

**United Nations Special Rapporteur on the independence of judges and lawyers and
Special Rapporteur on torture and other cruel, inhuman or degrading treatment or
punishment**

Official joint visit to Sri Lanka – 29 April to 7 May 2016

**Preliminary observations and recommendations of the Special Rapporteur
on the independence of judges and lawyers - Ms. Mónica Pinto***

Colombo, 7 May 2016

** This statement should be read in conjunction with the preliminary observations and recommendations of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment.*

Introduction

At the invitation of the government, my colleague, Mr. Juan E. Méndez – the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment – and I visited Sri Lanka from 29 April to 7 May 2016 to assess the situation and remaining challenges concerning torture and other cruel, inhuman or degrading treatment or punishment and the independence of judges and lawyers. We would like to express our appreciation to the government for extending an invitation to visit the country, for their full cooperation during our visit, and for the efforts displayed, in particular by the Ministry of Foreign Affairs, to facilitate and organize official meetings. In addition, we would like to thank the United Nations Resident Coordinator and the United Nations Office in Sri Lanka for supporting the preparations of the visit.

Sri Lanka is at a crucial moment in its history. While the armed conflict has ended after more than 30 years, much of the structures of a nation at war remain in place as the fabric of Sri Lankan society was left ravaged. It is now critical and urgent to replace the legal framework that allowed serious human rights violations to happen and set up sound democratic institutions and legal standards that will give effect to and protect the human rights embodied in the constitution of Sri Lanka as well as the international human rights treaties it has voluntarily ratified.

Officials we spoke to identified as the main threats and challenges of the country international terrorism and organized crime, as is the case with most countries in the world today. However, they can never justify the continuation of repressive practices or a normative framework that contributes to violations of fundamental rights and civil liberties.

The elections of January and August 2015 brought an opening in the democratic space and the change in government has led to some promising reforms, such as the re-instatement of the Constitutional Council. Yet, more reforms are expected and necessary before the country

can be considered to be on a path to sustainable democratization governed by the rule of law. There is a need to recover the momentum of reform and accelerate the process of positive change within a comprehensive and inclusive framework.

During my visit to Colombo, Anuradhapura, Jaffna and Kandy, I had the opportunity to exchange views with a number of high ranking officials, including representatives of the Ministry of Foreign Affairs, the Ministry of Defence, the Ministry of Law and Order, the Ministry of Prison Reforms, Rehabilitation, Resettlement and Hindu Religious Affairs, the Chief Justice, the Attorney General, the National Police Commission, the National Human Rights Commission, Governors of the North Central, North and Central Provinces, the Judicial Service Commission, the Judges' Training Institute, the Legal Aid Commission, as well as judges from different all tiers, the Sri Lanka Bar Association, lawyers, academics and civil society representatives. During his visit, the Special Rapporteur on torture also had the opportunity to visit a large number of detention facilities, including military camps, the details of which can be found in his statement.

I will now share some of my preliminary observations and recommendations. I will further develop my assessment in a written report, which I will present to the United Nations Human Rights Council in 2017.

Preliminary observations and recommendations

Need for a justice system reflecting the diversity of society

Sri Lanka's legal and judicial system has incorporated many laws, practices and proceedings inherited from the British, but also Roman Dutch law, which is mainly applied in civil cases. The society is predominantly Sinhalese, with important Tamil and Muslim minorities, which in the North and East of the country are in a majority position.

Yet, the diversity of the population is not reflected in the composition of the judiciary, the Attorney General's office, or the police, or in the language in which proceedings are conducted. For instance, there are very few Tamil-speaking judges appointed at the highest levels of the judiciary – in fact, with the exception of the current Chief Justice, there are no Tamils in the superior courts (Supreme Court and Court of Appeal). Police forces, in charge of investigation and the first steps to initiate criminal proceedings, are also composed of a large majority of Sinhala-speaking people. There are also very few Tamil-speaking State counsels in the Attorney-General's office.

Thus, diversity should not only be clearly set among the criteria for the appointment of judges and the recruitment of State counsels and police officers, but qualified interpreters should be assigned to tribunals as a measure to guarantee due process.

Women in Sri Lanka have reached the highest positions in the Justice System. However, their number decreases as the hierarchy of the court increases. Sri Lanka can envisage a plan for the parity in the justice system just favoring women to engage in the justice system.

