith in the justice process is now manifesting itself in acceptance of extrajudicial killings which have now spilled into mob killings of alleged suspects.

The Chief Justice's tractor is stolen from his house

In another demonstration of the lawlessness spreading throughout the country there were television reports of a tractor belonging to the Chief Justice (CJ) being stolen from one of his residence. The caretaker of the house gave details of the robbery which suggests that even a heavier vehicle may have been used for the transport of the tractor. The caretaker told the reporters that despite of the fact that the police are required to make routine patrols and sign post books at the CJ's residence such visits had not been made for quite some time. The television reporters used the incident of this robbery to demonstrate the extent to which crime is spreading in the country and how the policing system has failed. The reporters openly called on the Inspector General of Police to explain how this type of thing can take place. The caretaker of the house queried "if this could happen to such a high ranking person as the Chief Justice what is the security available to the ordinary folk in the country?"

Lawlessness has become the most troubling day-to-day experience of people throughout the country. This is also aggravated by the increase of people possessing firearms without proper legal permits throughout the country. In the north and the east the carrying of arms by civilians has been a very visible feature. However, the rest of the country including the capital itself is seeing an increasing spread of firearms. The purchasing of firearms and grenades is no longer a difficult task in any part of the country.

The kidnappings and forced disappearances that frequently occur are also often related to attempts at ransoms and for other criminal purposes. Despite of the police claims to be investigating these crimes hardly any person has been prosecuted. The police reports also show the involvement of the police and military personnel in such criminal acts.

The AHRC once more reiterates its position that what Sri Lanka faces is an exceptional collapse of the rule of law. It is the duty of the legislators and the ruling regime to address this issue. However, there seems to be no attempt on the part of the parliament or the executive to deal with this issue by way of any comprehensive strategy. Talk of crime prevention remains at pious promises and there is no visible action on this issue. It is

once again the burden of civil society itself to open the discourse of overcoming this situation of lawlessness. If this discourse does not rise with great vigour descent into mob violence may become an even more frequent phenomenon.

AS-087-2007

April 26, 2007

A Statement by the Asian Human Rights Commission

SRI LANKA: Giving police powers to the military will pave the way to torture chambers in military camps

The government has recently announced that police powers will be granted to the military by way of further emergency regulations. When the BBC Sinhala Service questioned the government spokesman, Minister Keheliya Rambukawella, as to whether the giving of police powers to the military will not result in the re-emergence of torture chambers inside military camps as it happened in the late 1980s the minister did not directly reply to the question, but answered that certain measures have to be taken due to the security situation. This was the same argument used in the late 80s under the pretext of the suppression of the activities of the JVP.

The numbers of disappearances as a result of these 'certain measures' has been officially listed at over 30,000. In fact there are claims that the real number is even higher.

To what extent detention in army camps can degenerate into is demonstrated by the famous case of the Ambilipitiya school children where around 24 children were made to disappear inside the military camp after being taken into custody due to a private complaint by a school principal. There had been no documentary evidence kept in the military records about these arrests and detentions, although the parents testified that their children were kept inside the detention centre for a considerable period of time. Two emergency regulations of the time that made large scale disappearances possible are giving powers to law enforcement officers above a particular rank to dispose of dead bodies without any reference to any judicial authority, and to detain persons outside places of detention authorized under the normal law. By allowing these two emergency regulations the government at the time gave license to torture, carry out extrajudicial killings and dispose of bodies.

Such laws are a sinister ploy designed to allow activities which are otherwise illegal such as torture and killing. In the recent decades in many places around the world there have been many such sophisticated strategies to erase all legal responsibilities for illegal arrest, detention and anything that may follow thereafter. Implied in such a process is the right to arrest arbitrarily, detain without any safeguards and to erase any records kept relating to all such matters.

The re-emergence of such a situation should be frightening to the citizens of a country which has seen such a situation in the past. Under the present circumstances the emerging situation can be even worse. The hysteria that has been generated on ethnic considerations can make any ethnic Tamil a vulnerable victim of this process.

Disappearances in the 80s showed the entrenched habit in the country for people to write anonymous petitions against their rivals with false information being one of the causes of the disappearance of many persons including children. From the total number of disappeared persons in the south around 15 percent were persons below the age of 19 according to the reports of the commissions on enforced disappearances. Further, given the manner in which emergency regulations are now being used to arrest and detain political opponents there is nothing to prevent these military camps being used also in order to suppress political dissent within the country. Given the fact that prominent politicians have already been arrested and more are facing threats of arrest, senior journalists have faced threats of arrest or death threats it would be no great surprise if this is extended to many others with the expansion of emergency powers.

The psychological climate is such that raising public outcry if such arrests, detentions and other acts take place would be an uphill task. The judicial process has become even more retarded during the recent decades. Under these circumstances the possibility for families or others to seek an effective remedy by way of the courts is extremely difficult.

Perhaps to appease public concern relating to the re-emergence of this traumatic experience of the military enjoying police powers the government also had some propaganda exercises on the 24th stating that the presidential instructions regarding the rights of the Human Rights Commission relating to detentions of persons should be respected by the police and the armed forces. These instructions issued on July 7, 2006 are of no legal validity and this is demonstrated by the fact that they did not prevent the increase of abductions and disappearances after their issue. Mere reiteration of such instructions is unlikely to have any effect other than being a public relations exercise and an argument before the international community that some measures have been taken to dilute the rigour of the emergency regulations giving wide powers of arrest and detention.

What was not pointed out is that the Human Rights Commission of Sri Lanka does not have the capacity to intervene inside military camps to watch the treatment of those detained in such camps.

Under these circumstances the Asian Human Rights Commission urges the international community as well as all concerned persons in Sri Lanka to exert pressure on the government to desist from the repetition of the issue of police powers to the military which in the past has resulted in gross abuses of human rights which in turn amounted to crimes against humanity under modern international law. Though this experience of the late 80s did not result in bringing Sri Lanka before international justice it would certainly be very difficult for the country to avoid such a predicament if it happens again under the glaring publicity that the modern communication systems have made possible.

AS-084-2007
April 19, 2007

A Statement by the Asian Human Rights Commission

SRI LANKA: Getting the CID to investigate crimes and not expelling diplomats is the only credible answer to allegations of gross abuse of rights

The grave problems regarding the lack of credible investigations into human rights violations in Sri Lanka continues as the government makes threats to expel foreign diplomats who call for such inquiries as persons meddling in the internal affairs of the country. Whether the government itself has caused such violations is not the issue. The key issue is the government's failure to carry out its obligations to cause credible investigations as required by law.

Meanwhile another minister, the Minister of Finance, has denied the existence of human rights abuses in any form under the present government (Human rights were violated in 1988-89 not now Bandula - Lakshmi de Silva *The Island* April 19 2007). And yet others have concentrated their attention on vilifying Amnesty International's campaign for all parties in Sri Lanka to play by the rules. Amidst such propaganda stunts by the government what they have failed to address is as to how inquiries are being conducted into serious violations of rights including serious crimes which have allegedly taken place throughout the country.

