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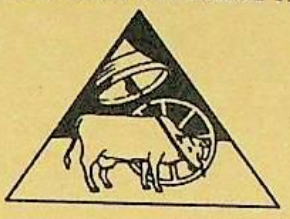

JUDICIAL RESPONSES TO VIOLATIONS OF FUNDAMENTAL RIGHTS IN SRI LANKA

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Editor's note.....

In this issue we publish an article by Dr Deepika Udagama on the judicial responses to State violence in Sri Lanka. She traces the history of State-sponsored violence in Sri Lanka and the response of the judiciary in relation to such violence. She notes that from a very conservative approach the judiciary has moved to a bolder approach and has openly struck down emergency regulations as being overbroad. She discusses several cases in which this was done. She, however, notes a reluctance on the part of the judiciary - despite their recent activism - to get involved in larger political issues: "If the courts remain activist in the protection of fundamental rights and expand their activism to larger political issues, they will make an invaluable contribution to the systemic consolidation of the fragile democratic space that currently exists in Sri Lanka."

We also publish an article by Saama Rajakaruna on the rape of Indonesian Chinese women during the riots in 1998. She calls for international condemnation of these savage acts and for the government to ensure that such incident will not recur.

Taming of the Beast: Judicial Responses to State Violence in Sri Lanka*

*Deepika Udagama***

This Article is an attempt at understanding the Sri Lankan judiciary's response to the cult of state violence[1] in Sri Lanka that has dominated life on the island from the 1980s. Although not entirely blameless,[2] the higher judiciary in Sri Lanka has nevertheless been held in relatively higher esteem by the people than other branches of the government. The Article aims to determine whether the judiciary has intervened in expurgating state violence, and if so, in what manner.

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[1]In this Article the term "violence" is used more in the sense of physical violence, while recognising that censorship and denial of equality and the like also constitute political and social violence.

[2]*See generally* Mario Gomez, IN THE PUBLIC INTEREST 125-53 (1993).

Judicial responses are bound to vary according to the degree and sources of violence. All parties to the two major conflicts in Sri Lanka that escalated in the late 1980s - that between the government and Liberation Tigers of Tamil Eelam (LTTE) and the government and the Janatha Vimukthi Peramuna (JVP) - were extremely violent. Nonetheless, the ruthless onslaught unleashed by the state on its opponents threatened the basic human rights of all Sri Lankans.

Many states are confronted with some degree of violence which law enforcement authorities and the penal system regulate. When the state itself becomes brutal and lawless, however, anarchy reigns, and the entire democratic order crumbles. Assuming that democratic institutions continue to operate with some degree of effectiveness in states with poor human rights records, the main challenge facing them is to determine how to discipline and rein in branches of the state that threaten human rights.

The recent process of democratisation all over the globe has focussed attention on the role of the judiciary in consolidating democratic rule and safeguarding social justice. States in the South have paid particular attention to the role of the judiciary in establishing social justice. For example, the judicial activism of the Indian Supreme Court has spawned a whole new debate on the role of the judiciary in a democracy.[3]

In the modern state, the judiciary serves as a bulwark against the excesses of the executive and the legislature. In common law jurisdictions in particular, the judiciary also has the ability to shape public policy by using concepts such as equity and human rights.[4] The judiciary, if viewed as capable of encouraging social reform, has a crucial role to play in addressing root causes of social and political violence such as poverty and discrimination. Courts must not only prescribe cures for violence, but they should also help prevent violence.

In order to examine the role of the Sri Lankan judiciary, this Article discusses judgments of the Sri Lankan Supreme Court and the Court of Appeal, mainly

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[3]*See* MOOL, CHAND SHARMA, JUSTICE P.N. BHAGWATI COURT, CONSTITUTION AND HUMAN RIGHTS (1995).

[4]*See* MAURO CAPPELLETTI, THE JUDICIAL PROCESS IN COMPARATIVE PERSPECTIVE (1989); SIMON LEE, JUDGING THE JUDGES (1988).

rendered in the latter part of the 1980s in response to petitions challenging state violations of fundamental rights[5] resulting in arbitrary arrests, detentions, involuntary disappearances, and extra-judicial executions, which were rampant during that period. The main thesis presented by this Article is that the Sri Lankan judiciary has shifted from judicial reasoning that initially paid a high degree of deference to the executive, to one where the courts now almost presume executive wrongdoing in cases involving state violence.

Before the onset of gross violations of human rights by the state, the Sri Lankan judiciary relied heavily on the *prima facie* presumption of *omnia presumuntur rite esse acta* (the presumption that acts of public officers are lawful until proven otherwise[6]), and placed a high degree of proof on the complainant. As state-sponsored violence in Sri Lanka escalated, however, the Sri Lankan judiciary altered its approach. The Sri Lankan judiciary now places a higher onus on the executive to prove that it has acted constitutionality, and the judiciary appears to have almost abandoned its use of the *omnia presumuntur* presumption. In doing so, the Sri Lankan higher judiciary has, to a great extent, recognised the imperative of judicial intervention to arrest state-sponsored violence.

Part I of this Article examines the qualitative nature of the violence that has engulfed Sri Lanka since 1971. It briefly traces the history of the institutionalisation of state violence that began when the Sri Lankan government declared emergency rule in 1971 in response to the first JVP insurrection. It then describes the culmination of that process in widespread state-sponsored human rights violations in the latter part of the 1980s. Part II maps out how legislation and emergency regulations facilitated state-sponsored violence. Judicial responses to state violence is examined in Part III. The Article discusses only the jurisprudence of Sri Lanka's two superior courts - the Supreme court and the Court of Appeal - which relates to state violence. The analysis here is limited to the jurisprudence of those two courts because the Sri Lankan Constitution vests the Supreme Court with jurisdiction

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[5]The term "fundamental rights" refers to those human rights that are constitutionally protected. "Human rights" denotes those rights that are recognised by international human rights law.

[6]BLACK'S LAW DICTIONARY 1087 (6th ed. 1990).

over fundamental rights[7] and entrusts the Court of Appeal with writ jurisdiction,[8] including the power to issue writs of *habeas corpus*.[9] The Supreme Court is also the court of final authority in Sri Lanka,[10] and, as such, shapes judicial policy binding on lower courts. Unable to rely on the criminal justice system due to government involvement in these violations,[11] victims of violence have most often relied on the jurisdiction of the Court of Appeal and the Supreme Court to seek redress.

In the Conclusion, the Article discusses possible reasons for the changes in the philosophy of Sri Lanka's highest courts. The Article argues that strong intervention of the judiciary to arrest state violence has helped embolden civil society, and that judicial activism, especially in the field of fundamental rights, can contribute significantly toward consolidating the fragile democratic space created after the 1994 presidential and parliamentary elections.

1. INSTITUTIONALISATION OF STATE VIOLENCE

Since 1971, Sri Lanka has spent more years under emergency rule than not.[12] Sri Lanka's political turmoil began in 1971, when the Marxist movement Janatha Vimukthi Peramuna (JVP) launched an organised, armed insurrection

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[7]SRI LANKA CONSTITUTION (1978) Article 126, section 1.

[8]*Id.* Article 140.

[9]*Id.* Article 141.

[10]*Id.* Article 118.

[11]The government's inaction in investigating alleged violations and prosecuting suspected police or armed forces personnel is well documented, AMNESTY INTERNATIONAL, SRI LANKA: WHEN WILL JUSTICE BE DONE? 6-9 (1994).

[12]*See generally* 21 YEARS OF CRM: AN ANNOTATED LIST OF DOCUMENTS OF THE CIVIL RIGHTS MOVEMENT OF SRI LANKA 1971-1992 (Manel Fonseka & Suriya Wickremasinghe eds., 1993); Suriya Wickremasinghe, *Emergency Rule, in* SRI LANKA: STATE OF HUMAN RIGHTS (1993); Suriya Wickremasinghe, *Emergency Rule, in* SRI LANKA: STATE OF HUMAN RIGHTS (1994); Suriya Wickremasinghe, *Emergency Rule, in* SRI LANKA: STATE OF HUMAN RIGHTS (1995); Suriya Wickremasinghe, *Emergency Rule, in* SRI LANKA; STATE OF HUMAN RIGHTS (1997).

against the Sri lankan government.[13] The coalition United Front government, dominated by the Sri Lankan Freedom Party (SLFP), declared a state of emergency and crushed the insurrection in a few days.[14] Observers reported that the government widely used torture and extra-judicial executions to suppress the insurrection in 1971.[15]

The leaders of the insurrection were jailed pursuant to findings of the Criminal Justice Commission, a tribunal specially constituted to try the rebels.[16] The government continued to consolidate its powers, often through anti-democratic measures using emergency powers and newly enacted legislation.[17] After the government crushed the rebellion, however, the incidence of large scale politically motivated arbitrary arrests and detentions, involuntary disappearances and extra-judicial executions tapered off.

After the election of the United National Party (UNP) into office in 1977, the Sri-Lankan government grew more repressive. The UNP-led government adopted the 1978 Constitution,[18] which introduced for the first time an executive presidential system, concentrating power in the President.[19] With its powers greatly expanded, the executive violently suppressed its suspected opponents. The police and government-backed groups of hoodlums and vigilantes were employed to harass and attack university students, trade

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[13]*See* AMNESTY INTERNATIONAL, REPORT ON A VISIT TO CEYLON, SEPTEMBER 1971 (1972).

[14]*Id.*

[15]*Id.*

[16]*See* CRIMINAL JUSTICE COMMISSION (INSURGENCY), JUDGMENT OF THE CRIMINAL JUSTICE COMMISSION INQUIRY No. 1 (1976).

