

LST REVIEW

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PROTECTING CHILDREN'S RIGHTS

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Editor's note.....

In this issue we publish the Bill on the National Child Protection Authority presented in parliament recently. While the establishment of the Authority was welcomed by every section of society, civil society organisations felt that the scope of the Authority was far too narrow. In addition, there were other provisions in the Bill which were unacceptable. These representations were made to the Ministry of Justice by several NGOs. The Law & Society Trust organised discussion on the Bill and the text of the recommendations is published in this issue. We also publish the text of the speech made by Dr Neelan Tiruchelvam in parliament when the Bill was being debated. Several amendments to the Bill were made pursuant to the representations made by civil society groups. It is heartening to note that the Bill was passed without a single dissenting vote. The text of the Act will be published in a subsequent issue of the LST Review.

We also publish the text of a presentation made by Dr Mario Gomez on the Human Rights Commission of Sri Lanka at a workshop organised by the Trust under its Equal Opportunity Programme. In his presentation Dr Gomez looks at the legal mandate of the Commission and its work during the first year of operation and highlights certain areas in which the Commission can and should get involved in. He also believes that unfortunately, the great expectations the community had when the Commission was first established have not been fulfilled by the Commission.

We also publish a report by Mr Navin Perera on election monitoring in Cambodia.

**THE GAZETTE OF THE DEMOCRATIC
SOCIALIST REPUBLIC OF
SRI LANKA**

Part II of July 17, 1998

SUPPLEMENT

(Issued on 20.07.1998)

NATIONAL CHILD PROTECTION AUTHORITY

A

BILL

to provide for the establishment of the National Child Protection Authority; for the purpose of formulating a national policy on the prevention of child abuse and the protection and treatment of children who are victims of such abuse; for the co-ordination and monitoring of action against all forms of child abuse; and for matters connected therewith or incidental thereto

Ordered to be published by the Minister of Justice,
Constitutional Affairs, Ethnic Affairs and
National Integration

L.D. - O.9/97.

AN ACT TO PROVIDE FOR THE ESTABLISHMENT OF THE NATIONAL CHILD PROTECTION AUTHORITY FOR THE PURPOSE OF FORMULATING A NATIONAL POLICY ON THE PREVENTION OF CHILD ABUSE AND THE PROTECTION AND TREATMENT OF CHILDREN WHO ARE VICTIMS OF SUCH ABUSE; FOR THE CO-ORDINATION AND MONITORING OF ACTION AGAINST ALL FORMS OF CHILD ABUSE; AND FOR MATTERS CONNECTED THEREWITH OR INCIDENTAL THERETO.

BE it enacted by the Parliament of the Democratic Socialist Republic of Sri Lanka as follows:

Short title and date of operation

1. This Act may be cited as the National Child Protection Authority Act, No.... of 1998 and shall come into operation on such date as the Minister may appoint by Order published in the Gazette.

Establishment of the National Child Protection Authority

2. (1) There shall be established an Authority which shall be called the National Child Protection Authority (hereinafter in this Act referred to as the "Authority.")

(2) The Authority shall by the name assigned to it by subsection (1) be a body corporate and shall have perpetual succession and a common seal and may sue and be sued in such name.

Members of the Authority

3. The Authority shall consist of -

(a) the following members to be appointed by the President (hereinafter referred to as the "appointed members") -

(i) at least one but not exceeding two;

- (A) senior psychiatrists serving in a Government hospital;
- (B) senior paediatricians serving in a Government hospital;
- (C) medical practitioners engaged in the field of forensic medicine,

nominated by the Minister in charge of the subject of Health;

- (ii) a senior officer of the Attorney-General's Department not below the rank of Deputy Solicitor-General nominated by the Minister in charge of the subject of Justice;
 - (iii) a senior officer of the Department of Police not below the rank of Deputy Inspector General nominated by the Minister in charge of the subject of Defence;
 - (iv) five members from persons who appear to the President to have wide experience, capacity and recognition in law, child welfare, education or any other related field; and
- (b) the following *ex-officio* member, namely the Commissioner of Probation and Child Care.

Disqualification from being a member

4. A person shall be disqualified from being appointed or continuing as a member of the Authority if -
- (a) he is or becomes a member of Parliament or any Provincial Council or any local authority; or
 - (b) he is not, or ceases to be, a citizen of Sri Lanka; or

- (c) he is under any law in force in Sri Lanka or in any other country found or declared to be of unsound mind; or
- (d) he is serving or has served a sentence of imprisonment imposed by any court in Sri Lanka or any other country; or
- (e) he holds or enjoys any right or benefit under any contract made by or on behalf of the Authority; or
- (f) he has any financial or other interest as is likely to affect prejudicially the discharge by him of his functions as a member of the Authority.

Removal and resignation of members

5. (1) An appointed member of the Authority may resign his office by letter addressed to the President and such resignation shall be effective from the date on which it is accepted by the President.

(2) The President may for reasons assigned remove an appointed member of the Authority from office.

(3) Where a member of the Authority dies, resigns or is removed from office, the President shall, having regard to the provisions of section 3, appoint another member in his place.

(4) A member appointed under subsection (3) shall hold office for the unexpired part of the term of office of the member whom he succeeds.

Term of office of members

6. Subject to the provisions of subsections (1) and (2) of section 5 the term of office of an appointed member of the Authority shall be three years and such member shall be eligible for re-appointment for one more term of office.

Remuneration or allowance of members

7. The members of the Authority shall be paid remuneration or

allowances out of the Fund of the Authority at such rates as may be determined by the Minister.

Chairman and Deputy Chairman of the Authority

8. (1) The President may appoint as the Chairman of the Authority, a member who has proven experience and capacity in the field of administration or management.

(2) The President may appoint another member as the Deputy Chairman of the Authority.

(3) If the Chairman or the Deputy Chairman is by reason of illness or absence from Sri Lanka, temporarily unable to perform the duties of his office, the President may appoint another member of the Authority to act in his place.

(4) The Chairman and the Deputy Chairman shall not engage in any paid employment outside the duties of their office, without the approval of the President.

Meetings of the Authority

9. (1) The Chairman of the Authority shall, if present preside at every meeting of the Authority. In the absence of the Chairman from any such meeting, the Deputy Chairman shall preside at such meeting. In the absence of both the Chairman and the Deputy Chairman from any such meeting, a member elected from among the members present shall preside at such meeting.

(2) The quorum for any meeting of the Authority shall be six members.

(3) The Chairman or the Deputy Chairman or other member presiding at any meeting of the Authority, shall in addition to his own vote, have a casting vote.

(4) Subject to the preceding provisions of this section, the Authority may regulate the procedure in regard to the meetings of the Authority and the transaction of business of such meetings.

Acts not invalidated by reason of a vacancy

10. No act, decision or proceeding of the Authority, shall be deemed to be invalid by reason only of the existence of any vacancy of the Authority or any defect in the appointment of any member thereof.

Seal of the Authority

11. (1) The seal of the Authority may be determined and devised by the Authority, and may be altered in such manner as may be determined by the Authority.

(2) The seal of the Authority shall be in the custody of such person as the Authority may decide from time to time.

(3) The seal of the Authority shall not be affixed to any instrument or document except with the sanction of the Authority and in the presence of the Chairman and one member who shall sign the instrument or document in token of their presence.

(4) The Authority shall maintain a register of the instruments and documents to which the seal of the Authority has been affixed.

Authority to exercise its powers under the direction of the Minister

12. In the exercise of its powers and the discharge of its functions, the Authority shall comply with the policy of the Government in relation to the protection and welfare of children and with any general or special directions issued to it by the Minister in relation to the implementation of such policy.

Delegation of powers and functions of the Authority

13. (1) The Authority may delegate any of the powers and functions of the Authority to the Chairman.

(2) The Chairman to whom any of the powers and functions of the Authority have been delegated under subsection (1) shall exercise or discharge the powers and functions so delegated, subject to the general or special directions of the Authority.

