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SRI LANKA : STATE OF HUMAN RIGHTS 2000

LAW & SOCIETY TRUST

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Editor's note.....

In this issue of the LST Review we publish the Overview of the Trust's annual publication *Sri Lanka: State of Human Rights* which is the 7th report in the series. This report surveys the human rights situation in Sri Lanka during the year 1999 and contains, as in other years, chapters on the Integrity of the Person, Emergency Rule and Judicial Protection of Human Rights. The Controversy over the Equal Opportunity Bill and the Rights of the Aged have also been discussed. State interference with public institutions is examined in A Case Study of the Bribery Commission. In addition, updates are provided in relation to freedom of expression and the media; environmental rights; internally displaced persons; workers' rights; freedom of association and assembly; the rights of persons with disabilities; and crimes, human rights and state responsibility.

The issue also carries Chapter III of the Draft Constitution of Sri Lanka, which is on fundamental Rights and Freedoms; an article on Language Rights and a joint NGO appeal for the creation of a UN Mechanism on Human Rights Defenders.

SRI LANKA STATE OF HUMAN RIGHTS - 2000

Overview

Elizabeth Nissan[*]

1. Introduction

The assassination of Dr Neelan Tiruchelvam, MP, in July 1999 was a particular tragedy for Law & Society Trust, which lost its dynamic and visionary founder and Director. It was also a grave loss to the legal and human rights communities within Sri Lanka and internationally. For Dr Tiruchelvam was an internationally respected lawyer and academic, an authority on constitutionalism and human rights protection. His deep concern to promote law and constitutionalism as a means of effecting social transformation and justice was ultimately to cost him his life.

Dr Tiruchelvam's killing by an LTTE suicide bomber in Colombo encapsulated many of the tragedies and contradictions of the Sri Lankan conflict, all of which have wide human rights and social implications. He was a peacemaker, a human rights defender and a civilian, committed to developing a new constitutional framework for Sri Lanka which he hoped would foster the development of a pluralist, democratic society, and which he hoped would offer a genuine response to the grievances of minority communities. An ardent spokesman in parliament on behalf of Tamil civilians most grievously affected by the conflict, as well as on a broad spectrum of other human rights issues, he was killed by the organisation which claims to pursue its war in order to secure Tamil rights. His death in Colombo – like the deaths of many other people during the year in suicide bomb attacks in the capital – also brought home yet again that this conflict cannot be contained within the North and East; it affects each and every person throughout the country.

The conflict continues to exact an enormous toll on human rights protection throughout the country; it remains the most significant factor in understanding Sri Lanka's human rights performance. It is imperative for a means to be found to create a just and

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sustainable peace; without such a solution, the lives of Sri Lankans throughout the Island will continue to be blighted by grave abuses of human rights.

The Law & Society Trust's annual reports on the state of human rights in Sri Lanka were much enriched by Dr Tiruchelvam's critical, but always constructive, inputs and suggestions. This volume again reflects many of his particular interests and concerns. As in previous years, it contains chapters on emergency rule during 1999, integrity of the person, judicial protection of human rights, the situation of internally displaced persons, freedom of expression, women's rights and children's rights. For the first time, however, it critically examines the work of some of the key institutions charged with the protection and promotion of human rights within the country: the Human Rights Commission, the Ombudsman, the Official Languages Commission and the Commission on Bribery and Corruption. Too often, human rights institutions are created that have neither the powers nor the resources to fulfil their important roles. One important way in which civil society organisations can assist in strengthening the institutional framework for human rights protection is to scrutinise and comment constructively on the performance of such institutions; to raise for debate issues of public accountability, effectiveness, resourcing and political will. These chapters make an important start in this direction, pointing to important areas which need to be strengthened.

Another issue which Dr Tiruchelvam believed to be of great importance was equality of opportunity. As described in the chapter on that subject, the government's attempts to introduce legislation on this important issue in October met with such vociferous resistance that the Bill was swiftly dropped. Within the statutory seven day time limit allowed for challenge, 42 parties had submitted petitions to the Supreme Court, arguing that the Bill was unconstitutional. Although the main intention had been to equalise opportunities for employment and education, especially for women, and to create obligations that the private sector would have to honour, most of the public debate concentrated on ethnic and religious issues, particularly as they applied to education, and it is possible that many of these objections would not have withstood the scrutiny of the Supreme Court. In the event, however, as the government undertook not to proceed with the Bill, the Supreme Court did not reach a determination on the issues raised in the petitions. A significant opportunity for the government to introduce legislation with the potential to gradually increase opportunity for all – creating greater equity in diversity – had been lost.

Law & Society Trust has always endeavoured to reflect on the human rights implications of a broad range of social issues. In this volume, the chapter on the implications of an ageing population for Sri Lanka's legislators and policy makers continues this trend. This is the first time that this topic has been addressed in a *Sri Lanka: State of Human Rights* volume.

2. Attacks on Democratic Practice

Elections to provincial governments and to the presidency were held in 1999 amid violence and intimidation. Attacks on the democratic process in Sri Lanka emanated from the LTTE, the government and political parties contesting elections. In addition to concerns about violence and intimidation affecting the extent to which these elections were free and fair, there was also considerable concern about the extent to which the ruling party misused the state media to promote its own cause.

LTTE suicide bombers attacked election rallies held by both the ruling People's Alliance (PA) and the opposition United National Party (UNP) on 18 December, just days before the presidential election of 21 December. President Chandrika Bandaranaike Kumaratunga, who subsequently won the election, and four government ministers escaped with injuries; others were less fortunate: at least 25 civilians were killed at the two rallies. The LTTE also continued to threaten and attack local councillors in Jaffna who had not resigned from their posts: the total number killed rose to 11. Elections to local councils in Jaffna had been held in January 1998 in an attempt by the Government to re-establish at least the beginnings of a democratically elected civil administration in the area. The LTTE's continuing campaign against these councils continued to severely handicap their functioning. The LTTE also threatened elected members of parliament from the east for part of the year, requiring them to stay away from their constituencies and suspend political activities. The LTTE's power to intimidate – reinforced by a long history of assassinations of elected representatives, including of Dr Tiruchelvam in July – continues to severely constrain prospects for democratic practice, and for democratic approaches to conflict resolution, in areas where it has influence.

Considerable concern was generated by the very high levels of political intimidation, violence, blatant ballot-rigging and abuse of the state media that were evident during the election to the Northwest Provincial Council in January. The Centre for Monitoring

Election Violence (CMEV) reported over 800 violent incidents, including two murders and 11 attempted murders, and numerous instances of assault and intimidation. Other election monitoring organisations – the Movement for Free and Fair Elections (MFFE) and the People's Alliance for Free and Fair Elections (PAFFREL) – also expressed their grave concern, as did representatives of various religious and human rights organisations. Although complaints were made against members of a number of political parties, by far the greatest number of complaints were against members of the ruling PA, including Members of Parliament and government Ministers. President Kumaratunga expressed her disquiet about the conduct of this election, but she subsequently appointed several PA members who had been implicated in the violence as Ministers in the provincial administration.

Five people died during the election campaigns for five further provincial councils in April. The elections to Southern Provincial Council in June was conducted more peacefully. The reduction in levels of violence in provincial council elections testified to the crucial role that can be played by civil society organisations in monitoring election practices, publicising their findings, and serving as impartial advocates for the public interest. Their ability to do so, however, depends upon respect for a range of rights, including freedom of association and expression. Any attempts to curtail these rights and to curtail the ability of such organisations to fulfil their mandates need to be viewed with concern. Attempts to discredit election monitoring organisations – such as the attacks on CMEV in the state media in April by two government Ministers – were worrying examples of such action. In the event, however, the election monitoring organisations were all able to function with little hindrance.

With parliamentary elections due in 2000, it is clear that decisive action needs to be taken to prevent a repetition of the violence and intimidation that has become a hall-mark of Sri Lankan elections. Every effort must be made to ensure that people are free to exercise the franchise without fear, and according to their conscience.

3. The Conflict and Human Rights

The Sri Lankan conflict has been described as a "no mercy war". On the battlefield, very few combatants are taken prisoner – far fewer than would be expected in comparable conflicts, given the scale of casualties. It can only be assumed that potential prisoners of

war are routinely killed or left to die, in violation of the most basic principles of humanitarian law.

People living in large areas of the North and East remained particularly vulnerable to abuse and to violation of a broad range of their rights as a result of the conflict. As military activity intensified during the year, yet more people were displaced from their homes, limiting their access to food, shelter, education and health services, as described in the chapter on internally displaced persons. Both sides to the conflict imposed restrictions on the movement of civilians in areas under their control, and also controlled their access to food, medical supplies and other resources.

Although humanitarian law requires that all necessary measures be taken to prevent civilian casualties, civilians in the conflict areas remained vulnerable to direct attacks. In September some 23 civilians died when the Air Force bombed an area of Mullaitivu district; although the government at first said the attack had targeted an LTTE camp, it subsequently admitted that it had made a mistake. In November, 40 displaced civilians who had sought refuge at the Catholic shrine of Madhu were killed in a mortar attack; while the perpetrators were not conclusively identified, it was clear that neither the LTTE nor the government had taken the measures necessary to ensure the protection of this displaced and highly vulnerable group of civilians.