Are all these diversionary tactics in the propaganda sphere a result of the actual incapacity of the government to cause investigations into alleged abductions and disappearances, extrajudicial killings and other abuses of human rights? In the past it was the Special Investigating Unit (SIU) of the Criminal Investigating Division (CID) that would have been mobilized in order to investigate serious crimes including serious violations of human rights. Is this unit now in a functional state to be mobilized effectively in order to cause professionally competent investigations into the abuses complained of? If the answer from the government is in the affirmative and if it is capable of demonstrating that the CID in fact is capable and willing to do its job then the accusation based on non-investigation into serious abuses will cease to be valid. If the government wants local and international voices calling for serious action against abuses of rights to be replied to with a serious answer then the only way out is to get the CID cracking on the job.

However, it is open to question as to whether various actions taken in recent times to interfere with the working of the CID have so drastically reduced its capacity to investigate into all these abuses complained of. To cite a few examples some senior officers who have held high positions have been removed for reasons perceived as political rather than professional. The CID has also been undertaking more actions which appear to be political like the arrest of the Mawbima publisher, Dushyantha Basnayake and a journalist, Munusame Paraeswari, who was released after three months of detention when it was found that there was no basis to sustain any charges against her. Also the

former Minister of Ports, Sripathi Suriyarachchi, is being held in remand, once again for reasons which are perceived as political. Earlier there was also the threat of arrest of the editor of the Sunday Leader for which orders had been received. However, due to conflicts within the CID itself the orders were not carried out. There is also talk about some well known killings such as that of the Tamil Politician, Nadaraja Raviraj, about which the investigations were compromised by the accusations that state agencies might be involved in the killing. (Such speculation gains strength when for months no one is arrested for the murder). To this list large numbers of forced disappearances and abductions and allegations of a similar nature may be added. Above all this the only constitutional body that has the necessary powers to stop politically motivated actions within the police, that is the National Police Commission, is now dysfunctional as the commissioners have not been appointed in the manner required by the constitution.

The simple option open to any government is either to investigate allegations about such serious crimes by its own agencies or allow some other body to conduct such investigations. It is not an option open to the government to not investigate such serious violations and also to not allow anyone else to do so. The appointment of various commissions is no alternative to proper professional investigations into crimes by criminal investigators as required by the Criminal Procedure Code (CPC) of Sri Lanka. No commission can be a substitute to the operation of investigations into crimes in terms of the CPC. No amount of propaganda diversions will help to overcome the fact of non-investigation into crimes in terms of the CPC. Such propaganda and inaction will only demonstrate that the government is not only incapable but also unwilling to deal with the issue of carrying out its obligations as a state to investigate crimes.

It is not an attribute of the sovereignty of a state to opt not to investigate into allegations of serious crimes. To claim this as an attribute of sovereignty would mean the complete misunderstanding of the very meaning of 'statehood' itself. The basis on which diplomats who have shown concern about the human rights situation in the country are threatened with expulsion is that they interfere in the sovereignty of the state. This is baseless in the face of the failure of the state to carry out its own basic functions to investigate crimes.

Threats of expelling diplomats and threats to journalists for reporting abuses only adds fuel to the dissatisfaction in the country and outside caused by the neglect of the state to do what, as a state, it is obliged to do which is to investigate into all allegations of crime.

AS-082-2007
April 16, 2007

A Statement by the Asian Human Rights Commission

SRI LANKA: Disappearance of persons and disappearance of the criminal investigation system - A response to Ambassador Richard Boucher's comments

The issue of enforced disappearances is among the highlighted topics of the discussion of human rights abuses in Sri Lanka. While about 1,000 disappearances were reported in 2006, already by April, 2007 around 300 cases have been cited.

A situation of this magnitude has found some response from the United States where Ambassador Richard Boucher, the US Assistant Secretary of State for South and Central Asian Affairs is quoted to have expressed serious concern about violations of rights in Sri Lanka both by the LTTE and the government. Mr. Boucher stated:

"Building democracy and building stability we think are part of the same thing. We are not looking to change governments, we are looking to help governments achieve the institutions that can support democracy, the education systems, the information systems, the rule of law, election commissions, anti corruption commissions, things like that, that really can make a democracy stable in the longer term. That sort of democratic stability in the longer term, that is what we are trying to achieve," he said. (Sunday Leader April 15, 2007)

Even a casual study into forced disappearances since the 1970s which, when put together far exceed the number of disappearances in any other country, would clearly indicate that the relevant governments were unwilling and incapable of bringing this situation under control.

In the process of using the law enforcement agencies and armed forces to act freely to control terrorism the entire criminal justice system in Sri Lanka has suffered an enormous set back. The criminal investigation machinery of the country has been so affected by long years of interference into its proper functioning that now the state simply does not have the capacity to cause proper criminal investigations into serious crimes and gross human rights abuses including forced disappearances. The government does not deal with the problem of the incapacity of the criminal investigation machinery, but instead engages in public relation measures such as the appointment of various commissions and now they are even talking about the appointment of an ombudsman.

Within the criminal justice framework of Sri Lanka it is not possible for any commission or an ombudsman to do what the country's Inspector General of Police cannot do through the use of the criminal justice machinery which is under his control. It is the incapacity of this machinery of criminal investigations that needs to be investigated and redressed. The questions of stability and democracy that Ambassador Boucher has raised cannot be addressed without first dealing with the collapse of the criminal investigations machinery in Sri Lanka.

This is not a new position that the Asian Human Rights Commission is taking up. As far back as 1998 we wrote of 'Disappearance of persons and the disappearance of a system.' Our position expressed then remains even more valid today under a situation of the continuous degeneration which deprives the people in all areas of the country the protection that the state is under obligation to provide by maintaining an efficiently functioning criminal investigating machinery.

We reproduce below the publication released in 1998 exposing the link between the disappearance of persons and the collapse of the criminal justice machinery in Sri Lanka:

Disappearances of persons and the disappearance of a system

The Sri Lankan Final Report of the Commission of Inquiry into Involuntary Removal or Disappearance of Persons in the Western, Southern and Sabaragamuwa Provinces (the Commission Report) among its recommendations mentions the need for a training programme in investigations for all police officers (pp. 80, 174). Besides this, the Commission Report recommends that Police-Lay Visitors Panels be instituted for each police area and Citizens Advisory Bureaus for each district level (pp. 80, 174). Obviously these are measures recommended to reverse the consequences caused to the law enforcement machinery by processes that made large-scale disappearances possible in Sri Lanka. (It must be noted that even politically related disappearances are not past events, as several hundred disappearances have been reported in the country quite recently.)

In fact, the law enforcement mechanism has collapsed. Extra-judicial killings are no longer a phenomenon that merely relate to insurgency investigations, but have subtly entered into criminal investigations as a whole. In many parts of the country there are complaints of so-called self-defence killings, shootings of fleeing suspects, and the like. Complaints about the lack of or inadequate investigation of, serious crimes have also become common. It is also no exaggeration to state that bribery in criminal cases has reached epidemic levels.

