

# The Phantom Limb

## **Failing Judicial Systems, Torture and Human Rights Work in Sri Lanka**



**A Study of Police Torture in Sri Lanka**

**Morten Koch Andersen  
*and*  
Basil Fernando**

**The Rehabilitation and Research Centre for  
Torture Victims (RCT) (Denmark)  
and the Asian Human Rights Commission  
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The photograph on the cover page was taken by Sisikelum Dahampriya Balage, Assistant News Editor of the Telshan Networks Ltd, who caught on video the murder of a 26 year-old man, Balawarnam Sivakumar in the Bambilipitiya Sea on the 29th October 2009. Sivakumar was chased into the sea by officers of the Bambilipitiya Police Station who beat him with sticks and clubs. He drowned as a result. Testifying before the Colombo Fort Magistrate Balage said, "I viewed what happened on the beach through the lens of a camera recorder from the seventh floor of a building located next to the Bambilipitiya railway station." This video was telecast the same evening and the pictures have been repeatedly reproduced over many media channels.

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# Table of Contents

Foreword .....	4
Introduction .....	5
1. What is and what is not of human rights in Sri Lanka ....	11
The State of Affairs .....	11
2. Politics and Governance .....	18
The 1978 Constitution .....	18
Conflict and Deprivation .....	19
3. Impairments & Dysfunctionalities .....	23
Report of 1946 .....	24
Report of 1970 .....	27
Report of 1995 .....	31
Report of 2004 .....	33
The Official Records .....	36
4. Here for All – Accessible for None .....	41
The Characteristic of the Victims .....	42
The Character of the Assault .....	45
The Police Revealed .....	53
5. The Phantom Limb .....	56
System to System .....	57
Logics .....	62
6. Conclusion .....	66
Bibliography .....	69
Annex A: Report of the Police Commission 1946 .....	73
Annex B: Report of the Police Commission 1970 .....	76
Annex C: Report of the Committee appointed 1995 .....	79

## Foreword

This study is a result of the cooperation between the Asian Human Rights Commission (AHRC) and the Rehabilitation and Research Centre for Torture Victims (RCT).

The study was done in January 2008 and the data was processed during April and May 2008 at the AHRC office in Hong Kong. The idea and outline of the study was developed by Basil Fernando of the Asian Human Rights Commission and the processing and analysis of the data and the writing of the report was completed by Morten Koch Andersen of RCT.

The study seeks to explore the routine use of torture by the police and illuminate the widespread violence and human rights violations that are part of everyday life in Sri Lanka. It seeks to show the apparent neglect of the Sri Lankan state to stop these atrocities and provide adequate protection and remedies for the victims by ignoring publicly available information provided by state commissioned investigations and reports on the continuously declining state of affairs in the police force and the general deteriorating of human rights in the country.

*Morten Koch Andersen and Basil Fernando, June 2009.*

# Introduction

In many countries regular use of torture is part of ordinary criminal investigations. Despite this well known sad reality most reporting on torture and the practice of torture – e.g. from a medical or legal perspective - departs from an intrinsic assumption that the use of torture is an exception from the ordinary – an alien or antagonistic practice in modern societies, and that torture is utilized with intent to secure the state and uphold specific constellations of power and governance.

Torture is part of the normal course of criminal investigations – standard operating procedure – and is not just utilized during “abnormal” settings such as (post)conflict situations. However, few studies depart from this point of view to explore the every day mundane and routine practices of torture and the ill treatment and degrading treatment widespread during arrest, investigation and interrogation within national criminal justice systems in many countries in the world.

In his comprehensive and thorough study on torture practices, Darius Rejali identifies three main reasons why torture is employed by state authorities – be it police or military – i) to intimidate, ii) to extract false confessions and iii) to generate accurate security information.<sup>1</sup> Even though these reasons capture the intentionality of torture practices, they do not explain the routine use of torture that has taken place for decades as part of ordinary police investigations in many developing countries. This study intends to address this shortfall and explore how police torture has become a

routine practice in the criminal justice system in Sri Lanka.

The importance of making specific studies on police torture is based on the observation that the use of torture – and the acceptance of this practice within the state apparatus – affects the overall administration of justice. This study advances the basic assumption that torture reveals the manner in which fundamental state institutions for the administration of justice operate.

The practice of torture interlinks and intersects institutions of justice – the police, the prosecution and the judiciary – and the rule of law. Thus, any attempt to understand linkages between the prevention of torture and the administration of justice requires investigating police torture through the concrete day-to-day practices of the criminal justice system.

All attempts to develop effective strategies for the prevention of torture require the understanding of the actual practices that produce and cause routine violations of human rights. Through this analysis, we can highlight and bring to the fore the risks and protective factors for becoming a victim in Sri Lanka today.

The background for the study is the experiences and lessons learned of the Asian Human Rights Commission (AHRC) and the Rehabilitation and Research Centre for Torture Victims (RCT). These two organizations have for a decade monitored the human rights situation in Sri Lanka closely and have worked intensively on the gradual breakdown of the rule of law.

At this point, when respect for human rights and the rule of law is continuously deteriorating, critical reflections on the AHRC's on-going work appears timely and appropriate. The report is motivated to understand the limited effect of human rights

work to end the widespread misuse of authority, police torture, impunity and general human rights violations, and to ensure redress, compensation and adequate protection and remedies for the survivors. The study aims to provide better insights and understanding of the causes and effects of police torture in developing countries with failing judicial systems.

The study's proposition is that current analysis of the situation in Sri Lanka tends to exaggerate the influence of the armed conflict in explaining the deterioration of the rule of law. This analysis tends to focus narrowly on the judicial structure and technical law complex and thus, it turns a blind eye to the everyday management of the justice system and the socio-economic factors which delineate social practices in a country without adequate state provision of welfare and security.

### **The question**

The study aims to address the following questions: How has the criminal justice system (police, judiciary, prosecutions, lawyers, probation workers, oversight institutions, magistrates) developed dysfunctional<sup>2</sup> practices (misuse of authority and widespread use of torture) and, what are the socio-economic factors that sustain, support or facilitate this development?

The intention is to carry through an analysis that goes beyond ordinary judicial examination which, often focuses, on defective systems and technical failures. This has been the main approach of the AHRC in the previous decade. In the current situation, the need for more in-depth analysis has been brought to the forefront, to understand the general degradation of human rights and to explore new avenues to improve the respect for human rights and ensure adequate remedies and protection of people in Sri Lanka.



## Methodology

The study aims to bring to the forefront, the practices, techniques and routines as well as the rationality, logic<sup>3</sup> and mindsets,<sup>4</sup> that place on social actors sets of constraints and moralities for rational behavior. These are somewhat different to those expected from an ideal legal perspective, through which the management of the judicial system unfolds. The point of departure for the following analysis is the criminal justice system: the formalized rules, regulations and procedures – and the functioning of the criminal justice system – the ways in which the system is implemented through the judiciary and the police.

The intention is not to focus on individual cases of human rights violations in order to pinpoint specific technical failures in the judiciary and/or the police but to explore the logic in ways that the system is practiced, that is, through the routinized behavior and standard operating procedures of policing. The study is limited to the AHRC's reporting of cases of police torture and other violations of human rights in Sri Lanka.

The study will consist of:

- A history of the judicial system in Sri Lanka leading to the current state of affairs, based on official government documents and reports; and,
- An outline of the current rule of law situation in the country depicted through the plentiful case documents compiled by the AHRC to outline trends and procedures. This will then be related to historically constructed socio-economic structures in Sri Lanka.

The material used for this study is 200 cases, which roughly cover 5 years of the AHRC reporting on Sri Lanka.<sup>5</sup> The cases were selected on a set of basic and simple criteria: i) the police were

the perpetrators,<sup>6</sup> ii) it was a real-time event and/or the reported incident directly connects to a recent case of human rights violation (in some cases the victims experience a series of assaults and harassment e.g. in relation to complaints of police brutality) and iii) the event involved physical force, which excludes cases of inaction in criminal cases (to protect criminals or influential persons), illegal detention, fabrication of charges and other forms of misuse of authority.

The particular focus on physical violence covers all acts from slaps in the face (of a child), beatings, to sexual abuse, water boarding and falanga (besting of the soles of the feet also known as bastinado). It highlights the state of affairs within the criminal justice system and pinpoints the character of the human rights violations. Because the cases vary in terms of duration (some cases are monitored through several years), severity and details of the torture, the reasoning or arbitrariness of the assault (in many cases the victims come forward with explanations of the assault, e.g. that it was instigated by a third party or due to complaints/filing of cases against state authorities) and the knowledge about the identity of the perpetrators, the cases are examined as social events.<sup>7</sup> These can involve a variety of stakeholders, perceptions and explanations of the assault.

The material used - the 200 cases - has not been recorded for the purpose of doing studies but to assist the victims in claiming their rights and to prevent future human rights violations. It has been compiled by several persons over a period of five years, under demanding circumstances (following a format of reporting which also developed during the years). The AHRC and the PAT network are not present in the north and the east and the reporting does not cover these regions. The AHRC and the PAT network did not report all cases of torture in Sri Lanka in the areas they covered

during the five year period – they do not make this claim and do not attempt to present a complete picture of the situation<sup>8</sup> – but the data material does tell us something about trends and characteristics of human rights abuses in Sri Lanka.

The intention here is to present an approach to the rule of law which hopefully will inspire more thorough situated studies on torture practices. It is hoped that this will contribute to discussions amongst human rights scholars, practitioners and activists and advance concerted efforts to eradicate torture in Sri Lanka.

- 
1. Rejali, Darius. "Torture and democracy". Princeton: Princeton University Press 2007.
  2. Dysfunctional denotes the opposition to an ideally functional system of justice, which amongst other things includes freedom from torture, equal access to justice and adequate remedies.
  3. The concept of logic is borrowed from Olivier de Sardan to denote present practices that are based or related to customary social practices but should not be viewed as pre-traditional or essentialist cultural ones.
  4. In this study the concept of mindset is used as a thought space circumscribing what can be said and done.
  5. The case materials are the Urgent Appeals that have been compiled and publicized by the AHRC and their network in Sri Lanka. Urgent Appeals are a method to disseminate real-time information of human rights violations to create national and international awareness. Urgent Appeals add pressure on the government to intervene and take disciplinary action towards perpetrators. The information is gathered by local grassroots organizations and sent to the AHRC, which publicizes the stories internationally through its web-based network.
  6. This study focuses on the ordinary police, but special branches of the police such as the Criminal Investigation Department are not a priori excluded as they in certain cases have worked in cooperation with the ordinary police in undertaking investigations and arrests.
  7. Notwithstanding this analytical qualification, cases and events are used interchangeably throughout the document when referring to AHRC reported material.
  8. Especially cases of sexual abuses are often not 'discovered' and reported, even by organizations or persons working at the local level, due to issues of fear, stigma, shame, etc.

# 1.

## What is and What is Not of Human Rights in Sri Lanka

This chapter outlines the current human rights situation in Sri Lanka and illustrates the widespread recognition of problems in the criminal justice system amongst non-governmental organizations, international organizations, state agencies and civil society actors.

### **The State of Affairs**

Every national and international observer agrees that Sri Lanka today is a state under tremendous stress. The Asian Human Rights Commission (AHRC) and Sri Lankan national civil society organizations have documented that violations of fundamental human rights are occurring everyday.<sup>9</sup> Extrajudicial killings, kidnappings, torture, forced recruitment and other human rights violations are persistent and widespread. Human rights groups and humanitarian agencies<sup>10</sup> are increasingly alarmed by the scale of violations and abuses, and it is feared that the country may fall into a state of complete lawlessness.<sup>11</sup>

The Government introduced two reprisal regulations called Emergency Regulations in August 2005. In December 2006 these were expanded via the introduction of the Prevention and Prohibition of Terrorism and Specified Terrorist Activities regulations. These regulations allow state authorities to search, detain and arrest without a warrant any person suspected of an offence under the regulations. Detainees can be held up to 12 months without any criminal charge.<sup>12</sup>

Further, the hostilities between the government and the Liberation Tigers of Tamil Eelam (LTTE) have displaced hundreds of thousands of people<sup>13</sup> and thousands have died due to increased violence,<sup>14</sup> many of which are civilians caught up in the fighting<sup>15</sup>. More than 1500 enforced disappearances, an increase in unlawful killings and other abuses have been reported between 2005 and December 2007.<sup>16</sup>

The government has used the anti-terrorism legislation to threaten and prosecute humanitarian workers, human rights defenders and journalists with alternative information or critical views of government policies by categorizing them as ‘traitors’, ‘terrorist sympathizers’, and ‘supporters of the LTTE’ to silence criticism. The police have continued to use torture and inhuman treatment and the government has been able to argue for its hard-line policy and actions with reference to the escalation of violence by the LTTE, thereby shifting focus from the deterioration of the rule of law in the country.