Further blatant abuses of humanitarian law were also evident in the LTTE attack on three border villages in Ampara District, in apparent reprisal for the air raid referred to above. Over 50 civilians were killed in this attack, which marked a most worrying return to the tactic of large-scale killing of civilians in border areas by the LTTE. Although such attacks had once been frequent, they had not taken place for about three years.

Another humanitarian issue of particular concern relating to LTTE practices was their continuing use of child soldiers, despite their undertaking in May 1998 to the UN Secretary General's Special Representative for Children and Armed Conflict that no child under 18 years of age would be used in combat, and that no child under 17 would be recruited. Instead, as described in the chapter on Children's rights, their recruitment of children and their use of child combatants appeared to have *increased* in 1999.

The chapter on integrity of the person makes clear that torture, disappearances and arbitrary arrests and detentions are by no means phenomena of the past in Sri Lanka. While by no means all cases of torture and arbitrary arrest are linked to the conflict, it certainly provides the context for many such violations. As we have reiterated in earlier years, there is an urgent need for a thorough review of legislation on detention and for compliance with legal safeguards against abuse; for complaints of torture to be investigated by a body independent of the police; for remedies available to victims to be strengthened; and for perpetrators of such violations to be brought to justice.

The continuing conflict also provided the pretext for the continuation of censorship throughout 1999 under emergency law. The regulations governing the censorship were amended in November, as discussed in the chapter on emergency rule, but continued to exceed the legitimate limits for restricting free expression envisaged in international human rights law. The enforcement of censorship meant that in the run-up to the presidential election in November and December, there was relatively little attention paid to the huge military set-backs that government troops were suffering in the North. In this period, the LTTE regained control of most of the territory that the Government had captured and controlled in the previous two years, at massive human cost.

4. Impunity

Human rights advocates have long called for impunity for human rights violations to end in Sri Lanka, and this remained a major issue through 1999 despite some positive developments. The conviction in February of a school principal and six soldiers in connection with the disappearances of young men from Embilipitiya in late 1989 and early 1990 was an important judgment, which was under appeal at the end of the year. However, numerous other cases from this period – and from earlier years in the North East – remain to be properly investigated.

In addition, there were reports of follow-up action by the Criminal Investigation Department and the Attorney General's Department in cases recommended for investigation and prosecution by the three presidential commissions of inquiry into involuntary removals and disappearances that had reported in 1998. By the end of 1999, 213 cases had reportedly been filed in High Courts. Details of the charges are not known. Another development relating to impunity were reports that various police officers had

been charged under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Act of November 1994. These cases were said to involve officers who had been found responsible for torture by the Supreme Court in its judgements on fundamental rights petitions alleging torture. Again, no further details were known at the time of writing.

As noted last year, the revelations about a mass grave at Chemmani on the Jaffna peninsula, where the remains of hundreds of people who disappeared in 1996 were believed to be buried, brought the issue of forensic excavations to the fore. During 1999, there were significant developments in this regard. During June and September, excavations were conducted which recovered the bodies of 15 people from shallow graves. International observers from Amnesty International, Physicians for Human Rights and the Asia Foundation were permitted to attend, but were not permitted to assist with the exhumations in any way. Criminal investigations into these deaths were still under way at the end of the year. However, the discovery of another mass grave site at Duraiappa Stadium in Jaffna did not result in another excavation and investigation. The grave was thought to contain the remains of people who may have disappeared during the period that the Indian Peace Keeping Force administered the peninsula.

In October, the UN Working Group on Enforced or Involuntary Disappearances visited Sri Lanka to examine the extent to which the government had implemented its previous recommendations for the prevention of disappearances. This was the Working Group's third visit to the country since 1991. The Working Group was concerned that no independent inquiry had been held into the approximately 540 disappearances in Jaffna in 1996, during the term of the current government, and recommended that an independent inquiry be held.

5. Gender Discrimination

In the first half of 1999, the Supreme Court gave a landmark directive about the guidelines adopted by the Department of Immigration and Emigration when issuing residence visas to foreign male spouses. In this case, *Bernard Maximillian Fitcher v. Controller of Immigration and Emigration,* a German male and his Sri Lankan wife filed

a fundamental rights case in the Supreme Court on the ground that the guidelines violated the equality clause guaranteed in Article 12(1) of the Constitution.[1]

The practice in issuing residence visas to foreign spouses had been that all male persons married to Sri Lankan females needed to apply annually for a residence visa, unless they were covered by some other provision of the law. However, male and female spouses had to follow different procedures. Foreign female spouses only had to demonstrate the fact of the marriage in order to be granted a residence visa, whereas foreign male spouses were required to establish their ability to support themselves and their wives.[2]

To satisfy the eligibility criteria, foreign male spouses had to show the authorities that they received an inward remittance of US$ 9000 *per annum*. They also had to deposit US$ 25,000 in a bank, which could not be removed without the recommendation of the Controller of Immigration and Emigration. In addition, foreign male spouses were debarred from seeking employment in Sri Lanka.[3]

The petitioners in the above case argued that the additional conditions applied to foreign male spouses were totally arbitrary, unfair and without any legal basis and irrational and hence contrary to Articles 12(1) and 12(2) of the Constitution.[4]

The Petitioners further argued that the failure to grant a residence visa to the applicant was in violation of Sri Lanka's obligations under the Universal Declaration of Human Rights of 1948, the International Covenant on Civil and Political Rights of 1996, and the Convention on the Elimination of All Forms of Discrimination against Women. Sri Lanka is a party to all these instruments, which have guaranteed equality between women and men.[5]

The matter was settled after the Controller of Immigration and Emigration agreed to issue the petitioner, Bernard Maximillian Fischer, a residence visa under similar terms and conditions applied when issuing residence visas to foreign female spouses.[6]

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[1] SC :FR No. 436/99
[2] *Sri Lanka: State of Human Rights* 1997 (Law & Society Trust, Colombo, 1997) p 267
[3] S.C.F.R Application 436/99
[4] *Ibid.*
[5] *Ibid.*
[6] *Supra* n 2.

The Supreme Court directed the Controller to make and publish guidelines and procedures conforming to the equality clause in Article 12 of the Constitution for the grant of residence visas to foreign spouses.[7] Following the Supreme Court Directive, the Department of Immigration and Emigration withdrew the existing regulations, until a new set of procedures was finalised. Until a new system becomes operative, foreign male spouses will have to reside in Sri Lanka on holiday visas.[8]

6. Conclusion

This volume is intended to provide an overview of the state of human rights in Sri Lanka, whilst also stimulating debate on key human rights issues and – it is to be hoped – helping to promote positive reforms. It is a significant contribution to the human rights debate within Sri Lanka, demonstrating the continued vitality and commitment of civil society organisations and actors to documentation, reporting and advocacy on a broad range of social and policy issues.

The chapters in this volume show all too clearly that the creation of institutions and the enactment of laws do not, in themselves, lead to effective human rights protection. Far more is needed in terms of political will and determination, resources and enforcement. The fate of the Equal Opportunity Bill demonstrated all too clearly the immense difficulties that can be involved in trying to introduce forward-looking, reformist legislation in such a highly charged, politicised climate as exists in Sri Lanka. Yet, means of addressing varied and conflicting interest groups must be found if genuine reform is ever to be achieved, whether in the sphere of equal opportunity or – even more fundamentally – constitutional reform.

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[7] *Ibid.*
[8] Department of Immigration and Emigration.

THE CONSTITUTION OF THE REPUBLIC OF SRI LANKA

A

BILL

Presented by the Minister of Justice, constitutional affairs, Ethnic affairs And National Integration and Deputy Minister of Finance
On 03rd August 2000

CHAPTER III

FUNDAMENTAL RIGHTS AND FREEDOMS

Inherent right to life.

8. (1) Every person has an inherent right to life and a person shall not be arbitrarily deprived of life.

(2) Any restriction shall not be placed on the rights declared and recognised by this Article.

Freedom from torture or cruel, inhuman or degrading treatment.

9. (1) A person shall not be subjected to torture or to cruel, inhuman or degrading treatment of punishment.

(2) Any restriction shall not be placed on the rights declared and recognised by this Article.

Freedom from arbitrary arrest, detention and punishment and prohibition of retroactive penal legislation, &c.

10. (1) A person shall not be arrested, imprisoned or otherwise physically restrained except in accordance with procedure prescribed by law.

(2) Save as otherwise provided by law, a person shall not be arrested except under a warrant issued by a judicial officer causing such person to be apprehended and brought before a competent court in accordance with procedure prescribed by law.

(3) Any person arrested shall be informed, in a language which the person appears to understand, of the reason for the arrest and of the person's rights under paragraphs (4) and (5) of this Article.

(4) Any person arrested shall have the right to communicate with any relative or friend of the person's choice, and, if the person so requests, such person shall be afforded means of communicating with such relative or friend.