The present situation is a byproduct of the large-scale disappearances that were achieved through loosening all the hard knots that keep criminal investigations tied to the rule of law and the elementary norms of human decency. The set of Emergency Regulations used at the time of mass disappearances removed limitations from the powers of law enforcement officers. As a result, Sri Lanka lost the human resources necessary for law enforcement: i.e., a group of law-abiding law enforcement officers committed to observing an extremely high degree of caution, while also being skilful in the detection, prevention, and investigation of crimes. In the past, although the Sri Lankan achievements in developing such a professional group of law enforcement officers had their limits, they were considerable. These hard-earned habits of professional behaviour were undermined in order to encourage law enforcement officers to engage in illegal arrests and detention, torture and killings.

Control of the behaviour of law enforcement officers is usually achieved through various forms of supervision in which departments deal with law enforcement and ultimate supervision rests with the courts. The set of Emergency Regulations used at the time of these disappearances was designed to remove such controls. One control removed was judicial supervision of post-mortem inquiries; this allowed for the easy disposal of bodies. What logically followed were executions without judicial inquiries. Law enforcement officers thus got the 'freedom' to deal with 'crime' in any way they liked.

The Emergency Regulations removed the most fundamental checks necessary to maintain a proper law enforcement mechanism.

Although the removal of controls was easy, effective re-imposition of these controls is not, it is easy to remove the Emergency Regulations. The chief executive or the legislature does this by means of a simple declaration. However to re-introduce controls to the same officers who have become used to operating without them is no easy task. The behaviour of a good watchdog that had been prevented from tasting blood can never be the same after the dog has tasted it. In a country that does not make a priority of incurring all the expenses necessary for human resource training and providing attractive conditions for law enforcement officers, the re-creation of an orderly law' enforcement system will remain a formidable task. Nevertheless, the delay in achieving this task poses a continuing threat to the society.

A greater danger is that even the memory of a rational system of law enforcement may be lost. Alleged criminals may be at the mercy of law enforcement officers. Contract killings may take place with varying degrees of consent on the part of the law enforcement officers. Corruption may become the deciding factor in the treatment of persons who seek recourse in the law. Politicians may exploit the situation and may themselves become compromised as a result.

Under these circumstances the Commission Report recommendations for training programmes in investigation for police officers are quite welcome and even laudable. However such measures are wholly inadequate to deal with the situation now prevalent in the law enforcement machinery one in which the internal structures of proper supervision have collapsed. Any attempt at finding solutions must be with realising the enormity of the problem and with understanding the structural issues gone wrong in the law enforcement machinery.

The social philosophy on the basis of which disappearances were encouraged: The need to maintain order, with or without law

The situation of instability and insecurity prevailing in the country during the last three decades, particularly during the last decade, has given rise to a 'consensus' that order has to be maintained with or without law. The underlying assumption is that the law itself could be an enemy of order. According to this way of thinking, certain provisions of law restrict the powers of law' enforcement officers to deal with disorderly conduct by some persons or groups. It follows that the perceived restrictions need to be removed and that, once freed from such restrictions, the law enforcement officers may return order and stability to society.

This way of thinking is usually regarded as 'realistic.' The maintenance of order through legal means is considered unrealistic for the following reasons, among others:

- The country cannot afford to have well-functioning law enforcement machinery and must therefore be resigned to defective machinery;

- Too much insistence on law may discourage law enforcement officers from carrying out their functions even to the extent that they are doing them;
- As corruption and abuse of power are facts of life in the country it may not be a wise policy to fight too hard against them; and,
- As the insistence on law may lead to conflict, it may be necessary to restrict such agencies that insist on observing the rule of law such as the judiciary
- These and other similar considerations form the basis for encouraging practices such as killing under certain circumstances.

The country now has the lessons gained by the experience of testing the practices ruthlessly launched on the basis of such a social philosophy. Instead of bringing about order, these practices have confounded the situation a thousandfold. Ironically, the worsening of the situation may reinforce this same philosophy. It is like the situation of a creditor who gives further credit to a debtor in the hope of regaining his earlier loans.

The recovery of the system

After the Cultural Revolution, the Chinese realised that their society's existence had been threatened. The slogan "Rule of Law as against the Rule of Man" was developed at the time. Since then, for over twenty years the Chinese have constantly struggled to rebuild a society based on the rule of law. Despite many setbacks and such cruel incidents as the Tiananmen Square killings, they have made enormous gains. Even with regard to Tiananmen Square, the killing of about 400 persons evoked tremendous adverse protests, which the disappearance of tens of thousands of persons in Sri Lanka failed to evoke. An impressive attempt to build a system based on law is taking place in China, despite the difficulties in developing such a system in a vast country with over a billion people.

Addressing the issues of developing the rule of law and of repudiating past practices remains a fundamental challenge to all persons who wish to help the system recover from the damage suffered in its 'great fall.' A serious crisis in a system of law enforcement can also bring about the dangerous consequence of a changing mentality among persons who have been beneficiaries of the system. They may shed their loyalty to the system because it has become ineffective. They may adjust their minds to the new situation.

It is only through the efforts of those engaged in various activities relating to social change that the situation can be saved. Political thinkers, social critics, jurists, judges, journalists, those who deal with moral and ethical matters and organisations including NGOs need to help create a social fabric upon which the society can develop.

The Interim Report of the Commission of Inquiry into Involuntary Removal or Disappearance of Persons in the Western, Southern and Sabaragamuwa Provinces contained the following recommendation:

Finally we recommend the creation of a 'Wall of Reconciliation' wherein are inscribed the names of all who have disappeared or died in this tragic period of our country's history.

Your Commissioners consider this recommendation to represent a very important aspect of national reconciliation. This Memorial Wall which will contain names denoting all sections of the Sri Lankan people, will be a symbol of our essential unity to future generations a place to which everyone in this country could come and pay respect to those lost to us.

This may be useful, as have been similar monuments in Cambodia, such as the Genocide Museum located in a school transformed into a Khmer Rouge interrogation centre) and the Killing Fields (the location where these prisoners were later taken, executed and buried). Beyond providing an opportunity to pay respect to the dead and preserve their memory such a wall can act as a reminder of the enormous crisis we face as a society and of the need to develop civilised ways to emerge from this situation,

(Initially published as an article by Basil Fernando, the Executive Director of the AHRC in the Sunday Observer, it was reproduced in several publications).

May 31, 2007
AHRC-OL-018-2007

An Open Letter to Ven. Ellawala Medhananda Thero leader of the JHU

Ven. Ellawala Medhananda Thero
Jathika Hela Urumaya,
152/B, Stanley Thilakaratne Mawatha,
Nugegoda,
Sri Lanka.

Fax: +94 11 2817738

Email: <mailto:info@jhu.lk>>info@jhu.lk or
<mailto:helaorumaya@gmail.com>>helaorumaya@gmail.com

Venerable Sir,

SRI LANKA: Democratic activists from Cambodia and Pakistan write to the leader of the JHU on the issue of dictatorship

Both of us who are the authors of this letter are from Cambodia and Pakistan, two countries that have witnessed the bitterest lessons of dictatorship.

We were shocked and saddened to see a statement in the Sri Lankan media (The Morning Leader, May 30, 2007) attributing a comment to you in which you said that the country (Sri Lanka) should “cast aside the fool’s democracy and look for a dictator who could restore democracy at least during his rule of five years.”