Strengthening an independent administration of justice

The country needs to conduct a strict exercise of introspection, so as to improve the quality of its judiciary and of the Attorney-General's office. This includes reviewing and publicizing the criteria for the appointment of judges and the causes for removal through disciplinary proceedings, providing quality legal and technological training, including mandatory training in international human rights law. "The judiciary is a national asset", said one of my interlocutors. It is also a permanent institution, one of the three branches of the State, which has a fundamental role to play in a democratic society based on the rule of law; therefore it should be robust and efficient.

In general, the administration of justice deserves to be more transparent, decentralized and democratic. The instances participating in the appointment of judges, counsels of the Attorney-General's office and judicial staff should publish the selection procedure, including the criteria and methods to be followed. The Constitution provides for the Chief Justice to head many instances dealing with administrative matters in the field of justice and this restricts very much his abilities to manage such an important branch of government.

A strict and rigorous recruitment process is essential for a justice system of high quality. Judicial officers should be appointed when meeting personal and technical requirements and after competitive examinations held at least partly anonymously. They should be trained in technical matters, including the administration of tribunals or the analysis of complex forensic evidence, as well as in human rights law, including gender and women's rights.

Promotions of judges, entrusted to the Judicial Service Commission, should take into consideration not only the seniority of a person but also his or her merits. Yet, there is no proper evaluation of the performance of judges in place. Decisions on promotions lack transparency. There are no known and established criteria, which gives too much discretion to the Judicial Service Commission.

Further, the Judicial Service Commission is in charge of the transfer of lower court judges to the different jurisdictions in the country. While transferring judges after a certain number of years from one jurisdiction to another can certainly contribute to judicial independence, attention should be paid to the conditions in which such transfers are done. Judges are usually asked about their preferences, but there seems to be no clear criteria and procedures in place on the grounds of which decisions are taken. Transparency when it comes to the transfer of judges will improve if the Judicial Service Commission sets up clear guidelines for the transfer of judges and publicizes them.

Pending a constitutional amendment or revision, legislation should explicitly provide for specific criteria for the appointment of judges, their removal on the grounds of a disciplinary proceeding whose grounds are set out in the law and which should be substantiated with full respect for due process, including the right to a review.

Judges' salary should not only be intangible but also adequate to conduct a decent life for the judge and his immediate family. Judges' salaries should be considered on their own context and not been assimilated to other public servants whose functions are completely different and also their possibilities to engage in other jobs. Establishing a separate salary scale for the judiciary should also help to consider other allowances, which is especially important when judges move to different work places with spouse and children on a regular basis.

Contempt of the Court, a legitimate offense in the judicial arena, had in the past become the favorite tool of some Chief Justices to impose sanctions *inaudita parte*. Legislation should be enacted to define a clear and precise scope for the offence of contempt of court, identifying behaviors constituting contempt of the court, and setting up a procedure to deal with such cases.

Independent, impartial and transparent institutions

Democracy also requires that all bodies exercising jurisdictional functions comply with the basic standards of the right to a fair trial, namely, to be independent, impartial, and competent and to respect due process. Thus, independence, impartiality, competence, due process, as well as the right to appeal a decision to a higher body, are essential requirements to fulfill when it comes to all disciplinary proceedings. In the context of Sri Lanka, this includes disciplinary proceedings conducted by the National Police Commission with regard to active policemen, the Public Service Commission for State counsels, the Judicial Service Commission in the case of judges, as well as, evidently, removal or impeachment proceedings for judges from the Supreme Court and Court of Appeal.

Transparency is an essential requisite of the rule of law. Institutions in Sri Lanka, including those that are crucial for a rule of law regime, are generally opaque. More transparent institutions can play an important role in strengthening democracy in the country and protection from arbitrariness. In such a context, institutions whose operational methods are not set down in legislation should urgently make available to the public the regulations and rules of procedures they are following to carry out their activities. As an illustration, the Constitutional Council should publish the rules of procedures it established for itself and applies in discharging its appointment functions, as well as the criteria used to evaluate candidates' suitability for a given position. Such publicity would contribute to dissipating possible accusations of deliberate opacity and arbitrariness.