(5) Any person arrested shall have the right to consult and retain an attorney-at-law and such attorney-at-law shall be afforded all reasonable facilities by the State.

(6) Any person arrested shall not be detained in custody or confined for a longer period than under all the circumstances of the case is reasonable and shall, in any case, be brought before the judge of a competent court within twenty-four hours of the arrest, exclusive of the time necessary for the journey from the place of arrest to such judge, and a person shall not be detained in custody beyond such period except upon, and in terms of, the order of such judge made in accordance with procedure established by law.

(7) Any person detained in custody or confined who is entitled, under the provisions of any law, to be released on bail or on the person executing a bond, shall be so released.

(8) Any person suspected of committing an offence shall be charged or indicted or released without unreasonable delay, having regard to the facts and circumstances of the case.

(9) Any person charged with or indicted for an offence shall be entitled to be heard in person or by an attorney-at-law of the person's own choosing and shall be so informed by the judge.

(10)(a) Any person charged with or indicted for an offence shall be entitled to be tried -

(i) without undue delay;
(ii) at a fair trial;
(iii) by a competent court; and
(iv) subject to sub-paragraph (b) of this paragraph, at a public hearing.

(b) A judge may, in the judge's discretion, whenever the judge considers it necessary, in proceedings relating to sexual matters or where the interests of juveniles so require or in the interests of national security or public order necessary in a democratic society or in the interests of order and security within the precincts of such court, exclude therefrom, persons who are not necessary for the purposes of those proceedings.

11(a) Every person shall be presumed innocent until the person is proved guilty.

(b) Anything contained in any law shall not be held to be inconsistent with sub-paragraph (a) of this paragraph to the extent that such law imposes upon an accused the burden of proving particular facts.

(12) A person shall not be compelled to testify against himself or herself or to confess guilt.

13(a) A person shall not be held guilty of, or punished for, an offence on account of any act or omission which did not, at the time of such act or omission, constitute an offence, except for any act or omission which, at the time it was committed, was criminal according to the principles of public international law.

(b) Any penalty more severe than the penalty in force at the time when an offence was committed shall not be imposed for such offence.

(14) Any person who has been convicted or acquitted of an offence in accordance with la.w by a competent court shall not be liable to be tried for the same offence save on the order of a court exercising appellate or revisionary jurisdiction.

(15)(a) A person shall not be punished with death or imprisonment except by order of a competent court made in accordance with procedure established by law.

(b) The arrest, holding in custody, detention or other deprivation of personal liberty of a person -

(i) pending investigation or trial shall, if not unreasonable having regard to the circumstances, not constitute punishment;

(ii) by reason of a removal order or a deportation order made under the provisions of the Immigrants and Emigrants Act or other such law as may be enacted in substitution therefor, shall not be a contravention of this paragraph.

16 (a) Any restrictions shall not be placed on the rights declared and recognised by paragraph (9), items (ii) and (iii) of sub-paragraph (a) of paragraph (10), paragraph (13) and paragraph (15) of this Article.

(b) Any restrictions shall not be placed on the rights declared and recognised by paragraphs (1), (2), (3), (4), (5), (6), (7), (8), items (i) and (iv) of sub-paragraph (a) of paragraph (10) and paragraphs (11), (12) and (14) of this Article other than such restrictions prescribed by law as are necessary in a democratic society in the interests of national security, public order or for the purpose of securing due recognition and respect for the rights and freedoms of others.

Right to equality.

11. (1) All persons are equal before the law and are entitled to the equal protection of the law.

(2)(a) Subject to sub-paragraphs (b) and (c) of this paragraph, a citizen shall not be discriminated against on the grounds of ethnicity, religion, language, caste, gender, sex, political or other opinion, national or social origin, place of birth, mode of acquisition of citizenship, marital status, maternity, parental status or any one of such grounds.

(b) It shall be lawful to require a person to acquire within a reasonable time sufficient knowledge of any national language as a qualification for employment or office in the service of the State or in the service of any public corporation, where such knowledge is reasonably necessary for the discharge of such employment or office.

(c) It shall be lawful to require a person to have a sufficient knowledge of any language as a qualification for any such employment or office where no function of that employment or office can be discharged otherwise than with a knowledge of that language.

(3) A person shall not, on the grounds of ethnicity, religion, language, caste, gender, sex, political or other opinion, national or social origin, place of birth, or any one of such grounds, be subject to any disability, liability, restriction or condition with regard to access to shops, public restaurants, hotels, places of public entertainment and places of public worship of such person's own religion.

(4) Anything in this Article shall not prevent special measures being taken by law, subordinate legislation or executive action where necessary for the sole purpose of the protection or advancement of disadvantaged or underprivileged individuals or groups including those that are disadvantaged or underprivileged because of ethnicity, gender, sex, age or mental or physical disability.

(5) Any restrictions shall not be placed on the exercise of the rights declared and recognised by this Article other than such restrictions prescribed by law as are necessary in a democratic society in the interests of national security, public order or the protection of public health or for the purpose of securing due recognition and respect for the rights and freedoms of others.

Freedom of movement.

12.(1) Every person lawfully resident within the Republic is entitled to the freedom of movement within the Republic and of choosing such person's residence within the Republic.

(2) Every person shall be free to leave the Republic.

(3) Any restrictions shall not be placed on the exercise of the rights declared and recognised by this Article other than such restrictions prescribed by law as are necessary in a democratic society in the interests of national security or public order or national economy or the protection of public health or morality or for the purpose of securing due recognition and respect for the rights and freedoms of others or for the extradition of persons from the Republic.

Freedom to return to Sri Lanka.

13. Every citizen shall be entitled to return to the Republic.

Right to private and family life.

14. (1) Every person has the right to respect for such person's private and family life, home, correspondence and communications and shall not be subjected to unlawful attacks on such person's honour and reputation.

(2) Any restrictions shall not be placed on the exercise of the rights declared and recognised by this Article other than such restrictions prescribed by law as are necessary in a democratic society in the interests of national security, public order or national economy or the protection of public health or morality or for the purpose of securing due recognition and respect for the rights and freedoms of others or for the enforcement of a judgment or order of a competent court.

Freedom of thought, conscience and religion.

15. (1) Every person is entitled to freedom of thought, conscience and religion including the freedom to hold opinions and to have or to adopt a religion or belief of the person's choice.

(2) Any restriction shall not be placed on the rights declared and recognised by paragraph (1) of this Article.

(3) Every person is entitled to the freedom, either alone or in association with others, and either in public or in private, to manifest the person's religion or belief in worship, observance, practice and teaching.

(4) Any restrictions shall not be placed on the rights declared and recognised by paragraph (3) of this Article other than such restrictions prescribed by law as are necessary in a democratic society in the interests of national security, public order, or for the purpose of securing due recognition and respect for the rights and freedoms of others.

Freedom of speech and expression including publication and freedom of information.

16. (1) Every person is entitled to the freedom of speech and expression including publication and this right shall include the freedom to express opinions and to seek, receive and impart information and ideas either orally, in writing, in print, in the form of art, or through any other medium.

(2) Any restrictions shall not be placed on the exercise of the right declared and recognised by this Article other than such restrictions prescribed by law as are necessary in a democratic society in the interests of national security, public order, the protection of public health or morality, racial and religious harmony or in relation to parliamentary privilege, contempt of court, defamation or incitement of an offence or for the purpose of securing due recognition and respect for the rights and freedoms of others.

Freedom of peaceful assembly.

17. (1) Every person is entitled to the freedom of peaceful assembly.

(2) Any restrictions shall not be placed on the exercise of the right declared and recognised by this Article other than such restrictions prescribed by any law as are necessary in a democratic society in the interests of national security, public order, racial or religious harmony, the protection of public health or for the purpose of securing the due recognition and respect for the rights and freedoms of others.

Freedom of association.

18. (1) Every person is entitled to the freedom of association.

(2) Every citizen is entitled to the freedom to form and join a trade union.

(3) Any restrictions shall not be placed on the exercise of the rights declared and recognised by this Article other than such restrictions prescribed by law as are necessary in a democratic society in the interests of national security, public order, racial or religious harmony, national economy or for the purpose of securing due recognition and respect for the rights and freedoms of others.

Right to enjoy and promote culture and use of language.

19. (1) Every citizen is entitled alone or in association with others to enjoy and promote such citizen's own culture and to use such citizen's own language.

(2) Any restrictions shall not be placed on the exercise of the right declared and recognised by this Article other than such restrictions prescribed by law as are necessary in a democratic society in the interests of national security, public order, racial or religious harmony or the protection of public health or morality or for the purpose of securing due recognition and respect for the rights and freedoms of others.

Freedom to engage in any lawful trade, occupation, profession, business or enterprise.

20. (1) Every citizen is entitled to the freedom to engage alone or in association with others in any lawful occupation, profession, trade, business or enterprise.