International actors have for a long time recommended strengthening the independence of national overseeing bodies and in concert promoted an operational national human rights commission to ensure the adequate functioning of the criminal justice system.<sup>17</sup> In response to rising national and international concerns about human rights violations, the parliament passed the 17th Amendment to the Constitution in 2001 that established an independent committee (recommended by the government, appointed commissions since 1970) to address biased appointments and promotions in the public sector and the police. The aim was; “*Transforming the Sri Lankan Police into a truly modern elite force with emphasis on respect for rule of law, professionalism, transparency, and responsiveness to public aspirations*”.<sup>18</sup>

The appointments to the commissions were to be selected and approved by a 10-member Constitutional Council (CC), which also had the obligation to make appointments to other state bodies, e.g. the national Human Rights Commission and the Election Commission.

This body was given the constitutional powers over appointments, promotions, dismissals and disciplinary control of police staff. It was required to establish procedures for entertaining, investigating, and redressing complaints against police personnel. It was also vested with the powers to provide for and determine the formulation of schemes of recruitment and training and the improvement of the efficiency and independence of the police service.<sup>19</sup>

However, the council was only in existence for a period of three years, 2002 – 2005, when the terms of the members expired. Thereafter, no new members were appointed to this overseeing council. However, this did not prevent the president from directly appointing members to the Human Rights Commission and the National Police Commission, bypassing the constitutional provisions. Allegedly the president appointed political supporters and personal friends as members leaving the commissions to be accused of political bias and dependency.<sup>20</sup>

Further, in November 2006, a Presidential Commission of Inquiry (COI) to investigate selected serious cases of human rights violations was created. The members were nominated by the president and a group of international experts was also appointed to observe the COI work; the International Independent Group of Eminent Persons (IIGEP).<sup>21</sup>

However, from the very beginning the COI lacked the resources and mandate to investigate attacks on civilians, abductions, and political killings that continued to take place.<sup>22</sup> The IIGEP launched a strong critique on the process of enquiry and the lack of cooperation from state agencies in several human rights cases.<sup>23</sup> In April 2008, the IIGEP committee members withdrew from their appointments due to the state's lack of cooperation in the investigation of human rights violations cases and the Attorney General's offices "*inappropriate and impermissible role in the proceedings of the Commission*".<sup>24</sup>

After the initial nomination of the COI members expired, the government did not appoint new members, and the COI appears more of an effort to stave off domestic and international criticism than a sincere attempt to address the downward spiraling human rights crisis and promote accountability and the rule of law.

Amnesty International,<sup>25</sup> Human Rights Watch,<sup>26</sup> the EU representation<sup>27</sup> and the UN have all emphasized the continuously deteriorating rule of law in Sri Lanka and the government's unwillingness to abide by international standards and obligations and adhere to national legislation. The United Nations Special Rapporteur on Torture issued the following statement on October 29 2007, after his visit to the country:

*"Though the Government has disagreed, in my opinion the high number of indictments for torture filed by the Attorney General's Office, the number of successful fundamental rights cases decided by the Supreme Court of Sri Lanka, as well as the high number of complaints that the National Human Rights Commission continues to receive on an almost daily basis indicates that torture is widely practiced in Sri Lanka. Moreover, I observe that this practice is prone to become routine*

*in the context of counter-terrorism operations, in particular by the TID [Police Terrorist Investigation Division]”<sup>28</sup>.*

Despite the reluctance of the Sri Lankan government to officially acknowledge widespread and routine human rights violations and violation of national and international legislation in its own examination and reporting on the criminal justice system, it recognizes an impaired judicial system and dysfunctional police apparatus.

In 2004, a report published by a committee established by the government<sup>29</sup> *“to identify the reasons for laws delays and to propose remedial action that can be taken to overcome the inadequacies in the practice and procedure of courts, so as to establish a credible and effective system with a focus on curbing crime and maintaining public confidence”*, stated:

“Inadequacies in the practice and procedure in the administration of criminal justice have been identified as one of the main factors contributing to delays in the dispensation of criminal justice in the country.

The rapid escalation of crime, increasingly committed in an organised manner with violence, impunity and considerable sophistication, thereby resulting in the loss of public confidence in the criminal justice system, has highlighted the need to review the existing criminal justice framework in Sri Lanka.”

The 2004 committee showed that the rate of convictions in the country in the period of 1983 - 2002 stood at merely 4%.<sup>30</sup> This was approximately the same figure in 2006. Out of almost 60,000 grave criminal cases nationwide, over 60% were pending in the



criminal justice system by the end of 2006,<sup>31</sup> regardless of the excessive use of force and harsh interrogation methods.<sup>32</sup>

The widespread human rights violations and the bad performance of the police in criminal investigations is not just the result of the current government's unwillingness to change a downward spiraling situation or the mismanagement of the police, but is the consequence of several years of government decisions that neglect the criminal justice system.

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9. See for example University Teachers for Human Rights, [www.uthr.org](http://www.uthr.org).
  10. The Sri Lankan government prevented the ICJ initially from entering the country to observe the inquest into the disappeared 17 aid workers from ACF (Action contre le Faim) (October 2006 ICJ), also see more reports and statements on Sri Lanka: AI Index: ASA 37/010/2007, HRW 060807 Report: Sri Lanka: Government Abuses Intensify. Killings, Abductions and displacement Soar as Impunity Reigns; and International Crisis Group (020807).
  11. During the black period – the so called JVP insurgency period of 1989-1991 an estimated up to 60,000 people were killed, mostly in Sinhalese-dominated areas in South and Centre of Sri Lanka.
  12. Special acts and regulations are a historical and common feature in Sri Lankan governance, see chapter 3.
  13. Common Humanitarian Action Plan (CHAP) 2008, prepared by the Inter-Agency Standing Committee (IASC) country team for Sri Lanka, see [http://ochadms.unog.ch/quickplace/cap/main.nsf/h\\_Index/CHAP\\_2008\\_Sri\\_Lanka/\\$FILE/CHAP\\_2008\\_Sri\\_Lanka\\_VOL1\\_SCREEN.pdf?OpenElement](http://ochadms.unog.ch/quickplace/cap/main.nsf/h_Index/CHAP_2008_Sri_Lanka/$FILE/CHAP_2008_Sri_Lanka_VOL1_SCREEN.pdf?OpenElement). Situation report 13 October 2008, see [www.irinnews.org/report.aspx?ReportID=80944](http://www.irinnews.org/report.aspx?ReportID=80944)
  14. From January to September 2006, over 1,300 civilians were killed with the shocking statistic of one every five hours According to statistics compiled by Home for Human Rights (HHR); published in The Daily Mirror 30.10.2006.
  15. ICRC 2008, see [www.icrc.org/Web/Eng/siteeng0.nsf/html/sri-lanka-news-130208!OpenDocument](http://www.icrc.org/Web/Eng/siteeng0.nsf/html/sri-lanka-news-130208!OpenDocument) and [www.icrc.org/Web/Eng/siteeng0.nsf/html/sri-lanka-update-080208!OpenDocument](http://www.icrc.org/Web/Eng/siteeng0.nsf/html/sri-lanka-update-080208!OpenDocument).
  16. Human Rights Watch, "Recurring Nightmare: State Responsibility for "Disappearances" and Abductions in Sri Lanka", 2008. see <http://www.hrw.org/reports/2008/srilanka0308/>.

17. International Crisis Group “Sri Lanka’s human rights crisis”. 2007, Amnesty International ”International Report 2007”. See [www.amnesty.org](http://www.amnesty.org), Human Rights Watch, World Report 2008”, see [www.hrw.org](http://www.hrw.org). See EU Strategy Paper 2007-13 <http://www.dellka.ec.europa.eu/en/index.htm>, and EU relations with Sri Lanka [http://ec.europa.eu/external\\_relations/sri\\_lanka/intro/index.htm](http://ec.europa.eu/external_relations/sri_lanka/intro/index.htm)., UNDP in Sri Lanka, see [www.undp.lk/uniportal/programmes/p/programmes.asp?xi=6](http://www.undp.lk/uniportal/programmes/p/programmes.asp?xi=6).
18. See [www.npc.gov.lk](http://www.npc.gov.lk)
19. Ibid.
20. 2008 Human Rights Council - Mission to Sri Lanka - A/HRC/7/3/Add.6 pp. 16-18, available at <http://daccessdds.un.org/doc/UNDOC/GEN/G08/111/35/PDF/G0811135.pdf?OpenElement>.
21. The Commission of Inquiry is composed of Sri Lankan members, along with an international group of advisors and observers chaired by a former Indian Supreme Court President.
22. The COI has a number of shortcomings. 1) No enforcement power; it can only recommend to the government. 2) The government is required to publicize reports. 3) The absence of a witness protection program endangers those who may step forward to report abuse by the military or police. 4) The attorney general’s office has refused to provide requested information, suggesting that the government will impede the commission’s work. 5) The head of the COI had tried to limit the work of the IIGEP to an observer-only role, which would prohibit it from conducting investigations and speaking with witnesses on its own.
23. IIGEP press statement of December 17, 2007.
24. For IIGEP press statement see, <http://www.iigep.org/prelease/estatement8.pdf>
25. Amnesty International “International Report 2007”. See [www.amnesty.org](http://www.amnesty.org)..
26. Human Rights Watch, “World Report 2008”, See [www.hrw.org](http://www.hrw.org).
27. See EU Strategy Paper 2007-13 <http://www.dellka.ec.europa.eu/en/index.htm>, and EU relations with Sri Lanka [http://ec.europa.eu/external\\_relations/sri\\_lanka/intro/index.htm](http://ec.europa.eu/external_relations/sri_lanka/intro/index.htm).
28. [www.unhchr.ch/hurricane/hurricane.nsf/view01/F493C88D3AFDCDBEC1257383006CD8BB?opendocument](http://www.unhchr.ch/hurricane/hurricane.nsf/view01/F493C88D3AFDCDBEC1257383006CD8BB?opendocument).
29. Committee Appointed to Recommend Amendments to the Practice and Procedure in Investigations and Courts, ”The Eradication of Laws Delays”, April 2004.
30. Committee Appointed to Recommend Amendments to the Practice and Procedure in Investigations and Courts, “The Eradication of Laws Delays”, April 2004.
31. Numbers from the Sri Lanka Police Service own reporting on national crime trends, see <http://www.police.lk/divisions/crimetrends.asp>
32. A reiteration of a well known fact that physical torture is an inefficient and unreliable interrogation technique e.g. see CIA, Human Resource Exploitation Manual—1983, K1.F (1983), a CIA textbook on interrogation techniques provided for governments in Latin America in the 1980s available at <http://www.gwu.edu/%7EEnsarchiv/NSAEBB/NSAEBB122/index.htm#hre>.

# 2.

## Politics and Governance

It is beyond the scope of this study to give an overview of last 60 years of Sri Lankan politics.<sup>33</sup> Instead, one key political decision will be highlighted which has affected the rule of law and the criminal justice system, namely the 1978 Constitution.