We are sharing our thoughts with you in the spirit of loving kindness and compassion as we are very concerned that the people of your precious country should not suffer the same fate that has befallen the people of our countries.

Cambodia lost one seventh of its population and all the basic institutions that sustains stability within a society. Under several military dictatorships, Pakistan also suffered enormous displacement of people and also all the basic institutional framework of the country. For the peoples of both of our countries, life is now a nightmare and we grope in the dark, wondering how to emerge from this terrible situation.

It is not that we do not appreciate what you speak of as a “fool’s democracy.” It is an absolute truth that in many parts of Asia we have failed to grasp what democracy is and that the strength of democracy lies in the establishment of viable institutions within which people can act intelligently to resolve their own problems. It was an unfortunate fact of history that in the post colonial period, in many Asian countries democracy was conceived only as the holding of parliamentary elections. However, the concern to build viable parliaments where all pressing problems of the people are debated and where budgetary allocations are made for the purpose of sustaining the institutional framework of the country was sadly absent. Democracy has its meaning only to the extent that there is a meaningful separation of powers and when all the three branches of government, the executive, legislature and the judiciary, can serve the people with independence and vigour. Bureaucracy in the country must be able to work within the framework of the law in order to serve the interests of the people efficiently. Unfortunately it is in these areas that we failed in our respective countries.

A “fool’s democracy” often resulted in political leaders elected by ballot becoming dictators. By the displacement of basic constitutional provisions for the separation of powers, for the independence of the judiciary for checks and balances and for the strict adherence to constitutionalism in all aspects of life dictators took all power into their own hands. The results are decades of the weakening of all the basic institutions that are needed to run a country for the benefit of its people. Gradually elected dictators have become a power unto themselves, and run their countries for their own personal gain. The logic of corruption has displaced the rule of law. We are all victims of schemes of corruption and that is what is at the heart of a “fool’s democracy”.

Military leaders and political ideologues have made use of the failures of democracy as the best argument to come to power and to establish power for themselves. In doing so they have often promised that they will restore democracy and their military takeovers are just a means of restoring this. However, behind such deceptive propaganda are schemes of dictators who want to place military control over society doing away with every form of institutional life that has been established, either through attempts to develop democracy or on the basis of some ancient traditions of community cooperation among the people. Dictators cannot avoid being repressive and it is in that process of repression that Cambodia lost over one seventh of its population and all its institutions.

Also the tragedy of Pakistan was accompanied by the deceptive language of the necessity of dictatorship to reconstruct society.

We are very moved by your reference to the tragic circumstances faced by your country. However, it is these circumstances that unscrupulous social forces use to make things even worse. The past history is full of such examples and we all know how the tragic circumstances of the period preceding the first world war in Germany was used by Adolf Hitler to come to power and play havoc on his nation as well as others. It is this same thing that we have experienced in our two countries in different ways. Our fervent hope is that your country will still be able to avoid that ruinous course.

In our countries we are struggling hard to establish a solid framework of institutional protection for our nations. We believe that the law can only be the basis of a stable society. And the law must be upheld by a competent judiciary with absolute integrity and in no way bow down to the executive.

A very essential component of a stable society in modern times is a credible and strong policing system respected by the people. If the policing system is lost everything is lost. This is what has happened in many of our countries now. We cannot call our policing system a rational system anymore. Internal command responsibility is lost, competence is lost, investigative capacity is lost. Instead of the enforcement of law, the police rely on muscle and gun power. The policemen who kill alleged criminals are even considered heroes today. What kind of rationality can prevail under such circumstances? If policing turns into a noon day madness in what institution can the people trust to safeguard democracy? To those of us who are concerned with the reconstruction of our societies dealing with the issue of our policing systems and finding ways to build rational systems of policing has become an imperative. This is no small matter. Perhaps the heart of the problem of a fool's democracy is fool's policing. To solve one we need to address the other.

Another very responsible institution is the prosecutor's office which in some countries is the Attorney General's Department. We witness today that part of a fool's democracy is the foolishness of such an important office as this. If such an office succumbs to political pressure or other forms of non professional practices who is going to be the guardian of the law? Today we have to ask such questions and find solutions to them.

Venerable Sir, we are not writing from a position of superiority but rather as sharers of a common tragedy. We should not allow ourselves to be demoralized and to lose our sanity because of the overwhelming nature of our tragedies. It is in these times that we should do our utmost to rise above all prejudices to use our reason and to look for the ways in which other people have dealt with the tragic situations of their societies and have overcome them. That task is inseparable from a strong fight for the will of law to be reestablished.

We are in solidarity with you. We are committed to the fight for democracy as a way of governance for our countries and human rights as the way to defend the dignity of our

people. We wish the same for the people of Sri Lanka. You will see these days the suspended Chief Justice of Pakistan, Iftehar Chaudhry, taking to the streets of Pakistan with lawyers associations and people with strong convictions to fight for the democracy that has been lost. It is this kind of struggle we need in our countries. We hope that as a religious leader in your country you will exert similar pressures to establish an institutional framework for your country on which people can rely.

Thank you.

With sincere wishes,

Dr. Lao Mong Hay Baseer Naweed
A Political Scientist and Broadcaster and
Social Activist (Cambodia) Human Rights Activist

May 29, 2007

AHRC-OL-017-2007

An Open Letter to the JSC regarding the Gampaha Magistrate's order of justifiable homicide regarding the killing of two suspects in the Delgoda family massacre case

Mr. Suhada	K. Gamalath	-	Secretary
Judicial	Service		Commission
Superior	Court		Complex
Colombo			12
Sri Lanka			

Fax: + Fax: 94 11 2320785

Dear Mr. Gamalath:

SRI LANKA: An Open Letter to the JSC regarding the Gampaha Magistrate's order of justifiable homicide regarding the killing of two suspects in the Delgoda family massacre case

Re: The verdict of justifiable homicide in the killing of two suspects in the Delgoda family massacre case

The newspapers reported that the Magistrate of Gampaha has pronounced that the killing of two suspects, E.A. Amaradasa and E.A. Upasena, who were allegedly involved in the

massacre of the family at Delgoda on May 26, 2007 as justifiable homicide in the act of self defense. (The Sunday Times, May 27, 2007 – Cops and Killers: Who reigns).

I am writing this on behalf of the Asian Human Rights Commission as we are concerned that serious problems of the administration of justice could arise from hastily pronounced judgements by Magistrates based purely on the police version of the events and before a thorough inquiry is carried out by the criminal investigating authorities, before the matter is scrutinized by the Attorney General's Department and before a trial court has the opportunity to examine all evidence judicially. An early pronouncement by the Magistrate results in ending all enquiries and impliedly declaring those who have done the killing as being innocent of any crime.

In this particular case the verdict is even more problematic.

Already media reports have cast doubts as to whether the two persons killed were even involved in this crime at all. There is a possibility that the killings of the two alleged suspects may have been a cover up protecting the real killers. According to reports, even some police investigators have complained of the erasing of evidence due to the burning of some houses in the neighbourhood.