Functions of the Authority

14. The functions of the Authority shall be -

- (a) to advise the Government in the formulation of a national policy on the prevention of child abuse and the protection and treatment of children who are victims of such abuse;
- (b) to advise the Government on measures for the prevention of child abuse;
- (c) to advise the Government on measures for the protection of the victims of such abuse;
- (d) to create an awareness, of the right of a child to be protected from abuse and the methods of preventing child abuse;
- (e) to consult the relevant ministries, Provincial Councils, local authorities, District and Divisional Secretaries, public and private sector organisations and recommend all such measures as are necessary, for the purpose of preventing child abuse and for protecting and safeguarding the interests of the victims of such abuse;
- (f) to recommend legal, administrative or other reforms required for the effective implementation of the national policy for the prevention of child abuse;
- (g) to monitor the implementation of laws relating to all forms of child abuse;
- (h) to monitor the progress of all investigations and criminal proceedings relating to child abuse;
- (i) to recommend measures to address the humanitarian concerns relating to children affected by armed conflict and the protection of such children, including measures

for their mental and physical well-being and their re-integration into society;

- (j) to take appropriate steps where necessary for securing the safety and protection of children involved in criminal investigations and criminal proceedings;
- (k) to advise and assist Provincial Councils and local authorities, and non governmental organisations to co-ordinate campaigns against child abuse;
- (l) to prepare and maintain a national data base on child abuse;
- (m) in consultation with the relevant ministries and other authorities to supervise and monitor all religious and charitable institutions which provide child care services to children;
- (n) to conduct, promote and co-ordinate, research in relation to child abuse and child protection;
- (o) to provide information and education to the public regarding the safety of children and the protection of the interests of children;
- (p) to engage in dialogue with all sections connected with tourism with a view to minimising the opportunities for child abuse;
- (q) to organise and facilitate, workshops, seminars and discussions, relating to child abuse;
- (r) to liaise and exchange information with foreign Governments and international organisations, with respect to detection and prevention of all forms of child abuse.

Powers of the Authority

- (a) to acquire, hold, take or give on lease or hire, mortgage, pledge, sell or otherwise dispose of, any movable or immovable property;
- (b) to borrow, with or without security, moneys, on such terms and conditions as may be approved by the Minister, for the purpose of discharging its functions;
- (c) to accept gifts, grants or donations whether in cash or otherwise, and to apply them for discharging its functions;
- (d) to appoint such officers and servants as may be necessary for carrying out the work of the Authority;
- (e) to appoint sub-committees or to coordinate with units at provincial level, for the effective discharge of its functions;
- (f) to determine the remuneration payable to the officers and servants so appointed;
- (g) to establish a social security scheme, and provide welfare and recreational facilities for its officers and servants;
- (h) to enter into and perform all such contracts, whether in or outside Sri Lanka, as may be necessary for the exercise of the powers and the discharge of the functions of the Authority;
- (i) to make rules in respect of the administration of the affairs of the Authority; and
- (j) generally, to do all such other things as are necessary to facilitate the proper discharge of the functions of the Authority;

Panel of Resource Personnel

16. (1) There shall be established a Panel of Resource Personnel (hereinafter referred to as "the Panel").

(2) The Panel shall consist of the following officers:

- (a) an officer not below the rank of a Senior Assistant Secretary of the Ministry of the Minister in charge of the subject of Justice, nominated by the Secretary of such Ministry.
- (b) an officer not below the rank of a Senior Assistant Secretary of the Ministry of the Minister in charge of the subject of Education, nominated by the Secretary of such Ministry;
- (c) an officer not below the rank of a Senior Assistant Secretary of the Ministry of the Minister in charge of the subject of Defence, nominated by the Secretary of such Ministry;
- (d) an officer not below the rank of a Senior Assistant Secretary of the Ministry of the Minister in charge of the subject of Health, nominated by the Secretary of such Ministry;
- (e) an officer not below the rank of a Senior Assistant Secretary of the Ministry of the Minister in charge of the subject of Social Services, nominated by the Secretary of such Ministry;
- (f) an officer not below the rank of a Senior Assistant Secretary of the Ministry of the Minister in charge of the subject of Provincial Councils, nominated by the Secretary of such Ministry;
- (g) an officer not below the rank of a Senior Assistant Secretary of the Ministry of the Minister in charge of

the subject of Women's Affairs, nominated by the Secretary of such Ministry.

- (h) an officer not below the rank of a Senior Assistant Secretary of the Ministry of the Minister in charge of the subject of Labour, nominated by the Secretary of such Ministry.

Authority to consult the Panel

17. The Authority may consult any officer or officers of the Panel in the exercise of its powers and discharge of its functions and for the purpose of giving effect to the principles and provisions of this Act.

Authority to advise the Minister

18. The Minister may on the advise of the Authority issue general or special directions to any Government Department or Statutory Institution requiring any such Department or Institution to carry out such acts relating to the prevention of child abuse as are specified in such direction.

Staff of the Authority

19. (i) The Authority may appoint officers and servants as it considers necessary for the efficient discharge of its functions.

(2) The officers and servants appointed under subsection (1) shall be remunerated in such manner and at such rates and shall be subject to such conditions of service as may be determined by the Authority with the approval of the Minister.

(3) At the request of the Authority an officer in the public service may, with the consent of the officer and the Secretary to the Ministry of the Minister in charge of the subject of Public Administration, be temporarily appointed to the Authority for such period as may be determined by the Authority with like consent, or be permanently appointed to such staff.

(4) Where any officer in the public service is temporarily appointed to the staff of the Authority, the provisions of subsection (2) of section 14 of

the National Transport Commission Act, No. 37 of 1991, shall, *mutatis mutandis*, apply to and in relation to him.

(5) Where any officer in the public service is permanently appointed to the staff of the Authority, the provisions of subsection (3) of section 14 of the National Transport Commission Act, No. 37 of 1991, shall, *mutatis mutandis*, apply to and in relation to him.

(6) Where the Authority employs any person who has agreed to serve the Government for a specified period, any period of service to the Authority by that person shall be regarded as service to the Government for the purpose of discharging the obligations of such agreement.

Fund of the Authority

20. (1) The Authority shall have its own fund (hereinafter referred to as the "Fund").

(2) There shall be paid into the Fund -

(a) all such sums of money that may be made available to the Authority out of the Consolidated Fund;

(b) all such sums of money that may be received by the Authority in the exercise, performance and discharge of its powers, duties and functions under this Act; and

(c) all such sums of money received by the Authority by way of gifts, grants or donations.

(3) There shall be paid out of the Fund all such sums as are required to defray the expenditure incurred by the Authority in the exercise, performance and discharge of its powers, duties and functions under this Act or under any other written law and all such sums as are required to be paid out of the Fund.

Exemption from certain taxes

21. Every donation made by money or otherwise to the Authority shall, for

the purposes of paragraph (b) of subsection (2) of section 31 of the Inland Revenue Act, No. 28 of 1979 be deemed to be a donation made in money or otherwise to a fund established by the Government.

Financial year and audit of accounts

22. (1) The financial year of the Authority shall be the calendar year.

(2) The provisions of Article 154 of the Constitution relating to the audit of the accounts of public corporations shall apply to the audit of the accounts of the Authority.

Declaration of secrecy

23. Every member of the Authority and all officers and servants of the authority, shall before entering upon his duties, sign a declaration pledging himself to observe strict secrecy in respect of all matters connected with the affairs of the Authority, and shall by such declaration pledge himself not to disclose any matter which may come to his knowledge in the performance or discharge of his duties and functions except -

- (a) when required to do so by a court of law; or
- (b) by any person or body of persons to whom such matters relates; or
- (c) in order to comply with any of the provisions of this Act, or any other law.

Returns and information

24. (1) For the purpose of enabling the Authority to exercise, perform and discharge any of the powers, duties and functions under section 14 and section 15 of this Act, the Authority or any person authorised in that behalf by the Authority may by notice in writing require any person to furnish to the Authority or to the person authorised, within such period as shall be specified in the notice, all such returns or information pertaining to any activities relating to children as are known to, or in the possession of, such person.