The re-establishment via the 19th amendment of the Constitution of some of the democratic achievements first introduced by the 17th amendment of that same Constitution has been widely welcomed in Sri Lanka and by the international community. In that context, the

Constitutional Council was re-introduced as the organ in charge of recommending the appointment of members of a number of independent commissions, such as the Human Rights Commission of Sri Lanka or the Public Service Commission, and approving the appointment of judges of the superior courts and important executive positions, such as the Attorney-General. The Constitutional Council consists of 10 members, seven of which are politicians and the remaining three are civil society representatives. To avoid the politicization of the appointment processes under the purview of the Council and to increase its legitimacy, this current composition should be changed so as to include more civil society representatives, including possibly representation from the Bar Association and academia.

Highly credible and competent commissioners were appointed in 2015 at the head of the National Human Rights Commission. The Commission has wisely decided to invest more time, efforts and resources in policy advice and human rights awareness-raising, so as to become more proactive than reactive. The Commission needs to be supported, it should receive more human and financial resources in order to strengthen and expand its activities and train its staff to become more knowledgeable and effective, thereby regaining the credibility it had lost in the public's eyes. Complain proceedings before the Human Rights Commission hold some promise for victims, but they alone cannot solve the problem of impunity for serious human rights violations.

Judicial accountability

The law in force in Sri Lanka does not include a proper code of conduct for judges. Having such a code would facilitate all disciplinary proceedings. Its drafting should be entrusted to a Commission composed of both retired and sitting judges, representatives of the Bar Association and of academia. It should take into consideration international standards as provided for in the United Nations Basic principles on the Independence of the Judiciary, the Bangalore Principles on Judicial Independence and other similar instruments, including regional ones.

Accountability is a must in a democratic society. As every citizen, judges should be held accountable for their misconduct. Judicial accountability goes hand in hand with judicial independence; it does not and should not constitute undue interference or a limitation to that independence. In this context, disciplinary proceedings should be conducted in accordance with a law passed by the Parliament, which would set up a special panel composed of independent and impartial individuals and would enumerate the specific causes triggering misconduct and the corresponding sanctions which must be proportionate and adequate. The proceedings should be conducted in a way which respects due process and the possibility to appeal the decision should be provided.

Accountability of the judges of the Supreme Court and the Court of Appeal is currently carried out through an impeachment procedure before Parliament. This procedure, which is foreseen in the Constitution, lacks regulation by an ordinary law. It is implemented by the Parliament through a Standing Order. The extreme politicization of the removal procedure in

force prevents its legitimacy. It is thus relevant to the independence of the justice system that any impeachment procedure be regulated by a law passed by Parliament. This law should provide for a judicial determination of the merits of the causes triggering the removal procedure, and the findings of alleged misconduct. Legislation should explicitly stipulate what constitutes misbehavior in the light of international standards as expressed in the Bangalore Principles on Judicial Independence. The final decision should lie in the hands of a panel or appellate tribunal, essentially composed of retired judges, which should decide on the existence of misbehavior in the given case. So as to avoid any selectivity in the composition of this panel, it may be decided that when retiring, judges are automatically enrolled in a list to serve as a member of the impeachment panel or appellate tribunal.

Constitutional review – an opportunity to strengthen independence

The Sri Lankan Parliament has recently constituted itself in a Constitutional Assembly and is taking steps with the view to drafting new constitutional provisions which may amount to one or more constitutional amendments or to a new Constitution. In either case, such undertaking presents an opportunity to confer constitutional status to provisions safeguarding the independence and impartiality of the administration of justice, thereby contributing to reinforcing the independence and impartiality of the justice sector as a whole.

For instance, the Constitution should include the requirements, criteria and selection procedure for the appointment of judges and prosecutors, the causes that may lead to their removal, and the proceedings to respect in case of disciplinary action, including impeachment. The composition of other national institutions should also be amended, so as to prevent politicization of the administration of justice. The Fundamental Rights Chapter should also be thoroughly revised to include the full range of human rights contained in the international treaties voluntarily ratified by Sri Lanka, and in particular provisions relating to access to justice, access to a lawyer, the right to an effective remedy, and to a fair and public trial in full compliance with due process guarantees.