### **The 1978 Constitution**

The constitutional changes of 1978 drastically altered the nature of governance in Sri Lanka. They replaced the previous Westminster style parliamentary government with a new presidential system modeled after a French Gaullist system, with a powerful chief executive. In this system, the president is to be elected by direct suffrage for a six-year term and is empowered to appoint – with parliamentary approval – the prime minister. This centralization of powers in the hands of the executive president introduced an authoritarian model of government in Sri Lanka. The Sri Lankan constitution is fundamentally different from the French model. The president can unilaterally dissolve the parliament, executive power rests entirely with the president and Sri Lanka's Constitutional Council is not a judicial body but is at best an administrative body dealing basically with appointments to important posts.<sup>34</sup>

In 1979 the government passed the Prevention of Terrorism (Temporary Provisions) Act enacted as a temporary measure

against the continuous civil disturbances and violent attacks on state symbols and authorities. The act later became permanent legislation and in a sense initiated the degradation of the rule of law that undermined the institutional framework of democracy.<sup>35</sup> The complete power in the hands of the president spurred civil unrest in the north by Tamil militancy led by the LTTE, and in the south by Sinhalese leftist militancy, led by the Janatha Vimukthi Peramuna (JVP) – the People’s Liberation Front. Uprisings were combated by the state authorities with great brutality resulting in the killing and disappearance of many thousands of people, Tamil and Sinhalese.

The violent repression by the military and police and the obvious disregard of the principles and procedures for the protection of people in detention as well as free and fair trial – combined with extra-judicial killings that reached an unprecedented height in the late 1980s and early 1990s with an estimate of 40,000 people being killed<sup>36</sup> - marked the infusing of authoritarian means into the democratic systems and institutions. Repressive means were utilized as standard policies to indiscriminately deal with any kind of civil disturbances, be they, labour strikes, election unrest, riots or insurgency<sup>37</sup>. The power of the president to issue regulations, emergency acts and provisions created a political environment where almost complete immunity exists for security and law enforcement agencies’ actions.

## **Conflict and Deprivation**

Much has been written on the conflict between the LTTE and the state in Sri Lanka. It is beyond the scope and intent of this study to delve into the unfolding of the conflict and detailed descriptions of its effects. However, there can be no doubt that social and political conflicts have had a huge influence on law making and policies.

The constitutional changes and the following special powers acts and provisions initiated before the LTTE conflict illustrate that it is not the current fighting which is the principal reason for abusive practices within the police. This and previous social and political conflicts in the country have intensified the undermining of the rule of law – politically advanced and managed – which in a reiterated reciprocal process sustains and strengthens the ethnic-political antagonisms and divisions in society.

Today, it could be said that the development of the law complex via the introduction of emergency and special powers acts combined with the introduction of presidential regulations, has been the prime reason for the undermining of the rule of law, the impairment of the judiciary and the dysfunctionality of the criminal justice system causing widespread and routinized use of torture. In short, the political and social conflicts have had an adverse effect on the overall human rights situation.

Furthermore, the process of state formation has gone from the ideal of rule of law, to the practice of rule by law, where the basic safeguards against state repression and the measures to achieve adequate remedies have either (in practice) been disregarded or been overruled. The authoritarian constitution and emergency legislation have made the judicial system ineffectual, which permits the practice of torture within the police.

It is evident that the government has had every opportunity to acknowledge and rectify the dysfunctionality of the criminal justice system (see also chapter 3 for a detailed historic account). However, if one looks more minutely at the actual management of the criminal justice system, the more deep-rooted character of human rights abuses becomes apparent.

At a UNDP training seminar on criminal investigation techniques and human rights conducted for approximately 100 Sri Lankan police inspectors in 2005, the opinion was that the failings of the system were due to unprofessional management, arbitrary promotions, unrealistic demands to solve cases and find offenders, disregard for procedures and regulations, and minimal willingness to uphold adequate remedies and protect human rights amongst the leadership<sup>38</sup>. The participants agreed that they felt they had to resort to the use of physical force and torture to solve cases due to:

- Sense of shame and loss of face if they fail to solve the case.
- Pressure from superiors to solve cases – under the threat of unfavorable reports in their personnel files which would adversely affect their career prospects.
- Lack of resources – personnel, vehicles, equipment, etc – to pursue investigations.
- The 24 hours custody being insufficient.

The interesting aspects of these statements is not as much the openness and honesty of the officers – the issues ‘revealed’ are well known in Sri Lanka – but more that the reasons for the mismanagement and human rights violations are not related to the technical disorganization within the criminal justice system. The issues of shame, pressure to perform and the results orientation is associated with a general lack of resources and technical regulations, and according to the officers, most of the persons victimized were the “*poor, destitute and defenceless*”.<sup>39</sup>

The identification of problems, their causes and effects – the social bias in the victimization – turn our attention to aspects which go beyond both the government and the international actors’ perspectives which tend to focus on the conflict as the main cause

of widespread human rights violations. They point towards the role of social attitudes and behavior in the management of the criminal justice system and in police practice.

In Sri Lanka the human rights situation is disturbing. The initiatives to pressure the government to respect human rights and abide by national and international legislation have so far proven to be unsuccessful and futile. Subsequent chapters explore the deep-rooted causes of social attitudes and behavior in actual police practice, to understand the current state of affairs in the criminal justice system and the unsuccessfulness of human rights work to change the latter.

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33. Events such as the 1936 implementation of adult franchise in the country, the 1956 decision to declare Sinhalese the only official national language and the very ruthless oppressive policies of the 1980s that resulted in disappearances and killing of many tens of thousands of persons most definitely have influenced the police and the sad developments of the rule of law in the country but will not be brought into the discussions.
  34. Fernando, B & Puvimanasinghe, S "An X-Ray of the Sri Lankan Policing System & Torture of the Poor" AHRC 2005 pp. 182-184, available at [http://www.ahrchk.net/pub/pdf/xray\\_slpolicing.pdf](http://www.ahrchk.net/pub/pdf/xray_slpolicing.pdf)
  35. For a comprehensive list of special laws and provisions see N. Monaharan "Counterterrorism legislation in Sri Lanka; evaluating efficacy", East-West Center Washington, USA 2007, pp. 24.
  36. International Crisis Group "Sri Lanka's Human Rights Crisis" Report No. 135, ICG 2007.
  37. N. Monaharan "Counterterrorism Legislation in Sri Lanka; Evaluating Efficacy", East-West Center Washington, USA 2007, pp. 22.
  38. Equal Jayakumar Thangavelu "Access to Justice: Where Should it Begin to Ensure Human Rights?", in, "An X-ray of Sri Lankan Policing and Torture of the Poor", AHRC 2005.
  39. Committee Appointed to Recommend Amendments to the Practice and Procedure in Investigations and Courts, "The Eradication of Laws Delays", April 2004.

# 3.

## Impairments & Dysfunctionalities

The following chapter explores the history of police brutality in Sri Lanka. The graveness of the situation is depicted through the official documents and reports commissioned by consecutive Sri Lankan governments. In general the aim of the different commissions was to identify and document the structures and practices that undermined the functioning and effectiveness of the criminal justice system, especially regarding police investigations.

The argument is that the past and current use of torture and ill-treatment is reasoned in intrinsic deficiencies and dysfunctions in the criminal justice system based on a lack of resources – human and economic – whereby malfunctions and mismanagement is reiterated and reinforced to generate a down-ward spiraling process that ends up in a rule of law caricature.

The intention with the following sections is to bring to the forefront the problems persistently identified through the last 60 years of government reporting. The intention is not to point out or determine flaws and inconsistencies and make suggestions for improvement, but to approach the widespread human rights violations as a systematic effect of the caste mindset, ordering society through the state apparatus.



## Report of 1946

The 1946 commission chaired by Justice Francis J. Soertsz – often referred as the Soertsz Commission<sup>40</sup> – was the first of a line of reports which focused on improving the police system and police practice. The objectives were:

*“(...)to inquire into, and report upon the organisation, administration and discipline of the Police Force, and to make recommendations as to the ways and means of enhancing the efficiency of the Force and securing a greater measure of public co-operation and confidence (...)”*

The commission looked at the structuring of the police force e.g. salaries, promotions, transfers; the procedures and practices of police work and policing e.g. complaints, investigations, custody; and the judicial regulations and laws to structure police work as well as guide conduct within the police force (for detailed list see Annex A).

To situate the state of affairs, in 1946 the commission briefly sketched the background to *“afford some explanation of the dissatisfaction there has been on the part of the public with the Police Force as it exists to-day”*. A series of social and political riots in the previous decades combined with the colonial administrations forceful dealing of these sustained the military character of the police and reinforced other military practices such as *“parades and drills with band accompaniments, rifle practices route marches, bayonet charges, and similar military- exercises of which there was so much complaint made to us in the course of our inquiry”*.

The army character of the police continued up to the World War II. In the aftermath of Japanese air raids and a shrinking economy the police were unable to curb rising crime levels, causing a detrimental effect on the public perception of the police force.

In 1943 the British colonial administration brought in a police officer with “considerable” Indian experience to fill the post as Inspector-General to revitalize and rebuild the police force. However, the appointed person was, in the words of the commission, “quite hopeless”. The Inspector-General introduced a racial aspect into appointments for leadership positions, bypassing senior and experienced police officers for British officers with very limited police experience and no experience in the colonial administration.<sup>41</sup> The commission concluded as a result of the racially motivated promotions that the police force had been broken into two opposing “camps”. In between these camps were “*bitter antagonism (...) each vigilant to put itself in as good a light as possible and to find fault with, to criticize and blame the other*”. The leadership “*know nothing about the outstations, the languages, caste questions*” and depended heavily upon assistance from Ceylonese officers of their choice<sup>42</sup>.

This biased practice created a division that saturated through the entire force to other ranks who tried to take advantage of the situation. Promotions and transfers were consistently biased, creating “*much discontent and dissatisfaction in the Force*”. Furthermore, the leadership disregarded court rulings when it came to police officers and “*put themselves above all other authority in the country*” and “*(...)did not take any notice of any finding by the Courts*”. Hence, police officers who were convicted of crimes were not disciplined and continued to act within the police force. This disregard of the rule of law not just affected “*the prestige and the*

*morale*” of the police force but could be said to introduce a “*lack of discipline*” and disrespect for the law in the police force.

After this initial stocktaking of the police force, the commission made a line of recommendations on how to rectify the situation “*with due regard to their probable financial implications*”.<sup>43</sup> Amongst other things, the report highlights the need for amendments to the recruitment process and qualifications, and police training as well as promotions of police staff to improve the police force and distance the police from the present “*military aspect*”.<sup>44</sup>

## **Recruitment**

The commission recommended that to improve the police force the recruitment process should be strengthened to recruit a “*better class*”<sup>45</sup> of persons and be directed away from a focus on physical capabilities and towards higher-educated officers.

*“Not only should their educational qualifications, with due regard to the educational standards of the country, be adequate, but also their character should be exemplary, for only such men can resist the many temptations to which policemen are daily exposed. Such men alone can walk the straight and narrow path of the Police profession”*.<sup>46</sup>

The commission recommended a more thorough application process to assess if applicants possessed the qualifications required to be proper officers.

## **Police Training**

The commission recommended that the training of the recruits “should be conducted with a view to both physical and intellectual

culture”.<sup>47</sup> Physical abilities and discipline was essential but the intellectual abilities to relate with the public in a positive and productive manner were identified to be “*sadly lacking*”.<sup>48</sup> This required the ability of “*reading or writing an additional language, English, Sinhalese or Tamil*”.<sup>49</sup> The improved training should ensure the reorganizing of the force to efficiently undertake duties as police in a “*tactful, patient and polite*”<sup>50</sup> manner.

## **Promotions**

The recommendations regarding promotions are based on the biased leadership and split in the force, on leadership decisions that “*led to the promotion of favourites and, in some instances, even to bribery and corruption*”.<sup>51</sup> The commission recommended that the requirements for promotions on the one hand are to be made transparent, e.g. time scale of employment and on the other hand be made dependent on examination and independent evaluations by an expert board, to ensure that “*promotions would be made on just and sound principle*”.<sup>52</sup>

## **Report of 1970**

The next commission was established to investigate the organization, administration and discipline of the police. The commission produced a comprehensive report dealing with a wide range of aspects relating to the institutional set-up of the police force and police work.<sup>53</sup>

The commission looked into a very comprehensive list issues of the police force, e.g. salaries, promotions, transfers; the procedures and practices of police work and policing e.g. complaints, investigations, custody; and the judicial regulations and laws to structure police

work as well as guide conduct within the police force (for a detailed list see annex B).