(2) It shall be the duty of any person who is required to furnish any return or information by a notice under subsection (1) to comply with such requirement within the period specified in such notice, except where such person is precluded from making such return or divulging such information under the provisions of any law.

(3) The Authority or any member thereof or any officer or servant of the Authority, shall not disclose to any person or use any returns or information furnished under subsection (1), except when required to do so by a court of law or for the purposes of discharging its functions.

Authority to be a scheduled institution within the meaning of the Bribery Act

25. The Authority shall be deemed to be a scheduled institution within the meaning of the Bribery Act and the provisions of that Act, shall be construed accordingly.

Members, officers and servants of the Authority deemed to be public servants

26. All members, officers and servants of the Authority shall be deemed to be public servants within the meaning and for the purposes of the Penal Code.

State property both movable and immovable to be made available to the Authority

27. (1) Where any immovable property of the State is required for any purpose of the Authority, such purpose shall be deemed to be a purpose for which a special grant or lease of such property may be made under section 6 of the Crown Lands Ordinance and accordingly the provisions of that Ordinance shall apply to a special grant or lease of such property to the Authority.

(2) Where any movable property of the State is required for any purpose of the Authority, the Minister may, by Order published in the Gazette, transfer to, and vest in the Authority the possession and use of such movable property.

Provided however, that no order affecting any movable property of the State shall be made by the Minister under the preceding provisions of this subsection, without the concurrence of the Minister having control over such property.

Acquisition of immovable property under the Land Acquisition Act

28. (1) Where any immovable property is required to be acquired for any specific purpose of the Authority and the Minister by Order published in the Gazette approves of the proposed acquisition for that purpose that property shall be deemed to be required for a public purpose and may accordingly be acquired under the Land Acquisition Act and transferred to the Authority.

(2) Any sum payable, for the acquisition of any immovable property under the Land Acquisition Act for the Authority shall be paid out of the Fund of the Authority.

Protection for action taken under this Act or on the direction of the Authority

29. (1) No action or prosecution shall be instituted -
- (a) against the Authority, for any act, which in good faith is done or purported to be done by the Authority under this Act; or
 - (b) against any member, officer or servant of the Authority or a officer of the Panel for any act which in good faith is done or purported to be done by him under this Act or on the direction of the Authority.

(2) Any expenses incurred by any such person as is referred to in paragraph (b) of subsection (1), in any action or prosecution instituted against him in respect of any act which is done or purported to be done by him under this Act or on the direction of the Authority shall be paid out of the Fund of the Authority, if the Court holds that such act was done in good faith.

No writ to be against a member, officer or servant of the Authority

30. No writ against the person or property shall be issued against any

member of the Authority or any officer or servant of the Authority in any action brought against the Authority.

Furnishing of information to the Minister

31. The Minister may, from time to time, direct the Authority to furnish to the Minister in such form as the Minister may require returns, accounts and other information with respect to the work of the Authority and the Authority shall carry out every such direction.

Powers of Authority to authorise any officer to enter and inspect any premises

32. The Authority may, where it has reason to believe that there is child abuse on any premises, authorise in writing any officer to enter and search such premises. An officer so authorised is hereinafter referred to as an "authorised officer."

Power of inspection and search

33. Any authorised officer may -

- (a) enter and inspect any premises of any institution by which child care services are provided;
- (b) enter and inspect any premises, where he has reason to believe that children are being kept for -
 - (i) the purpose of child abuse;
 - (ii) any other unlawful purpose;
 - (iii) illegal adoption;
- (c) enter and inspect any hospital or maternity home, where he has reason to believe that, illegal adoptions are taking place in such hospital or maternity home;

- (d) examine any books, registers or records maintained by such institution, hospital or maternity home and make extracts or copies therefrom;
- (e) interrogate any person in any such premises for the purpose of ascertaining the activities carried on in such premises and whether there is any contravention of any law relating to children.

(2) Every person who obstructs or resists such officer in the exercise of any power conferred on him by subsection (1) shall be guilty of an offence under this Act and shall on conviction after summary trial by a Magistrate be liable to a fine not less than one thousand rupees or to imprisonment of either description for a term not less than six months or to both such fine and imprisonment.

Power to seize articles

34. (1) Any authorised officer may, if he has reason to believe that any offence under any law relating to children, has been or is being committed, seize and detain -

- (a) for such time as may be necessary, any article by means of or in relation to which the offence is alleged to have been committed or which is used in relation to the commission of the offence;
- (b) any book, register, record or other document or any mechanical or electronic device which in his opinion may constitute evidence in relation to the prosecution of any person for any such offence.

(2) Where any authorised officer seizes any article under subsection (1), such article shall be kept in the custody and control of the Authority pending its disposal.

Authorised officers deemed to be peace officers

35. All authorised officers appointed under section 33 shall be deemed to

be peace officers within the meaning of and for the purposes of, the Code of Criminal Procedure Act, No. 15 of 1979.

Offences

36. Every person who -

- (a) fails to furnish any return or information in compliance with any requirement imposed on him under this Act;
- (b) knowingly makes any false statement in any return or information furnished by him;
- (c) being a member, officer or servant of the Authority or a officer of the Panel discloses any information obtained by him in or in connection with the exercise of his powers or the discharge of his functions under this Act, to any person for any purpose other than a purpose for which he is authorised to disclose such information by this Act;
- (d) contravenes the provisions of this Act or any regulation made thereunder,

shall be guilty of an offence under this Act.

(2) Every person who commits an offence under this Act for which no punishment is expressly provided by any other provision of this Act, shall on conviction after trial before a Magistrate, be liable to a fine not exceeding one thousand rupees or to imprisonment for a period not exceeding six months or to both such fine and imprisonment.

(3) Where an offence under this Act is committed by a body of persons, then -

- (a) if that body of persons is a body corporate every director or officer of that body corporate;
- (b) if that body of persons is a firm, every partner of that firm,

shall be deemed to be guilty of that offence;

Provided, however that a director or an officer of such body corporate or partner of such firm shall not be deemed to be guilty of such offence if he proves that such offence was committed without his knowledge or that he used all due diligence to prevent the commission of such offence.

(4) Every officer of the Panel or an officer or servant authorised in writing by the Authority shall be deemed to be a public officer within the meaning of section 136 of the Code of Criminal Procedure Act, No. 15 of 1979, for the purpose of instituting proceedings in respect of offences under laws relating to children.

Regulations

37. (1) The Minister may make regulations in respect of any matter required by this Act to be prescribed or in respect of which regulations are authorised by this Act to be made.

(2) Every regulation made by the Minister shall be published in the Gazette and shall come into operation on date of such publication or on such later date as may be specified in such regulation.

(3) Every regulation made by the Minister shall as soon as convenient after its publication in the Gazette, be brought before Parliament for approval. Any regulation which is not so approved shall be deemed to be rescinded as from the date of such disapproval but without prejudice to anything previously done thereunder.

(4) Notification of the date on which any regulation made by the Minister is deemed to be rescinded shall be published in the Gazette.

Interpretation

38. In this Act unless the context otherwise requires -

"Chairman" means the Chairman of the Authority appointed under section 8;

"child" means a person under eighteen years of age;

"child abuse" means any act or omission relating to a child, which would amount to a contravention of any of the provisions of -

- (a) sections 286A, 288, 288A, 288B, 308A, 360A, 360B, 360C, 363, 364A, 365, 365A, or 365B of the Penal Code;
- (b) the Employment of Women, Young Persons and Children Act;
- (c) the Children and Young Persons Ordinance; or
- (d) the regulation relating to compulsory education made under the Education Ordinance,

and includes the involvement of, a child in armed conflict which is likely to endanger the child's life or is likely to harm such child physically or emotionally;

"Deputy Chairman" means the Deputy Chairman of the Authority appointed under section 8.