The Judicial Service Commission, which is in charge of the initial recruitment of magistrates who enter the judicial career, as well as the administration of transfers, promotions and disciplinary proceedings. This Commission is composed of the Chief Justice and two justices of the Supreme Court. Its independence and technical capabilities could be enhanced by enlarging this composition, so as to incorporate independent individuals – namely retired judges, high ranking administrative officers, sitting judges of the Court of Appeal, or representatives of the Bar Association. These individuals can also bring specific expertise and technical advice.

Implementation of international human rights law

In Sri Lanka, the Constitution is on top of the legal hierarchy. The country has ratified the great majority of international human rights treaties, including some instruments relating to the acceptance of United Nations treaty bodies' competence to deal with individual

communications. However, these instruments and their related jurisprudence are deemed not enforceable at the domestic level. This extreme form of dualism is not a sustainable position because it is well known that a State may not invoke the provisions of its internal law as justification for its failure to abide by a treaty it has voluntarily ratified.

Sri Lanka should adopt urgent measures, in accordance with its constitutional process, to give effect to the rights protected in international human rights treaties which have been ratified and which are in force. It is under the duty to ensure that every person under its jurisdiction can enjoy and exercise the right protected in these instruments and, if needs be, have access to an effective remedy to seize the courts and have judicial decisions enforced by the competent authorities. At the same time, the country should enforce decisions adopted by the United Nations treaty-bodies whose jurisdiction it has voluntarily accepted.

Attorney-General's role

The Attorney-General's acts both as a legal advisor to the State and as the Chief Prosecutor. In the first capacity, the Attorney-General is called to give advice on the constitutionality of draft legislation. This is an important power in a country where there is no judicial review of the constitutionality of laws after their adoption by Parliament.

The Attorney-General is also de Chief Prosecutor, and, as such replaced the position of the Independent Prosecutor which existed in the past. In such a capacity, the Attorney-General should issue clear and proper guidelines for the investigation and prosecution of crimes, specific guidelines could be developed for the investigation and prosecution of serious human rights violations, including torture, and violations of international humanitarian law. He should also monitor how cases are substantiated so as to avoid the delays incurred by his office. Even in 'ordinary' non-conflict-related and non-political cases, the Attorney-General's office takes too much time to produce an indictment. This is but one of the reasons for the long judicial delays in the administration of justice in Sri Lanka and which court users of to endure.

The Attorney-General's office acts as the representative of the State, which by no means should be equivalent to defending the government. His office should also be able to make a neat separation between the State and the public interest they act on behalf of and the persons behind the institutions so as to avoid any possible conflict of interest. Such conflict of interest have arisen for instance in cases where the Attorney-General's office appears in the defence of police officers or military officers in cases of habeas corpus applications, as if the court decides that the respondent are responsible for the crimes they are accused of, the same office would be called to prosecute them.

Police's important role in the criminal justice system

The police force also plays an important role in judicial criminal proceedings, for this reason they should be appropriately trained. The police force should incorporate members of the

different groups living in the country and speak all the languages of the country. Not only policemen should be able to communicate in Sinhalese and in Tamil, but they should be able to do so when recording the statement of detainees, so as to produce reliable pieces of evidence before the judges and to observe due process. As the police assumes the prosecutorial role before magistrate courts, its officers should be adequately trained to discharge this delicate function.

Access to a lawyer and other due process guarantees

The government has to ensure that every person detained has access to a lawyer from the moment of the arrest and that every person is told about this right. This right should be enshrined in the Constitution but pending an amendment, it should be embodied in national legislation and law enforcement agents should be entrusted with the duty to tell detainees about their rights.

The frequent practice of confessions – especially in cases under the Prevention of Terrorism Act – and the plea bargain – which is not explicitly provided for in legislation in force -, if they are kept, should be coupled with some evidence supporting them, so that the judicial proceeding fulfills its function of shedding light to the facts. Truth is but one of the goals of the judicial process.

Judicial delays

Judicial proceedings are too long, and the time they involve affect especially people deprived of liberty. It amounts to a denial of justice. Cases are regularly postponed. Judges cannot afford the number of cases they have to deal with. The Criminal Investigations Department and the government Analyst Department are centralized in Colombo and conduct investigations for the whole justice system. Criminal prosecutors are overburdened. The backlog of Tribunals, in both civil and criminal matters, should be considered so as to be the object of some work plan to tackle the delays and to prevent their occurrence. Some elements to be taken care of are the increased capacities of the Mediation System Board, the increase in the number of judges and the establishment of some more courts in different parts of the country and some family courts, the clear cut difference in the prosecutorial services in the Attorney-General's office so as to have a strong Prosecutor's Office, and the implementation of an evaluation of performance plan.