The background for the establishment of the commission was a public attention on “(...) *police activity suggestive not only of inefficiency but also of corruption and excesses frequently bordering even on depravity*” channeled through newspapers, which “*raised grave concern*” amongst the commissions members regarding abusive police practices “(...) *in the name of public security and the protection of the ordinary rights of the people*”.<sup>54</sup> Practices that were confirmed by the police force:

*“Members of the Police Force appearing before us, some as individual and others as members of unions of officers, representative of a wide cross section of almost all the operative grades of the Force have themselves admitted to the existence of corruption and excesses which cause grave anxiety even to them”.*<sup>55</sup>

As in the previous report, the commission recommended to strengthen the recruitment requirements and training of officers as well suggesting the establishment of an overseeing state agency to control the police force.

## **Recruitment**

The commission recommended strengthening the recruitment requirements by raising the minimum level of education at all ranks of the police force. This recommendation was linked to a pending proposal to recruit more than a thousand new police officers. The selection should be based on merit and examination in all three languages - Sinhala, Tamil and English.<sup>56</sup>

Further, the commission recommended to end the recruitment of military personnel who did not possess the educational qualifications and other prescribed requirements as it was perceived to “*not only lower the standards of that Service but also affect its prestige*”.<sup>57</sup>

## **Training**

Yet again, the training of new police officers was assessed as inadequate to meet “*modern needs*”<sup>58</sup> and requirements of a functional police force to curb “*crime (...) being fast modernized*”.<sup>59</sup> The key issue was the lack of financial and human resources which had a detrimental effect on the quality of the training.<sup>60</sup> Generally the cadets lived under poor conditions. The physical environment was deemed “*not conducive to a sound preparation for such responsible work as that of a police constable or an officer of the Police Force*”.<sup>61</sup>

*“The buildings, which are of a temporary nature, have been neglected since the School took them over. The result is that the essential buildings, especially the toilets, are in such a bad state that, on our visit, we were appalled by much of what we saw”*<sup>62</sup>.

Furthermore, the actual education of the police officers did not follow the procedures to examine and assess the recruits’ development of qualifications and skills because the “*elaborate supervision now exists only in theory and has not been carried out for the last six years*”.<sup>63</sup>

This lack of maintenance of the physical facilities and the insufficiency of teaching and training as well as supervision was partly due to the lack of financial funds but more so due to the low level of teachers’ qualifications and interest in the work to educate police officers.

*“According to some of the witnesses who appeared before us, the School has been regarded as virtually a penal station to which Police Officers not required elsewhere are posted. That attitude has damaged the prestige of the institution and resulted in loss of efficiency and is partly the cause of the decadence of the Police Service”*<sup>64</sup> .

## Overseeing Agencies

To correct the identified impediments under the present system, such as that *“appointments, promotions and disciplinary action is considerably delayed”*<sup>65</sup> and an *“inability to deal promptly with disciplinary matters undermine the morale of a service”*,<sup>66</sup> the commission recommended to establish a Police Service Commission as an overseeing body. It was the opinion that it would reduce *“the grievances that now exist (...) as regards “unfairness in regard to promotions and transfers, and unjudicial approach to disciplinary inquiries and trials”*.<sup>67</sup> And evade *“political interference”* in police practices and management, which *“affects the independence of the members of the Service and the impartial discharge of their duties”*.<sup>68</sup>

On the basis of the identified risks of delays, bias in promotions and transfers as well external influence in police work the commission recommended the establishment of yet another overseeing authority empowered to take *“immediate and effective cognizance of the abuse of its (police) powers”*.<sup>69</sup>

The creation of a Police Ombudsman with authority and means to, inquire into complaints by the public against the Police” was suggested.<sup>70</sup> The independence of the agency would ensure the people come forward despite *“the fear that there would be retaliation if a person tried to expose the abuse of authority by the Police, with “the consequence is that the vast majority of people suffer in silence”*.<sup>71</sup>

## Report of 1995

In 1995, yet another committee was appointed to "*inquire into and report on the reorganization of the Police service*"<sup>72</sup> (for a detailed list see annex C). The task of the committee was to:

*"(...) examine and report on:- the structure and composition of the Police Force; (...) methods of recruitment and training (...); (...) promotions and transfer; the nature and scope of functions of the Police Force and the measure that should be taken to secure the maximum efficiency of the Police Force for the purpose of maintain law and order; better relation with the general public; the establishment of a Permanent Police Commission to administer recruitment, promotions and disciplinary control in the Police Service"*.<sup>73</sup>

The appointment was grounded in a continued need for reform and improvement of the police and police practice in Sri Lanka, identified by the government:

*"Government was giving the highest priority to restoring the moral and image of the Police, so that every officer would be motivated to discharge his duties equally and impartially to all the people in Sri Lanka. The image of the Police had been severely tarnished in recent years and remedial measures had to be taken has a matter of urgency, so that the people would have confidence in the Police and a healthy relationship would be established between the Police and the public"*.<sup>74</sup>

This commission continued the focus on strengthening the recruitment requirements and training of officers as well follow-up on the establishment of an overseeing state agency to control the police force, outlined in the two previous reports.



## Recruitment

Recruitment measures are to be tightened and made more transparent. The emphasis on educational qualifications is to be upgraded. Examinations and assessment procedures are outlined in detail to ensure adequate selection based on merit and qualifications.

## Promotions

Regular promotions should follow similar procedures as in the recruitment processes, e.g. examinations, interviews and merits. However, special promotions can be granted on the basis of “*gallantry, outstanding good work, outstanding performance in any activity which bring credit to the country and enhances the reputation of the Police Service*”.<sup>75</sup> However, this special provision to grant promotions on the basis of a subjective assessment of the individual conduct was being seriously abused; “*One IGP on his retirement (...) had promoted as many as over one hundred officers through recourse to this provision. (...) It is difficult to resist the impression that they were capriciously done*”.<sup>76</sup>

As stated in the previous reports, “*undue pressures that were brought to bear in the matter of appointments, promotions, postings and even transfers, (...) from politicians*” were yet again identified as “*one of the main reasons for the break down of discipline, loss of morale and the high incidence of corruption in the Police Service*”.<sup>77</sup>

## Training

The training of the police officers continued to suffer from a severe lack of resources – financial and human – and low priority by the

administrating authorities; *“the basic requirements for the training of Police officers by way of qualified personnel and equipment are not provided at all or is inadequately available. (...) it would seem that the subject of training is treated with indifference and that the importance of training has not been sufficiently recognised at the higher levels”*.<sup>78</sup>

Further, the officers appointed to plan and conduct the training had been selected at random and *“do not have the inclination, much less in motivation to perform the role that is expected of them. Moreover, it has been found that officers unwanted elsewhere have been posted to the Police College”*<sup>79</sup>. This situation applied to both recruit training, refresher courses for police officers and specialised training, e.g. for criminal investigation officers.

## **Overseeing agency**

On the basis of the knowledge *“(...) that many officers do not perform their duties fairly and impartially, (...) have blackened the entire police force (...) and the confidence of the people in the Police eroded”*<sup>80</sup>, the committee supported the former Basnayake Commission in 1970 its recommendation to establish a police commission to oversee and control the police which have the authority to attend and actively engage in recruitments, appointments, promotions, transfers and disciplinary matters and appeals relating to police practices.

## **Report of 2004**

In 2004, the government established the most recent investigation.<sup>81</sup> The objective was *“to identify the reasons for laws delays and to propose remedial action that can be taken to overcome the inadequacies in the practice and procedure of courts, so as to establish*

*a credible and effective system with a focus on curbing crime and maintaining public confidence”*.<sup>82</sup>

The report was commissioned to investigate inadequacies and inconsistencies within the criminal justice system:

*“Inadequacies in the practice and procedure in the administration of criminal justice have been identified as one of the main factors contributing to delays in the dispensation of criminal justice in the country.*

*The rapid escalation of crime, increasingly committed in an organised manner with violence, impunity and considerable sophistication, thereby resulting in the loss of public confidence in the criminal justice system, has highlighted the need to review the existing criminal justice framework in Sri Lanka”*<sup>83</sup>.

The report was almost a blueprint of the previous investigations and recommendations; it identified a lack of resources, insufficient training and arbitrary promotions, but also introduced new issues such as police cooperation with the Attorney General’s Department and the need for witness protection programmes to create a safe environment to curb organized crimes.

## **Lack of Resources**

The committee identified a lack in logistic resources to transport the police, lack of technological support and equipment to use “*modern investigative techniques*”<sup>84</sup>. The committee recommended that to facilitate a meaningful effort in curbing crime the authorities need to invest in “*IT and forensics*”<sup>85</sup> equipment.

## Training

Like the three former government committees, this one identified serious problems in police training and management: “*The lack of effective training, commitment and leadership within the Police Force wields a significantly negative impact on the quality of investigations carried out by the Police.*”<sup>86</sup> The absence of commitment was attributed to an overall lack of motivation due to the continued “*limited prospects of promotion and the imbalance of ranks within the Force.*”<sup>87</sup>

## Promotions

The issue of promotions was yet again identified as creating problems for the effectiveness of the police. Ignoring merits and arbitrariness in promotions do not just affect the motivation to conduct quality police work but are (recalling the police officers’ statements at the UNDP training seminar on human rights) conducive for the misuse of authority and human rights violations (see chapter 1). Yet again, the committee recommended improving and implementing “*the recognition of performance.*”<sup>88</sup>

## Cooperation and Witness Protection

In the administration of the criminal justice system the Committee identified inadequate “*support and partnership*”<sup>89</sup> of other state agencies, i.e. the Attorney General's Department. This bottleneck created delays in the management of the justice system. These delays were caused by the lack of human resources to process the case load due to an increase in cases filed in the recent decade.<sup>90</sup> This bottleneck illuminates the downward spiraling judicial system

and the deteriorating rule of law – an increase in cases filed and lesser resources results in overloads and inefficiency.

Another problem area is the “*reluctance of witnesses to identify and testify against offenders due to threats and various other forms of duress made against witnesses and their families.*”<sup>91</sup> This is acknowledged as a key contributor to the failure of justice in criminal cases against police officers. The recommendation, if implemented, could enhance the credibility of the police force. However, the issue of human rights is tellingly, not present in the assessment of the criminal justice system, despite the objective “*to establish a credible and effective system with a focus on curbing crime and maintaining public confidence.*”<sup>92</sup>

## **The Official Records**

The official records, analyzing a variety of aspects of the criminal justice system agree on the lack of the ability of the criminal justice system to regulate police conduct and undertake credible criminal investigations to ensure public confidence in the police force.

Effective criminal justice systems have been on the government agenda for a long time. Consecutive governments have issued investigations in the functioning of the criminal justice system since before independence in 1948. Investigations were carried out in 1946, 1970, 1995 and 2004. All of these reports, which are publicly available, point to systematic inefficiencies and management deficiencies within the police and judiciary over the last 60 years of governance.

Going through the four reports, it is striking that the present problems in the police identified in the report of 2004, are similar

to those identified almost 60 years ago, in the report of 1946.<sup>93</sup> The continued militarization of the police, the poor policing in terms of investigative capacities and the misuse of authority have been present at least since independence.<sup>94</sup> Lack of resources, insufficient training and arbitrary promotions are still prevailing. Despite, a series of recommendations to rectify the situation, i.e. to strengthen the recruitment-requirements, train officers in investigative techniques and introduce a transparent and objective merit-based procedure for promotions as well to suggest the establishment of an overseeing state agency to control the police; nothing has changed to the better.

Contrary to the moral and legal obligations promoted in human rights reporting, the problems identified in the government reports are delimited as technical problems in the system that create potential for mismanagement which can be corrected by re-structuring and amending the existing law complex. The latest 2004 report “The Eradication of Laws Delays” – as well as the previous reporting – focus on technical deficiencies and insufficient resources in the criminal justice system to explain failures in practice and procedure.

Recruitment, training and promotions appear to be key issues to improve the abilities and standards in criminal investigations. This view is supported by a recent survey amongst police officers on why the police did not prevent crime. More than 70% of the officers rated lack of resources as the prime reason, followed by undue political influence, lack of public support, lack of support from superiors and lack of training – and 60% of the police officers stated that they are unsatisfied with the present scheme of promotions.<sup>95</sup>

The responsibility to initiate the needed amendments to the law complex regulating the criminal justice system and make the technical investments and improvements of police practices is with the politicians, the parliament and the government, who, despite knowing the problems and possible avenues for improvements, have neglected the criminal justice system and thereby impaired its functionality.