(2) Any restrictions shall not be placed on the exercise of the rights declared and recognised by this Article other than such restrictions prescribed by law as are necessary in a democratic society in the interests of national economy, national security, public order, protection of public health or morality, the environment or for the purpose of securing due recognition and respect for the rights and freedoms of others or in relation to-

(a) the professional, technical, academic, financial and other qualifications necessary for practising any profession or carrying on any occupation, trade, business or enterprise, and the licensing and disciplinary control of the person entitled to such fundamental right; and

(b) the carrying on by the State, a State agency or a public corporation of any trade, business, industry, service or enterprise, whether to the exclusion, complete or partial, of citizens or otherwise.

Right to ownership of property.

21. (1) Every citizen is entitled to own property alone or in association with others subject to the preservation and protection of the environment and the rights of the community.

(2) Any person shall not be deprived of the person's property except as permitted by law.

(3) Any property shall not be compulsory acquired or requisitioned save for a clearly described public purpose or for reasons of public utility or public order and save by authority of law which provides for the payment of fair compensation.

Special rights of children.

22. (1) Every child has the right -

(a) to a name from birth;

(b) to be protected from maltreatment, neglect, abuse or degradation; and

(c) to have an attorney-at-law assigned to the child by the State, and at State expense, in criminal proceedings affecting the child, if substantial injustice would otherwise result.

(2) Every child has the right -

(a) to family care or parental care or to appropriate alternative care when removed from the family environment; and

(b) to basic nutrition, shelter, basic health care services and social services.

(3) The State shall take reasonable legislative and other measures within its available resources with a view to achieving the progressive realisation of the rights guaranteed by paragraph (2).

(4) In all matters concerning children, whether undertaken by public or private social welfare institutions, courts, administrative authorities or legislative bodies, the best interest of the child shall be of paramount importance.

(5) Every child shall have the right to grow up in an environment protected from the negative consequences of the consumption of addictive substances harmful to the health of the child and, to the extent possible, from the promotion of such substances.

(6) Every child between the ages of five and fourteen years shall have access to free education provided by the State.

(7) A child shall not be employed in any hazardous activity.

(8) The rights recognised by this Article shall be in addition to any other right to which a child is entitled as a citizen or person under this Chapter.

(9) For the purposes of this Article "child" means a person under the age of eighteen years.

Freedom from forced labour.

23. (1) A person shall not be required to perform forced labour.

(2) For the purposes of this Article, forced labour does not include -

(a) any labour required as a result of a lawful sentence or order of a competent court;

(b) any services of a military character, or in the case of a person who has conscientious objections to service as a member of the armed forces, any labour which that person is required by law to perform in place of such service;

(c) any service that may be reasonably required in the event of an emergency or calamity that threatens the life and well-being of the community; or

(d) any labour reasonably required as a part of normal civil obligations.

Right to safe conditions of work.

24. (1) Every person has the right to safe conditions of work.

(2) The State shall take reasonable legislative and other measures within its available resources with a view to achieving the progressive realisation of the rights guaranteed by paragraph (1).

Social rights.

25. (1) Every citizen has the right to have access to –

(a) health-care services including emergency medical treatment;

(b) sufficient food and water; and

(c) appropriate social assistance.

(2) The State shall take reasonable legislative and other measures within its available resources with a view to achieving the progressive realisation of the rights guaranteed by paragraph (1).

(3) A person shall not be evicted from the person's home or have the home demolished, except as permitted by law.

Operation of certain fundamental rights in their application to the armed forces to be subjected to restrictions prescribed by law.

26. The exercise and operation of the fundamental rights declared and recognised by Articles 10, 11(1), 12, 13, 14, 15(3), 16, 17 and 18 shall in their application to the armed forces, the police force and other forces charged with the maintenance of public order be subject to such restrictions as may be prescribed by or under any law in the interests of the proper discharge of their duties and the maintenance of discipline among them.

Derogation in times of public emergency.

27. (1) Where a Proclamation has been duly made pursuant to the provisions of Chapter XXIII, and subject to paragraph (2) of this Article, measures may be prescribed by law derogating from the exercise and operation of the fundamental rights declared and recognised in this Chapter to the extent strictly required by the exigencies of the situation and necessary in a democratic society, provided that such measures do not involve discrimination solely on the grounds of ethnicity, class, religion, gender, sex, language, caste, national or social origin and for the purpose of this Article "law" includes regulations made under the law for the time being in force relating to public security.

(2) In prescribing measures under paragraph (1) of this Article, there shall be no derogation -

(a) from any of the rights declared and recognised by Articles 8, 9, 10(1), 10(2), 10(9), 10(10)(a)(iii), 10(3), 10(15), 13 and 15;

(b) from the right declared and recognised by Article 10(6) unless at the same time legal provision is made requiring –

(i) the Magistrate of the area in which such arrest was made to be notified of the arrest; and

(ii) the person arrested to be produced before any Magistrate,

within such time as is reasonable in all the circumstances of the case.

Existing written law and unwritten law.

28. (1) All existing written law and unwritten law shall be valid and operative notwithstanding any inconsistency with the provisions of this Chapter.

(2) (a) Within three months of the commencement of the Constitution, the President shall establish a Commission consisting of not more than five persons, appointed under the hand of the President, who have distinguished themselves in the fields of law or human rights, of whom one shall be appointed Chairperson, to examine all existing written or unwritten law and report to the President as to whether any such law is inconsistent with the provisions of this Chapter.

(b) In appointing the members of such Commission, the President shall have due regard to the necessity of ensuring the representation of the three major communities on the Commission.

(c) The Commission shall submit its report to the President within a period of three years from the date of its establishment and the President shall, as soon as practicable, cause such report to be placed before Parliament.

(3) The subjection of any person on the order of a court to any form of punishment recognised by any existing written law shall not be a contravention of the provisions of this Chapter.

Interpretation of law.

29. In this Chapter "law" includes a Statute of a Regional Council.

Remedy for the infringement of fundamental rights by State action.

30. (1) Subject to paragraphs (2) and (3) of this Article, every person shall be entitled to apply to the Supreme Court as provided by Article 171 or to the Court of Appeal as provided by Article 182, in respect of the infringement or imminent infringement, by State action, including executive or administrative action, of a fundamental right to which such person is entitled under the provisions of this Chapter.

(2) Where the person aggrieved is unable or incapable of making an application under Article 171 of Article 182 by reason of physical, social or economic disability or other reasonable cause, an application may be made on behalf of such a person, by any relative or friend of such person, if the person aggrieved raises no objection to such application.

(3) An application under this Article may be made in respect of any group or class of persons affected, in the public interest, by any person in that group or class or by any incorporated or unincorporated body of persons, acting *bona fide.*

(4) For the purposes of this Article and Articles 171 and 182, "State action" does not include legislative or judicial action.

Rights of non-citizens permanently and legally resident.

31. A person who, not being a citizen of any country, has been permanently and legally resident in the Republic at the commencement of the Constitution and continues to be so resident, shall be entitled to all the rights declared and recognised by this Chapter, to which a citizen of Sri Lanka is entitled.

The Beginning Of The Ethnic Problem In Sri Lanka – Violation Of Language Rights

M.C.M. Iqbal[*]

At a time when the government and other political parties are involved in attempts to solve the ethnic problem in this country, it would be appropriate to take a look at the root causes of this problem in this country.

Until 1956 English was the official language of Sri Lanka. The medium of instruction in all secondary and tertiary level educational institutions was English while all official correspondence had been in English until then. With the enactment of the Official Language Act No. 33 of 1956 a sudden change was brought about in the country. Sinhala was made the official language and all official correspondence had to be in Sinhala. All those employed in the State services had to learn Sinhala. The language by itself was not the only matter at issue. Language is an important aspect of one's ethnic identity. Relegating Tamil to a lower status offended the Tamils and inflamed their feelings. This led to the seeds of discord being sown in the country. The events that led to the infamous ethnic riots of 1958, 1977 and 1983 were all the consequences of this discord. These riots proved that all efforts made to bridge the breach of the harmony that existed between the Tamils and Sinhalese speaking people had been fruitless. The upshot of all this was the steady growth of militancy among the Tamil youth which received an impetus with the events of July 1983. Subsequent to these events there was a mass exodus of Tamils from the South to the North of Sri Lanka and to other parts of the world both as refugees and as persons seeking better pastures. The net result of all these was the loss of the lives of a large number of citizens on both sides of the divide, which changed Sri Lanka from a peaceful country to a land ridden with militancy. All this was partly due to the infringement of the basic right of the Tamil speaking people to use their mother tongue in their day to day affairs with the State.

This was followed by employment under the State being denied to those who did not know Sinhala or agree to learn Sinhala after joining the Government Service. Changes in the rules of admission to the universities and the colonisation policies of successive governments were among the other reasons, that added fuel to the ethnic problem.

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The Muslims of the North and East who do not speak Sinhala also faced the same plight. Following the enactment of the Tamil Language (Special) Provisions Act of 1958 the use of Tamil in the North and the East for administrative purposes and in the courts was made possible. But the Sinhala people living in those parts had difficulties in using their mother tongue when dealing with the courts and the local bodies in those areas.