"local authority" means any Municipal council, Urban Council or Pradeshiya Sabha and includes any authority created or established by or under any law to exercise performance and discharge, powers duties and functions corresponding to or similar to the powers duties and functions exercised, performed and discharged by any such Council or Sabha;

"Provincial Council" means a Provincial Council established under Chapter XVIIIA of the Constitution;

Sinhala text to prevail in case of inconsistency

39. In the event of any inconsistency between the Sinhala and Tamil texts of this Act the Sinhala text shall prevail.

National Child Protection Authority Bill*

Dr Neelan Tiruchelvam

The National Child Protection Authority Bill endeavours to provide an institutional focus for the prevention of child abuse and the protection of children who are the victims of such abuse. Under the Children's Charter, a National Monitoring Committee was established. Although this Committee includes persons with a strong commitment to child rights such as Professor Savitri Goonesekere and Mr. Bradman Weerakoon, it has not been able to function effectively and to co-ordinate inter-departmental activities in relation to children. In the circumstances, it would be appropriate to merge the concerns on the National Monitoring Committee and the proposed authority to create a single body with the overall responsibility of child protection. In this regard, we need to carefully consider the mandate of this new authority, its composition, structure and its potential effectiveness in the discharge of the powers and responsibilities which have been entrusted to it.

The mandate of the new Authority is limited to child abuse. Child abuse, in turn, is somewhat restrictively defined to include the contravention of the relevant provisions of the Penal Code, the Employment of Young Persons and Children Act, and the Children and Young Persons Ordinance. There are two other aspects to the definition. The first relates to the regulations relating to compulsory primary education made under the Education Ordinance. The second relates to involvement of children in armed conflict. This definition needs to be broadened to also include the impact of armed conflict on children.

However, we have a more fundamental observation with regard to the scope of this legislation. The new Authority, if it is to replace the National Monitoring Committee on the Children's Charter, its mandate needs to be

*Text of the speech made in parliament on 20th August 1998. Edited for publication.

expanded to include the full realisation of all of the rights recognised under the Convention of the Rights of the Child including child abuse and the protection of children who are victims of such abuse. This is because the rights under the Convention which have been categorised as survival rights, child development rights, protection rights and participation rights are inter-related and it is important that the new Authority should have the capacity to adopt a comprehensive approach to this question. We accordingly recommend that Clause 14(a) of the Bill be appropriately amended to include "the realisation of the rights of the child recognised by the Convention on the Rights of the Child." Similar consequential changes may need to be incorporated into Clauses 14(b) to 14(r). Professor Goonesekere in her book on *Children, Law and Justice - South Asian Perspectives* has drawn attention to the importance of using the Convention of the Rights of the Child "creatively with optimism and commitment" as a vital instrument for giving children an opportunity to realise their basic rights. The National Child Protection Authority, if it is to be effective and meaningful can symbolise an unequivocal commitment to the realisation of these objectives.

With regard to the composition of the Authority, we welcome the importance that has been accorded to professionals with experience in child protection issues and to civil society actors who have achieved recognition in law, child welfare and education. However, in the choice of a Chairman under Clause 8, the President would have the unfettered discretion of appointing a Chairman who has the vision, the moral commitment, experience and understanding of the law and practice relating to child rights and the administrative capacity to build a new institution which will command the respect of child right activists and other concerned members of the public. Sadly in the past, we have devoted a great deal of energy and efforts towards the creation of new institutions in areas of human rights and public accountability and given little thought to the quality of persons who should man such institutions. It should also provide in Clause 8 (1) and (2) that the Chairman and the Deputy Chairman should be full time persons and should not accept or assume any responsibility or office which is incompatible with their obligations to the Authority. The disqualifications in clause 4(e) and 4(f) may also be inappropriate given the nature of the functions of the Child Protection Authority.

With regard to the powers of the Authority they should include the power to receive complaints from individuals or bodies on the denial or imminent

infringement of the rights of the child. Similar provisions exist with regard to the National Human Rights Commission in section 10(a) and 10 (b) of Act No. 21 of 1996. The Authority should also be free to liaise with non-governmental organisations and human rights groups with a special interest in the rights of the child.

An important concern relates to how the Authority would give effect to its recommendations. Clause 18 provides that a Minister may on the advice of the Authority, issue general or special directions to any department or statutory institution. We need to define the Minister who would be responsible for issuing such directions. Since the law enforcement agencies fall within jurisdiction of the Ministry of Justice, the appropriate line Minister should be the Minister of Justice. Wherever the other line ministries are involved, the Minister of Justice may request the appropriate ministry to issue the directions. Directions may need to be issued not only to relevant departments and institutions, but also to specific officials. The Clause needs to be amended accordingly.

One of the difficulties that the new Authority will confront would relate to inter-ministerial and inter-departmental co-ordination. Clauses 16 and 17 enable the Authority to consult with members of a panel of resource personnel which in turn would consist of the representatives of the relevant line ministries. This seems to be a rather weak mechanism and it will be more satisfactory if a more formal inter-departmental committee consisting of officials is established to work with the Child Protection Authority so as to ensure that there is proper co-ordination and effective implementation.

With regard to the staff of the Authority, while Clause 19(1) provides for the appointment of officers and servants, it would be useful to appoint the Secretary to the Authority who can exercise supervisory control over the staff.

Further with regard to the powers of the Authority, Clause 32 enables the Authority to authorise in writing any officer to enter and search premises in which child care services are provided or where children are being kept for purposes of child abuse, illegal adoption or any other unlawful purpose. It is not clear whether the officer for this purpose needs to be an officer or servant of the Authority or whether it could include a police officer. Since the powers of entry into private premises and the incidental power to interrogate any person and to seize any article is an exceptional one, the question does arise

as to whether the Authority should not ordinarily be obliged to secure a judicial order from a magistrate before such search or seizure of private premises can take place.

In conclusion, the questions of child protection are of universal relevance to all communities and to all political formations in this country. Our record with regard to child abuse and child prostitution has been dismal. We have also failed to insulate children from the cruel consequences of a brutal war. If we are to take our international obligations seriously, we need not only to amend laws and policies, but also ensure that the new Authority carry out effective implementation in a co-ordinated and systematic manner.

A Report on the Discussion on the National Child Protection Authority Bill

*I.K. Zanofer and Chris Felstead**

The Law and Society Trust (LST) convened a discussion on the 17th of August 1998, on the proposed National Child Protection Authority Bill. This report provides a summary of issues which arose during the discussion. Participants at the meeting included a member of the academic staff of the Faculty of Law, representatives from several Ministries, NGOs and the Trust who participated in their individual and personal capacity.

The participants agreed that the scope of the Bill, focusing primarily on sexual exploitation of children, was too narrow: they felt that its objective should be to protect **all** the rights of children in line with the Convention on the Rights of the Child. It was further noted that the first draft of the Bill had been considerably wider in scope.

The participants also felt that the proposed structure was weak. They considered that the Authority should be given greater powers to ensure that recommendations are considered and acted upon, and that proposals which cut cross government departmental boundaries are co-ordinated.

Issues and Recommendations

1. The long title of the Bill is phrased too narrowly. The participants recommended that the long title be redrafted as follows:

*An Act to provide for the establishment of the National
Child Protection Authority for the purpose of
formulating a national policy for the protection of the*

* Interns, Law & Society Trust.

rights of the child; for the co-ordination and monitoring of action against all forms of infringement of the rights of the child; and for matters connected therewith or incidental thereto.

2. The Bill fails to define which Minister is to be responsible for the Authority. As the Authority will be considering matters which impact a wide range of existing government ministries, it is essential that the Authority is strongly represented at cabinet level. It was recommended that the Minister in charge of the Authority should be the Minister of Justice as he is in a good position to ensure that the recommendations of the Authority are implemented in a co-ordinated fashion.

3. It was recommended that the members of the Authority, as defined in Section 3 of the Bill, should encompass a wider range of government ministries. No reference is made to the Ministry of Social Welfare, which the participants considered was a serious omission.