[17]*See generally* CIVIL RIGHTS MOVEMENT OF SRI LANKA [hereinafter CRM], THE PEOPLE'S RIGHTS 7-97 (1979).

[18]SRI LANKA CONSTITUTION (1978).

[19]Under Article 35(1) of the 1978 Constitution, no suit can be brought against the President, either in his/her professional or personal capacity, while the President holds office.

unionists, journalists,[20] and even Supreme Court justices after they rendered a fundamental rights judgment against the government.[21] The government also started the cynical practice of promoting police officers whom the Supreme Court had found to be responsible for violations of fundamental rights.[22]

Human rights violations dramatically escalated throughout the 1980s, creating an atmosphere of fear among Sri Lankans and drawing international concern.[23] During the 1982 referendum to extend the term of parliament - which the government held in lieu of a parliamentary election - fear had overcome the public due to extensive intimidation and harassment of those perceived to be opposed to the government.[24] Whereas Sri Lanka's previous elections had featured active political debates, opposition during the referendum was muted.[25] Because the government had terrorised trade unions, political parties, and other traditional units of political organisation, the capacity of civil society to organise itself to launch an effective protest

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[20]*See* CRM, DOC. NO. 2/7/80, THE JUNE 5TH PROTEST AND COUNTER PROTEST (1980); CRM, DOC. NO. 5A/10/81, CRM CATALOGUES COMPLAINTS OF THUGGERY (1981); CRM, DOC. NO. 3/4/83, POLICE ASSAULTS (1983).

[21]*See* CRM, Doc. No. 2/6/83, ATTEMPT TO INTIMIDATE THE SUPREME COURT (1993). The attacks on the houses of the justices were sparked by the judgment in the case of *Vivienne Gunawardene I: Hector Perera* [1986] 2 FUNDAMENTAL RIGHTS 426 (*decided in* 1983).

[22]In *Daramitipola Ratanasara Thero* v. *P. Udugampola* [1986] 2 FUNDAMENTAL RIGHTS 364 (*decided in* 1983) (*Pavidi Handa* case), the Supreme Court found that the government had violated the petitioner's freedom of expression. In a move that showed its disregard for the judiciary's decisions, the government promptly responded by promoting Premadasa Udugampola, a police officer who was the main respondent in the case. Udugampola was later accused of massive human rights violations during the government's campaign against the JVP in the south and central provinces. *See* CRM, Doc. No. 2/4/83, PROMOTION OF POLICE OFFICERS WHO VIOLATED FUNDAMENTAL RIGHTS (1983); CRM, Doc. No. 2/6/83, ATTEMPT TO INTIMIDATE THE SUPREME COURT (1983).

[23]*See generally* 21 YEARS OF CRM, *supra note* 12.

[24]*See* CRM, Doc. No. 2/1/83, WAS THE REFERENDUM FREE AND FAIR? (1983).

[25]*Id.*

campaign had weakened.[26]

During the same period, ethnic unrest among the minority Tamil community, concentrated in the north and east of the island, intensified. The Tamil community alleged that successive governments dominated by members of Sri Lanka's ethnic Sinhalese majority had discriminated against them.[27] Eventually, the Liberation Tigers of Tamil Eelam (LTTE) launched a separatist rebellion.[28] As the LTTE's campaign intensified in the early 1980s and spread from the north to the east of Sri Lanka, the government's forces became increasingly violent.[29] Reports identified a pattern of arrests followed by extra-judicial executions and disappearances of detainees.[30]

Between 1987 and 1990, when the Janatha Vimukthi Peramuna (JVP) staged a second insurrection in southern Sri Lanka, the government's human rights violations increased in severity.[31] While the second JVP insurrection took place in the South, the LTTE's separatist campaign continued in the Northeast.[32] Government security forces and para-military squads took action against suspected members of the JVP and the LTTE and even against mainstream political opponents of the government.[33] Incidents of involuntary

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[26]*See generally* CRM, Doc. No. 1/11/89, EROSION OF CIVIL LIBERTIES SINCE 1971 (1989).

[27]VIRGINIA LEARY, ETHNIC CONFLICT AND VIOLENCE IN SRI LANKA 14-18 (1983).

[28]*Id.*

[29]*See generally* AMNESTY INTERNATIONAL, SRI LANKA: 'DISAPPEARANCES' (1986).

[30]*See generally* PAUL SIEGHART, SRI LANKA: A MOUNTING TRAGEDY OF ERRORS (1984); VIRGINIA LEARY, *supra note* 27.

[31]*See generally* BARNETT R. RUBIN, CYCLES OF VIOLENCE: HUMAN RIGHTS IN SRI LANKA SINCE THE INDO-LANKA AGREEMENT (1987); AMNESTY INTERNATIONAL, SRI LANKA: EXTRA-JUDICIAL EXECUTIONS, 'DISAPPEARANCES' AND TORTURE, 1987-1990 (1990) [hereinafter AMNESTY INTERNATIONAL, EXTRA-JUDICIAL EXECUTIONS]; AMNESTY INTERNATIONAL, SRI LANKA BRIEFING (1990).

[32]*See* AMNESTY INTERNATIONAL, SRI LANKA BRIEFING, note 31, at 1-2.

[33]*Id.* at 1-7, 10-12.

disappearances, extra-judicial executions and torture increased dramatically.[34] The U.N. Working Group on Disappearances declared in 1992 that Sri Lanka, with approximately 12,000 documented involuntary disappearances, had the highest number of recorded involuntary disappearances in the world.[35] Human rights organisations estimated that between 40,000 and 60,000 persons had been involuntarily disappeared or extra-judicially executed since 1983.[36] The government arbitrarily detained thousands in military detention camps.[37] Government forces and "death squads" sponsored by the ruling United National Party are widely believed to be responsible for the thousands of extra-judicial executions.[38]

Although the violence gradually abated in the South after the government defeated the JVP between 1989 and 1990, the atmosphere of fear remained pervasive. In university classrooms, for instance, students refused to comment on issues even remotely connected with politics.[39] Academics would not make even innocuous public statements and deferred to state authority.[40] Similar effects occurred throughout society.[41]

Given this atmosphere of fear, the vibrancy of the parliamentary and presidential election campaigns of 1994 was remarkable. In an important

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[34]*See* AMNESTY INTERNATIONAL, SRI LANKA; EXTRA-JUDICIAL EXECUTIONS, *supra* note 31, at 1.

[35]*Report of the United Nations Working Group on Enforced or Involuntary Disappearances*, U.N. Commission on Human Rights at 38, U.N. Doc. E/CN.4/1992/18/Add.1 (1992).

[36]PATRICIA HYNDMAN, HUMAN RIGHTS ACCOUNTABILITY IN SRI LANKA 6 (1992).

[37]*Id.* at 28.

[38]AMNESTY INTERNATIONAL, SRI LANKA: WHEN WILL JUSTICE BE DONE?, *supra* note 11, at 7.

[39]This statement is based on author's observations as a faculty member of the University of Colombo from 1991 onward.

[40]*Id.*

[41]*See*, e.g., ARTICLE 19 INTERNATIONAL CENTRE AGAINST CENSORSHIP, INFORMATION FREEDOM AND CENSORSHIP WORLD REPORT 1991, 223-30 (1991) for description of attacks on those who dared to engage in free expression.

accomplishment, the new People's Alliance (PA) government has significantly dissipated the atmosphere of fear that pervaded Sri Lanka from the 1980s.[42] Although human rights concerns in the war-ravaged Northeast and those relating to arbitrary arrests of Tamils in the South still remain significant today,[43] a greater space has been created for democratic activity. In particular, the space for open discussion and debate on political issues, including harsh criticism of the government and government political figures by the mass media, has vastly increased. The fear of state-sponsored physical reprisals for such activities has decreased to a considerable extent.

II. A REGIME OF LEGALLY SANCTIONED VIOLENCE

Often, governments subvert the legal system in order to unleash violence on the populace and terrorise them. In Sri Lanka during the late 1980s, however, as in many other national security states, the legal system facilitated most forms of violence. This Part illustrates how legislation enacted by Parliament, as well as emergency regulations promulgated by the President paved the way for arbitrary arrests and detentions, torture, involuntary disappearances and extra-judicial executions.

A. Legislation

The Sri Lankan Constitution of 1978 prevented the courts from playing an active role in striking down legislation that promoted violence and repression during the 1980s. Article 80 of the Constitution does not permit legal challenges to the constitutionality of laws after they are enacted by Parliament.[44] The constitutionality of a draft law can be challenged, but only within a week after a draft law is placed on the official agenda of the Parliament.[45] The public often has no knowledge of or access to draft laws

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[42]This insight is based on the author's observations as a human rights activist.

[43]*See generally* AMNESTY INTERNATIONAL, SRI LANKA: HUMAN RIGHTS SITUATION AT A CRITICAL JUNCTURE (1996); AMNESTY INTERNATIONAL, SRI LANKA: WAVERING COMMITMENT TO HUMAN RIGHTS (1996).

[44]SRI LANKA CONSTITUTION (1978) Article 80, section 3.

[45]*Id.* Article 121, section 1.

to challenge them within that short period.[46]

1. The Prevention of Terrorism Act

Since 1979, the Sri Lankan government has used the Prevention of Terrorism Act (PTA) to stifle dissent and to violate individual rights. The Parliament enacted the PTA in 1979 to provide temporarily for the prevention of terrorism and unlawful activities.[47] However, this law was made permanent in 1982, and continues to operate.[48] The PTA gives extensive powers to the authorities and seriously erodes constitutional guarantees of fundamental rights.