The large percentage of Tamils live outside the North and East. They continued to have problems caused by alleged discrimination in various spheres such as education and employment. Many steps were taken towards promoting the policy of providing equal opportunities and bilingualism in public administration, legislation, language of the courts and even in promoting one community to study the language of the other in schools. In 1965 Tamil was made a regional language and in 1978, a national language. By an amendment to the Constitution in 1987 Sinhala and Tamil were granted equal status as the official languages of Sri Lanka. That made it possible for some to say that the language problem of the Tamils had been solved once and for all.

However, these steps failed to heal the cleavages that had occurred. The Government could not succeed in bringing about the required change in attitudes among State officials and others concerned. There was a problem of the dearth of persons competent in Tamil to work in Government Departments. No meaningful steps were taken to recruit an adequate number of Tamil speaking officers. Equipment such as Tamil typewriters and personnel such as translators were not readily available. Once again, the Government had to take recourse to the law in an effort to remove the remaining obstacles.

In 1991 the Official Languages Commission (OLC) was established to monitor and supervise compliance with the provisions in the Constitution which had been enacted and to ensure that the language rights of the Tamil speaking people are not violated. The right of any person to communicate with the Government in the official language of his or her choice is enshrined in the Constitution. Yet, many State institutions such as local authorities and even some departments continued to ignore these provisions with impunity. OLC's principal function is to inquire into and report on any violation of these provisions which are brought to its notice and to make an effort to get the department or official concerned to fall in line with the provisions of the Constitution. Further, the OLC can institute legal action against those State officers who wilfully neglected and failed to comply with the language rights of any citizen.

However, it appears that the OLC has received only a few complaints and even in respect of such complaints it has not taken appropriate action as the OLC is unable to ensure compliance due to obstacles in the law. Section 28(1) of the Official Languages Commission Act No 18 of 1991 enables the Commission take legal action against State officers who "wilfully fail or neglect to transact business, receive or make such communication" in Tamil and shall be guilty of an offence for which a fine or term of imprisonment could be imposed by a Magistrate, if such officer was found guilty of the charge. Section 28(2), however, states that no such prosecution shall be initiated except with the prior sanction of the Attorney General. The Attorney General had been understandably averse to prosecuting an officer of State whose "wilful neglect" could be difficult to prove. He could always say that he does not have the resources to use Tamil in his official work. Consequently, Tamils continue to receive replies to official correspondence in a language they do not understand. Often name boards in Government or Semi-Government institutions and departmental circulars or even street names are not bilingual. This is in total disregard of the specific provisions of the Constitution which requires the use of both official languages.

The fact that only a few complaints had been received by the OLC is no indicator of the magnitude of the indignation of the non Sinhala speaking persons on this issue. Perhaps most persons who are affected or inconvenienced believe there is no use complaining to the OLC which, in their eyes, is another agent of the State rendered impotent by legal provisions knowingly or unknowingly enacted by the State. It could also be because they may be unaware that there are institutions to which they could complain. This is more so because enough had been said about this in Parliament and elsewhere. Even the Police who are enforcers of the law are seen putting up road traffic signs blatantly violating the language rights of the Tamils. Often notices to viewers on TV are not in Tamil. None of these institutions can claim to be ignorant of the fact that Tamil is also an official language and that those who do not know Sinhala would not be able to understand these signs and notices. At times such notices are only in English. And even some Government institutions have name boards only in English. These are violations of the language rights not only of the Tamils but also of the Sinhala citizens. Hardly do they realise that a little effort on their part in these matters could go a long way to earn goodwill and spare a lot of heart burn to those affected.

The institutions created for this purpose such as the Official Language Department, the Official Languages Commission, the Ministry of Ethnic Affairs etc., should be empowered to play a dynamic role in this regard. It appears that the Official Languages Commission had drawn the attention of the State to Article 22 of the Constitution which requires the President to gazette the areas outside the North and East which have a considerable number of Tamils living, to enable the Government institutions in such areas to equip themselves to deal with the Tamils in those areas in their mother tongue. Fifty two such divisions had been identified but only 12 such divisions in the Nuwara Eliya and Badulla districts had been so declared, due to the pressure of the CWC, just prior to the last Predeshiya Sabha elections. This helped the CWC candidates to get some additional votes but no Tamil Officers had been appointed to these Divisional Officers yet. Consequently, even in those areas one cannot have a death or birth registered in Tamil. Such dubious actions are the cause of continued discontent and disillusionment among the Tamils.

In the absence of meaningful steps to heal the festering wounds caused by the denial of language rights, one could not expect cordiality amongst the people of Sri Lanka. Violation of constitutional rights of citizens should be made a penal offence and those responsible should be dealt with swiftly and effectively. The failure to enforce available provisions of the law could lead to undesirable consequences.

While the Government is making every effort to solve the problem of militancy to prevent a division of the country, it is the duty of all concerned to ensure that the people in a united Sri Lanka do not have cause even to think of separation. Ensuring that the language rights enshrined in the Constitution which we all accept, are implemented diligently and honestly could certainly deprive those seeking to justify the call for a separation of one of the means they use to espouse their cause. It is hoped the proposed peace package or rather the devolution package had taken this matter into serious consideration.

While the efforts to stop the war continue, there is an urgent need to commit ourselves to devise ways and means to overcome the obstacles that stand in the way of the resolution of the ethnic conflict raging in our country. Ultimately when the protagonists sit down to sign a truce let there be no room for anyone to stress the need to ensure the language rights of citizens. It should then be possible to say that, in fact, such a problem no longer

exists. The performance of the Government in this regard should be judged not just by its success in enacting legal provisions, but by the efforts that were made, the commitment with which it was done, and the goodwill it earned with its ability to compromise. These would contribute towards bringing a lasting solution to the ethnic problem in this land and banish the need for anyone to even toy with the idea of separation.

In the circumstances non governmental organisations which are committed to improving the awareness of the public of their civic rights and means of access to justice, are trying to do what they could to make the State and its officials to see reason. The support of such organisations could be sought by those whose rights are so infringed. They could assist the Government in bringing to its notice violations of its officials to enable it to take remedial action with a view to promoting goodwill and a sense of recognition among the people of the country.

Organisations such as the Law & Society Trust, the Law Society of Sri Lanka, the Forum for Human Dignity, MIRJE, Movement for the Defence of Democratic Rights, etc., study these issues and bring to light the problems and constraints existing in government institutions with the intent of helping them to solve these problems. Some of these organisations even provide legal assistance to vindicate the rights of those affected. It is also hoped they would bring about awareness amongst the citizens of the remedies available and the institutions to which they could complain to, in the event of any infringement.

Essay Competition on National Reconciliation*

Awards Day Speech

Professor G.L. Peiris

Your Excellency Ruth Frances Archibald, the High Commissioner of Canada in Sri Lanka, Ms. Janet Lim of the UNHCR, Mr. Ian Martin, Mr. Sidat Wettamuny, Ladies and Gentlemen.

I think this is a very appropriate way to commemorate the death of the late Dr. Neelan Tiruchelvam. Today is a very sad day to all of us in that it is the first anniversary of his tragic assassination. What is important is that, as I said in Parliament on the day they passed a vote of condolence on the death of Dr. Neelan Tiruchelvam, is that, it is not enough to have symbolic gestures to commemorate him and make statues of him. It would be better rather to humanise the spirit of the work he did and the ideas he strove to achieve and the difference that he made with regard to the political culture of our country. Neelan was a multifaceted personality who was interested in many things, but I think that there was a central thread running through all the activities, which pervaded his life. That central trend it seems to me, is his deep and unrelenting commitment to national integration. He realised that Sri Lanka's trend consists of integrating all the different communities that inhabit this country. Most of all, he wanted to get across, loud and clear, a message that diversity is not a source of weakness but a strength. Sri Lanka in that respect finds herself in a unique situation, because our country has people who speak three different languages, Sinhala, Tamil and English. The country is inhabited by the Sinhalese, the Tamils, the Muslims and the Burghers. Our culture and our civilisation is nourished by the four major religions of the world. And in that respect it helps to construct and consolidate political and social institutions that enable all people in our country to live in it. Whatever religion they profess, whatever language they speak, and whatever cultural background they come from, to feel at home in our country without any perception of inferiority or exclusion. That is an essential trapping for happiness. We can try to achieve this by means of laws and regulatory mechanisms which are absolutely

* Organised by the Law & Society Trust under the Neelan Tiruchelvam Memorial Trust to coincide with Dr. Tiruchelvam's 1st death anniversary which fell on 29th July 2000. Edited for publication.

essential. We can also resort to administrative practices and procedures which are conducive to the achievement of these objectives. All this will achieve very little in these areas unless we concentrate on the transformation of attitudes. That needs hard work on attitudes and values. Otherwise, I think it will be in a mere shell – a facade.