What is more important here is the role of a magistrate at an early stage of a preliminary inquiry when someone takes up the position of a killing due to self defense. The very nature of a defense against a criminal charge is that it should be made against all the evidence available. The availability of evidence depends on a criminal inquiry into the alleged crimes in terms of the provisions of the Criminal Procedure Code. It is not the function of a magistrate to decide on a defense as having been proved even before a criminal investigation into the killing has taken place.

If a civilian was to take up the same defense in an alleged killing would the magistrate have the power to make the pronouncement at such an early stage before the investigations are completed, or before the Attorney General's Department and the High Court inquiry into the matter?

This issue of pronouncing justifiable homicides also raises issues regarding the responsibilities of the police before they finally shoot people dead. Criminal suspects in custody are completely at the disposal of the police. These officers are responsible to see that the suspects are disarmed and that they are also in no position to have any access to arms while in their custody. The police officers also have the capacity to ensure a sufficient number of personnel when taking suspects outside for purposes such as the discovery arising from the confessions of the suspects. It is the duty of the officers to take all precautions to ensure that they can be kept under their control. Besides, if by some chance there is some threat it is also the duty of the officers to use minimum force to the extent of being able to subdue them. What this means is that when self defense is taken up by police officers who admit to having shot two suspects dead, they have a heavy burden to prove if they rely on self defense as the cause of the shooting. Such proof can

only be measured after a criminal trial at an appropriate court, which in Sri Lanka is the High Court.

This killing of two suspects needs further inquiry and therefore the early verdict of the magistrate needs to be withdrawn and inquiries in terms of the Criminal Procedure Code need to be ordered.

We urge that you place these circumstances before the Judicial Service Commission (JSC) so that it can exercise its judgement on this matter and to take appropriate the measures the JSC thinks fit.

Our concern is that similar verdicts are being given regularly by many magistrates throughout the country according to reports that constantly appear in the newspapers. In the Asian Human Rights Commission's annual report we made our observations on this issue.

“In several instances magistrates after initial inquests make orders stating that several such deaths amount to a justifiable homicide. This is clearly outside the powers of the magistrates when conducting inquests.

The following sections of the Criminal Procedure Code of Sri Lanka are relevant to the issue of the conduct of inquests by magistrates.

Sec.369 - An inquest of death shall not be made except under the provisions of the Code; Sec 370 (1) - Every inquirer on receiving information that a person; Sec.370 (1) (c) has died suddenly or from a cause which is not known, shall proceed to the place where the body of such deceased person is and there shall make an inquiry and draw up a report of the apparent cause of death; Sec 370 (3) - If the report (which is forwarded to the magistrate) discloses a reasonable suspicion that a crime has been committed the magistrate shall take the proceedings under ch. XIV and XV of the code.

Deaths in custody of police are dealt separately in Sec. 371 of the code: Sec 371 – (1) When a person dies in the custody of the police or in a mental or leprosy hospital or prison Forthwith give information to the magistrate..... Forthwith hold an inquiry into the cause of death. (2) For the purpose of an inquiry under this section a magistrate shall have all the powers which he would have in holding an inquiry into an offence.

Section 9(b) (iii) deals with the Magistrate's jurisdiction to inquire into cases of death by violence, accident or sudden; sections 114 and 115 of the Code deals with situations where evidence against a suspect is deficient and well founded. Under section 114 if evidence is insufficient or no reasonable ground to justify suspicions, the inquirer (or the magistrate) may release the suspect on bail on the conditions the person may appear before the magistrate.

None of these provisions authorize the magistrate to discharge a suspect at the stage of an inquest.

We hope that the Judicial Service Commission will take appropriate action to deal with this issue.

Thank you.

Yours sincerely,

Basil Fernando

Executive Director, Asian Human Rights Commission

May 25, 2007

AHRC-OL-016-2007

An Open Letter to the Honourable Speaker and the Members of Parliament calling for a parliamentary debate on rule of law issues

Mr. W.N.J. Lokubandara
The Honourable Speaker
Parliament of Sri Lanka
Sri Jayewardenepura Kotte
Sri Lanka

Fax: +94 11 2777564

To the Honourable Speaker and all Honourable Members of the Parliament of Sri Lanka,

SRI LANKA: The AHRC Open Letter to the Honourable Speaker and the Members of Parliament calling for a parliamentary debate on rule of law issues

I am writing this letter on behalf of the Asian Human Rights Commission based in Hong Kong.

The subject matter of this letter is the murder of an entire family at Delgoda, said to be related to a civil dispute over a piece of land, the subsequent arson of three houses by a large number of people and the shooting to death of two suspects after they were taken into custody by the police.

All three incidents taken together reveal the breakdown of the rule of law in Sri Lanka. These three incidents, the family murders, subsequent mob violence and the killing of the suspects in police custody present a situation of a very rare nature. To our knowledge no similar incidents have been reported, purely on a civil dispute in any other country in Asia in recent times.

If the law was enforced even to a minimum degree and if civil society had intervened in the events around its social environment to a reasonable degree, this incident would not have happened. If the police and civil society in the neighborhood had made the normal interventions that are usually expected it is most likely that this great tragedy would not have occurred.

For a civil dispute over a piece of land to evolve into the massacre of an entire family could not have been a spur of the moment action; such a crime would have involved a chain of many events before it ended in this horrific tragedy. Under normal circumstance if the law enforcement in the country and civil society reactions functioned in a normal manner it is quite likely that this incident would not have happened. It is a normal habit among the people to seek the help of the police by the making of complaints on such disputes at an early stage. Though land matters are civil disputes there are many other aspects of such disputes which may have possibilities of evolving into crime and these are the matters on which people under normal circumstances seek the assistance of the police. The modes of seeking such assistance are statements to the police and the making of complaints. As long there is a basic confidence in police action the people resort to their help. If no such help has been sought in this particular incident, or if, despite of seeking such help the incident has happened regardless, that demonstrates a breach of confidence of the people regarding the very process of policing.

Similarly, under normal circumstances in the time period between the initial dispute and the family massacre the neighbours and others such as relatives of both parties to the dispute would have made many interventions to prevent such a dispute reaching maturity and ending as a crime. The very fact that there had not been such a decisive civilian intervention also demonstrates a type of abnormal alienation on the part of the civil society in the neighbourhood. Such abnormal withdrawal of the civil society is also a manifestation of some deep transformations that are taking place with civil society itself.

The combination of the absence of the normal resorting to police interventions and the absence of the normal interventions of civil society has resulted in this grave crime. The reports of many other incidents from around the country also manifest the twin phenomena of policing inaction and civil society alienation. A while ago there was the report of a prisoner returning from prison and killing an entire family over a family dispute. Before that killing neighbours had complained to the police of the family unrest but there was no decisive intervention on the part of the police. The killing of the high court judge, Sarath Ambipitiya and the torture victim Gerard Perera who was prevented from giving evidence before court by his killing are also two well known incidents symbolically reflecting the same phenomena.

Immediately after the murder of the family it is reported that a large number of people gathered and burned three houses in the neighbourhood. This reflects the anger and the frustration of the neighbours of their own inability to prevent such a horrendous crime occurring. Such powerlessness of the people, giving vent through such acts of violence also reflects the extremely abnormal levels of frustration and self infliction of violence on themselves. Such actions are reflections of extremely abnormal behaviour on the part of

communities that feel the loss of their constructive capacity to intervene in their society to prevent great social evils.