Sections 6 and 9 of the PTA in particular, greatly expand the state's powers of arrest and detention. Section 9 empowers the Minister to order the detention of a person for up to eighteen months without judicial supervision, where the Minister "has reason to believe or suspect that any person is connected with or concerned in any unlawful activity."[49] Such an order is final and conclusive and cannot be questioned in any court or tribunal.[50] Also, Section 6 permits the police to arrest, search a person or premises and to seize any document or item without a warrant,[51] and allows the police to detain a person for three days without judicial supervision if there is a reasonable suspicion that the person is connected with any unlawful activity.[52]

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[46]*See, example,* CRM, Doc. No. 2/7/79, NON-AVAILABILITY OF BILL FOR THE PREVENTION OF TERRORISM (TEMPORARY PROVISIONS).

[47]Prevention of Terrorism Act (Preamble), No. 48 (1979) (Sri Lanka) [hereinafter PTA].

[48]PTA, No. 10 (amended 1982).

[49]*Id.*, section 9.

[50]*Id.*, section 10. However, the courts have held that they do have jurisdiction over detention cases when state authorities have issued a detention order outside the permissible limits of the law. *See infra* Part III.B.1.b, dealing with cases overruling detention orders.

[51]*Id.*, section 6

[52]*Id.*

The provisions on detention contained in Sections 6 and 9 differ significantly from Sri Lanka's general criminal procedure laws on detention. Sri Lankan criminal law normally requires that the arresting authority produce the suspects before a judicial officer within twenty-four hours of their arrests.[53] Thereafter, the judicial officer is the only party empowered to detain suspects further in an official place of detention.[54] Removing suspects from the custody of the arresting authority as early as possible prevents the authorities from abusing detainees. By eliminating early judicial supervision of detention, both provisions enable the security forces to torture and otherwise violate detainees' rights. Further, under Section 9, the authorities may detain a suspect "in such place and subject to such conditions as may be determined by the Minister," thus allowing a great degree of executive discretion.[55]

Under general criminal law, confessions made to a police officer are not admissible because of the possibility that torture may be used to extract an admission of guilt.[56] Section 16 of the PTA, in contrast, provides that a confession made to a police officer above the rank of Assistant Superintendent of Police is admissible as evidence.[57] To challenge the confession, it is the suspect who bears the burden of proving that the confession was made under duress.[58]

The Constitutional ban on judicial review of legislation made it impossible for Sri Lankans to challenge the PTA through the judicial system after its enactment.[59] The relevant authorities did not make the draft of the PTA available for public comment before enactment so that its constitutionality

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[53]Code of Criminal Procedure Act, No. 15, sections 37, 115 (1979) (Sri Lanka).

[54]*Id.*

[55]PTA, section 9(I).

[56]Evidence Ordinance (Cap. 21), sections 24-26 (1979) (Sri Lanka).

[57]PTA, section 16.

[58]PTA, section 16(1)-(2).

[59]*See supra* Part III.A.

could be challenged.[60] For this very reason, the Civil Rights Movement of Sri Lanka (CRM), a leading human rights organisation, complained to the Minister of Justice about the unavailability of the draft Prevention of Terrorism Act,[61] and has since along with other civil libertarians, continued to call for its repeal.[62] Amnesty International has consistently advocated the removal, at a minimum, of those provisions which pave the way for arbitrary arrest, prolonged detention, and torture.[63] Despite the protests of Amnesty International, CRM, and other civil libertarians, many Sri Lankans did not question the law initially when it was enacted because they believed that it applied only to Tamil Separatists.[64] After the government used the PTA against its political opponents in the predominately Sinhalese south, however, public opposition to the law increased.[65]

2. The Indemnity Laws

Legally authorised impunity has significantly perpetuated human rights violations in Sri Lanka. The Indemnity Act No. 20 of 1982, as amended by Act No. 60 of 1988, exempts members of the security forces and other public officials from prosecution or civil suit for acts committed in good faith between 1 August 1977 and 16 December 1988.[66] Section 26 of the PTA also exempts state officials and others from prosecution for acts they

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[60]*See* CRM, Doc. No. 2/7/79, NON-AVAILABILITY OF BILL FOR THE PREVENTION OF TERRORISM ACT (TEMPORARY PROVISIONS) (1979).

[61]*Id.*

[62]*See, example,* CRM, Doc. No. 4/12/79, THE LIFTING OF THE EMERGENCY (1979); CRM, Doc. No. 1/4/81, LETTER TO PRESIDENT JAYEWARDENE (1981); CRM, Doc. No. 1/1/86, RECENT ARRESTS IN THE SOUTH (1986).

[63]AMNESTY INTERNATIONAL, SRI LANKA; 'DISAPPEARANCES,' *supra note* 29, AT 63; AMNESTY INTERNATIONAL, AN ASSESSMENT OF THE HUMAN RIGHTS SITUATION 6 (1993).

[64]This information is based on the author's personal observations as a Sri Lankan human rights activist.

[65]*Id.*

[66]Indemnity Act No. 20 section 2 (1982); Indemnity Act No. 60 sections 1-4 (1988).

committed in good faith pursuant to the PTA.[67]

B. Emergency Regulations

As noted above in Part I, since 1971, Sri Lanka has been under emergency rule for longer than it has been under democratic rule. The Public Security Ordinance (PSO) No. 25 of 1947, as amended, gives the President the power to declare a state of emergency in the interest of public security and the preservation of public order.[68] The President may also declare a state of emergency to maintain supplies and services "essential to the life of the community."[69] The Supreme Court held in 1980 that courts cannot question the President's grounds for declaring a state of emergency.[70] The only requirement that limits presidential discretion is Article 155 of the Constitution, which specifies that Parliament must provide its approval before the President can extend a proclamation of emergency beyond fourteen days.[71]

Section 5 of the PSO allows the President, after declaring a state of emergency, to promulgate emergency regulations (ERs) in the interest of public security, to preserve public order, to suppress mutiny, riot, or civil commotion, or to maintain essential services and supplies.[72] ERs may override existing law, but they cannot override the Construction.[73] The ERs have operated as the law of the land during Sri Lanka's prolonged periods of emergency rule since 1971 to the present, and have given rise to repeated

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[67]PTA, section 26.

[68]Public Security Ordinance [hereinafter PSO], section 2.

[69]*Id.*

[70]*Yasapala* v. *Wickremasinghe and Others* [1984] 1 FUNDAMENTAL RIGHTS 143, 154-56 (*decided in* 1980).

[71]SRI LANKA CONSTITUTION (1978) Article 155, section 6.

[72]PSO, section 5.

[73]*Id.* Article 155, section 2.

demands on successive governments to remove ERs that are unduly harsh.[74]

The public has limited information about the prohibitions contained in the ERs because they are not easily accessible. The government does not publish an index to the ERs nor a separate compilation of ERs.[75] To find the individual ERs, one has to wade through innumerable Gazettes - the official government journals in which all government notices are published[76] - and sometimes the Gazettes themselves are not readily available.[77]

1. Powers of Arrest and Detention

Throughout the years, the ERs that caused serious human rights violations have been those which provided wide powers of arrest and detention to members of the armed forces and police without sufficient safeguards to protect the interests of detainees. Those ERs paved the way for torture and involuntary disappearances and even extra-judicial executions due to the absence of provisions requiring accountability and judicial protection of the detainees.

Sri Lankan forces widely used emergency powers that permit preventive detention (generally referred to as Regulation 17 powers). Regulation 17 authorises a public official, generally the Secretary of Defence, to detain a person in order to *prevent* a person from engaging in acts inimical to national security *in the future*.[78] The Secretary must be satisfied that detention is necessary to prevent the suspect from "acting in a manner prejudicial to

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[74]*See* CENTRE FOR THE STUDY OF HUMAN RIGHTS, UNIVERSITY OF COLOMBO (IN ASSOCIATION WITH NADESAN CENTRE), REVIEW OF EMERGENCY REGULATIONS (1993). This report highlighted what are considered to be unduly harsh ERs that were in operation in 1993.

[75]*Id.*

[76]*Id.*

[77]*Id.*

[78]*See, example,* Emergency (Miscellaneous Provisions and Powers) Regulation No. 17, GAZETTE No. 563/7 (20 June 1989) [hereinafter ER] (emphasis added). This ER also provided for the restriction of movement of a suspect (akin to the practice of "banning" in South Africa). Previous ERs also contained similar or identical provisions.

national security or in contravention of emergency regulations."[79] Regulation 17 also, until recently, permitted the state to detain persons indefinitely and did not require a judicial officer to review the detention. It provided that an order made by the Secretary of Defence for preventive detention cannot be challenged before a court of *law on any ground whatsoever.*[80]

In addition to Regulation 17, Regulation 18 of the ERs confers wide powers of arrest, search and seizure on the police and the armed forces. Under Regulation 18, authorised personnel may detain a suspect if s/he reasonably suspects that someone has committed or is committing an offence in violation of the ERs.[81] Regulation 18 does not require state officials to issue detention orders.[82] Such suspects, generally termed "Regulation 18 detainees," may be detained in police custody, without judicial supervision, for prolonged periods.[83] There has been widespread concern that secret places of detention were maintained by the authorities.[84]

During the 1980s, the authorities used their emergency powers of detention in conjunction with the powers conferred on them by the PTA,[85] and enabled

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[79]*Id.*

[80]*Id.* Under new ERs promulgated in November 1994, a number of those unsavoury features have been removed, ER No. 17, GAZETTE No. 843/12 (4 Nov. 1994). Although the Secretary cannot order preventive detention beyond one year (the detainee has to be produced before a magistrate if it is necessary to extend detention beyond that point), many civil libertarians are of the opinion that one year of preventive detention without early judicial intervention is unreasonable. The Supreme Court addressed this issue in a 1997 decision. *See infra* text accompanying notes 146-153.