I think it necessarily follows that the initiative to do this must be in the school rooms when the mind is still flexible and open to new ideas. That is the time that this initiative must be embarked upon if positive results are to be achieved. Once this has passed, the opportunity for changing minds is lost. The elasticity for accepting new ideas etc. is limited. Thereafter, the character and the outlook of the child gets stratified. That is why the school system is more important in maintaining ethnic relations. It is also my conviction that one of the fundamental problems in our country is the stratification and compartmentalisation that is characteristic of the educational system. That is a regrettable state of affairs. The educational system must emphasis the things that we have in common, the values that we share. The alternative is the opposite system where schools and universities recognise a division into language streams where a Sinhala child goes to a Sinhala University and a Tamil child to a Tamil University which makes room for a division according to language streams. Language, I think, is a real barrier to unification. Unfortunately, as far as the vernacular students are concerned they cannot speak the language of the other; neither of them is able to use the English language with sufficient facility and ease to enable spontaneous verification to make friends. That is why in our country they have become so acutely obdurate or racial. When I was in the University, I was at the Akbar Nel Hall and Neelan was in the Arunachalam Hall. None of us was at all conscious of our racial identity. We made friends on the basis of interests and not on the basis of language or ethnic identity.

Today, unfortunately, the situation is very different. One of the things that has to be taken into consideration is the factor of change that has taken place in the educational system. That is why it is so important to indicate the values pertaining to integration in the minds of the child. That brings a very sharp focus on school children. It is also necessary to be somewhat innovative and imaginative in the methods to achieve this goal. It cannot be done by formal lectures and presentations. People get tired of these. There is a certain monotony in them. That is the reason why the Neelan Tiruchelvam Trust is to be commended for this particular initiative where children between 15 to 19 years of age were invited to take part in an essay competition which importantly was conducted in all three languages - Sinhala, Tamil and English on the theme "National Integration." So

this is a way of involving young people in the search for solutions, new ideas, new approaches and new value systems. That is the way of designing a very relevant national endeavour.

I would like to point out to you four institutions which, to my mind, have a vital role to play, if we are to succeed in this endeavour.

The first of this institutions is the school system. I am happy that Mr. Sidat Wettamuni is here on this occasion. When I talk about schools and universities, I do not mean just the formal lecture rooms or the classrooms. It includes the gamut of activities that are associated with the educational institutions such as cultural activities as well as sports activities. Those are the natural settings in which young people from different cultural backgrounds have the opportunity of interacting with each other. So I am taking a holistic or comprehensive view of the secondary and tertiary education systems in our country. Schools and universities are pivotal, absolutely pivotal in this process, and there is no doubt about it.

Secondly, I think there is a very critical role to be played by the clergy, the clergy of all religions. Whatever may be said, the clergy plays an important role in the cultural context of Sri Lanka. These are values from which one cannot shirk. It all depends on historical traditions associated with them and the value systems of varied particular cultures. As far as our own culture is concerned I cannot see any conceivable doubt that the clergy has a profound impact on the formation of attitudes in this country. It is very important to see the continuity of the involvement of this process.

The third institution that I have in my mind is the media. The media is very important indeed. One of the reasons why problems have become so aggravated and exasperated in our country is because the highly emotional content in the on-going dialogues. That is very obvious today if you look at the debate on political reforms. For example, the emotional content of the debate is striking. It is the heart that matters and not the thinking, reflecting and discriminating mind. They come to conclusions and then they try to back up those conclusions, and they have to reverse their decisions due to ex post facto reasoning. The media has to help in zeroing on the issues, identifying the issues and encourage rational, objective and dispassionate thinking about the core issues. I think that should be the principle role of the media.

The fourth institution I have been in my mind is the public service. You can have all the laws you want and all the regulations and administrative practices, but somebody has to make it all work. That is the bureaucracy. So the attitudes of the people who make the system work on the ground, the people who interact with the public, cannot be under-estimated. You can have the most excellent laws in the statute books, truly inspiring in their content. But if there are no clerks, no typewriters and so on such as the problems that some government departments are having when they have to work in Sinhala or Tamil, it cannot be made to work. So it is necessary to induce the public service, to reform the mind of the bureaucracy and make available to them the facilities and the resources needed. The need is to sensitise the bureaucracy without which none of the objectives could be achieved.

Those I think are the four pillars of this endeavour - the schools, the clergy, the media and the bureaucracy. I have not presented them in any particular order. I think this is a truly important national undertaking. Your emphasis and your priorities are correct. You have chosen to address the minds of the young children on issues of national integration. You have also decided to conduct this competition in all three languages, covering every part of the country. You have chosen to do this at a time when something meaningful and sensible can be done and that is when there is exposure and openness on these issues. So that is the bulwark - the strong anchor, on which we can construct the future of our country.

I would like to conclude as I began by emphasising that if we truly believe in the cause for which Neelan sacrificed his life, there is no better or more meaningful means to commemorate his life and work than by participating vigorously in everything we have visualised in those ideas, each according to his ability. These are historical processes which are indeed indispensable for the well-being of our country.

Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict

The States Parties to the present Protocol,

Encouraged by the overwhelming support for the Convention on the Rights of the Child, demonstrating the wide-spread commitment that exists to strive for the promotion and protection of the rights of the child.

Reaffirming that the rights of children require special protection, and calling for continuous improvement of the situation of children without distinction, as well as for their development and education in conditions of peace and security.

Disturbed by the harmful and widespread impact of armed conflict on children and the long-term consequences this has for durable peace, security and development.

Condemning the targeting of children in situations of armed conflict and direct attacks on objects protected under international law, including places generally having a significant presence of children, such as schools and hospitals.

Noting the adoption of the Statute of the International Criminal Court and, in particular, its inclusion as a war crime of conscripting or enlisting children under the age of 15 years or using them to participate actively in hostilities in both international and non-international armed conflicts.

Considering, therefore, that to strengthen further the implementation of rights recognised in the Convention on the Rights of the Child there is a need to increase the protection of children from involvement in armed conflict.

Noting that article 1 of the Convention on the Rights of the Child specifies that, for the purposes of that Convention, a child means every human being below the age of 18 years unless, under the law applicable to the child, majority is attained earlier.

Convinced that an optional protocol to the Convention raising the age of possible recruitment of persons into armed forces and their participation in hostilities will

contribute effectively to the implementation of the principle that the best interests of the child are to be a primary consideration in all actions concerning children.

Noting that the twenty-sixth international Conference of the Red Cross and Red Crescent in December 1995 recommended, inter alia, that parties to conflict take every feasible step to ensure that children under the age of 18 years do not take part in hostilities.

Welcoming the unanimous adoption, in June 1999, of International Labour Organisation Convention No. 182 on the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, which prohibits, inter alia, forced or compulsory recruitment of children for use in armed conflict.

Condemning with the gravest concern the recruitment, training and use within and across national borders of children in hostilities by armed groups distinct from the armed forces of a State, and recognising the responsibility of those who recruit, train and use children in this regard.

Recalling the obligation of each party to an armed conflict to abide by the provisions of international humanitarian law.

Stressing that this Protocol is without prejudice to the purposes and principles contained in the Charter of the United Nations, including Article 51, and relevant norms of humanitarian law.

Bearing in mind that conditions of peace and security based on full respect of the purposes and principles contained in the Charter and observance of applicable human rights instruments are indispensable for the full protection of children, in particular during armed conflicts and foreign occupation.

Recognising the special needs of those children who are particularly vulnerable to recruitment or use in hostilities contrary to this Protocol owing to their economic or social status or gender.

Mindful of the necessity of taking into consideration the economic, social and political root causes of the involvement of children in armed conflicts.

Convinced of the need to strengthen international cooperation in the implementation of this Protocol, as well as the physical and psychological rehabilitation and social reintegration of children who are victims of armed conflict.

Encouraging the participation of the community and, in particular, children and child victims in the dissemination of informational and educational programmes concerning the implementation of the Protocol.

Have agreed as follows:

Article 1

States Parties shall take all feasible measures to ensure that members of their armed forces who have not attained the age of 18 years do not take a direct part in hostilities.

Article 2

States Parties shall ensure that persons who have not attained the age of 18 years are not compulsorily recruited into their armed forces.

Article 3

1. States Parties shall raise the minimum age for the voluntary recruitment of persons into their national armed forces from that set out in Article 38, paragraph 3, of the Convention on the Rights of the Child, taking account of the principles contained in that article and recognising that under the Convention persons under 18 are entitled to special protection.

2. Each State Party shall deposit a binding declaration upon ratification of or accession to this Protocol that sets forth the minimum age at which it will permit voluntary recruitment into its national armed forces and a description of the safeguards that it has adopted to ensure that such recruitment is not forced or coerced.

3. States Parties that permit voluntary recruitment into their national armed forces under the age of 18 shall maintain safeguards to ensure, as a minimum, that:

(a) Such recruitment is genuinely voluntary;

(b) Such recruitment is done with the informed consent of the person's parents or legal guardians;

(c) Such persons are fully informed of the duties involved in such military service;

(d) Such persons provide reliable proof of age prior to acceptance into national military service.

4. Each State Party may strengthen its declaration at any time by notification to that effect addressed to the Secretary-General of the United Nations, who shall inform all States Parties. Such notification shall take effect on the date on which it is received by the Secretary-General.

5. The requirement to raise the age in paragraph 1 of the present article does not apply to schools operated by or under the control of the armed forces of the States Parties, in keeping with Articles 28 and 29 of the Convention on the Rights of the Child.