The third event to follow is the arrest of two persons alleged to have been involved in the commission of the crime and shortly thereafter the shooting of these persons while in police custody. The police story is that they tried to escape and were shot in self defense. However, stories of similar killings after arrest are now very common. Perhaps by these summary killings the police tried to appease the disturbed neighbours by creating the impression that justice has been done in some manner. If this was the motivation that too demonstrates an extremely desperate situation. What is worse is that by such killings judicial intervention into this incident has been prevented. Judicial intervention into grave crimes is an essential ingredient to maintain social sanity and stability. Summary killings are the extreme expression of the psychopathic behaviour of an abnormal society. It contributes to the greater alienation of the people and the greater reinforcement of the sense of powerlessness within society.

The family murder, the subsequent mob action of burning the houses followed by the police killing of the suspects taken together present a very disturbing picture that the august assemble that you represent should not ignore. To do so would be to imperil the rule of law even further and the stability of the whole society.

The Asian Human Rights Commission suggests that the wiser course for Parliament is to avail itself of this opportunity to take some decisive action by intervening in this matter. How you can make such intervention by using the powers available to you is best known to you. However, we would take this opportunity to suggest some basic steps on an urgent basis.

- a. To immediately hold a parliamentary debate on this issue and evolve an enlightened approach to deal with perhaps the country's most pressing problem which is the maintenance of the rule of law.
- b. Using the powers of the Parliament to appoint a group of mature and reliable persons to make a study into the incident forthwith and to submit a report to your august assembly within the shortest possible time.
- c. To create a parliamentary sub-committee for evolve a strategy and an urgent action plan to deal with the law and order situation in an enlightened manner.

The Asian Human Rights Commission has been constantly observing and studying the rule of law situation in Sri Lanka for a long period of time. We are of the view that had the Constitutional Council and the commissions created by the 17th Amendment were in operation the situation such as the Delgoda incident may have been avoided. The 17th Amendment was the minimum remedial measure that has so far been created by the Parliament to deal with the desperate collapse of the basic institutions that are needed to protect the basic stability of Sri Lankan society. The wiser course that is open now is to make it possible for the Constitutional Council and the related commissions to function as soon as possible

Over a number of years the Asian Human Rights Commission has written to several executive presidents in Sri Lanka and other authorities of what it describes as an exceptional collapse of the rule of law in the country. We sadly note that no action of any significance has been taken in a positive direction to deal with this problem. Therefore we appeal to your august assembly, the Parliament of Sri Lanka, which is the last resort that the people have. All your strategies and actions directed to resolve the issue of the rule of law will assuredly generate enthusiastic support from the people. You will also have the strong support of the international community for any action you will take to avoid great tragedies such as that which took place at Delgoda.

Thank you.

Yours sincerely,

Basil Fernando
Executive Director
Asian Human Rights Commission

May 10, 2007

AHRC-OL-015-2007

An Open Letter to the Chairman of the HRCSL on the quantum of compensation in torture cases

Justice S. Anandacoomaraswamy, Chairman, Human Rights Commission of Sri Lanka,
No. 36 Kynsey Road

Colombo 08

Sri Lanka

Tel: +94 11 2694925

Fax: +94 11 2694924

Email: sechrc@sltnet.lk

Dear Mr. Justice Anandacoomaraswamy,

SRI LANKA: An Open letter to the Chairman of the HRCSL on the quantum of compensation in torture cases

I refer to your letter to us dated 26.4.2007.

As a matter of courtesy we are replying to your letter since you have misunderstood or misinterpreted our correspondence. Let me quote the relevant portion of our letter to you regarding the HRCSL's responsibility for determining the quantum of compensation in this case.

This very recommendation by the HRCSL itself (which has not been paid) is a clear indication of the lack of respect for, or understanding of the international norms and standards by the commission. It is quite simply an insult to the torture victim to declare a quantum of altogether Rs. 12,500 for causing torture by two policemen. International standards on these matters have been set out on the basis of the gravity of torture as a violation of human rights. It is one of the greatest injuries that can be caused to the dignity of a human person. The HRCSL should be urged to review the quantum of compensation granted in this case as well as in all earlier cases.

It was incorrect for you to imply that our reference was regarding the HRCSL's powers of implementation. We are fully aware that yours is a toothless commission from the point of view of implementation. Further we are also aware that from the point of view of appointment, your present commission was appointed contrary to the provisions of the 17th Amendment to the Constitution. However, the matter we raised was regarding your obligations to conform to the international norms and standards in awarding compensation to torture victims.

In this particular case the HRCSL found the respondent police officers to have breached the victim's rights under Section 11 (Torture) and 13(1) (Illegal arrest) of the Constitution. The victim has alleged that he was stripped, hung and beaten with wicket poles and was forced to make a confession. Our criticism of the quantum you have awarded is based on the Article 2 of the International Covenant on Civil and Political Rights which obligates the state party to provide an *ADEQUATE REMEDY* for violations of rights. The question of compensation goes to the very heart of the question of adequate remedy.

The United Nations Committee against Torture as well as the Human Rights Committee has repeatedly gone into the issue of compensation as a part of adequate remedy against torture.

The HRCSL, you may be aware, is founded on the basis of what are known as 'the Paris Principles.' These principles are based on a resolution of the General Assembly of the United Nations, 48/134 adopted in December 1993. One of the functions of institutions like the HRCSL is "to promote and ensure harmonization of national legislation, regulations and practices with the international human rights instruments to which the state is a party and their effective implementation."

When the HRCSL investigates cases of torture and makes its decision these decisions should be in harmony with the international norms and standards of human rights. It is

one of the most elementary principles regarding torture that it is considered among the worst categories of crimes. It is one of the human rights about which there is an absolute prohibition. Both the International Covenant on Civil and Political Rights (ICCPR) and the Convention against Torture attribute the highest importance to the elimination of torture. It is up to you to consider whether the HRCSL decisions, including the one in this case, harmonize with international human rights instruments. In fact instead of harmonizing with such decisions you are in complete contradiction with the international norms and standards. If it is HRCSL's position that such harmonization is not possible then your commission defeats the very purpose for which it was created.

Paltry sums awarded in cases of torture are an encouragement to torture perpetrators. Institutions like the HRCSL exist not to encourage torture perpetrators but to discourage them. If they are discouraged from the practice of torture this will cause the police establishment to look for improvements in its methods of criminal investigation and such improvements is one of the primary needs of the country. Failure of criminal investigations is one of the primary causes, not only for the increase in crime but also the increase of gross abuses of human rights such as abductions, disappearances, extrajudicial killings, torture and the like. In granting insignificant quantum as awards against such heinous acts of torture the HRCSL contributes to the continuation of a situation of increased crime and abuse of human rights. Paltry sums awarded in torture cases also discourage the victims and their families from pursuing such complaints.

We have good reason to believe that there are attempts to discourage rather than encourage the making of complaints to your commission. We have received many complaints from those who have resorted to your commission of their frustration. Such discouragement pursued through disproportionate awards for grave human rights violations contradict the HRCSL's mandate to protect and promote human rights.