[81]*See, example,* ER No. 18, GAZETTE No. 563/7 (20 June 1989).

[82]*Id.*

[83]For example, ER No. 19, GAZETTE No. 563/7 (20 June 1989), provided that a suspect arrested on reasonable suspicion of violating ERs, could be kept in police custody for up to 30 days after arrest without any judicial supervision.

[84]*See* AMNESTY INTERNATIONAL, SRI LANKA: AN ASSESSMENT OF THE HUMAN RIGHTS SITUATION 6-7 (1993). *See also* CRM, Doc. No. 1/11/92, PREVENTION OF "DISAPPEARANCES" AND THE WORK OF THE HUMAN RIGHTS TASK FORCE (1992).

[85]*See, example,* facts in *Susila de Silva* v. *Weerasinghe* [1987] 1 Sri Lanka Law Reports [hereinafter Sri L.R.] 88 (*decided in* 1986).

detaining authorities to shield themselves from judicial scrutiny. As a result, large-scale arbitrary arrests and incommunicado detention became widespread.[86] Because the authorities were not held accountable when they detained suspects, they carried out disappearances and extra-judicial executions, described respectively as "lifting" and "bumping off" in local parlance, with impunity.[87] Moreover, relatives of detainees had few opportunities to obtain information about their loved ones. Typically, the security forces abducted suspects in unmarked vehicles.[88] The authorities generally denied the arrests, and most relatives never received detention orders.[89] If relatives learned where a family member was detained, and if the authorities acknowledged the detention, relatives could then take them food and clothing, but often were not permitted visiting rights.[90] If the articles were accepted, family members could assume that their relative was alive. Refusal to accept the items, however, was an ominous sign.[91]

2. Tampering with Inquest Procedures

Normally, Sri Lankan law requires an inquest in cases of suspicious death.[92] ERs operative in the 1980s, however, seriously restricted or removed this requirement where members of the armed forces or the police were involved in killings.[93] These ERs also permitted the authorities to dispose of corpses

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[86]AMNESTY INTERNATIONAL, SRI LANKA: AN ASSESSMENT OF THE HUMAN RIGHTS SITUATION 12-13, 17-20 (1993).

[87]*See generally* AMNESTY INTERNATIONAL, SRI LANKA: EXTRA-JUDICIAL EXECUTIONS, *supra* note 31.

[88]Id. at 15-19, 32-39.

[89]*Id.*

[90]*Id.* at 34-35.

[91]AMNESTY INTERNATIONAL, SRI LANKA BRIEFING 10 (1990).

[92]Code of Criminal Procedure Act, No. 15, Chapter XXX (1979) (Sri Lanka).

[93]*See, example*, ERs Nos. 55 A-F, GAZETTE No. 563/7 (20 June 1989).

without returning them to the deceased person's relatives.[94]

3. Censoring Political Opposition

Under the guise of protecting national security or preserving public order, successive Sri Lankan governments have suppressed legitimate political opposition. By adopting ERs, the executive created offences such as causing disaffection against the government, inciting sedition, and spreading rumours or false statements likely to cause public alarm or a breach of public order.[95]

The indictment of Paul Nallanayagam, the president of the Citizen's Committee of Kalmunai, a grassroots human rights organisation, for sedition and spreading rumours in violation of the ERs shows how the state used the ERs to stifle dissent.[96] Nallanayagam was arrested because he had made statements regarding the alleged participation of government forces in the destruction of two Tamil villages and the killing of twenty-three youth from the village of Naipattimunai.[97] The misuse of ERs, coupled with the existence of ERs permitting wide powers of arrest and detention, instilled fear in Sri Lankan citizens and chilled the exercise of legitimate democratic rights.

4. Altering Rules of Evidence and Procedure

The ERs deemed confessions made to a police officer admissible into

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[94]*Id.* Under current ERs promulgated on 4 November 1994, there are fewer restrictions on the inquest procedure. ER No. 17, GAZETTE No. 843/2 (4 November 1994). However, the police still have the power to dispose of dead bodies in the interest of national security or for the preservation of public order. ER No. 45, GAZETTE No. 843/12 (4 November 1994). It is incomprehensible why normal inquest procedures - as demanded by civil libertarians and the public - cannot apply in these cases.

[95]*See* ERs Nos. 25, 26 and 29, Gazette No. 563/7 (20 June 1989). Similar or identical provisions existed in previous ERs.

[96]*See The Democratic Socialist Republic of Sri Lanka* v. *Paul Nallanayagam*, High Court of Colombo No. 1717/85, 1-3 (*decided in* 1986).

[97]After a lengthy two-month trial publicised internationally, the High Court of Colombo acquitted him of all charges, observing that public-spirited citizens like Nallanayagam "sometimes are a source of embarrassment to the authorities." *See id.*, at 80. The provincial High Courts of Sri Lanka have original jurisdiction over felonies. Jurisdiction over alleged violations of ERs is conferred on the High Courts. Appeals from the High Courts go to the Court of Appeal and then to the Supreme Court.

evidence, contrary to the fundamental tenets of evidence under normal Sri Lankan law.[98] The detainee had the burden of proof to challenge a confession on the basis of duress.[99] Detainees faced significant difficulties in discharging such a burden. Detainees typically do not have adequate legal representation or adequate access to medical personnel during detention. Since ERs restrict the availability of bail to detainees, this difficulty was compounded because suspects generally remained in detention during their trials.[100] Further, the standard procedure relating to police investigations with its attendant safeguards such as requiring search warrants, producing a suspect within twenty-four hours before a judicial officer, and requiring a suspect's consent in obtaining fingerprints or other body specimens,[101] did not apply in cases of investigations under ERs.[102]

III. JUDICIAL RESPONSES

This Part examines the revolution of the responses of the Supreme Court and the Court of Appeal to complaints of state violence. After providing a brief overview of the operative constitutional provisions relating to the independence of the judiciary, the discussion mainly focuses on the jurisprudence of the Supreme Court and the Court of Appeal since the latter half of the 1980s, when violence in Sri Lanka escalated. Before 1978, Sri Lankans had few opportunities to challenge human rights violations by the state. However, after the Sri Lankan Constitution of 1978 introduced justiciable fundamental rights, Sri Lankans could vindicate fundamental rights by petitioning the Supreme Court.[103] Ironically, the escalation of state

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[98]*See, example*, ER No. 60, GAZETTE No. 563/7 (20 June 1989). Confessions were admissible under previous ERs as well.

[99]*Id.*

[100]*See, example*, ER No. 64, GAZETTE No. 563/7 (20 June 1989).

[101]*See* Code of Criminal Procedure Act, No. 15, Chapter XI (1979) (Sri Lanka) for a list of safeguards.

[102]*See. example*, ER No. 61, GAZETTE No. 563/7 (20 June 1989).

[103]Article 126 of the 1978 Constitution vests the Supreme Court with sole and exclusive jurisdiction to adjudicate questions relating to the infringement or imminent infringement of guaranteed fundamental rights by executive or administrative action. SRI LANKA CONSTITUTION (1978). Article 126.

violations of fundamental rights in Sri Lanka ran parallel to the strengthening of constitutional protection of fundamental rights.

A. Constitutional Provisions Governing the Judiciary

Under the current Constitution, members of the Supreme Court and the Court of Appeal are appointed by the President and "hold office during good behaviour."[104] The Supreme Court is the highest court in the land, having constitutional, fundamental rights, and final appellate jurisdiction.[105] The Court of Appeal possesses primary appellate jurisdiction and writ jurisdiction, including the power to grant writs of *habeas corpus*.[106]

Under the Constitution, the President appoints members of the Supreme Court and the Court of Appeal.[107] The President can remove the judges of these courts only on proven grounds of misbehaviour or incapacity and after a majority of the parliament has supported a resolution for removal.[108] Parliament determines judges' salaries and charges salaries to a protected fund.[109] Judges' salaries cannot be reduced during their term of office.[110] By contrast, members of the lower judiciary are appointed, and can be disciplined and removed by the Judicial Service Commission.[111]

Despite constitutional guarantees, there have been many attempts at undermining judicial independence since the 1970s. The government of President J.R. Jayawardane, in particular, seriously threatened the independence of the judiciary in the 1980s. During that period, judges of the

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[104] *Id.* Article 107, section 1.

[105] *Id.* Articles 118-131.

[106] *Id.* Articles 137-144.

[107] *Id.* Articles 107, sections 1-2.

[108] *Id.* Articles 107, sections 2-3.

[109] *Id.* Article 108, section 1.