Article 4

1. Armed groups that are distinct from the armed forces of a State should not, under any circumstances, recruit or use in hostilities persons under the age of 18 years.

2. States Parties shall take all feasible measures to prevent such recruitment and use, including the adoption of legal measures necessary to prohibit and criminalise such practices.

3. The application of the present article under this Protocol shall not affect the legal status of any party to an armed conflict.

Article 5

Nothing in the present Protocol shall be construed as precluding provisions in the law of a State Party or in international instruments and international humanitarian law that are more conducive to the realisation of the rights of the child.

Article 6

1. Such State Party shall take all necessary legal, administrative and other measures to ensure the effective implementation and enforcement of the provisions of this Protocol within its jurisdiction.

2. States Parties undertake to make the principles and provisions of the present Protocol widely known and promoted by appropriate means, to adults and children alike.

3. States Parties shall take all feasible measures to ensure that persons within their jurisdiction recruited or used in hostilities contrary to this Protocol are demobilised or otherwise released from service. States Parties shall, when necessary, accord to these persons all appropriate assistance for their physical and psychological recovery and their social reintegration.

Article 7

1. States Parties shall cooperate in the implementation of the present Protocol, including in the prevention of any activity contrary to the Protocol and in the rehabilitation and social reintegration of persons who are victims of acts contrary to this Protocol, including through technical cooperation and financial assistance. Such assistance and cooperation will be undertaken in consultation with concerned States Parties and relevant international organisations.

2. States Parties in a position to do so shall provide such assistance through existing multilateral, bilateral or other programmes, or, inter alia, through a voluntary fund established in accordance with the rules of the General Assembly.

Article 8

1. Each State Party shall submit, within two years following the entry into force of the Protocol for that State Party, a report to the Committee on the Rights of the Child providing comprehensive information on the measures it has taken to implement the provisions of the Protocol, including the measures taken to implement the provisions on participation and recruitment.

2. Following the submission of the comprehensive report, each State Party shall include in the reports they submit to the Committee on the Rights of the Child, in accordance with Article 44 of the Convention, any further information with respect to the implementation of the Protocol. Other States Parties to the Protocol shall submit a report every five years.

3. The Committee on the Rights of the Child may request from States Parties further information relevant to the implementation of this Protocol.

Article 9

1. The present Protocol is open for signature by any State that is a party to the Convention or has signed it.

2. The present Protocol is subject to ratification and is open to accession by any State. Instruments of ratification or accession shall be deposited with the Secretary-General of the United Nations.

3. The Secretary-General, in his capacity as depository of the Convention and the Protocol, shall inform all States Parties to the Convention and all States that have signed the Convention of each instrument of declaration pursuant to Article 13.

Article 10

1. The present Protocol shall enter into force three months after the deposit of the tenth instrument of ratification or accession.

2. For each State ratifying the present Protocol or acceding to it after its entry into force, the present Protocol shall enter into force one month after the date of the deposit of its own instrument of ratification or accession.

Article 11

1. Any State Party may denounce the present Protocol at any time by written notification to the Secretary-General of the United Nations, who shall thereafter inform the other States Parties to the Convention and all States that have signed the Convention. The denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General. If, however, on the expiry of that year the denouncing State Party is engaged in armed conflict, the denunciation shall not take effect before the end of the armed conflict.

2. Such a denunciation shall not have the effect of releasing the State Party from its obligations under the present Protocol in regard to any act that occurs prior to the date on which the denunciation becomes effective. Nor shall such a denunciation prejudice in any way the continued consideration of any matter that is already under consideration by the Committee prior to the date on which the denunciation becomes effective.

Article 12

1. Any State Party may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate the proposed amendment to States Parties, with a request that they indicate whether they favour a conference of States Parties for the purpose of considering and voting upon the proposals. In the event that, within four months from the date of such communication, at least one third of the States parties favour such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of States Parties present and voting at the conference shall be submitted to the General Assembly for approval.

2. An amendment adopted in accordance with paragraph 1 of the present article shall enter into force when it has been approved by the General Assembly of the United Nations and accepted by a two-thirds majority of States Parties.

3. When an amendment enters into force, it shall be binding on those States Parties that have accepted it, other States Parties still being bound by the provisions of the present Protocol and any earlier amendments that they have accepted.

Article 13

1. The present Protocol of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United nations.

2. The Secretary-General of the United Nations shall transmit certified copies of the present Protocol to all States Parties to the Convention and all States that have signed the Convention.

INTERNATIONAL SERVICE FOR HUMAN RIGHTS

Joint NGO appeal for the creation of a UN Mechanism on Human Rights Defenders

1. The adoption, by the UN General Assembly on 9 December 1998, of the "Declaration on Human Rights Defenders"[1] (hereafter "the Declaration") marked the most significant universal recognition by UN member States of the important role of human rights defenders in helping the victims of human rights violations. It requires States to create the conditions to enable human rights defenders to freely undertake their work.

2. Yet by simply promoting human rights and taking up the issues of victims, human rights defenders face the same dangers as before the Declaration was adopted, for example: intimidation, suspension from their employment, subtle abuse of civil litigation, administrative obstacles and harassment, slander and physical attacks, arbitrary detention and extrajudicial killings. New restrictions, sometimes backed by national legislation, are imposed on their ability to operate freely.

3. In many regions of the world human rights defenders suffer even more difficulties, so much so that the Sub-Commission has felt obliged to draw the attention of the Commission to the matter in resolutions in 1998 and 1999.[2] Furthermore, the General Assembly of the Organisation of American States adopted a resolution on Human Rights Defenders during its June 1999 session in Guatemala.[3]

4. The response of the Commission on Human Rights has not adequately matched the gravity of the global problem.

5. The annual Secretary-General's report[4] on problems encountered by human rights defenders co-operating with the Commission's mechanisms will be its nature always

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[1] Full title: Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms, Resolution 53/144.
[2] Resolution numbers: E/CN.4/Sub-2/1998/3 and 1999/3.
[3] Resolution number: AG/RES.1671 (XXIX-0/99).
[4] E/CN.4/2000/101.

be too limited in its perspective. Furthermore, it does not reflect the variety of work carried out and the difficulties encountered by human rights defenders.

6. From 1996 to 1998 the Commission suggested in the resolution on the thematic procedures that due attention should be given to human rights defenders. However, when thematic rapporteurs did, some found that their mandate did not allow them to deal with the variety of problems faced by human rights defenders.

7. The existing thematic mandates do not deal with all the issues, referred to in the Declaration, relating to the free and effective functioning of human rights defenders. The mandates of the thematic mechanisms do not cover all forms of intimidation and harassment suffered by human rights defenders, for example, on the freedom of association and freedom of movement, which are both essential for the work of human rights defenders. They are, therefore, unable to provide systematic reporting on the degree to which the rights of human rights defenders are respected or to present their reactions and recommendations to these problems.

8. The current special procedures are neither able to provide a comprehensive review of the implementation of the international standards which provide some forms of protection of the rights of human rights defenders (including the Declaration), nor are they able to investigate adequately specific cases. In the most recent report from the annual meeting of the special rapporteurs/representatives, experts and chairpersons of special procedures of the Commission, they have acknowledged that the *"nature of the problem was not one that could be covered satisfactorily by them alone in the discharge of their specific mandates."*[5]

9. Last year's resolution of the Commission (1999/66) *"Requests the Secretary-General to consider appropriate ways for the effective promotion and implementation of the Declaration...."* The subsequent report of the Secretary-General[6] reflects the views transmitted to him by some governments, national institutions and several NGOs. Various ways for the effective promotion and implementation of the declaration are mentioned but the most convincing reasoning presented is for the creation of a new UN mandate on human rights defenders.

[5] E/CN.4/2000/5, para 87 (p), page 25 of English version.
[6] E/CN.4/2000/95.

10. Non-governmental organisations around the world remain convinced that a special rapporteur on human rights defenders should be created urgently. The proposal repeatedly made in many fora, including in joint NGO statements at recent sessions of the Commission on Human Rights, remains valid, that is the creation of a single person mechanism, namely a special rapporteur on human rights defenders. Ensuring that human rights defenders are able to freely perform their activities, this rapporteur should focus on: effective measures to prevent violations against human rights defenders, propose ways to improve the implementation of the Declaration on human rights defenders; and devise methods to better protect the rights of Human Rights Defenders.

11. The work of human rights defenders is so central to the further promotion and protection of human rights that the establishment of this mandate should be a top priority of the 56th session of the Commission on Human Rights. This mechanism would fill a major gap and not duplicate other mandates, as it would focus on the particular problems faced by anyone acting individually or in association with others to promote and protect human rights and fundamental freedoms.