4. Under Section 8(1), the Chairman is to be appointed by reference to his or her experience in administration and management. No reference is made to the need for the Chairman to be a person familiar with the issues surrounding child protection. It was recommended that the section should be re-drafted:

The President shall appoint as the Chairman of the Authority, a member who has proven experience and capacity in the field of child protection.

5. It was recommended that a full time Chairman be appointed to the Authority. The Chairman should be supported by a full-time Deputy Chairman and a professional secretariat. Section 8 should have an additional subsection inserted as follows:

The Chairman and the Deputy Chairman shall be full-time employees of the Authority.

6. Under Section 12 the Minister has the power to compel the Authority to follow any directions or orders he may issue. Further, the Authority is obliged to comply with the policy of Government

regarding the protection and welfare of children. This seriously compromises the independence of the Authority, and will limit its scope to consider matters outside of current Government policy. It was recommended that the Authority be free to make recommendations which may differ from current government policies. Further, the Minister should not have any power to compel the Authority to follow any directions or orders he may issue.

7. Section 14(a) should define the function of the Authority more widely as "child protection," rather than prevention of child abuse. It was recommended that the interpretation of "child protection" under Section 38 be amended as follows:

Child protection means the protection of the child from the violation of any of the rights contained in either the United Nations Convention on the Rights of the Child or the Children's Rights Charter, and the protection of the child from involvement in armed conflict which is likely to endanger the child's life or is likely to harm such child physically or emotionally. In the event of any inconsistency between these instruments, the definition contained in the United Nations Convention will prevail.

8. Under Section 14(k), the Authority has the power to advise and assist Provincial Councils and local authorities and non-governmental organisations on child protection matters. This fails to mention whether the Authority has the power to advise and assist international or domestic non-governmental organisations, or both.
9. Under Section 14(m), the Authority should not be compelled to undertake supervision and monitoring of all religious and charitable institutions which provide child care services. Instead, their duty should be to evaluate and report on such facilities at regular intervals. These reports should be made public.
10. Under Section 14(n), the powers which the Authority will have to enable it to co-ordinate action in relation to child abuse and child protection, are not mentioned.

11. Section 16 establishes a Panel of Resource Persons made up of civil servants from a number of different Ministries. However, it fails to adequately define the role and function of this Panel, and how it will perform its duties. It was recommended that the Panel should convene a regular meeting of secretarial staff from each Ministry for the purpose of monitoring and implementing the recommendations of the Authority.
12. Under Section 18 the Minister may issue directions to other government departments. This power is not sufficient to ensure that the directions of the Authority are **implemented** by different government departments, nor to ensure that a decision by the Minister not to follow the advice of the Authority is publicly explained. Section 18 should be redrafted as follows:

The Minister shall on the advice of the Authority issue general or special directions to any Government Department or statutory institution requiring that Department or Institution to carry out such measures relating to the protection of children as are specified in such direction. If the Minister does not follow the advice of the Authority, he must explain his reasons for not following the advice in parliament.
13. Under Section 23, members of the Authority are not permitted to disclose or discuss any matters considered by the Authority. This will prevent members of the Authority from discussing issues with members of outside bodies, or even with other governmental departments. Further, it is essential that the Authority is accountable to Parliament and the public in such a sensitive area.
14. Under Section 24(1), there is no definition of a "person authorised" by the Authority.
15. Under Section 32, there is no definition of who represents an "authorised officer", nor of who, within the Authority, is responsible for granting such authorisation.

16. The Authority should have the power to refer any cases it has investigated to either the Human Rights Commission or to the appropriate court of law.
17. There should be a procedure established through which the public can make complaints of child mistreatment and violations of the rights of the child which will then be investigated by the Authority.
18. The Authority should advise and assist both domestic and international non-governmental organisations on child protection matters.
19. Members of the Authority should be free to discuss any aspect of their work with other relevant authorities, such as the Attorney-General's Department or interested non-governmental organisations as long as this does not compromise the confidentiality of those subject to investigation. Further, an annual report should be published and tabled in Parliament. Copies of this report should be made freely available to the public. This will ensure that the Authority is held accountable for its actions.

Conclusion

The participants felt that the focus of the Bill was too narrow. Whilst the issue of child sexual abuse was recognised as serious, the participants felt that the establishment of a National Child Protection Authority should be used as a means of securing, monitoring, and protecting **all** the rights of children. Thus, it was considered that the role of the Authority should be much wider, addressing all the issues surrounding child protection and it was recommended that the phrase "child abuse" used throughout the Bill should be substituted with the wider phrase of "child protection." This, in turn, should be defined by reference to the United Nations Convention on the Rights of the Child and the Children's Charter.

Further the participants considered that the Authority should be strengthened and comprise a full-time Chairman and Deputy Chairman, together with a professional secretariat. This will ensure that it has adequate resources to monitor all aspects of child protection.

Great Expectations:

The Sri Lankan Human Rights Commission*

*Mario Gomez***

The law establishing the Human Rights Commission was passed in July 1996. The five member, all male Commission was appointed in March 1997 and the Commission began functioning in July 1997, a year after the law was passed.

The birth of the Human Rights Commission (HRC) was met with great expectations in this country. The State had spoken for many years about the creation of a human rights commission, but all this remained on paper. Here at last then was a statutory body that was vested with substantial powers for the protection, promotion and fulfilment of human rights. In addition, it had counterparts in other parts of the world from whose work it could draw inspiration.¹

1. The Functions of the Human Rights Commission

The law that set up the HRC envisaged an institution that would perform a wide range of functions. One of its primary functions was to act as a complaints mechanism, a human rights complaints mechanism that would respond quickly, a mechanism that would be inexpensive and easy to access. This is the rationale for similar commissions around the world: that they

* Text of the presentation made at a workshop organised by the Law & Society Trust on 6th June 1998 at the Sri Lanka Foundation Institute, Colombo. Edited for Publication.

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¹ See Mario Gomez, "Sri Lanka's New Human Rights Commission" in *20 Human Rights Quarterly* (1998) 281, for an analysis of the legislation that established the Commission.

would emerge as inexpensive and easily accessible mechanisms for a victim of a human rights violation. According to the statute the Commission was to try and deal with the complaint through mediation and conciliation first, where conciliation was appropriate.

However, in the context of human rights violations conciliation and mediation can sometimes be dangerous. If conciliation helps in providing a speedy access between a victim and the alleged violator, there can be no objection to conciliation. However, if conciliation results in the Commission compromising fundamental standards of human rights, then this can send out the wrong signals and can be dangerous.

If conciliation fails, or if one of the parties objects to conciliation, then the HRC can go to court. It can also suggest to state institutions that redress be offered to the victim and recommend a modification of the practice giving rise to the violation. However, it has no power to make binding orders.

The Commission is given the power to initiate litigation. This power is an important one and has yet to be used by the Commission. The Commission also has the power to intervene in existing litigation, with the consent of the court, again a power that has not yet been exercised by the Commission. The Indian Human Rights Commission, by contrast, has not been afraid to file public interest petitions and intervene in existing litigation.

The law gives the Commission wide powers of investigation. It has the power to compel the production of any evidence and the power to compel a witness to attend an inquiry. Apart from the victim of a fundamental rights violation who is entitled to complain, some other person may also complain to the Commission on behalf of the victim, thus allowing for public interest type complaints before the Commission. In addition, the Commission is given the power to investigate alleged infringements on its own.

The HRC has been given the very specific mandate of monitoring the status and conditions of those taken into custody under the Prevention of Terrorism Act and Emergency Regulations. Here the Commission is taking over the functions exercised by the Human Rights Task Force (HRTF). Much of the Commission's work over the past eleven months has been in this area. It was fortunate to be able to recruit most of the previous HRTF staff and also take over many of the regional centres set up by the HRTF.

Apart from acting as a complaints mechanism the Commission is also empowered to advise and assist the State in formulating laws and practices that promote and protect fundamental rights. It also has the power to suggest reforms to existing laws and practices in order to bring them in line with international human rights standards. In addition, the Commission is given the very important but difficult task of engaging in human rights education. It may conduct seminars, workshops and engage in research and "do all such other things as are necessary or conducive" to help it achieve its objectives.