Sri Lanka has a Mediation Board System composed substantially by retired public officers in charge of cases up to a certain amount of rupees. This system can be improved by appointing retired judges, through a public mechanism open to applications, and by raising the amount of money so as to cover more cases. In that way it may have the potential to settle many cases in just way, thus decreasing the number of judicial cases.

Access to justice

Access to justice is not only essential to give effect to the right to an effective remedy, but it is also explicitly included as one of the components of the goals of the 2030 Agenda for Sustainable Development. To exercise this right, however, Sri Lankans need to be in a position to reach the courts and to have their cases timely adjudicated. 335 judges at all instances and in the whole country, a number given to us by the Judicial Service Commission, seem insufficient for a population of more than 20 million inhabitants. Further, the number of judges does not seem enough to deal with the variety and complexity of legal issues faced in Sri Lanka. Appointing more judges also needs to be accompanied by adequate facilities and resources, including building new court houses. While the government should approach this issue globally and progressively, it should soon take, and be seen to take, concrete measures in this direction. Increasing the number of judges and courts, should also help tackling the extremely serious issue of judicial delays. Setting up new courts and hiring more judges should further contribute to reduce the backlog and daily workload of judges, allowing them to improve the quality of their work.

In a country lacking public defense service, the Legal Aid Commission is doing important work. Its organization and its geographical display are important tools for the right of all Sri Lankans to access justice. This Commission should be supported through an adequate national budget.

Generally, judicial proceedings do not consider the victim, specially the criminal ones. All judicial actors should have the victim in mind when working. Criminal proceedings should be amended so as to be compatible with the rights of the child and thus avoiding children the cruel experience to be in court together with his/her aggressor. In this context, the establishment of family courts may be important provided that judges are trained in these matters and have the assistance of professionals in psychology, medical care, and others.

Today fundamental rights jurisdiction in Sri Lanka is vested only with the Supreme Court which acts as only instance. Many people are prevented from seizing this jurisdiction because they have to go to the capital city, Colombo, and engage a local lawyer. This jurisdiction should also be given to High Courts, which are all over the country, in every one of the nine provinces.

Education and training

Education by Law Schools should acknowledge that students are future law operators who will have to face a world whose legal order is undergoing significant change. They should be prepared to deal with different issues involving new problems and new tools. Judges, prosecutors and lawyers are all law graduates. Law curriculum should take notice and advantage of new issues and of practical matters, including international human rights law, gender perspective, international humanitarian law, international criminal law but also evidence, complex crimes' evidence, among others.

Law has an evolving nature because it needs to adapt to social needs. All those participating in the justice system, whether judges, lawyers, State counsels or police officers, need to constantly update their knowledge. The Sri Lankan Judges' Institute should incorporate specific training in international human rights law, gender and women's rights, as well as new legal issues. The Institute's governing authorities should be advised by a board composed of retired judges, academics and representatives from the Bar.

Transitional justice

On more than one occasion, Sri Lanka resorted to *ad hoc* commissions to enquire into serious and complex crimes, as well as to shed light on past atrocities and deal with lessons learned. However, for a variety of reasons these commissions have not been as successful as hoped and they have even, by their very existence, jeopardized the development or reinforcement of competent permanent institutions.

Sri Lanka is envisaging transitional justice mechanisms to deal with its near past. These sort of mechanisms are important for the future and have a substantial value as healing processes. Whatever the decision taken, the government should ensure that the bodies set up or existing which have to deal with these issues, be composed by independent and impartial people, completely beyond any questioning by the society, well learned in law. The different elements of a transitional justice strategy should be designed in a comprehensive, holistic manner that take into account the necessary links of these different components.

Sri Lanka is in a very good moment to envisage the strengthening of its justice system as a way to reinforce a main branch of government and as a means to ensure non-recurrence of the past. The international community should side Sri Lanka in these efforts and support it not only politically but also providing adequate training and co-operation in this field.