On a more practical level, it has been thoroughly argued that reform programs tend to be planned and justified in terms of the desirability of their goals rather than their feasibility and they are advanced as self-fulfilling – if people know of human rights they will respect human rights. However, to achieve the sought-after end goal “(...)requires changing the system and culture of an organization” to create the conditions which “(...)encourage, facilitate and oblige people to do what is desired”.<sup>96</sup>

The buy-in of key stakeholders – politicians, government, state authorities and managers – of the institutions and systems in question is a necessary prerequisite to carry through reform processes. In Sri Lanka, the states sovereignty has been and still is contested, and the politicians have not shown willingness to address the deterioration of human rights and initiate polices to live up to legal standards. On the contrary, successive governments have implemented a series of special powers acts and regulations by-passing national legislation and undermining the rule of law.

The effect of this system and its practice will be outlined through the AHRC case material in the following chapter.

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40. "Report of the Police Commission 1946" chaired by Justice Francis J. Soertz.
  41. The Inspector-General (IG) requested two senior police officers from the London Metropolitan Police to lead the rebuilding of the police force. However, due to the war the Secretary of State for the Colonies offered two inexperienced junior officers for the positions. Despite, their lack of experince the IG appointed them to leadership positions, disregarding the national staffs.
  42. In these appointments and promotions the Deputy Inspector Generals emptied the outstations of competent staffs and brought them to the headquarter in Colombo.
  43. Ibid p.10.
  44. Ibid p.15.
  45. Ibid p.12
  46. Ibid p.12
  47. Ibid p.14.
  48. Ibid p.14
  49. Ibid 15. An issue of language later became a focal point in the relation with the Tamils and a defining issue in the current armed conflict.
  50. Ibid p.14.
  51. Ibid p. 20.
  52. Ibid p. 20
  53. "Report of the Police Commission 1970", Government Publications Bureau 1970.
  54. Ibid p. 28.
  55. Ibid p. 28.
  56. Ibid p. 5-7. The recruitment was carried through based on the qualifications required under previous terms of recruitment that the commission deemed obsolete and outdated. "We deplore the action of the Government in adopting qualifications which are no longer of any value in the recruiment of personnel to a Service so important and vital to the well-being of the community as the Police Service"..
  57. Ibid p. 7. A common practice undertaken on basis of the decisions embodied in Treasury Circular No. 434 of 20th March 1958.
  58. Ibid p. 28.
  59. Ibid p. 25.
  60. Ibid p. 13.
  61. Ibid p. 9.
  62. Ibid p. 8.
  63. Ibid p. 16.
  64. Ibid p. 17.
  65. Ibid p. 28.
  66. Ibid p. 28.



67. Ibid p. 29.
68. Ibid p. 29.
69. Ibid p. 30.
70. Ibid p. 31
71. Ibid p. 31.
72. "Report of the Committee appointed on 24-02-1995", report to the Ministry of Defense 1995.
73. Ibid p. 1.
74. Ibid p. 1.
75. Ibid 13. Police Departmental Order -A5- part IV.
76. Ibid pp. 14.
77. Ibid pp. 43.
78. Ibid pp. 15.
79. Ibid pp. 17.
80. Ibid pp. 44.
81. Committee Appointed to Recommend Amendments to the Practice and Procedure in Investigations and Courts, "The Eradication of Laws Delays", April 2004.
82. Ibid p. 6.
83. Ibid p. 6.
84. Ibid 8.
85. Ibid 8.
86. Ibid 9.
87. Ibid 8.
88. Ibid 10.
89. Ibid 10.
90. Ibid p. 11. In 1996 the amount of files received at the Attorney Generals office were 1639 and in 2002 it was increased to over 6000 files.
91. Ibid p. 20.
92. Ibid p. 6.
93. Fernando, B. "The Sri Lankan Police: A Historical Perspective" in "An X-Ray of Sri Lankan Policing and Torture of the Poor", AHRC 2005.
94. Of the 65,000 policemen and women, 20,000 belong to the regular police and 45,000 to the reserves. See UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions Mission to Sri Lanka (December 2005) p. 28.
95. Report of Transparency International Sri Lanka "In Pursuit of 'Absolute Integrity' Identifying causes of police corruption in Sri Lanka" 2006 p. 71 and p. 41. Available at [www.tisirilanka.org](http://www.tisirilanka.org).
96. Baylay, D, H, "Democratizing the Police Abroad: What to Do and How to Do it", National Institute of Justice 2001, pp.10.

# 4.

## Here for All – Accessible for None

This chapter explores the effects of the government's neglect of the criminal justice system which has undermined and impaired the police force, resulting in the current level of human rights violations. The systematic dysfunctionalities of the rule law are explored through the AHRC case material on police torture and human rights violations.

The case material shows that justice is an absurdity for the socio-economically marginalized. It demonstrates that the poor and destitute in society are the main victims of police brutality. The chapter gives an illustration of the unwillingness and incapacity of the state in Sri Lanka to provide protection and adequate remedies for its citizens through the everyday operation of the (impaired) criminal justice system, and portray the dysfunctionalities of the police.

The case load presented has been compiled by the AHRC during the last five years. Even though it is large, the case load does not – to the least extent – cover the complete number of cases and human rights abuses conducted by the police in Sri Lanka today. As everywhere else in the world where human rights violations are common, the actual numbers of victims are unknown. This is due to the closed nature of governments and state authorities combined with the reluctance of victims to come forward because of fears of retribution and lack of trust in the criminal justice system, and/or

unawareness of their basic rights to adequate remedies and justice.

However, the cases indicate trends and causes – their practices and character – of human rights violations, especially in terms of the socio-economic make-up of the victims, the routinized use of torture in investigations and the inadequate protection of, and remedy for people detained by state authorities. Delineating a key aspect of the dysfunctional police practices – standing operating procedures – adds another cause to the three reasons for torture identified by Rejali; to intimidate, to extract false confessions and to generate security information<sup>97</sup> – namely, to perform according to local standards.

The previous chapters have shown that international observers, national bodies and organizations as well the government and state authorities acknowledge that human rights, the rule of law and policing in Sri Lanka do not live up to national and international standards. However, to rectify the problems within the criminal justice system requires a qualitatively better and more detailed understanding of victim categories and the character of violations.

The chapter is divided into two sections. The first section explores the characteristics of the victims and the second, the character of assault. The two sections show the everyday process – the standing operating procedure – of an assault event: who the victims are and what the police do.

## **The Characteristics of the Victims**

This section brings to the forefront the characteristics of the victims' gender, socioeconomic status, ethnicity and political affiliation, and regional distribution is also highlighted.

## Gender Distribution

Of 200 selected events of violent physical assault by the Sri Lankan police, there were 221 male victims including 21 boys less than 18 years, the youngest being 7 years old. Eight female were victimized in three individual events and five events which involved other women or their husbands. Two of the women were pregnant and one of the unborn children died due to the assault. It is noteworthy that the number of victims is higher than the actual events due to the fact that in 21 of the reported cases more than one person was victimized in one event. As in many other places in the world, men are registered as the primary victims of police torture.<sup>98</sup>

## Socioeconomic Status

In 115 of the 200 cases the victims occupations were recorded. The typical employments are farmers, workers (day laborers) and drivers – most often of three wheelers. Most of the victims less than 18 years undertook some form of education. The case material shows that people of the lower level of income and social status in society are overwhelmingly represented amongst the victims. It delineates the socioeconomic stratification of torture victims and shows the social bias in the misuse of authority.

However, this social bias in the recorded assaults is in line with the police officers concerted agreement in the introduction stating that victims were the “*poor, destitute and defenceless*”<sup>99</sup>. However, the seven cases which involve soldiers and police officers as victims unveil the very arbitrariness in the assaults (though in civilian clothes one would expect some kind of professional respect – not to say comradeship).

## Ethnicity and Political affiliation

In the 200 selected cases of police torture not one was recorded as reasoned in ethnicity or grounded on political affiliation. None of the 200 cases were revealed after the AHRC investigation to be linked directly to the LTTE conflict as the actual reason for the arrests and/or assault – none of the victims were reported as Tamils or involved in the conflict. Nonetheless, the conflict and tightened security measures due to the conflict was used by the police to intimidate and assault several of the victims to comply with the demands of the perpetrators e.g. to confess to criminal activities under the threat of being charged with offences under special acts and regulations i.e. with possession of illegal weapons (e.g. see UA-18-2004).

## Regional Distribution

The regional distribution is depicted in Table 1 overleaf. Out of the 200 reported cases, just 32 cases occurred in regions which were, at that time, directly affected by the conflict between the Sri Lankan government and the LTTE.

In 168 of the cases, the events occurred in regions which did not see warfare and/or were territorial conflict zones – (such as the east and the north). An apparent reason is the obvious underreporting from these areas, especially from the (at that time) Tamil-controlled north and east provinces which were and still are not easy to access.<sup>100</sup> The eastern region was not covered by the



reporting and only one case was reported from the north. The data shows that the Western province (which includes the capital of Colombo) represents more than one third of the material and none of the cases are reported as linked in any way to the conflict.

This indicates that the conflict is not the primary cause of human rights violations.

Province	No. of cases	% of case load
Sabaragamuwa	22	11
Western	74	37
Southern	35	17.5
Central	32	16
Uva	5	2.5
North Western	22	11
North	1	0.5
North Central	9	4.5
Eastern	-	-
Total	200	100

Moreover, none of the cases were reported to be about ethnicity or political affiliation, as shown above. The main part of the reporting period covers a time of peace talks and ceasefire agreements that

further underline the absence of ethnicity and political affiliation as major factors. That most cases occur outside conflict zones shows that the prevalence of police torture is not directly connected to the conflict but that the conflict policies and regulations sustain and advance a system in which abusive practices can take place on a regular basis without disciplinary control and oversight.

## The Character of the Assault

To illuminate the everyday practices of violence this section focuses on: detention and reason for arrest, place of violations, type of

violations, the extent that perpetrators are identified, treatment and injuries and adequate remedies i.e. compensation and disciplinary measures.

## Detention and Reasons for Arrest

Every violent event started in the encounter between the victim and police perpetrator.

In 26 of the events the police did not arrest the victims but simply violently assaulted them as part of criminal investigations.

Detention & reasons for arrest	No. of cases	% of cases
Not arrested	26	13
Formal charge	124	62
Charges not disclosed	50	25
Total	200	100

The intention was to extract confessions and/or to intimidate the victims. In the most absurd case a police

officer kidnapped and tortured a person to withdraw a complaint of excessive use of force during a prior detention (see UA-122-2004).

In 124 of the 200 (62%) of events formal charges were presented by the police either at the time of arrest, during the violent interrogation or to retrospectively justify the arrest – often the charges of illegal weapons or liquor or were fabricated as a means to protect criminals and/or to show a good track record (e.g. see UA-303-2007).

In 50 events, criminal charges were not disclosed by the police or the magistrate court - in many cases the victims were presented in

the court before being detained or the victim was released without appearing before a court, at all.

In one event, a person had been severely beaten by police with a gun. He was then presented before the court on a fabricated story of being injured in a fist fight. The arresting police officer stated that the man was taken into custody to assist him. The fabrication of such stories by the police is intended to justify the arrest, explain the victim's visible and often recorded injuries and avoid further investigations into the events (e.g. see UA-58-2003).

Out of the 124 cases where formal charges were presented, none of the persons were convicted for any kind of activities or involvement in the LTTE conflict. But the tightened security measures, as well as the perceptions and fears amongst the population, are used by the police, to intimidate victims and justify their wrongful actions.

## Place of Violations

In the 200 reported cases from Sri Lanka, 47 violent assaults occurred prior to detention including 26 cases where the victims were not arrested. In 43 of the events, the violence began during the actual arrest outside the police station and continued when the victim were detained at the police station.