Human rights commissions occupy a peculiar position. They perform, or should perform, many of the activities that non governmental human rights monitors perform. Yet, they are funded by the State and one of their primary functions is as a human rights watchdog of the State.

2. The First Year

It is now a year since the HRC began functioning. During this short period the Commission has not initiated any drastic measures. The Commission has moved cautiously in implementing its statutory mandate, and at moments has been infuriatingly cautious about its activities. The Commission had the advantage of being able to take over most of the staff of the previous Human Rights Task Force and its regional offices, and this should have given its activities a boost.

Unfortunately, we have not had during this brief period a statement of vision from the Commission: what sort of a role does the Commission envisage it can play? On what areas would it focus? What sort of a relationship does it envisage with NGOs, the Attorney-General's Department and other bodies like the Ombudsman, the National Committee on Women, the Committee on the Rights of the Child and the Law Reform Commission. What sort of a role will its regional centres play? What sort of autonomy will the regional centres have? What relationship does it envisage with the Supreme Court? This vision has not yet been articulated by the Commission.

During its brief period of operation the Commission has had limited involvement with human rights organisations. It would not have been too much to have expected the Commission to have had a much stronger engagement with human rights groups, legal aid organisations, professional organisations and other civil society groups over the past year. The wide

range of organisations that are found outside of government is a vital component in any strategy to safeguard human rights and it is imperative that the Commission look at creative ways of working with these groups. The Indian Human Rights Commission, by contrast, has even had discussions with political parties to seek their support in combatting violence and other human rights violations.

Apart from non governmental groups and professional associations like the Bar Association, interaction with other groups like the National Committee on Women, the Law Reform Commission and the Ombudsman would have been useful.

What would also not have been unfair to have expected in this brief period is a much higher public profile. The Commission would have benefitted from a sustained and stronger attempt to inform the public of the existence of the Commission and the role it can play. A much stronger engagement with the media would have helped to inform the public of the existence and work of the Commission and have also assisted in raising the general level of awareness about human rights. The Chairman of the Australian Human Rights Commission stated at a public seminar last year that the Australian Human Rights Commission is in the media every day which is part of a conscious policy of the Australian Human Rights Commission.

3. Annual Report

The Human Rights Commission of Sri Lanka has to submit an Annual Report to Parliament. This report is now being prepared by the staff of the Commission. The presentation of this report needs to become a sort of annual stock-taking of the work of the Commission. It should be a stock-taking in which there would be substantial civil society and media involvement. Hopefully, in this report the Commission will articulate a vision for the institution and role it thinks it can perform in the protection and promotion of human rights.

In addition, parliament needs to set in motion a process that will ensure that the report is debated at length and in a constructive way; this will help take the work of the Commission forward.

4. Engagement with NGOs

There are several steps the HRC can take. Indeed, many more things are expected of the HRC. Its work will no doubt be limited by the availability of resources including human resources. It is important then that the HRC engage the non governmental human rights community in its work. It is vital that the HRC makes a serious effort to interact with other bodies dealing with human rights such as the National Committee of Women, the Committee on the Rights of the Child, the Child Protection Authority, the Ombudsman and the Law Reform Commission. Professional associations, including those representing the medical and the legal professions would also be a useful resource for the HRC. The Commission should endeavour to make use of the resources these organisations possess at every opportunity.

For their part the human rights NGOs have shown a limited willingness to interact with the HRC. Some human rights and legal aid organisations have tried to work with the Commission, but others have preferred to let the Commission take the initiative. NGOs cannot wait for the HRC to act on its own initiative. They would need to continually bombard the HRC with ideas and information. A similar responsibility rests on professional associations and other civic groups.

5. Interpretation of its statutory mandate

If the Commission is to make an impact then it would need to adopt a bold and expansive interpretation of its statutory mandate. One example is in relation to the phrase "fundamental right." According to the interpretation section of the Act the phrase "fundamental right" refers to a fundamental right declared and recognised by the Constitution, **unless the context otherwise requires**. It would be important, where the context requires this, for the Commission to look at international human rights instruments apart from the fundamental rights chapter of the Constitution.

In certain areas like human rights education and where the Commission advises the government to modify its laws or practices, then a consideration of international human rights norms would be inevitable.

6. The South African Human Rights Commission

National institutions or human rights commissions are springing up all over the world. One of the consequences of the globalisation of human rights commissions is that, like courts of law, it has allowed a commission in one country to gain from the experience of a commission in an other country. I am sure that the Sri Lankan HRC would be willing to learn from the work of similar institutions worldwide and at the same time share its own experiences with other commissions. Human rights commissions the world over are all engaged in the same objective of protecting and promoting human rights.

The South African Human Rights Commission has an unusual constitutional mandate. According to this mandate every year the South African HRC must

Require relevant organs of state to provide the Commission with information on the measures that they have taken towards the realisation of the rights in the Bill of Rights concerning housing, health care, food, water, social security, education and the environment.²

The South African Human Rights Commission has been working with universities and NGOs, and has jointly held a number of workshops and meetings in a bid to implement this constitutional mandate. At these workshops and meetings the Commission and its partners have looked at a number of issues including the state organs that should be targetted for information; the type of information that should be requested; the criteria for evaluating the information received; the role of civil society in this process; and the procedures for reporting to Parliament.

The South African Commission proposes to engage a team of consultants to study and evaluate the information it receives from state organs. It intends preparing a special report on economic and social rights which will be forwarded to the President and Parliament.

This initiative has at least two lessons. First, the South African Commission is willing to look at a neglected area of human rights: socio economic rights, and at ways of realising these rights. Secondly, the process by which the

² Section 184 (3) of the Constitution of South Africa (1996).

Commission has sought to engage civil society and recruit members from outside the Commission to help it evaluate the large body of material it expects to receive, is illuminating. This process and similar procedures would be of relevance in other areas such as women's rights.

7. Economic and Social Rights

This brings us to the question of economic and social rights and role of the Commission in promoting the realisation of economic and social rights.

There has been over the past five years or so a large number of statements on economic and social rights at the international level. These statements have affirmed that all human rights are equal and that there should be no discrimination between different categories of rights. These statements have stressed that equal weightage should be attached to civil and political rights as well as to economic, social and cultural rights and an attempt should be made to protect, promote, respect and fulfil both sets of rights. Despite this rhetoric, civil and political rights continue to be treated differently to economic and social rights.

This state of affairs is likely to continue till such time as the human rights community defines with more precision the meaning of some of these economic and social rights. This process has begun in some courts of the world and in human rights scholarship. However, it is likely to take many years for both sets of rights to achieve equal status, in *de facto* terms.

It is important that the Sri Lankan Human Rights Commission makes a contribution to the realisation of economic and social rights. The HRC would need to look at creative ways of realising these rights. It would also need to take a lead in trying to promote NGOs and the State to act along similar lines. The importance of access to education, adequate housing, health care and water, cannot be over-emphasised in our social context. For most of our population they are important rights and for some vulnerable groups like displaced persons and women, they assume an added significance.

8. The Way Ahead

On paper the Human Rights Commission law looks promising. For an imaginative and dynamic commission the legal framework is clearly in place.

Unfortunately, the promise the law spawned has dimmed over the past two years. The State took almost eight months to appoint the members of the Commission, and the Commission took a further three months to begin operations. In the 11 months the Commission has been operating it has moved cautiously, frustrating many of the expectations that the human rights community initially had.

Like any institution, including the courts, the efficacy of the HRC will depend to a large extent on those persons who sit on the Commission and the quality of its staff. The ability to creatively interpret its mandate and a dynamic approach to its work would be vital if the HRC is to emerge as an effective institution. Its relationship with NGOs and government institutions will also determine how effective the institution becomes. A close relationship with other national institutions, in other parts of the world, will expose it to a variety of experiences and make it more effective. The efficacy of the Commission will also depend on how local human rights organisations interact with the Commission and endeavour to shape its work.