[110] *Id.*

[111] *Id.* Articles 111, 112, 114.

superior courts were once locked out of their chambers,[112] homes of several Supreme Court judges were attacked after a fundamental rights judgment found against the government,[113] and the Chief Justice was almost impeached for referring to matters of public interest in a public speech.[114]

In spite of these attempts to restrain the judiciary, however, Sri Lanka's higher courts, or at least some Justices of these courts, appear to have become relatively more independent during the last decade. This factor is especially reflected in the progressively bold judgments delivered by the Supreme Court in fundamental rights case that challenged state violence. Moreover, after a period of inaction, the Court of Appeal also began to respond strongly in favour of individual liberties in *habeas corpus* applications.[115]

B. Forms of Judicial Relief

To challenge the state violence of the 1980s described in Part I, above, Sri Lankans primarily involved the fundamental rights jurisdiction vested in the Supreme Court and the writ jurisdiction vested in the Court of Appeal.[116]

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[112]The judges were locked out of their chambers in 1983 on the basis that they had not taken an oath under the Sixth Amendment to the 1978 Constitution. *See* CRM, 21 YEARS OF CRM, supra note 12, at 46.

[113]*See supra* note 21.

[114]*See* CRM, Doc. No. 1/4/84, PROPOSED ACTION ON CHIEF JUSTICE'S SPEECH UNCONSTITUTIONAL (1984).

[115]It must be emphasised, however, that the highest judiciary in Sri Lanka continues to display a reluctance to challenge larger political questions. *See generally* MARIO GOMEZ, IN THE PUBLIC INTEREST (1993).

[116]According to unpublished statistics provided to the author by the Registrar of the Supreme Court, the following number of Fundamental Rights cases were filed before the Supreme Court between 1989 and 1994:

1989 - 49
1990 - 79
1991 - 192
1992 - 1,012
1993 - 486
1994 - 213

But see special petitions discussed *infra* Part III of this Article - "Liberalising Procedure."

Plaintiffs minimally resorted to criminal charges against state officers who committed abuses during that period due to the public's perception that the Attorney General's Department lacked independence and also because the police were left to investigate themselves.[117]

Furthermore, many victims could not gain access to the courts because of a lack of resources or awareness about their rights and legal procedures.[118] The location of the Supreme Court and the Court of Appeal in the capital Colombo made physical access to the courts difficult. The difficulty of obtaining legal counsel may also have discouraged potential plaintiffs[119] - a difficulty compounded when, between 1987 and 1990, a number of lawyers representing families of the disappeared were killed.[120]

1. Fundamental Rights Jurisdiction

Since 1978, the judiciary has struggled to balance constitutionally recognised rights with the many limitations permitted by the Sri Lankan Constitution. While the right to life is not guaranteed, Chapter III does guarantee, *inter alia*, freedom from torture or cruel, inhuman, degrading treatment or punishment;[121] freedom from arbitrary arrest and detention and the right to be produced before a judicial authority within twenty-four hours of arrest;[122]

Between 1987 and 19 June 1995, the Court of Appeal received 2,927 applications for writs of *habeas corpus*, according to unpublished statistics provided to the author by the Registrar of the Court of Appeal (on file with author).

[117]*See* AMNESTY INTERNATIONAL, SRI LANKA; WHEN WILL JUSTICE BE DONE? 7 (1994); AMNESTY INTERNATIONAL, SRI LANKA: SUMMARY OF HUMAN RIGHTS CONCERNS 6 (1994); CRM, Docs. Nos. 1/6/91 & 1A/6/91, IMPUNITY AND THE KOKKADDICHOLAI TRAGEDY (1991), CRM, Doc. No. 1/8/92, RECENT VIOLENCE - A GRAVE THREAT TO THE DEMOCRATIC PROCESS (1992). *See* CRM, Doc. No. 1/9/90, THE NEXT STEP IN THE RICHARD DE ZOYSA CASE (1990).

[118]AMNESTY INTERNATIONAL, SRI LANKA: 'DISAPPEARANCES' 55-56 (1986).

[119]*Id.*

[120]*See* AMNESTY INTERNATIONAL, SRI LANKA: EXTRA-JUDICIAL EXECUTIONS 26-28 (1990).

[121]SRI LANKA CONSTITUTION (1978) Article 11.

[122]*Id.* Article 13.

and freedom of expression, association and peaceful assembly.[123]

Chapter III limits the scope of those fundamental rights, by subjecting them - with the exception of freedom of conscience and religion, and freedom from torture - to limitations prescribed by law,[124] in "the interests of," *inter alia*, national security, public order and the protection of public health or morality, or for securing due recognition and respect for the rights and freedoms of others, or of meeting the just requirements of the general welfare of a democratic society.[125] Given the breadth of these limitations, Chapter III can be described more accurately as a bill of limitations than as a bill of rights. In addition, ERs can limit the fundamental rights guaranteed by the Sri Lankan Constitution.[126] The following section examines how the Supreme Court has interpreted Chapter III in adjudicating complaints brought by victims of violence.

a. Checking the Omnipotent Executive

Until recently, the judiciary paid a great degree of deference to the executive in fundamental rights cases. The judiciary displayed its greatest deference during emergency rule, even though the threat to individual liberties were greatest during such periods. In its opinions, the judiciary consistently pointed to the need to give the executive sufficient powers and flexibility to make quick decisions and act expeditiously in times of national crisis. Those considerations were given priority over the necessity to exercise caution to protect individual liberties seriously harmed by the use of extensive executive powers. Accordingly, the Supreme Court held in 1980 that it could not question the President's decision to declare a state of emergency or promulgate ERs in the absence of bad faith.[127]

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[123]*Id.* Article 14.

[124]*Id.* Article 15.

[125]*Id.* Article 15.

[126]*Id.* at section 7.

[127]*See Yasapala* v. *Wickremasinghe and Others, supra* note 70, at 154-56, per Sharvananda J. The Court held that:

> [T]he existence of a State of Emergency is not a justiciable matter which the Court

Previously, the Supreme Court had held that, though the holding troubled the Court's conscience, the validity of a detention order made under an ER could not be questioned because of Section 8 of the Public Security Ordinance, which specifically prohibits courts from examining the validity of ERs and orders made under them.[128] In a 1983 decision, however, the Court held that the judiciary could question ERs and orders made under them on grounds of bad faith or unreasonableness and that Section 8 did not prevent such judicial review.[129] The Court, however, continued to apply the *prima facie* presumption that officials acted properly (*omnia presumuntur rite esse acta*), and consequently, required the injured party to prove bad faith or unreasonableness on the part of the officials.[130]

Although the Supreme Court recognised judicial review of ERs and orders made under them, it still gave the executive wide discretion to use emergency powers.[131] While recognising that fundamental rights may have been seriously circumscribed by the use of emergency powers, the Court declared that it should not question how the authorities evaluate facts in the absence of bad faith or unreasonableness. Hence, despite increasing institutionalisation of state violence and abuse of authority over the years, the Supreme Court viewed state action with conventional solicitude. Against this backdrop of increasing violence, the Court, or at least some justices, displayed an amazing degree of implicit faith in the authorities.[132]

> could be called upon to determine by applying an objective test .... The President is not bound as a matter of law to disclose reasons for the Proclamation. ... [and] [t]he President is made the sole judge of the necessity of the Regulations ... [i]t is not the objective fact but the subjective opinion of the President that it is necessary or expedient to pass a regulation that is a condition of the regulation-making power. In the absence of bad faith or ulterior motive, the jurisdiction of the Court is excluded.

[128]*Gunasekera* v. *Ratnavale* [1972] 76 New Law Reports 316, 317 per Alles J.

[129]*See Janatha Finance and Investments* v. *Liyanage and Others* [1983] 2 FUNDAMENTAL RIGHTS 373; *Siriwardene* v. *Liyanage and Others* [1983] 2 FUNDAMENTAL RIGHTS 310 (*decided in* 1983).

[130]*Id. See also Hirdaramani* v. *Ratnavale* [1971] 75 N.L.R. 67, 68 (decided in 1971).

[131]*Id.*

[132]"The solicitude of the Courts for the liberty of the subject during an Emergency rule need no longer be overstretched particularly in present day Sri Lanka wherein sits a Government with overwhelming genuine popular support after an honest referendum and a

b. Positive Trends

However, there have appeared some significant silver linings. While in the early eighties, these progressive developments came in sporadic spurts of inspiration, beginning in the late 1980s a pattern of bold decisions began to emerge, pointing to a greater degree of judicial maturity and sensitivity. This section provides a brief overview of those positive developments.

i. Checking the Use of Emergency Powers

One of the earliest signs of the judiciary's new thinking became evident when it invalidated an ER in the 1987 case *Joseph Perera* v. *Attorney General*,[133] signifying a judicial invalidation of an ER for the first time in the legal history of Sri Lanka. This case involved a constitutional challenge to an ER that prohibited the distribution of *any* poster, handbill or leaflet without police permission, regardless of its impact on national security or preservation of public order.[134] The Court held that the limitations imposed by the ER were overbroad, and thus violated the freedom of expression[135] and equality[136] clauses of the Constitution. Also, the Court held, *inter alia*, that the President did not possess unfettered powers to make ERs and that s/he could not

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clean plebiscite." *Siriwardane* v. *Liyanage and Others*, *supra* note 129, at 346 (Rodrigo J.). This case was decided in January 1983, after the presidential election and the controversial referendum to extend the term of parliament were held in 1982. It is widely believed that the referendum, in particular, was heavily rigged by the incumbent government.

Yet again in *Yapa* v. *Bandaranayake*, Justice L.H. de Alwis of the Supreme Court, referring to a complaint made by a minister against the petitioner, who as a consequence was arrested by the police and held in detention under emergency orders for 109 days without being produced before a magistrate, stated, "[i]t is true that Mr. de Mel was not a witness to the incident and had not divulged the source of his information. But *Mr. de Mel is the Minister of Finance and it is inconceivable that as a responsible Cabinet Minister he would have made a frivolous complaint on the telephone to the 2nd respondent.*" *Yapa* v. *Bandaranayake* [1988] 1 Sri L.R. 63, at 68 (*decided in* 1987) (L.H. de Alwis J.) (emphasis added).