This joint appeal is made by the following non-governmental organisations:

International Service for Human Rights
Amnesty International
International Commission of Jurists
International Federation of Human Rights (FIDH)
Association for the Prevention of Torture
World Organisation Against Torture (OMCT)
Franciscans International
Dominicans for Justice and Peace
Baha'i International Community

BOOK REVIEW

THE LEGAL HERITAGE OF SRI LANKA*
BY A.R.B. AMERASINGHE

*Haris de Silva***

The Legal Heritage of Sri Lanka by A.R.B. Amerasinghe (LL.B., B.Litt., Ph.D, Judge of the Supreme Court of Sri Lanka) is a veritable *tour-de-force* of the author, resulting from his inquiry into the laws of the land and its judicial administration. It covers the period from 'the time of the colonisation of the island by tribes from India sometime in the 5th century before Christ, to the days of the last king of Sri Lanka, Sri Wikrama Rajasinha (1798-1815) - a period of about 2500 years.' (p.6)

It is a well conceived and well structured publication. It consists of 19 chapters in 383 pages. They are I. Introduction [3pp.]; II. The Period under consideration [3pp.]; III. The early Settlers and Sri Lankan Laws [26pp.]; IV. Punishment and its Purported Justification [21pp.]; V. Forms of Punishment [27pp.]; VI. Treason [36pp.]; VII. Other Offences [18pp.]; VIII. The Monarch [57pp.]; IX. Traditional Canons of Judicial Conduct [5pp.]; X. The Allegation of Corruption [21pp.]; XI. A Society without Laws? [42pp.]; XII. Written Court Records, Codes and Texts [9pp.]; XIII. The Courts of Law in General [12pp.]; XIV. Officials and their Judicial Functions [25pp.]; XV. Other Courts and Tribunals [44pp.]; XVI. Removing the Underlying Cause of Discontent [5pp.]; XVII. Sanctuary [20pp.]; XVIII. Public Co-operation in Law Enforcement [5pp.]; and XIX. Conclusion [(4pp.)].

The Notes to the 19 Chapters - a mine of information - are given at the end of the last chapter, from pages 384 to 563, i.e. in 180 pages. It is followed by a Glossary [3pp.], Table of Cases [3pp.], a Select Bibliography [8pp.], and an Index [15pp.].

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According to the author, 'what I am concerned in this book is what Hayley described as "the common law in the strictest sense" and the legal institutions for the administration of justice according to that law.' (p.3)

The author has examined the subject he is concerned with through a masterly marshalling of facts from the *Dharmasastras,* inscriptions, chronicles, literature, written laws and practices, and modern day judgments, spanning a period of around two millennia. The result is a most fascinating account of that very technical and abstruse subject of law and its administration, in ancient and modern Sri Lanka.

The publication presents not only the laws that were administered in the island from ancient times, but in the course of its examination the author has shown the negative concepts the early British writers and others have had on the laws of the land. It is here that the skills of a lawyer, judge, historian and even of an epigraphist, is seen combined to advantage.

Going through the book, one would easily see the author's firm grasp of the subject. The ease and grace with which he moves from one source to another, varying in time from the pre-Christian era to the modern day, citing ancient dicta and modern judgments, to analyse, illustrate and present the cohesive picture, that comes out fascinatingly in the publication.

The multi-disciplined knowledge of the author, displayed in the book, and the Sri Lankan perspective with which the subject has been dealt with, is not a quality that is easily seen in publications on the subject, or one would even expect to see oft repeated.

The views of the author presented in the book are both balanced and scholarly. For example, on Forms of Punishment he says, "I find myself in complete agreement with the views of the British writers and officials of the Nineteenth Century that barbarous forms of punishment were imposed by the monarchs of Sri Lanka. However, the retention of execution and flogging by the British cannot be satisfactorily explained if, as a matter of policy, barbarous forms of punishment were to be abolished."

Moreover, the punishments imposed ought to be placed in the context of time and circumstances and the prevailing laws, not as an excuse, much less as a justification, but

as an aid to understanding why they were imposed; they ought also to be considered in the light of punishments imposed by other societies, although comparison may be odious, so that it might be realised that there was nothing uniquely harsh and cruelly savage about punishments of Sri Lanka.' (p.58).

Then, again, on judicial conduct, the author observes, 'Commenting on the legal system of Sri Lanka, Sir Alexander Johnson said, "the laws and institutions [introduced by the first ruler] had never been altered by any foreign conqueror but had continued to prevail in the original state from the time they were first introduced into the interior of Ceylon till the year 1815."

He says, 'What Sir Alexander meant by the phrase "first introduced into the interior of Ceylon" is not clear. However, this much is certain: the canons of judicial conduct set out in D'Oyly were a part of an ancient system that went into the past, well beyond the days of the Udarata - the Kandyan Kingdom, that commenced with the reign of Senasammata Vikramabahu (1469-1511). As we have seen, according to the evidence in the chronicles, the principles of judicial impartiality and independence go back to the times before Christ." (p. 193).

He further says, 'In my view, Sri Lankan judges have a greater duty to uphold and adhere to these principles than if they were required to follow canons of judicial conduct 'imported' with the legal system that was imposed on this country. (p.195).

On *res judicata*, L.J.M. Cooray is cited as an example, where the subject matter has been wrongly comprehended, or had been inadequately examined. He says, when Cooray put it down, that 'In Sinhalese procedure there appears to have been no law to prevent the retrial of a case previously heard and decided. The ancient Sinhalese law did not know of *res judicata*', he [i.e. L.J.M. Cooray had] only reproduced, "verbatim, what Hayley stated. ... only adding the last sentence.' (p.207).

Elaborating on that subject, the author says, 'The Kondavattavan Pillar Inscription of Dappula IV (924-935 AD) stated: "Fines shall not be levied once again for offences which have been settled by levying fines previously", and gives more historical evidence for the application of that principle *res judicata*. Thus he shows that it was a fundamental rule in Sri Lanka that a person could not be punished twice for the same offence. (p.209).

In dealing with his topics, the author examines them in a time frame. Thus, for example, when discussing Treason, he takes examples from the 3rd Century AD to the 19th Century, and shows what offences were considered as constituting treason, what the punishments were, and how they were meted out from time to time.

To quote one instance, closer in time to the present day, he says, 'When Pilima Talawe proposed elevating Konnasamy to the throne, the Mahanayake Thero warned: "Rest assured, if the keeper do not take care of his elephant, not only the lives of others, but his own will be endangered." The Mahanayake's prophetic words were fulfilled. Pilima Talawe was executed.' (p.101).

On the laws of the land he firmly says, Hayley's observation that "The Sinhalese kings do not appear to have made laws, and Knox's view "here are no laws", even if we take 'law' to mean the command of the sovereign, require reconsideration. (p.251).

Elaborating on the subject, he says, while the laws made in the land were stable, and not subject to rapid change, they were not static. In support of his contention he quotes the Medirigiri Slab Inscription of Mahinda VI. which says "The regulations promulgated by Bud-Mala enacted when the year One Thousand six hundred had been completed, and the fifth year shall not be applied," and quotes other inscriptional evidence as well, to show that laws were not static. (p.251-252).

On judicial administration, the author's views - coming as it is from a sitting judge of the Supreme Court of the Island - would need serious consideration.

He says, "In my view, the perilous current situation of the administration of justice in Sri Lanka is a direct result of the devaluation of the traditional system of dispute resolution which had a menu of dispute resolution techniques - mediation, conciliation, negotiation, arbitration, adjudication or a combination of such techniques - a system, interestingly enough, adopted in recent times by the most economically advanced communities, which among other things, require a speedy resolution of disputes as a part of their efficient infrastructure." (p.317).

He further says, 'The current crisis caused by the 'Law's Delay' will, in my view, abate only when it is acknowledged that it is necessary for the efficient administration of

justice, and that it is in the litigant's interest, to match disputes to appropriate dispute resolution processes. That, it must be accepted, is as much a part of 'good lawyering' as are litigation skills.' (p.318).

The publication shows, that concepts of justice and natural justice, were known and practised in the island, for more than 2000 years. It, further shows, that cardinal principles in adjudication like equality before the law, had been the norm for millennia, i..e., long before they came to be practised in modern day courts, and, also, that a system based on principles, where precedents were followed, had been in place during the period of its monarchical rule.

In his presentation, the author has very forcefully shown, that the island had an appropriate and well developed judicial system, as against the previously held notions that no such system had existed.

Technically, the production is excellent. The print is clear, on quality paper, and easy on the eye. I must say, that after a long time, I have seen a local publication that has the diacritical marks inserted accurately, and the text meticulously proof-read.

I am not surprised. Knowing the author's proclivity for perfection, nothing less would have been expected. That the printer had stood up to such rigorous requirements, and had creditably acquitted himself, would stand as a handsome tribute to the excellence in printing and production at Sarvodaya.

The publication has not been done for profit. Its royalties are donated to the Sarvodaya Suvasetha Sewa Society for the benefit of destitute orphaned children.

In its approach to the subject, in the methodology adopted, and in its presentation, it is the first of its kind to come out in print. It is a major contribution to our understanding of the law of the land, its people and its rulers. No doubt, it would be a classic in its field.

The legal Heritage of Sri Lanka, would, at once attract the general reader and the specialists in many fields. The excellence of its contents and the quality of its production, would ensure that before long it will be in the lists of 'rare books'. Those who come to possess it early, would be the fortunate and the privileged.