The magnitude of the Commission's task is obvious. Adequate financial resources would depend on the attitude of the government, but finding dedicated and skilled staff will always be a problem.

The use of NGOs, the Bar Association and other civil society groups should be explored at every possible opportunity. The UN Technical Cooperation Programme in Human Rights has a sub programme for national institutions, and it will be possible for the Commission to seek assistance under this programme. Because of the magnitude of the tasks before the Commission it will be forced to prioritise its work. These priorities will clearly shift and will have to respond to social and political events.

The following are some issues which the Commission may want to focus on at the outset:

Public Access

An issue which the Commission may well attach priority to is public access. The setting up of provincial sub committees as envisaged by Section 11(b)

would then become important.³ Provincial sub committees would assist the public in bringing complaints to the notice of the HRC and also assist the HRC in its efforts at promoting awareness of human rights standards. In the long-term such committees would facilitate research and help in developing more effective educational programmes on human rights. It is heartening to note that the Commission has set up 10 regional centres apart from the office in Colombo and these will no doubt play an important role in the future activities of the Commission.

Easy access is arguably the most important characteristic of any national institution. Courts almost never act on their own initiative. Their jurisdiction is inevitably ignited by a complaint. Human rights commissions, on the other hand, have the power to respond even without a complaint. They thus possess the capacity to 'search' for human rights violations. In addition, by exercising the power of setting up local commissions or committees, they are able to get physically close to people and thereby facilitate access to the justice system.

Systemic Violations

Another area the HRC may well attach some priority to is with regard to systemic violations and 'patterns' of human rights abuse. The Commission's activities in this regard may not necessarily be confined to 'reacting' to complaints of systemic abuse. The Commission's activities may also extend to more creative interventions, in cases where such interventions are possible. For example, the failure of law enforcement agencies to respond promptly and adequately to gender based violence is an area in which Commission's intervention could be of use.

Law and Administrative Reform

The Commission could also focus, at least initially, on those areas in which its status as a statutory and semi-governmental body, and its unique legal framework, give it a distinct advantage. Law and administrative reform in this context would be important. By virtue of the position it occupies, and its statutory mandate, the Commission will be in a strong position to advise the government "*regarding measures which should be taken to ensure that local*

³ Fundamental rights applications are currently filed only in the Supreme Court, which sits in Colombo.

laws and administrative practices are in accordance with international human rights norms and standards."⁴

Similarly, the Commission is uniquely poised to "*advise and assist the government in formulating legislation and administrative directives and procedures*" that will promote and protect human rights.⁵ In addition, it has a specific statutory role in advising the government on the need to ratify international human rights instruments.⁶ Participation in the reporting process under many of the treaties the government has ratified is another role the Commission can explore.

Detainees

The task of monitoring the welfare and conditions of persons in custody under the Prevention of Terrorism Act (PTA) and the emergency regulations, is specifically vested in the Commission. Here the Commission is taking over the work of the Human Rights Task Force and no doubt this task would (and should) receive high priority in the work of the Commission. Discharging this responsibility is going to demand a large share of resources and time and may require the establishment of a separate sub-unit within the Commission.

The Human Rights Commission law currently requires security officials to inform the Commission when a person is detained under the PTA and under emergency regulations, and to notify the Commission of the place of detention.⁷ Failure to do so is made an offence.⁸ The Commission would need to devise procedures for prosecuting those officers who fail to comply with this obligation. At the same time it is important that its work with detainees does not overwhelm the Commission: it should be able to strike a balance between this role and its many other roles.

⁴ Section 10(d).

⁵ See Section 10(c).

⁶ Section 10(e).

⁷ Section 28(1).

⁸ Section 28(3).

9. Conclusion

A human rights commission is an institution set up by the State, funded by the State, yet possessing an autonomy from the State so as to be able to investigate the State. The State is the biggest violator in most countries of the South and the Commission should have the power, not restricted in any way, to monitor and scrutinise the State's performance in relation to human rights issues.

It is a paradox that much of the credibility of the institution comes from the fact that it is State-sponsored (through legislation) and State-funded. Its credibility as an institution will also depend on the nature of its activities and the impact its work has. Yet, among its major functions is the scrutiny of State action, the education of State actors' and the advising of State entities.

Human rights commissions are being set up in many parts of the world. While the powers of these institutions in different countries vary, a 'core' concept seems to be emerging. One possible consequence of this 'globalisation' of human rights commissions, is the cross fertilisation of ideas and jurisprudence that may take place. Like courts, commissions will hopefully borrow from one another's jurisprudence and ideas. This process of cross fertilisation has the power to strengthen the work of all human rights commissions.

In many countries, such commissions have not matched upto the expectations they generated when they were established. On the other hand in some other countries (like India and Indonesia) where the expectations were not very high, the commissions have brought some positive results. Sri Lankan human rights groups had great expectations when the Commission was set up. Many of these expectations, however, remain unfulfilled.

National Assembly Election - Cambodia, July 1998

*Navin Perera**

Introduction

The **Asian Network for Free Elections (ANFREL)** invited the Law & Society Trust to nominate an Observer for the National Assembly Election. I had the privilege of being the Observer entrusted with the task of monitoring/observing the recently concluded elections in Cambodia.

Cambodia is a country which has suffered much and this election was crucial for the upliftment of the country as well as its standing in the international community. This was one reason why the Government and the National Election Commission wanted and needed as many international observers as possible to monitor the election.

The Khmer's are open and friendly people, they were keen to be part of the electoral process and were confident that their vote would make a difference. The majority of the population live in relative poverty, this was more evident in the rural areas. Yet, it is they who are keen to participate. It was the "simple people" (as they described themselves) who were in charge of the polling stations and the counting stations, they took enormous pride in carrying out their allocated tasks. This was despite the variety of election related incidents which included the shooting of political party members, attempted bombings, tearing down of party sign boards, death threats and even the killing of local journalists. Four Vietnamese fishermen had also been killed on the 15th of July 1998, but upon interviewing the family members it was considered an act not in relation to the election. The family members were nevertheless reluctant to vote fearing a backlash, but on polling day they had eventually cast their ballot.

* Programme Assistant, LST

It appeared unlikely that the people of Cambodia will oppose whatever party that comes into power as they have had their fill of violence and suffering under the Khmer Rouge regime and the July 1997 coup. Therefore, their present want is peace be it under any government.

This was the backdrop against which the National Assembly Election was held.

My personal experience took place on the 29th of July in Phnom Penh when two unidentified men carrying arms entered the Hotel at around 10 p.m., in which the ANFREL observers were housed, and proceeded to conduct inquiries concerning the observers. Upon being questioned by the UN Security Personnel (who were also housed in the same hotel) they stated that they meant no harm to the international observers. They departed soon afterwards.

On the same day (29th July) the opposition parties had rejected the election results which were being announced. They stated that there had been tampering of the ballot boxes, intimidation of voters and other numerous violations of the election law. The FUNCINPEC party and the Sam Rainsey party figured prominently. Sam Rainsey held an impromptu meeting on the street upon the completion of the press conference.

Asian Network for Free Elections (ANFREL)

ANFREL was formed in November 1997 as a result of a regional consultation aimed to develop regional collaboration of election monitoring groups and human rights NGOs in addressing the situation in Cambodia. It also aims to develop a regional network that would respond to similar democratic processes in the region. ANFREL would focus on the Cambodian Election for the first year and thereafter prepare for the elections in Indonesia and possibly Burma.

ANFREL had the co-operation of the **Committee for Free and Fair Elections (COMFREL)** which assisted in the local co-ordination for the Observers. COMFREL election observers were present at every polling station in the country. COMFREL should be lauded for their contribution to this election. The organisation has seen to it that the voters were educated, been critical of the authorities when action needed to be taken and had campaigned toward making the election as free and fair as possible.

COMFREL's origins are found in the "Task Force" which came together to provide an independent domestic monitoring team at the May 1993 UNTAC election. There are presently 12 NGOs with representation on the Board of COMFREL.