Place of violations	No. of cases	% of cases
Prior to detention	47	23.5
Prior and during detention	43	21.5
During detention	106	53
Not specified	4	2
Total	200	100

In 106 of the events, the violent assault occurred at the police station, which includes events where



the victim was requested to appear at the police station. In four (2%) of events the assault was not specified in the reporting. Of these, three victims died in police custody and one at an unknown location, as the victim was kidnapped and blindfolded by the police.

In short, the table shows that in approximately 75% of the reported cases, the police station was the main site of the police assaults which often took place in the initial stages of an arrest and continued in subsequent detention.

### **Type of Violations**

The variety of violations covers all acts from slaps on the face (of a child), to beatings, sexual abuses, water boarding and falanga. In order to map out the range of techniques, the different types are categorized according to the simplicity of the assaults.

<b>Type of violations</b>	<b>No. of cases</b>	<b>% of cases</b>
Beaten with hands and kicked	72 (6 persons died incl. one shot)	36
Beaten with blunt instruments	84 (6 persons died)	42
Special techniques and equipment	23	11.5
Not specified	21 (7 persons died and 1 disappeared)	10.5
<b>Total</b>	<b>200</b>	<b>100</b>

The table shows that in 72 of the events the police beat the victims with their hands and kicked them. Of these events, six people died

due to their injuries and one person was shot when trying to escape an assault in the street.<sup>101</sup>

In 84 of the events the police used blunt instruments such as batons, poles, cables, iron rods, etc. to hit the victims. In many cases blunt instruments were employed on the joints and the soles of the feet (falanga), combined with forced running and jumping, causing tremendous pain and agony. Due to the torture, six people died.

In 23 events, the police utilized special techniques or equipment such as chili powder, strangulation and water boarding, suffocation by a plastic bag filled with petrol pulled over the head of the victim, dharma chakra (a very popular technique where the victims hands and legs are tied together and the victim is hanged vertically on a iron pole and beaten), hanging from ceiling, often by the hands tied together behind the back.

In 21 cases the type of police violations were not specified in the reporting. These cases include eight events where the victim died in police custody and the exact circumstances about the events in police custody were not reported, because there was no postmortem examination or the cause of death did not directly relate to the torture e.g. hanging and drowning. It is noteworthy that in approximately 75% of the reported events the type of violations consisted of simple beatings by fist or boots and/or the use of police equipment such as batons, wooden poles and guns etc.

## **Treatment and Deaths**

After violent assault, 141 of the victims were treated for their injuries of which 47 were examined by a Judicial Medical Officer (JMO) or received medical attention during detention, in remand

at hospital or in prison.<sup>102</sup> In 14 cases the victims did not seek medical care or the persons were still in detention at the time of the reporting.<sup>103</sup>

In twenty five of the cases the reporting does not state whether medical attention was provided or sought after by the victims.

Treatment	No. of cases	% of cases
Received	141	70.5
No medical attention	14	7
Not reported	25	12.5
Deaths & disappeared	20	10
Total	200	100

In nineteen of the cases, deaths occurred after contact with the police and one person disappeared. In eight cases no post mortem examination was performed. In eleven cases the post mortem examination stated violence as cause of death. This includes one being shot and ten deaths from injuries due to police violence excluding the premature death of a baby inside the womb. The high number of deaths in custody, presumably caused by police torture, supports the observation of the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions that stated: “*There is a nationwide pattern of custodial torture in Sri Lanka (...). The vast majority of custodial deaths in Sri Lanka are caused not by rogue police but by ordinary officers taking part in an established routine.*”<sup>104</sup>

## Perpetrators

A special feature of the reporting is the relatively high level of knowledge about the police perpetrators.

In 81 of the 200 reported cases the specific perpetrators were not

known by name or service number but the name and location of the police station was known and it is assumed the perpetrators identities could be established.

Perpetrators	No. of cases	% of cases
Not identified, police station known	81	40.5
Identified	116	58
Unknown	3	1.5
Total	200	100

In 116 of the cases all or some of the perpetrators were known by their name and/or number. In very few events, three cases (2.5%) the perpetrator(s) identity(ies) were not disclosed e.g. because the victim died while still in detention or the assault occurred outside the police station.

In almost all of the reported cases, the perpetrators are or could be identified, which makes the inaction of the appropriate state authorities (e.g. the National Police Commission, the Inspector General of Police and the Prosecutor) to stop these cruel practices even more outrageous. Investigations of police conduct and disciplinary measures against police perpetrators could easily be enacted, if there were a willingness and inclination amongst the decision makers to do so.

### **Adequate Remedy - Compensation and Disciplinary Measures**<sup>105</sup>

In 145 of the 200 events the victims or the victims' families filed a complaint about the police. In 55 events complaints were not filed at the time of reporting.

In five of these cases the victims were threatened not to file any complaints against their perpetrators.

Adequate remedy	No. of cases	% of cases
Complaint	145	72.5
Complaint not filed	55	27.5
Total	200	100

Most often the complaints were forwarded to the Judicial Medical Officer (JMO) that recorded the injuries, the National Police Commission, the national Human Rights Commission (HRCSL) and the local police station (most often the site of the violations). However, the impaired functionality of the overseeing body and the limited judicial powers of the HRCSL in terms of disciplinary measures the result was that many cases were not investigated. Moreover the initial investigations must be conducted by the OIC of the police station where the violations occurred.<sup>106</sup> In effect, the OIC will investigate his own staff – consequently very few investigations are carried through or produce evidence of violations. In 96 of the 145 cases the authorities, at the time of the reporting, did not take any form of action on the complaints of wrongful police conduct.

In 34 of the cases, the complaint resulted in re-victimization of the complainant, and often also the victim's family – instead of initiating investigations and disciplinary measures against the perpetrators (see UA-63-2004).

Complaint (145 cases)	No. of cases	% of case
No action	96	66
Re-victimization	34	23
Investigation (Verdict)	16 (4)	11 (3)
Total	146	100

In 16 of the complaint cases, investigations were undertaken by the police or the NHRC. In five of these cases, this resulted in the deposit of compensation to the victims in so-called fundamental human rights cases (in one complaint case the victim later withdrew the charges because of police pressure and accepted a private arrangement for compensation). Despite the compensation for injuries the perpetrators were not brought before a court because disciplinary measures are not within the jurisdiction of fundamental human rights cases. If internal police disciplinary measures are taken then they commonly do not extend beyond transferring the accused officer to another police station or district (see UA-39-2004).

Few, very grave, examples of human rights violations have attracted public interest and criminal cases have been initiated against police officers but so far the perpetrators have been acquitted by the courts (see UA-191-2005+UP-019-2008).

In short, out of the 200 selected cases, 196 cases were not tried in the courts and the Sri Lankan state did not provide adequate remedies for these victims of police torture and ill-treatment during the last five years of the AHRC reporting on Sri Lanka.

## **The Police Revealed**

The case load presented above reveals a disturbing trend and pattern of routinised violent behavior in the police force and an apparent lack of respect for fellow human beings in the criminal justice system. This pattern is forcefully implemented and reiterated in mundane everyday practices in the encounters between citizens and the state authorities. It is denoted by an institutionalized ruthlessness which leaves the victims hurt and vulnerable, without

any rights, protection and prospects of adequate remedy such as compensation and equality before the law.

The data shows a lack of respect for the poor that very few cases are tried in courts creates a sense of impunity amongst the police. The data shows an apparent unwillingness and incapacity of the judiciary to protect the victims and witnesses and ensure equal access to justice and adequate remedies. There is greater risk for re-victimization than potential for proper investigations if the victims complain about police brutality.

It is noteworthy that none of the events had any direct connection to the civil conflict – e.g. in terms of reasons for arrest – but conflict-related policies and regulations are misused by the police to arbitrarily arrest people and the conflict is used as an instrument to continue abusive practices with impunity.

The above chapter gave a situated illustration of the concrete effects of the deteriorating of the rule of law within a dysfunctional judicial system. The next chapter proposes that we can understand aspects of the widespread human rights violations and torture practices by exploring the ‘logics’ of social ordering and practice.

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97. See introduction.

98. This however should not induce us to think that men also are the primary victims of violence. Despite fears and efforts of concealment, state violence is easier to record than domestic violence including rape which can be socially accepted and/or does not involve the state authorities. Further, sexual violence is often not registered due to the social stigma and fear of social repercussions for the victim.

99. Committee Appointed to Recommend Amendments to the Practice and Procedure in Investigations and Courts, "The Eradication of Laws Delays", April 2004.

100. This does not imply that there are no cases of torture and human rights violations in the North and East or directly war related atrocities, on the contrary. This shows the difficulties of human rights reporting under conflict and the limits of this study. For an exploration of conflict related human rights abuses and its consequences e.g. see Somasundaram, D; "Scarred Minds: the psychological impact of war on Sri Lanka Tamils" Sage Publications 1998.
101. Either there was performed a post-mortem examination or the victim had told visiting family members of the type of torture violations before they died.
102. This should be noted that the facilities at the prison hospitals are seriously lacking resources to provide adequate treatment of serious injuries inflicted by the violence of the police.
103. It is expected that most of the victims will seek some form of medical attention after release.
104. UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions Mission to Sri Lanka (December 2005) pp. 18.
105. Victims of police human rights violations can make complaints to the Human Rights Commission of Sri Lanka (HRCSL) or the National Police Commission (NPC) that can make enquiries and investigations, for a description see J. Joseph "Sri Lankas dysfunctional criminal justice system" AHRC 2007.
106. "Although Sri Lanka has signed or ratified many conventions, there is no command responsibility for effective implementation in accordance with article 2, even after a law is made. Act No. 22 of 1994 is exemplary. It does not contain a binding obligation on the inspector-general of police to ensure that all complaints of torture are investigated in the same manner as other crimes. (...). If the alleged crime is to be tried before a high court--as should be the case where allegations of torture are concerned--the file is sent from the court to the Department of Attorney General, which is obliged to inquire into the matter and, if the evidence submitted is sufficient to lead to a conviction, file the case forthwith. However, a Special Investigation Unit (SIU) established in 2002 under the Department of Attorney General to deal specifically with cases of police torture and abuse does not usually follow this procedure. SIU inquiries usually start only when the government or Department of Attorney General forwards a complaint that has been received from an international agency, such as the Special Rapporteur on the question of torture". See 62nd Session of the United Nations Commission on Human Rights 2006 statement on Sri Lanka.



# 5.

## The Phantom Limb

Much human rights reporting that focuses on crises and immediate risks, dangers and suffering tends to overlook historic processes and social ordering systems – such as caste – in (often case based) illustrative descriptions of repressive practices, misuse and mismanagement of authority and the inadequacy of the justice system to protect the citizens. However, it is the proposition of this study that to investigate torture practices and the apparent inability to change the current state of affairs one has to explore the logic based in deep rooted social systems and attitudes. This insight offers an explanation for the socioeconomic bias in the enactment of torture and the reluctance and resistance to change in the criminal justice and political system. In this regard, caste as an ever present social ordering system in South Asia appears to be a viable and fundamental issue to include in the analysis to understand current human rights abuses.

The argument is that a ‘debris’ of the caste system somehow orders social perceptions, relations and actions in the unfolding of the criminal justice system, especially in the images of the marginalized laboring poor. To proceed, we will look into the interconnectedness of the early judicial system and administration, and the caste system.

## System to System

The foundation for the current law and judicial system in Sri Lanka was built by the British colonizers. Basic British laws were codified in local colonies and new technologies of rule - such as cartography (to control the territory) and the assessment and (re)classification of lands use, property forms and structures for taxing purposes – facilitated and advanced an exploitative operation of trade and commerce in colonial India<sup>107</sup>.

Common law principles and the British law complex such as the Immigration Law, Penal Code, Criminal Procedure Code, was installed in a limited form to regulate and control the society. When Sri Lanka achieved independence by the partition of India in 1947, the colonizers (limited) law complex formed the foundation for the establishment of the Sri Lankan state apparatus. It inherited a judicial system that was designed to impede opportunities for national self-determination and citizenship as the foundation for the development of the current criminal justice system - including the police.