[133]*Joseph Perera* v. *Attorney-General* [1992] 1 Sri L.R. 199, 202-02 (*decided in* 1987).

[134]*Id.* at 227.

[135]SRI LANKA CONSTITUTION (1978) Article 14, section 1(a).

[136]*Id.* Article 12.

promulgate ERs that were unconstitutional.[137] Chief Justice Sharvananda noted that the unbridled powers that the ER conferred on the executive are "the antithesis of equality before law" because they would permit the arbitrary and capricious exercise of power.[138] Justice Sharvananda held that limitations on fundamental rights must bear a reasonable nexus to the state's objective in order to be constitutional.[139]

Except for lack of good faith, preventive detention orders issued by the Secretary of Defence were generally not scrutinised by courts even though indefinite detention was possible under such orders. The reasoning was that the Secretary could make an order on a subjective opinion under emergency powers.[140]

Beginning in the late 1980s, however, the courts reversed their position and began scrutinising preventive detention orders.[141] Courts now require the Secretary of Defence to disclose the factual basis for all detention orders.[142] The courts now use a reasonableness rest to determine the legality of the Secretary's decision.[143] This approach reflects an increase in concern for individual liberties and a dilution of the *omnia presumuntur* presumption under which the courts had deferred to public officials. In fact, the Supreme Court has repeatedly censured the Secretary of Defence for approving detention orders mechanically without carefully studying the merits of each case.[144] Nonetheless, the Supreme Court has repeatedly refused to declare preventive

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[137]*Id.*

[138]*See Joseph Perera* v. *Attorney-General*, *supra* note 133 at 215-17, 230.

[139]*Id.* at 215-17.

[140]*Hirdaramani* v. *Ratnavale*, *supra* note 130 at 68.

[141]*See, example*, *Wickramabandu* v. *Herath and Others* [1990] 2 Sri Lanka L. Rep. 348 (decided in 1990).

[142]*Id.*

[143]*Id.*

[144]*See, example*, *Vidyamani* v. *Lt. Col. Jayatilleke and Others* [1993] 2 Sri Lanka L. Rep. 64, 69 (*decided in* 1992); *Sasanasirithissa Thero* v. *Silva and Others* [1989] 2 Sri L.R. 356, 358.

detention unconstitutional, opting instead to create a regulatory framework to minimise abuse of individual liberties by preventive detention.[145]

Judicial vigilance over state violence has continued even after the change in the government in 1994, which heralded a great space for democratic activity and a decline in the number of arbitrary arrests and detentions, disappearances, and extra-judicial executions. In *Rodrigo* v. *Secretary of Defence*, which was decided in August 1997,[146] the Supreme Court declared that the legal protections granted to arrested persons under normal Sri Lankan law also apply to persons held in preventive detention under the ERs.[147] In that case, the authorities had not informed the suspect of the reason for his arrest at the time of arrest,[148] claiming days afterward that the suspect had plotted to assassinate the President, and offering other dubious justifications for the arrest and detention.[149] The suspect was also not brought before a judicial officer within twenty-four hours of the arrest as required by normal law. Although, on its face, ER 17 requires the production of a detainee under preventive detention before a judicial officer only if the detention is to be prolonged beyond a year,[150] the court applied normal Sri Lankan criminal procedure law, and ruled that the authorities should have brought the petitioner before a judicial officer within twenty-four hours of the arrest.[151] Finding the arrest and detention unconstitutional,[152] the Court ordered the

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[145]*See Wickramabandu* v. *Herath*, *supra* note 141; *Kumaranatunga* v. *Samarasinghe* [1983] 2 Fundamental Rights 347. The Supreme Court also held in *Somasiri* v. *Jayasena* [1991] S/C Application 147/88 at 6, decided on March 1, 1991, that the Minister of Defence does not have unlimited discretion to issue a detention order under Section 9 of the PTA. Instead, the Court held that the authorities must have an objective and rational basis for detaining a suspect.

[146]*Rodrigo* v. *Secretary of Defence*, S/C Application No. 478/97 (*decided in* 1997).

[147]*Id.* at 42-47.

[148]*Id.* at 39.

[149]*Id.*

[150]*See* ER No. 17, GAZETTE No. 843/2 (4 November 1994).

[151]*Rodrigo* v. *Secretary of Defence*, *supra* note 146.

[152]*Id.* at 48.

state to pay unprecedented compensation to the petitioner.[153]

It is of interest to note that the petition was brought on behalf of a senior cabinet minister in the previous government of President Premadasa, a government that had brutally crushed the second JVP insurrection and escalated political violence in the late 1980s.[154] The judgment strongly illustrates the Supreme Court's determination to continue to monitor abusive and violent practices of the executive regardless of the parties involved, and to develop judicial doctrine on individual liberties accordingly.[155]

ii. Scope of Rights

In addition to checking the use of the government's emergency powers, since the late 1980s, the Sri Lankan judiciary has significantly expanded the scope of substantive rights. The Supreme Court has recognised that torture includes mental torture[156] and that freedom of expression includes the right to information,[157] circulation of information,[158] the use of any medium of expression of one's choice,[159] and political dissent.[160] These developments are remarkable given the early conservatism of the court.

iii. Liberalising Procedure

The most innovate and effective judicial response to state-sponsored human

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[153]*Id.*

[154]*See supra* text accompanying notes 31-41.

[155]*See Senaratne* v. *Punya de Silva* [1995] 1 Sri L. Rep. 272 (*decided in* 1995), in which the Supreme Court found that the petitioner, an opposition politician, had been arrested without sufficient grounds and in violation of the constitutional guarantee of freedom from arbitrary arrest.

[156]*See W.M.K. Silva* v. *Ceylon Fertilizer Corporation* [1989] 2 Sri L. Rep. 393, 400-01.

[157]*Visuvalingam* v. *Liyanage* [1984] 2 Sri L. Rep. 123, 132.

[158]*See Joseph Perera* [1992] 1 Sri L. Rep. 199, 202, *supra* note 133.

[159]*See Ameratunga* v. *OIC Ingiriya Police Station* [1993] 1 Sri L. Rep. 264, 270.

[160]*Id.* at 270-71.

rights violations facing the country in the late 1980s was the liberalisation of the procedure for petitioning the Supreme Court for a violation or imminent violation of fundamental rights. Under Article 126(2) of the 1978 Constitution, only the injured party or his/her lawyer can file a fundamental rights petition and the petition must be drafted formally according to rules adopted by the Supreme Court.[161]

In late 1989, thousands of detainees who did not have access to lawyers began writing letters to the Chief Justice of the Supreme Court,[162] seeking relief from their prolonged detentions without being charged.[163] Despite its initial hesitancy to entertain these letters as petitions, the Supreme Court acknowledged the grave human rights dimensions of the problem and devised ways to provide relief, as described below.

By June 1990, the Supreme Court had drawn up procedures to accept the detainee's letters as petitions.[164] These petitions were referred to the Bar Association for legal representation.[165] By the end of 1994, the Court had received approximately 8259 special petitions - some letters containing many signatures - of which approximately 4736 petitions had already been processed by December 1994.[166] Ultimately thousands of detainees were released

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[161]*See infra* note 164.

[162]PATRICIA HYNDMAN, HUMAN RIGHTS ACCOUNTABILITY IN SRI LANKA 25-26 (1992).

[163]*Id.*

[164]Supreme Court Rules of 1990, No. 44(7), Gazette (Extraordinary) No. 665/32 (1991), *quoted in* JAYAMPATHY WICKRAMARATNE, FUNDAMENTAL RIGHTS IN SRI LANKA, APPENDIX IV 501 (1996).

[165]*See* HYNDMAN, *supra* note 162.

[166]The following breakdown by each year was provided to the author by the Registrar of the Supreme Court:

1990 - 1,416
1991 - 4,238
1992 - 1,307
1993 - 797
1994 - 501
Total- 8,259 (on file with the author).

unconditionally, and the Court forced the state to compensate the detainees for violating their fundamental right to be free from arbitrary arrest and detention under Article 13 of the 1978 Constitution.

Although untested, the new Supreme Court rules also permit third parties to complain on behalf of aggrieved persons.[167] Supreme Court Rule 44(2) of 1990 permits a third party to sign a proxy authorising a lawyer to represent the petitioner if the petitioner cannot do so and has authorised the third party to do so, "whether orally or in any other manner, and whether directly *or indirectly*."[168]

In another display of its growing activism, the Supreme Court has interpreted leniently the requirement that a petition claiming human rights violations be filed within one month of the alleged infringement.[169] The one month filing requirement has seriously limited the ability of victims to secure justice because of the difficulties experienced in securing legal representation in preparing the case, and travelling to Colombo, where the Court is situated.[170] The Supreme Court has recognised the concept of continuing violation, e.g., in cases of detention.[171] It has held that the one month period will run only after the petitioner is in a position to take effective steps

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[167]The new procedural rules adopted by the Supreme Court resemble the innovations the Indian Supreme Court has developed to encourage public interest litigation. The Indian Supreme Court's reforms allow a third party, including community organisations, to bring *bona fide* petitions on behalf of an aggrieved party who cannot petition the courts for reasons such as poverty or illiteracy. Any *bona fide* member of the public or an organisation may bring a similar action on behalf of a public injury or public wrong perpetrated by the state. *See Gupta* v. *Union of India*, [1981] S.C.C. (Suppl.) 87; *People's Union for Democratic Rights* v. *Union of India* [1982] 3 S.C.C. 235; *Bandhua Mukti Morcha* v. *Union of India* [1984] 3 S.C.C. 161.