The complaint in this case was made in September 2004 and the decision was made on March 27, 2007. It has taken almost two and a half years to decide this simple case. The duty to investigate promptly into complaints of human rights abuse is one of the primary ways to ensure an adequate remedy. We refer you to the Concluding observations of the Committee on Sri Lanka on the duty to investigate promptly:

Prompt and impartial investigations

12. The Committee expresses its deep concern about continued well-documented allegations of widespread torture and ill-treatment as well as disappearances mainly by the State's police forces. It is also concerned that such violations committed by law enforcement officials are not investigated promptly and impartially by the State party's competent authorities (article 12).

The State party should:

a) ensure prompt, impartial and exhaustive investigations into all allegations of violations of torture and ill-treatment and disappearances

committed by law enforcement officials. Such violations should, in particular, not be undertaken by or under the authority of the police, but by an independent body. In connection with prima facie cases of torture the accused should be subject to suspension or reassignment during the process of investigation, especially if there is a risk that he or she might impede the investigation;

b) try and, as appropriate, convict the perpetrators and impose appropriate sentences on them, thus eliminating any ideas of impunity that might be entertained by perpetrators of torture.

CAT/C/ LKA /CO/1/CRP.2 - 23 November 2005

Although the duty of prosecution does not lie with your commission the duty to investigate complaints of torture from the point of view of compensation is your obligation.

On the issue of implementation may we refer you to the Presidential Directive dated July 5, 2006 instructing 'Service Commanders and the IGP to assist HRC of Sri Lanka to exercise its functions and duties without any hindrance.' Your letter implies that this directive of the president is not being complied with. If that be the case the HRCSL has a moral obligation to raise the matter with the president and also to inform the public of the issue. The Paris Principles makes it an obligation for national institutions like the HRCSL to negotiate with the government for the improvement of implementation on human rights matters. While the commission cannot be expected to implement decisions without legal provisions, the commission does have the obligation to exercise its functions in order to get the government to implement the decisions relating to human rights.

As for prosecution of offenders, this particular case will be taken up with the Attorney General and the Inspector General of Police. We urge you to use your moral authority and powers of persuasion to see that your own commission's decisions, including the decision in the present case be implemented. What is more important perhaps is for you to review the case and other similar cases from the point of view of the quantum of the awards and to increase the sums so as to be in harmony with the international norms and standards.

Thank you

Yours sincerely,

.....
For and on behalf of

Programme Officer, Urgent Appeals Programme

Asian Human Rights Commission, Hong Kong

May 8, 2007

AHRC-OL-014-2007

An Open Letter to the Additional Secretary to the Ministry of Defence, Public Security, Law & Order on the failure to investigate into complaints of abductions and disappearances

We reproduce below a letter written to the Additional Secretary to the Ministry of Defence, Public Security, Law and Order by the AHRC today.

Mr. R.M.S. Ratnayake
Additional Secretary (D) II
Ministry of Defence, Public Security,
Law & Order
No. 15/5 Baladaksha Mawatha
Colombo 03
Sri Lanka

May 8, 2007

Dear Mr. Ratnayake,

Re: SRI LANKA: Failure to perform state duties to investigate allegations of abductions and disappearances through the machinery of the investigating branch of the police; neglect of complaints made to state authorities

The Asian Human Rights Commission sent an Urgent Appeal on February 26, 2007 (UA-063-2007) to several government authorities to which a reply was received on May 7, 2007 from you as the Additional Secretary for the Ministry of Defence, Public Security, Law & Order dated April 3, 2007 (SMOD/703/HUMAN RIGHTS).

The AHRC's Urgent Appeal concerned 59 cases of abductions and disappearances on the basis of information made available in a report by the Civil Monitoring Mission. The reply received from you shows how such complaints end up in the rubbish heap.

We quote the relevant part of your reply to the complaint:

A: A directive has been issued on 5 July 2006 by H.E. the President to Service Commanders and the IGP to assist HRC of Sri Lanka to exercise its functions and duties without any hindrance; B: A directive has been issued on 21 July 2006 by H.E. the President to Service Commanders and the IGP outlining the treatment of women and girls during search, arrest and detentions; C: Appointment of Mr. T Sundaralingam as the special Rapporteur to the NRC Sri Lanka to deal with human rights issues and all Service Commanders and TOP have been directed to assist him; D: Establishment of Inter - Ministerial Committee on human rights. This Committee is chaired by the Hon Minister

Disaster Management & Human Rights. All grievances with regard to the human rights can be forwarded to this committee without any harassment and such incidents are taken into consideration regularly.

Comments on your reply on behalf of the Ministry:

The matters mentioned in paragraphs A & B of your letter do not relate to abductions and disappearances that have already taken place. They instead refer to Presidential directives which have no binding affect in law anyway. These directives only deal with the instructions that the police and armed forces are supposed to follow during arrest. However, the cases referred to in the UA are about abductions and disappearances which have already taken place.

Paragraph C refers to the appointment of a special Rapporteur on human rights issues to the Human Rights Commission of Sri Lanka. However, it is not within the mandate or the 'capacity' of the special Rapporteur to investigate into disappearances. Paragraph D refers to the establishment of the Inter-Ministerial Committee on human rights. This again is a committee created a long time ago and the abductions and disappearances complained of have happened despite of the existence of this committee. This committee does not have any legal basis as it has not been created through any legislation. This committee has also neither the mandate nor the capacity to conduct serious criminal investigations which are required when such a grave violations as an abduction or disappearance is reported.

In any credible legal system a complaint of an abduction or disappearance would be treated as a matter of the highest gravity. Normal practice when such a crime is reported to a legal authority is for that authority, which is often the Chief of the Police in the country, is to order immediate inquiries through the best criminal investigating teams available at his disposal. In relation to Sri Lanka, the person who should be held responsible for dealing with all complaints relating to an abduction or disappearance is the Inspector General of Police (IGP) and it is his duty to mobilize the best teams available to him in the Criminal Investigation Division (CID) to deal with each of the individual cases. The usual practice of other jurisdictions in matters of abductions or disappearances is for the investigating officers to make announcements to the whole country through all media channels giving the description of the person alleged to have been abducted or disappeared and to encourage the public to provide any information they may have regarding such person or the circumstances that might lead to the discovery of the person.

Usually such information is broadcast repeatedly until some success is achieved in finding the person or at least discovering what has happened to him or her. Meanwhile alerts would be sent to all the police units throughout the country to look into such disappearance.

The issue of abductions or disappearances is not about who may have been responsible for the act, it is about who has the responsibility to conduct thorough, prompt and competent inquiries into the cases. And that responsibility is entirely in the hands of the

law enforcement agency that has the responsibility for investigations into all crimes which is the police. The exercise of that responsibility is in the hands of the IGP and his high command.

The issue is not one of presidential directives or committees. It is a hard core criminal justice issue. The legal responsibility is already there within the existing law of the country. If this legal responsibility cannot be exercised by the law enforcement agency which has the legal responsibility to do it, it is a most fundamental flaw in the country's criminal justice system.