But the introduction of the law complex – principles, regulations and procedures – did not obliterate already existing social systems and configurations of power. It is well known that the colonizers used and recast social systems and power structures that had regulated and controlled local socio-economic transactions and exchanges for centuries in a divide and rule policy.<sup>108</sup> Cardinal for the colonial efforts to subjugate and manage colonial India was the social system of caste that under colonialism became far more pervasive as social denominator and contested political question through the enumeration and social classification processes of the national censuses.<sup>109</sup>

However, to elucidate the current situation in Sri Lanka the issue of interest is not the origin of caste or caste structures during and after colonialism or to suggest a special exotic feature or essence of the South Asian culture but rather the effects of caste mentalities modeled and exacerbated through the colonial state apparatuses.

Caste originates from northern India. It is a theological system for social and economic ordering of society based on an inherent and divine right of the upper caste for privileges, opportunities and power. Caste membership is achieved by birth and is kinship-based. It orders every person into a categorization – the Hindu Varna system – which not just structures the people's position in society but also circumscribes everyday practices, defines and condones proper social behavior and choice of conduct, e.g. through employment and marriage. Even though, the actual hierarchical classification of caste groups is a contested political process, the caste entity and membership is an absolute and indisputable categorization which guides even the minutest and mundane practices, from getting out of bed to profession and livelihood.<sup>110</sup>

The social ordering of the caste system should, however, not be reduced to a normative system of social morality and individualized ethics or a relation of power and knowledge, even though it all plays a part in the unfolding of the system. The social identification and categorization within the caste system is rigid and static - social norms and positions can not and have not been changed through social interrelations or for that matter because of state interventions and policies – as proven by India's constitution, which in its preamble forbids negative public discrimination on the basis of caste even though the categorization as Scheduled Castes has been a site of political contestations over access to state-secured benefits for the low caste groups.

Caste is fundamental to the social structure of many South Asian countries through the thousands of castes and subcastes that orders everyday life. In India (especially the northern regions) reign the Brahmins – the clerical caste – at the top and at the bottom the Dalits – a caste of predominantly unskilled wage (day) labourers, also referred to as Scheduled Castes or Untouchables. The Dalits are completely segregated in society. It is a sin for the upper caste to touch them or their belongings as they are perceived to be unclean and polluted due to their occupations.<sup>111</sup> Their duties are to service the upper castes through all kinds of manual labour such as cultivation of fields, livestock rearing and latrine and sewer cleaning, etc. Ideally with complete social segregation and without any form of social and physical contact (no more than necessitated to give orders and oversee tasks).

The system is based on the rights of the upper caste and the duties of the lower caste to service, assist and abide.<sup>112</sup> Each caste is part of a locally based system of interdependence with other groups, involving occupational specialization and social hierarchization. Still this system is reiterately produced and reproduced in day to day exchanges, especially through the labour markets.<sup>113</sup> Today in the market economy, caste and class conflate as the low caste groups completely dominate the unskilled and manual labour markets due to poor education and employment opportunities.

In Sri Lanka the caste system is not linked to the Hindu Varna and did not unfold through the clerical profession but took the form of a secular hierarchy based in land ownership. There are three caste systems: that of the Sinhala, Jaffna Tamils and Upcountry Tamils. The Sinhalese form the vast majority (75%) of the Sri Lankan population. The Sinhalese caste system categorizes people according to descent and kinship and to their hereditary roles and functions

that saw landlords – the Govigama – as the dominant caste and the Rodyas or Rodi (meaning ‘filth’) as the repressed and exploited.<sup>114</sup> Even though the categorization was based on landownership and different from the Indian heritage, the Sinhala caste system was comparably rigid in its social ordering.

During colonization the introduction of British law altered the way the caste system worked as regards labour opportunities and legal justice. The codifying of the British law complex introduced concepts and principles that at least in the formalised structures and in certain aspects of social ordering disrupted and reformed the existing caste system. Some level of merit-based recruitment and promotion was introduced in the civil administration which opened opportunities for social and economic elevation for lower caste persons. To some extent this challenged and replaced the categorization and ordering operation of the caste system. As elsewhere in South Asia, the British colonizers utilized, appropriated and changed the already existing social ordering system for their own ends. In Sri Lanka, one privileged caste of Govigama, traditionally farmers and small landowners, gained through exclusive appointments in colonial native services. This created new power configurations, political alliances and social leverage.

Further, the colonial law system introduced the ideal of basic equality and the right to a free and fair trial which meant that all people were regarded as citizens with equal rights in the eye of the state – at least in principle.<sup>115</sup> This principle was in sharp contrast to the hereditary categorizations of the caste system which was based on social segregation and marginalization of certain groups for the benefit of the dominant castes. The emerging Dalit movement tried to advance within the independence movement, in an effort

to bypass and replace the oppressive village justice system through which the high caste ruled the rural sub-continent.<sup>116</sup>

A key feature of the caste system was and still is landownership – in India and Sri Lanka. Today, it can be said that the division is between those with land, most often high castes, and the low castes who work the land as manual wage labourers – a division of class based in social categorizations and historically determined economic opportunities.<sup>117</sup> Despite universal suffrage and equal citizen rights, even today a debris of the caste system – the cooption by the resourceful castes of the modern development state, e.g. based on access to land, education etc. – influences the socioeconomic stratification in society which leaves manual laborers with comparably marginal changes to their lives and few livelihood opportunities.

In D.R. Nagaraj's analysis, the notion of a caste mindset is associated with the debate between Gandhi and Ambedkar. In this debate caste issues and the liberation from the oppressive features of the caste system is reduced to conflicting positions of religious purification vs. materialist equality.<sup>118</sup> He argues that the continuous social practice of the caste system's rigid socioeconomic hierarchy and segregation simultaneously create, sustain, reinforce and internalize a caste mindset– a psychology of the caste system. In other words, the moral and material social ordering (re)produces the high caste perceptions and prejudices of the low castes as polluted and detrimental and (re)enforces the submission to the system amongst the low castes.<sup>119</sup>

Two points are of crucial importance in the unfolding of the caste mentality. One is that of proportion, where minor transgressions of the social boundaries of the caste system are seen as grave offences

by the upper castes. The other is that in the context of the low castes the individual is not seen as a legitimate category but is only accepted through the collective category. That is, a fault of a low caste person is attributed to the collective category and the entire social group is held responsible and punished accordingly by the high caste.<sup>120</sup> These two points refer to social practices of guilt and innocence as well as judgment and punishment.

Along these lines, this study has explored the unfolding of the caste mindset in present day Sri Lanka and its effects on the practices within the criminal justice system. However, the aim is not to explore whether the criminal justice system is controlled by the high castes and/or intentionally oppresses low castes but to explore the logic (and effects) of everyday police work.

Thus, the study suggests that the colonial introduction of British law did not obliterate the caste system but the two systems of social control and ordering entered into a dynamic relationship of repression delineated by socioeconomic stratification and categorization. It is argued that, since independence – which ended the colonizers' forceful implementation of law as the main ordering system – and up to present day the law system works on particular logic based in social attitudes and the ordering mindset of the caste system. This logic is based in the exploitation and socioeconomic marginalization which (re)produces poor persons – not exclusively low caste – as lesser human beings.<sup>121</sup>

## **Logics**

A large-scale study of over 6500 cases of police torture in nine states of India found that 66% of all victims of human rights abuses were of low castes.<sup>122</sup> Along similar lines, the case material compiled by

the AHRC indicates that the impaired and dysfunctional criminal justice system combined with a particular logic of social practice causes widespread and routinized human rights violations of especially the very poor people. The almost complete impunity for abusive action results in higher risk of victimization than actual court trials. If a victim makes a formal complaint or files a criminal charge against the police perpetrator the data show a 23% risk of re-victimization. The very brutal and blunt torture methods employed by the police that leave visible and unmistakable signs of violence illustrate the particular logic in police work. When in the hands of the authorities (in the street or at the police station), the person in question is perceived and treated by the police officers as socially and humanly inferior. They have no status, position or (access to) resources which require some form of respect or legal rights.

To include the concept of logic in the analytical approach broadens the understanding of the impairment of the judiciary and the dysfunctionality of the police. This in turn could explain the failure of national and international actors to achieve adequate remedies and protection of human rights for the poor and marginalized via targeted interventions and monitoring/documentation activities.

This analytical input can, as a simple illustration, show the criminal justice system as a 'phantom limb' which for the amputee often appears to be – and is treated as – an operational certainty but at closer scrutiny is revealed as a phantasm, a sought after ideal of equality and fairness that does not (and has not) existed.

This approach might help us to understand the police officers' routine behavior in criminal investigations towards poor people and explain why efforts to improve the criminal justice system



have not succeeded. The everyday routines of the police could be understood as a logic and effect of a caste 'debris', not just in how it informs police practices but also in the ways it contributes to the current collapse of the rule of law.

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107. Dirks, N.B "Castes of Mind: Colonialism and the Making of Modern India" Princeton University Press, 2001 pp.9.
  108. Pandey, G, "The Construction of Communalism in Colonial India". Oxford University press 1998.
  109. Dirks, N.B "Castes of Mind: Colonialism and the Making of Modern India" Princeton University Press, 2001 pp.13.
  110. For a vivid and insightful description of caste see Kancha Ilaiah "Why I am not a hindu – a sudra critique of hinduist philosophy, culture and political economy", Samya Press, Calcutta India 2007 (1996). Another key reference is B.R. Ambedkar "The annihilation of caste" 1936, available at <http://wcar.alrc.net/mainfile2.php/Documents/76/>.
  111. Mendelsohn, O & Vicziany, M; "The Untouchables: subordination, poverty and the state in modern India". Cambridge University Press 1998,pp. 7-8.
  112. However, the system should not be conflated with a patrimonial structure based on interdependency of the master and servant (e.g. see Gellner & Waterbury 1977 or Breman 2003) because emancipation from the oppressive system is a non-existing option. For example, a slave could be freed by his master and become a free man and proper citizen with certain rights (such as the right to have slaves). However, in a caste system the master is not in a position to change the social categorization and inherited caste status (this would require divine intervention) and there are no room for social elevation and re-positioning in society. Further, the slave would be the property and part of the household and the master would treat them as an economic asset such as livestock e.g. provide basis necessities of food and housing.
  113. Jan Breman presentation at an international seminar at Roskilde University in Denmark, May 2008. For further readings see the writings of Jan Breman e.g. "The Labouring Poor of India", Oxford University Press 2003.
  114. For a description of the Sri Lankan caste system see e.g. Tambiah, S.J. "Ethnic Fratricide and the Dismantling of Democracy". I.B. Tauris 1986.
  115. Galanter, M. "Competing Equalities: Law and the Backward Classes in India". University of California Press 1984,pp.20-21.

116. Nagaraj, D.R “The Flaming Feet-a study of the Dalit Movement”, South Forum Press 1993.pp.5,15,31-33.
117. See Mendelsohn, O & Vicziany, M; “The Untouchables: subordination, poverty and the state in modern India”. Cambridge University Press 1998,pp. 8 and Breman, J; “The Labouring Poor of India”, Oxford University Press 2003, pp. 33-34.
118. Nagaraj, D.R “The Flaming Feet-a study of the Dalit Movement”, South Forum Press 1993.pp.20.
119. Ibid pp. 7-9.
120. Ibid pp. 32-33.
121. A mindset that also could be said to have hampered the effective integration of local police officers into the neutral, hierarchical, bureaucratic criminal justice structure that the British imagined they were creating.. See Brass, P.R; “Foucault steals political science”. Annual Review of political science no. 3, 2000.
122. Tinphagne, H. execute of People watch Tamil Nadu presentation at the Danish Parliamentary Hearing on Dalits in South Asia, Copenhagen 25/9 2008.

# 6.

## Conclusion

This study pursued two main arguments. Firstly, we need to include approaches that can encompass routinized torture – standing operating procedures – to be able to understand and explain the full range of global torture practices. And secondly, we need to include socio-economic aspects and thought systems to supplement the legal perspective and contribute to the better understanding of causes and trends in torture practices and human rights violations.

As regards the first issue, the data material compiled by the AHRC network suggests that the concept of torture is everyday and mundane – not the exception and/or part of an intentional state strategy to ensure national security and state sovereignty. Torture is a routine practice that is employed in the encounter between police and underprivileged poor. The encounter is circumscribed by the systematic and attitudinal supremacy of the police officer and particular logic that to a certain extent resembles and reflects caste ordering of society and rests on an expectation of impunity which produces certain categories of victims and enables continuous abusive practices.