The concept of social action litigation has been incorporated into the latest proposals on constitutional reform presented by the government of Sri Lanka in October 1997. Proposed Art. 30(1) of Sri Lanka Constitution.

[168]*See* Supreme Court Rules, *supra* note 164, Rule 44(2) (emphasis added).

[169]SRI LANKA CONSTITUTION (1978) Article 126, section 2.

[170] *See* Hyndman, *supra* note 36, at 29-30.

[171]*See Sasanasirithissa Thero* [1989] 2 Sri L.R. 356, 364, *supra* note 144.

to come before the Court (such as upon release from detention),[172] or when the petitioner becomes aware of the violation of a fundamental right.[173]

iv. Remedies

Article 126(4) of the 1978 Constitution permits the Supreme Court to grant such relief or directions as it may deem *just and equitable* in the circumstances.[174] The traditional relief has been to declare a violation of a fundamental right by the state, and to order the state to pay compensation.[175] Because fundamental rights jurisdiction is in a legal category of its own (*sui generis*), the Supreme Court imposes liability on the state for acts done under colour of official authority.[176]

Over the years, the Supreme Court has enlarged the scope of remedies in fundamental rights cases, imposing personal liability on public officials who violate human rights.[177] Moreover, by imposing higher compensation awards against state officials found guilty of human rights violations, the Court has intensified pressure on such officials.[178] The Supreme Court has also directed the Inspector General of Police to refrain from promoting officers found guilty of violating fundamental rights for a specified period.[179]

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[172]*Namasivayam* v. *Gunawardane* [1989] 1 Sri L.R. 394, 400 (*decided in* 1987); *Saman* v. *Leeladasa* [1989] 1 Sri L.R. 1 (*decided in* 1989).

[173]*Siriwardane* v. *Rodrigo* [1986] 1 Sri L.R. 384, 387 (decided in 1986).

[174]SRI LANKA CONSTITUTION (1978) Article 126, section 4.

[175]*See* JAYAMPATHY WICKRAMARATNE, FUNDAMENTAL RIGHTS IN SRI LANKA 470-76 (1996).

[176]*See Saman* v. *Leeladasa*, *supra* note 172, at 24-26.

[177]*Sirisena* v. *Perera* [1991] 14/90, S/C Minutes (*decided in* 1991); *Karunaratne* v. *Ranasinghe* [1991] 71/90, S/C Minutes (decided in 1991).

[178]Police officers appeared more concerned about the possibility that they would have to pay compensation awards for their conduct than by the prospect that they could face disciplinary action. This insight is drawn from author's discussions with police officers in Sri lanka in 1996 and 1997, in the Police Higher Training Academy in Colombo in the course of human rights training programmes.

[179]*See Shantha Wijeratne* v. *Perera* [1994] S/C Application No. 379/93 7.

In almost every case where the Court has found the police responsible for violations, it has ordered the Inspector General of Police to report to the Court the disciplinary measures authorities have taken against those officers.[180]

On a refreshing note, Justice Mark Fernando suggested in one case, perhaps ironically, that the Inspector General of Police circulate "appropriate directions" to his subordinates that public criticism of the government is indeed acceptable and is protected by constitutional guarantees.[181]

2. Writ Jurisdiction

As state violence escalated in the 1980s, hundreds of Sri Lankans whose relatives had disappeared sought relief by petitioning the Court of Appeal for writs of *habeas corpus*.[182] Through the writ, the Court of Appeal can compel the authorities to produce a detained person,[183] and then inquire into the legality of the detention.[184] Although the writ largely has been ineffective in tracing the disappeared, one ground-breaking judgment, which is discussed below, has the potential of paving the way for making the writ

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[180]*See, example, Abasin Banda* v. *Gunaratne* [1995] 1 Sri L.R. 244 (*decided in* 1995); *Ratnasiri* v. *Devasurendran* [1994] 2 Sri L.R. 127, 137 (decided in 1994).

[181]*See Ameratunga* v. *OIC, Ingiriya Police Station, supra* note 159, at 271.

[182]As pointed out earlier, 2,927 *habeas corpus* cases were filed between 1987 and 1994. *See supra* note 116. The Registrar of the Court of Appeal provided the following breakdown:

1987 - 336
1988 - 505
1989 - 483
1990 - 74
1991 - 108
1992 - 503
1993 - 543
1994 - 376
1995 - 69 (as of June 19, 1995).

Lawyers who tenaciously pursued *habeas corpus* cases were viewed as opponents of the state, and several were executed extra-judicially between 1987 and 1990. *See* CRM, Doc. No. 2/9/89, CIVILIZATION AND HUMANITY IN PERIL (1989).

[183]SRI LANKA CONSTITUTION (1978) Article 141.

[184]*Id.*

effective in checking arbitrary arrests, detentions, and involuntary disappearances.

Previously, the respondents in most *habeas corpus* cases, typically army or police personnel, routinely denied taking suspects into custody.[185] Moreover, because they often had not observed standard procedures in arresting suspects, the authorities left no paper trail,[186] and as a result, the Court of Appeal eventually transferred the cases to the Magistrates' Courts for further inquiry.[187] However, the respondents often did not cooperate with the inquiry and the applications languished in the court system for years, defeating the very purpose of the writ.[188]

In December 1994, the president of the Court of Appeal, Justice Sarath Silva, in a remarkable judgment,[189] held that a person in authority cannot diminish the writ of *habeas corpus* "to a cipher" by a mere denial of the arrest and detention of a person where there was evidence to the contrary.[190] In this case, the magistrate's inquiry established that the respondent police officer had arrested the individuals concerned who subsequently disappeared.[191] The Court ordered the officer to pay 100,000 Rupees to each petitioner as exemplary costs.[192] Also, the Court ordered the Registrar of the Court to forward the magistrate's findings to the Attorney General and the Chief of

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[185]AMNESTY INTERNATIONAL, SRI LANKA: 'DISAPPEARANCES' 55-59 (1986).

[186]*See supra* Part II.B.1.

[187]*See Leeda Violate and Others* v. *OIC Dikwella Police Station*, Court of Appeal (1994) 2 Sri L.R. 377, 382 (*decided in* 1994).

[188]*Id. See also* AMNESTY INTERNATIONAL, SRI LANKA - THE NORTHEAST: HUMAN RIGHTS VIOLATIONS IN A CONTEXT OF ARMED CONFLICT 26, 53 (1991); AMNESTY INTERNATIONAL, SRI LANKA: EXTRA-JUDICIAL EXECUTIONS 54-55 (1990).

[189]*See Leeda Violate and Others* v. *OIC Dikwella Police Station*, *supra* note 187.

[190]*Id.* at 384.

[191]*Id.* at 382-83.

[192]*Id.* at 386.

Police for consideration as information of a serious offence.[193]

In his opinion, Justice Silva drew inspiration from the jurisprudence of international and comparative authorities, including the Inter-American Court on Human Rights and the Indian Supreme Court.[194] Although the monetary compensation ordered by the Court may have offered little comfort to the disappeared persons' families who sought to determine the fate of their loved ones, this judgment provided an important legal precedent. The precedent established by this judgment will hopefully deter public officials from violating the rights of other detainees in the future.[195]

IV. CONCLUSIONS

This Article has discussed how legislation and emergency regulations that facilitated state repression were used as a major means of unleashing state violence on the people by successive Sri Lankan governments. A review of early fundamental rights decisions in the early 1980s illustrates how, even in the face of growing state violence, the courts rarely held the state responsible for violations of constitutionally guaranteed fundamental rights. As state violence escalated throughout the 1980s, the Supreme Court initially seemed unsure of how to use its extensive jurisdiction over fundamental rights to rein in the state. Whether the judiciary's posture reflected its political innocence, or its inability to resist the executive's ill-concealed attempts to humiliate and interfere with the independence of the judiciary, remains unclear.

When state-sponsored violence in southern Sri Lanka escalated between 1987 and 1990, Sri Lanka's highest courts moved away from their previous deference toward the executive as reflected by the use of the *omnia presumuntur* presumption. Some members of the highest courts began to

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[193]*Id.* at 387.

[194]The Justice referred, *inter alia*, to the judgments of the Inter-American court of Human Rights in the case of *Velasques Rodriguez* [1988] 9 Human Rights Law Journal 212 *(decided in* 1988), and to the Supreme Court of India in the case of *Sebastian M. Hongray* v. *Union of India* [1984] 1 A.I.R. 1984 S.C. 1026.

[195]The Court of Appeal has followed this judgment in at least one subsequent *habeas corpus* case. *See Heen Manike* v. *The Commandant R.D.F. Camp* [1995] 1 Sri L.R. 242, 243.

recognise the need to solve the political chaos in Sri Lanka and to fulfil the expectations of the public that the judiciary protect individual rights against state tyranny. The opinions of Sri Lanka's highest courts toward the latter part of the 1980s have almost presumed that state action relating to arrests and detentions is inherently suspect and that it is the state which must prove the legality of its actions. The courts' perception of the state as a benevolent and responsible entity having changed, the *omnia presumuntur* presumption has been dislodged as a starting point of judicial reasoning in cases relating to state violence.