The response that is needed by persons complaining about abductions or disappearances is as to what the country's premier law enforcement agency has been doing on that complaint, what success it has achieved and if it has not been successful as to why this is the case. This is knowledge that the public is entitled to have on all cases relating to serious crimes. The government will fail in its legal obligations if it falls short in providing such information to the public.

The letter sent by you on behalf of the Ministry of Defence, Public Security, Law & Order does not reflect that this ministry understands the legal obligations involved in the state's responsibility to investigate into allegations of serious crimes through the proper machinery of law enforcement in the country. Your letter shows that the state has not paid any respect to the nature of the complaint and its gravity which is about the abductions and disappearances of 59 persons.

We urge the ministry to disclose to the public what the country's law enforcement agency, the Criminal Investigation Division and the IGP and his high command have done so far to investigate into the above complaints. If the ministry is unable to do this it would not be unfair for the people of the country, as well as the international community to assume that the law enforcement duties relating to such a serious allegation have not been carried out.

Thank you.

Yours sincerely,

For and on behalf of:
Programme Coordinator
Asian Human Rights Commission

HUMAN RIGHTS AWARDS

PRESS RELEASE

AHRC-PL-011-2007

SRI LANKA: Kishali Pinto-Jayawardena named Woman of Courage 2007

(Hong Kong, March 12, 2007)

The Asian Human Rights Commission congratulates Kishali Pinto-Jayawardena of Sri Lanka for being recognized as Sri Lanka's Woman of Courage for the year 2007 by the United States. A communiqué announcing the award states as follows:

'Ms. Pinto-Jayawardena has been an unstinting advocate for the rule of law as her legal work and writings on safeguarding the independence of the Sri Lankan judiciary and key constitutional bodies such as the National Human Rights Commission and National Police Commission demonstrate.

Ms. Pinto-Jayawardena has publicly called on the government to uphold the requirement to have the Constitutional Council appoint members of national commissions. She has been involved in cases involving the right to freedom of movement, freedom from arbitrary arrest, and equality of persons and has faced politically motivated threats of "contempt of court" charges.

Ms. Pinto-Jayawardena has written extensively in newspapers, journals, and books about human rights, media freedom, and the role of women. She has served as a trailblazer for women in the field of law, leaving an indelible mark in the areas of legal advocacy, litigation, and the media," Ambassador Blake said. "She has raised the profile of human rights protection not only in Sri Lanka, but also in international law," he added.

Ms. Pinto-Jayawardena is a close associate of the Asian Human Rights Commission and has worked closely with the commission on many issues relating to the protection and promotion of human rights in Sri Lanka as well as in Asia.

"We are happy about the recognition given to the work of Ms. Pinto-Jayawardena. These are times when it is difficult to stand up for issues relating to human rights in Sri Lanka," said Mr. Basil Fernando, the Executive Director of the Asian Human Rights Commission.

He went on to say that, "Many have given up speaking out in public on vital issues due to subtle and sometimes even very overt pressures. The undermining of the independence of the judiciary and the absolute power exercised by the presidential system are two of the most crucial problems that have stifled the democratic freedoms in Sri Lanka. Only seriously critical voices can save this situation. Such voices are not many in Sri Lanka at present. Unfortunately, even the Bar Association of the country itself has helped the

deterioration of standards by their silence in the midst of serious attacks on the independence of the lawyers. The elite in the legal field have also remained silent while some lawyers have adopted the attitude of cynical resignation. Ms. Pinto-Jayawardena's is one of the voices which have consistently spoken out against this situation and we hope that the recognition she has gained will encourage others to discharge their fundamental obligations to their community by the use of free speech to condemn extremely grave violations of human rights and to suggest ways out of the crisis."

PRESS RELEASE

AHRC-PL-016-2007

ASIA: Two outstanding rights defenders from India awarded regional prize

(Hong Kong, May 2, 2007) Two persons fighting for human rights in different parts of India were awarded a prestigious regional human rights prize on Monday.

The 2007 Gwangju Prize for Human Rights went jointly to Lenin Raghuvanshi for his resistance to caste-based discrimination in the country's north and Irom Sharmila for her resistance to the indiscriminate use of military force against civilians in the northeast.

Raghuvanshi leads the People's Vigilance Committee on Human Rights (PVCHR), which has over 50,000 members working against caste discrimination and torture across five states.

The Korean awarding committee said that Raghuvanshi had brought hope back to thousands of bonded labourers and those suffering human rights abuses due to India's caste system, especially Dalits.

The Asian Human Rights Commission (AHRC), which has worked closely with the PVCHR for a number of years, congratulated Raghuvanshi on his receipt of the award.

"Dr Lenin and his colleagues are tackling deep feudal practices that go back thousands of years and require immense dedication and effort to be eliminated, as they must if human rights and democracy are ever to have any meaning in India," Basil Fernando, executive director of the Hong Kong-based regional rights group, said.

"We have no doubt that he is a very worthy recipient of this award and that it will contribute much to his further efforts," Fernando said.

Raghuvanshi has been acknowledged for his work as a social changemaker by the international Ashoka Fellowship.

His co-recipient, Irom Sharmila, has conducted a hunger strike for the abolition of the Armed Forces Special Powers Act (AFSPA) in the northeastern states since a massacre in

Manipur during 2000. She is being detained at the Ram Manohar Lohia Hospital, where she is force-fed by drip.

"They both have fought for the same noble cause of the advancement of human rights and social justice, yet they still have a long way to go. The Gwangju Prize for Human Rights will boost their further struggles," the May 18 Memorial Foundation said in announcing the award recipients.

A ceremony to present the award will be held in Gwangju on May 18.

Previous recipients have included Basil Fernando, Jayanthi Dandeniya, the coordinator of the Families of the Disappeared in Sri Lanka, and the chairperson of the Working Group on Justice for Peace in Thailand, Angkhana Neelaphajit.

AHRC-PL-018-2007

SRI LANKA: A new booklet - The Delgoda Family Massacre and Confronting Lawlessness

(Hong Kong, May 31, 2007)

On May 26, 2007 five persons belonging to the same family were chopped to death in their own home. According to reports the alleged cause of the multiple murders was a land dispute which had gone on for some time.

The following day, according to reports, a group of people arrived from outside the neighbourhood in a bus and burned three houses. The same day two suspects were arrested by the police and within a few hours they had been shot dead and their deaths were announced through electronic media to the whole nation. Within 24 hours of that event the magistrate of the area pronounced that the two deaths amounted to justifiable homicide in self defence.

Within the two weeks around this event there have been several murders of families in various parts of the country. In fact extra ordinary forms of crimes are taking place reflecting an extremely abnormal situation.

Following this incident the Asian Human Rights Commission issued a series of statements. In this booklet these and earlier statements and a letter written to the Secretary of the Judicial Service Commission are included. In an open letter to the speaker of Parliament and the members of parliament the AHRC called for a parliamentary debate on the issue and for the development of a strategic plan on an urgent basis to deal with the issue of the lawlessness in an enlightened manner. The AHRC for the last ten years constantly pointed out that there is a situation of an exceptional collapse of the rule of law in the country which if not decisively addressed may lead to unimaginable peril for the whole country. We are publishing this booklet to contribute to a public debate, which is now imperative if there is to be a recovery.