The causes for the deteriorating rule of law and dysfunctional criminal justice system are not just ‘bad’ governance (as opposed to ‘good’ governance according to international standards ) or

the result of armed conflict (and the inherent assumption that an end to war is an end to police violence). It is a complex set of institutional structures, historical contexts and mindsets and political factors which the judiciary and policing authorities negotiate and appropriate in the day-to-day practices of the criminal justice system.

From different perspectives growing evidence shows that neither internal monitoring or national overseeing bodies and international mechanisms can efficiently work to change and develop criminal justice systems without support from the top management and the political leadership. This study shows that use of torture within the criminal justice system is acknowledged and accepted by the judiciary, the police and politicians. The combined unwillingness and failure within the criminal justice system and the politicians to take action serves to maintain and advance the socioeconomic structures and political (power) configurations that cause routine abuses and misuse of authority that victimize the poor and destitute.

As regards the second issue, the study points out that initiatives to rectify and improve human rights standards in developing countries based on the premise that judicial systems can be corrected through training and/or the establishment of monitoring procedures and overseeing bodies is false. The key problem with this thinking is that it relies on Weberian criteria concerning well-functioning bureaucracies operating in a democratic political system, which disregards the deep-rooted characteristics in the use of torture, e.g. caste and socioeconomic stratification, and implicitly or explicitly de-politicizes agendas for change by reducing remedies to technical “fixes”.

Further, this study illustrates a gap in current research and illuminates the need to undertake context-specific studies which look beyond the strict confinement of legal and/or institutional analysis. The work of the AHRC - PAT network shows that we cannot and should not limit our analysis to a human rights perspective on criminal justice systems if we want to understand the use of violence and prevent torture. Socio-economic factors, mindsets and attitudes and structured inequalities are all subject matters which can enlighten our understanding of police violence to inform adequate and appropriate interventions to prevent torture and change oppressive systems and abusive practices.

Research and knowledge generation can fill the gap and outline new avenues for torture prevention activities and interventions that – in an informed and concise manner – target the police practices and the judiciary based on a broad analysis and understanding of the interconnectedness of rule of law, power politics and social and attitudinal systems.

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123. See e.g. OECD-DAC Guidelines on SSR and Governance (2005), OECD-DAC Handbook on SSR: Supporting Security and Justice (2007) developed by the DAC Network on Conflict, Peace and Development Co-operation.

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## **Annex A: Report of the Police Commission 1946**

YOUR EXCELLENCY,

BY your letter No. 37 dated January 26, 1946, you were pleased to issue to us a commission calling upon us to inquire into, and report upon the organisation, administration and discipline of the Police Force, and to make recommendations as to the ways and means of enhancing the efficiency of the Force and securing a greater measure of public co-operation and confidence and, in particular, recommendations relating to-

- (a) the composition of the Force the conditions of service other than basic rates of pay, and the selection of officers for promotion and transfer;
- (b) the procedure for the investigation of complaints made by the public against the Force;
- (c) the powers and duties of the Police, especially in relation to the preliminary investigation of offences, the arrest and custody of accused or suspected persons, and the institution of prosecutions in Court and the expeditious conduct thereof; and
- (d) any amendments of the Police Ordinance and of other existing legislation which may be necessary for giving effect to the recommendations of the Commission on the matters aforesaid or for securing the objects or purposes of such recommendations.

We were required to transmit to Your Excellency a report on these matters as early as possible. Your Excellency also required and directed all public officers and other persons to whom we may apply for assistance or information for the purposes of the inquiry to render such assistance or furnish all such information as may properly be rendered or furnished in that behalf.

Unfortunately, we were not able to begin our sittings till two months later owing to the difficulty experienced by the Ministry of Home Affairs in providing us with the necessary staff. We began our sittings on March 26, 1946, in Colombo, and we visited the eight other capital provincial towns in the island in the following order: — Kurunegala, Ratnapura, Badulla, Batticaloa, Galle, Anuradhapura, Jaffna and Kandy, and we took evidence in each of those towns.

We held 52 meetings in the course of which we examined some 185 witnesses who were kind enough to come forward to assist us with their views, suggestions and recommendations. We left it open to these witnesses to decide whether they would give their evidence in public or in camera, because we desired to cause them the least possible anxiety, for we felt that that would be the best way of securing their candid and unreserved views on the matters referred to us for investigation and report. The majority of these witnesses chose to give their evidence entirely in public; of the rest, some put their views to us and made their recommendations partly in public and partly in camera, a few preferred to give their evidence entirely in camera.

We have thus been able to secure a large volume of evidence and an almost embarrassing variety of views. The typescript of the notes taken by the stenographers at all the meetings we held runs

into 2,240 pages. In addition to this mass of oral evidence, there was a large volume of documents tendered to us in the course of the inquiry, and there were also memoranda submitted to us on behalf of several associations and by individuals, among the former being memoranda submitted by the Sergeants' and Constables' Association, the Inspectors' Association, and by a group said to comprise "...a considerable body of Ceylonese police officers of various ranks. The document they tendered bore the title "A critical examination and suggestions for the re-organisation and improvement of the Police Force". Representatives of these bodies appeared before us and spoke in explanation and in amplification of the contents of the documents they submitted to us. We concluded our sittings in Kandy on July 11, 1946, but were not able to address ourselves to the preparation of our report because the two stenographers given to us were unable, despite their best endeavours and long hours of work, to complete the transcription of their notes till about August 10, 1946.

Thereafter the Secretary to the Commission had to peruse the transcription of the notes of evidence taken in order to prepare a summary of the evidence, and we were only able to get our copies of the transcript of the evidence and of the summary made by the Secretary by the middle of September. And then, before our report could be begun, we had to refresh our memory by going over nearly all this mass of oral and documentary evidence, and to do that we had only the hours of leisure that our ordinary duties allowed us. We therefore venture to hope that Your Excellency will ill excuse the delay that there has been in our submitting this report to Your Excellency.

## **Annex B: Report of the Police Commission 1970**

YOUR EXCELLENCY,

1. THE four of us who are signatories to this Report and Mr. G. A. K. Rockwood were appointed a Commission of Inquiry on 28th December, 1965, for the purpose of inquiring into and reporting upon the organization, administration and discipline of the Police Force, and the power and duties of the members of the Police Force, with special reference to the following matters :-
  - (a) the nature and the scope of the functions of the Police Force, and the measures that should be taken to secure the maximum efficiency of the Police Force for the purpose of maintaining law and order, and to secure a greater measure of Public co-operation and confidence, ;
  - (b) the measures that should be taken to reorganize the Police Force, having regard to Ceylon's status as a independent country;
  - (c) the structure and composition of the Police Force, the methods of recruitment and training of personnel for the Police Force, the terms and conditions of service (other than basic rates of pay) and the selection of officers for promotion and transfer;

- (d) the procedure that should be adopted for the investigation of complaints made by the public against members of the Police Force,
- (e) the powers and duties of the members of the Police Force, especially in relation to -
  - (i) the preliminary investigation of offences,
  - (ii) the apprehension and custody of accused or suspected persons, and
  - (iii) the institution of prosecutions in the Courts and the expeditious conduct thereof ;
- (f) the adequacy of the security and safeguards provided hitherto to members of the Police against risk to life and bodily injury involved in the performance of their duties, and the adequacy of the compensation hitherto payable where injuries were sustained, or where death resulted from any injury sustained, in the course of their duties;
- (g) any amendments to the Police Ordinance and to other existing legislation which may be necessary for giving effect to our recommendations on the matters aforesaid or for securing the objects and purposes of such recommendations; and
- (h) any other matter connected with, or incidental to the matters specified above in respect of which we may receive representations ;

and to make such recommendations as we may consider necessary as a result of our inquiries in respect of the aforesaid matters.

2. The Secretary of the Commission was not appointed till 12th March, 1966, and thereafter up to now we have held 138 sitting and heard 153 witnesses, both official and unofficial. A list of witnesses who gave evidence before us, marked Appendix I, and a list of those who sent memoranda, marked Appendix II, are attached hereto.
3. On 8th June, 1966, Mr. Rockwood resigned his membership of the Commission. No appointment was made to fill the vacancy created by his resignation.
4. On 1st May, 1968, our Secretary, Mr. R. I. Obeyesekere, ceased to hold public office having resigned from the post of Crown Counsel. As our work was already far advanced we decided to continue Mr. Obeyesekere as our Secretary. Mr. Obeyesekere having thereafter entered private practice at the Bar, necessarily his full time services were not available to us.
5. We have submitted already to Your Excellency two Interim Reports, dated 1st October, 1966, and 31st March, 1967, which so far have not been published. We now submit our Final Report. In doing so we have embodied under their appropriate heads the bulk of the text of both our Interim Reports, for purposes of comprehensiveness and completeness of this our Final Report.

# Annex C: Report of the Committee appointed 1995

## CONFIDENTIAL

### Introduction

#### Term of reference:

1. We were appointed her excellency the President, in her capacity as Minister of Defence, to a Committee to "inquire into and report on the reorganization of the Police service". This conveyed to us by the Secretary". Ministry of Defence by his letter D/P C 37/25 of 24 February, 1995. The term of reference, set out in the same letter, were;

"To examine and report on:-

- (a) the structure and composition of the Police Force;
- (b) the methods of recruitment and training of personnel for the Police Force;
- (c) the selection of officers for promotions and transfer;
- (d) the nature and scope of functions of the Police Force and the measure that should be taken to secure the maximum efficiency of the Police Force for the purpose of maintain law and order;
- (e) the measure that should be adopted to encourage better relation with the general public;
- (f) the establishment of a Permanent Police Commission to administer recruitment, promotions and disciplinary control in the Police Service;
- (g) any other amendments to the Police Ordinance and to other existing legislation which may be necessary for giving effect to



the recommendations on the matters aforesaid or for securing the objects and purpose of such recommendations;

## **Briefing**

2. the Deputy Minister of defence met the Committee on 23-02-1995. In elaborating on the term of reference, he said that the Government was giving the highest priority to restoring the moral and image of the Police, so that every officer would be motivated to discharge his duties equally and impartially to all the people in Sri Lanka. The image of the Police had been severely tarnished in recent years and remedial measures had to be taken as a matter of urgency, so that the people would have confidence in the Police and a healthy relationship would be established between the Police and the public. He drew the attention of the Committee to the address made by Her Excellence the President to senior officers of the Police last August .

## **Low profile**

3. He would like the Committee to maintain a low profile in carrying out its inquiries and to avoid, as far as possible, external publicity. After identifying the issue to be studied, the Committee could have discussions with the relevant officials in the Police, afford an opportunity to the organizations in the Police to make their representation, study the reports that have been submitted by the earlier Commissions and by officials of the Police, and make their report. In keeping with this directive, the Committee confined its consultation within the Police and to having informal discussion with an academic in the field social psychology, a representative of the Bar Association of Sri Lanka and a Member of Parliament.

**M**uch human rights reporting that focus on crisis and immediate risks, dangers and sufferings tend to overlook historic processes and social ordering systems – such as caste – in their (often case based) illustrative descriptions of repressive practices, misuse and mismanagement of authority and the inadequacy of the justice system to protect the citizens. However, it is the proposition of the study that to investigate torture practices and the apparent inability to change the current state of affairs one has to explore the logics based in deep rooted social systems and attitudes. This insight offers an explanation for the socioeconomic bias in the enactment of torture and the reluctance and resistance to change in the criminal justice and political system. In this regard, caste as an ever present social ordering system in South Asia and Sri Lanka appears to be a viable and fundamental issue to include in the analysis to understand current human rights abuses.

The argument is that a ‘debris’ of the caste system somehow orders social perceptions, relations and actions in the unfolding of the criminal justice system, especially in the images of the marginalized laboring poor. To do this, we will look into the interconnectedness of the early judicial system and administration and the caste system.



- **The Rehabilitation and Research Centre for Torture Victims (RCT) (Denmark)**
- **Asian Human Rights Commission (Hong Kong)**