This process of progressive judicial reasoning which has emerged in Sri Lanka in the late 1980s highlights several important factors. Sri Lanka's highest courts, especially the Supreme Court, appear to have identified their role in the current political milieu. The courts seem conscious that Sri Lanka's human rights movement is growing, is becoming better informed, and is raising public expectations. Moreover, Sri Lanka's judiciary has consistency drawn inspiration from India's activist judiciary, and exposure to international human rights standards and international criticism of Sri Lanka's human rights record appears to have influenced the judiciary. Nonetheless, the courts' approach to Sri Lanka's broader political sphere remains conservative, with the courts consistently demonstrating an unwillingness to challenge the mainstream political order in Sri Lanka, unlike the Supreme Court of India.

The changed position of Sri Lanka's highest courts, especially the Supreme Court, has contributed in great measure to the empowerment of civil society and civil society institutions that demand state accountability and an end to state violence. The Supreme Court has continued its activism relating to fundamental rights protection even though the political changes brought about by the 1994 elections have improved Sri Lanka's human rights condition to some extent. Despite the judiciary's efforts, human rights violations continue to occur in Sri Lanka, although one can reasonably argue, to a lesser extent than in the 1980s. If the courts remain activist in the protection of fundamental rights and expand their activism to larger political issues, they will make an invaluable contribution to the systemic consolidation of the fragile democratic space that currently exists in Sri Lanka.

IS THIS ETHNIC CLEANSING? RAPE OF INDONESIAN CHINESE WOMEN

Saama Rajakaruna[*]

On 13 May 1998, W, a fifty year-old mother L, her twenty-six year old daughter were raped in Indonesia. They belonged to the Chinese minority community. Some unknown people came and first destroyed and plundered their house. Some of them forced the son of the victim to rape his sister. They threatened, 'If you refuse, we will burn you!' They also forced the servant to rape his boss. Raping continued by unknown people. The victim's house was burned and the brother and sister were thrown into the fire. Later their mother committed suicide by jumping into the fire.![1]

The May 13-15 riots that resulted in the ousting of President Suharto took place in the whole of Jakarta. While the destruction and burning down of buildings were systematically carried out, a well-organised attack on Indonesian women of Chinese descent resulted in hundreds of rapes. These horrifying atrocities mainly took place in the North and West of Jakarta and in other areas where the concentration of Chinese homes and business were high. This and the fact that most of the rape victims are Chinese established the fact that the violence was directed at the Chinese minority. In some cases, before the rape took place, racial comments such as, "Scoundrel Chinese! Damaging our country!" were uttered.[2] In another instance one rioter retorted, "You are a woman and you are beautiful and you are part of Chinese." This is not the first time that violence was directed at the Chinese minority in Indonesia. In one of the recent examples, half a million ethnic

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[1]Mass Rape in the Recent Riots: The Climax of an Uncivilised Act in the Nation's Life-Volunteers for Humanity-Violence against Women Division.

[2]Case of L and L - 13 May 1998. See supra n 1.

Chinese were massacred in a civil strife in the sixties. Even then, systematic rape was used as an instrument of torture. Such inhuman acts, committed against any civilian population on national, ethnic, racial or religious grounds, have taken the form of 'ethnic cleansing.' The present President, B.J. Harbibie, in an interview for Business Week, however, disputed that the Indonesian riots in May this year were racially motivated."[3]

The use of rape as a tactic of warfare gained international attention in Bosnia, Rwanda and Algeria. The same pattern seems to have followed in Indonesia. By the beginning of July, 168 cases of rape were reported from Jakarta and its environs Solo, Medan, Palembang and Surabaya.[4] But, undoubtedly, the total number is much higher. Most rape victjms, ages ranging from 10-60, were gang raped in public, often in front of their families. In one case, a ten year-old girl was returning home from school when she discovered that her shop/house where her family lived and worked had been burned. When she went inside the debris to search for her parents, she was seized by two men who raped her in front of her neighbours.[5] Some rape victims were killed by guns, some by knives and some by being thrown into burning buildings. The others died of injuries, from suicide and the rest are still suffering from their physical and psychological scars. These women were not only raped but were further tortured by inserting objects like barbed wire, pieces of glass, bottles and sticks into their vaginas, mutilating their genital organs and tattooing messages on their backs. Fathers were forced to rape their daughters, brothers were forced to rape their sisters and all of these crimes were recorded and photographed to sell and display in the Internet. Some women got pregnant as a result of these rapes but abortion was not an option for them as their reproductive organs were totally wounded.

The perpetrators came from outside these communities but their origin unknown. They systematically raped in one area and then moved into another area to start the process all over again. They have not been recognised by the witnesses. At least in some instances, incidents occurred with the apparent

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[3]3 August 1998.

[4]Supra n 1.

[5]The New York Times: Indonesians Report Widespread Rapes of Chinese in Riots - Seth Mydans, 10 June 1998.

participation of elements of the security forces.[6] It is alleged that each soldier was paid twenty thousand Rupiah (US$ 1.50) to rape a Chinese woman.[7] There have been incidents where taxi drivers were paid to rape their chinese passengers and their payments were doubled if they kidnapped them and brought them to a specific place.

For many eyewitnesses, the border between 'seeing' and 'experiencing' and 'self' and 'victim' is hazy. As one person said, "After accidently seeing a Chinese girl being raped by many people, my young sister is so frightened and tense. Her speech is incoherent and her body trembles every time someone comes near her. For two weeks she was in hospital. I wonder whether my sister only saw someone raped or she herself was also raped. Why does she react this way?"[8] This shows that it is not only the rape victim that suffers because of such crimes but also anyone who witnesses it and all the people who are close to her will suffer from the victim's pain and trauma.

Most victims will never reveal what really happened to them because of the deep shame they feel and also because rape survivors sometimes feel that they are somehow to blame for the violence committed against them. They suffer from various degrees of damaged genital organs, other painful physical problems and psychoneuroses. Many women live in fear and desperation, always reliving the memories of their torment. Many victims are tempted to commit suicide. The treatment of women as objects has destroyed the lives of the victims, their families and their loved ones and has created a climate of fear and helplessness.

After the riots, statements were made denying the rapes ever occurred. Lieutenant Colonel Iman Haryatna, the Central Jakarta Police Chief, said victims were welcome to come forward but that the police had not received reports of assaults on women during the riots.[9] The absence of reports,

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[6]Letter to Ms. Radhika Coomaraswamy, International Centre for Ethnic Studies, Echo Wang, a member of Taipei Professional Secretaries' Association.

[7]Supra n 6.

[8]Supra n 1.

[9]Chinese Women 'Systematically Raped,' South China Morning Post-Internet Edition, 10 June 1998.

however, is not proof that these incidents never happened. The widespread mistrust of security forces because of their alleged support and participation in these crimes and the lack of trust towards the government as a result of their inaction to bring the perpetrators to justice might be some of the reasons for not coming forward to report the crimes. Even the victims who were brave enough to report such attacks were discouraged to do so because their identity cards were stolen at the time of rape. Some victims do not testify because they believe that no justice will be done and they would only be embarrassed publicly and blamed for their injuries. Many women have been silenced by threats of reprisal and efforts have been made to eliminate victims so that they are unable to give a public testimony. Photographs taken during the rape are sent to the victims to psychologically torment and humiliate them. But, recently, because of the diligence of human rights organisations, it was confirmed that these rape incidents took place. Women's crisis centres, human rights groups, relatives, hospital staff and doctors who treat them are threatened not to continue their activities of listening to and helping victims. They receive telephone calls, anonymous letters and threats by military agencies. Father Sandiyawan, an aid worker, was sent a hand grenade by mail as a warning. Another worker received a call, in which a man said, "Do you know that a week ago we sent a grenade to Father Sandiyawan? Do you want more than the grenade we sent to Father Sandiyawan?"[10]

The above tactics reveal that these rapes were highly organised incidents. Even after the riots, during the end of June and the beginning of July, some cases of rape were reported. It seems that although the rioting has come to an end, raping of Chinese Indonesian women still continues.

The first step in doing something about what has happened is recognising the fact that such incidents did actually taken place. There have been demonstrations outside the Indonesian Embassies, candle light vigils and talks on the Indonesian crisis. But, what is more appropriate at the moment is to help these innocent victims as soon as possible and not indulge in political debates. It is high time that the Indonesian government took measures to reveal the identities of the perpetrators in order to punish them and also to gradually gain the confidence of the public once again. It is specifically set forth in several international instruments the duty of the state to prevent,

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[10]Supra n 5.

punish and prosecute the perpetrators of violence against women. Articles 9, 10 and 11 of the Declaration on the Elimination of All Forms of Violence Against Women (1992) consider rape and other forms of violence as a violation of international human rights law by state and non-state actors. The recent tribunals in The Hague and Arusha that deal with war crimes in Bosnia and Rwanda as well as the Convention establishing the International Criminal Court, clearly recognise sexual violence as acts of torture, willful suffering and a crime against humanity. Since there is now evidence that some of the violence was a result of active participation of the Indonesian security forces, international law recognises the right of effective remedy on the part of individual persons and groups of persons who are under the jurisdiction of the offending state and who are victims of those breaches. States may also be held responsible for acts committed by individuals if they fail to act with due diligence to prevent, investigate and punish acts of violence. Such failure will result in the state being liable for the crimes committed and as a result will have to provide compensation for the victims and their families.

If the community at large is to be renewed, the chains of terror and fear have to be broken. The Chinese Indonesians should not be treated as second class citizens. They have the right to be protected by the government, the military and the police. The international community must strongly condemn the savage violation of human rights in Indonesia and press the government to make sure that no such racist and sexist incidents will recur in the future.

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