National Assembly Election-1993

The United Nations assumed responsibility for the security leading up to the 1993 election. This was under the auspices of UNTAC (UN Transitional Authority in Cambodia).

The elections were held on the 25th May 1993 and were adjudged by international and domestic observers alike as free and fair. It was decided that the election was legitimate, despite some politically motivated violence and allegations of fraud. 90% of the registered electors voted and a proportional electoral system was used, which was based on regional party lists, with a threshold of 4% before a party was entitled to seats in the Assembly. Of the 120 seats, 58 seats (45% of the vote) were won by the FUNCINPEC party led by Prince Ranariddh; 51 seats (38% of the vote) by the CPP led by Hun Sen; 10 seats by the Buddhist Liberal Democratic Party (BLDP); and 1 seat by the Molinaka party. The new constitution was adopted in September, following which a coalition government formed from the two major parties which came into office (FUNCINPEC and CPP). In October 1993 the UNTAC departed having completed its task.

The coalition government under the Co-Prime Ministers, Prince Ranariddh and Hun Sen, held together despite the numerous disagreements, expulsions and splits, until the 5th and 6th July 1997 when backed by the military, Hun Sen forcibly deposed Prince Ranariddh. Sections of FUNCINPEC and BLDP backed this action and remained supportive of Hun Sen, but most of those opposing this action remained out of the country. Co-Prime Minister, Hun Sen after being in power for nearly 20 years was unlikely to relinquish his post easily. The UN Centre for Human Rights has evidence of at least 41 individuals being executed - apart from those killed in military conflicts - and has been pressing for an independent investigation.

"Due to the coup, Cambodia's entry to the Association of South East Asian Nations (ASEAN) was suspended by the organisation. Also its seat at the UN

General Assembly was left vacant.”¹

National Assembly Election-1998

The National Assembly Election took place under volatile political circumstances primarily caused by the above described coup of July 1997.

The election of the National Assembly was administered by the National Election Committee (NEC). Members of the NEC were appointed by the National Assembly, their appointment was nine (9) months prior to the election date. It consists of 11 members. The body was responsible for the planning, organisation, supervision and management of the election. The NEC had the Provincial/Municipal Electoral Commissions (PEC's), Commune Electoral Commissions (CEC's) and the Polling Station Commissions (PSC's) to carry out its work. The work of the NEC is determined by internal rules (by-laws) in accordance with the provisions of the Law on the Election. All decisions of the body should be passed by an absolute majority. The NEC delegates its powers to the PECs, CECs and the PSCs to conduct the election.

A general election is held every 5 years in order to elect the members to the National Assembly. At this particular election 122 representatives are to be elected. The elections are held under a proportional system and are provincially based. The number of seats a party wins is according to the percentage of the total votes it receives. As an example, consider the calculations for a province that is entitled to 20 seats in the National Assembly. If one of the competing parties succeeds in winning 40% of the votes in the province, that party would be awarded 8 of the 20 seats.

In order to vote, Article 50 of the Law on the Election of the National Assembly stipulates that a Khmer citizen must have his name in the list of voters and must have a voter registration card. In order to be qualified for registration he/she must be: a Khmer citizen, must be 18 years of age, have a definite address in the Kingdom of Cambodia, register in person, should not be serving a prison sentence, and should not be insane. Article 52 states that every Khmer citizen shall be registered under one name only and at only one registration station. The registration process was monitored by ANFREL, and

¹ Amnesty International Report 1998.

it was conducted smoothly with a fair number of people registering themselves.

Political Parties

There were 39 political parties participating in this election; however, not all parties are represented in each province; there were only three main parties which took prominence during the recently concluded National Assembly Election on the 26th July 1998. These parties are: The Cambodian People's Party - the CPP - was the successor to the communist Khmer People's Revolutionary Party (KPRP) which was established to fight for independence from France. In 1989 the KPRP renamed itself the Cambodian People's Party and discarded communism in favour of a social democratic platform.

The FUNCINPEC Party - established by Prince Sihanouk in 1981 to liberate Cambodia from Vietnamese influence and in 1992 it was established as a political party with Prince Ranariddh as President. The party won the 1993 elections. Between the years 1995 and 1997 the party has gone through some changes. Sam Rainsey who was expelled from the party in 1995 established the Khmer Nation Party. In July 1996, Ngoun Soer, former Deputy Secretary General of FUNCINPEC formed the Khmer Citizen Party. April 1997 a number of FUNCINPEC politicians led by Siem Reap Governor Toan Chay broke away from the mainstream FUNCINPEC in order to establish another FUNCINPEC. After fighting in July 1997 the remaining FUNCINPEC politicians could not reach any agreement to establish a united party.

The Sam Rainsey Party - an offshoot of the FUNCINPEC and previously known as the Khmer Nation Party - which was established on 9th November 1997. The majority of the supporters are veteran party members from the border camps who were not given any positions in the bureaucracy (according to the Voice of the Khmer Youth) and disenchanting CPP members. Rainsey lacks a strong support base in the provinces where 80% of the Cambodian's live. His supporters prevail among the urban population.

Other political parties like the Buddhist Liberal Democratic Party, Reast Niyum Party, Sonn Sann Party and the Khmer Nationalist Party also campaigned, but were unsuccessful in their attempt to obtain a seat.

Polling

On the 26th of July 1998, the polling stations opened for voting between 7 a.m. and ended at 4 p.m. the same day. If all registered voters in the polling station had cast their ballots before 4 p.m. the Polling Station Commissioner could decide to close the station.² Based on the observation of 11 polling stations, the electoral process in the province of Kratie (Primarily in the Districts of Chlong and Prek Brasab) was credible. No major discrepancies were observed. The regulations were followed as stipulated in the electoral law of the Kingdom of Cambodia.

97% of the registered voters had cast their vote by approximately 12 p.m. This could be attributed to the numerous announcements and advertisements which were being broadcast by the government as well as from the polling stations urging voters to cast their ballot early. The public announcements continued to be broadcast from the polling stations on election day. One had to only follow the sound in order to locate a polling station.

The polling station officials were well versed in the electoral process and as such, were able to guide the [few] voters who were confused regarding the procedures. The majority of the voters had been educated on the process of voting; this was evident in the smooth flow of the line. A minor problem, however, was the long line-up of people outside the polling stations which led to the eventual overcrowding at the entrances. Nevertheless, this could be attributed to the heat, causing people to crowd to the shady areas which was more often than not the narrow passage leading to the polling station. Furthermore, the registration list was too close to the entrances, thus increasing confusion and contributing to the eventual overcrowding.

Lighting inside the polling stations was also a problem at times. The voting booths, therefore, were especially dark, and several elderly voters had difficulty seeing the ballot papers. Two polling stations opened slightly late as the party agents had failed to arrive on time. There were some instances of lost registration cards. In these cases, the people were sent to the CEC and were allowed to cast their vote, upon procuring a letter verifying their identity.

² Article 85 of the Law on Election.

A voter was allowed a second chance if he/she erred in the marking of the ballot paper. In this instance another ballot may be requested from the Chairman of the Polling Station. The Chairman inserts the spoiled ballot in the envelope marked "Spoiled Ballots" and authorises the Vice-Chairman to issue another ballot to the voter. A voter, therefore, receives a second ballot but no more.

In Prek Brasab District, Kratie Province a party box on the ballot poster outside the polling station was marked by indelible ink. Upon drawing this to the attention of the polling station Chairman, the poster was immediately taken down. These posters were used to educate the voters on the correct method of marking their ballot paper.

Security for each polling station appeared satisfactory. There were 2 security personnel in civil clothing with NEC's badges stationed 40 metres from the polling station. Three security personnel were stationed 200 metres from the polling station. They were armed with a rifle which was kept concealed from the view of the general public.

There were an equal number of men and women who turned up to vote; at times it seemed as if the women outnumbered the men. The CEC and the Polling Station Officials again consisted of an equal number of men and women.

Counting process

The counting process began at 7 a.m. on the 27th of July 1998. At each Counting Station the Chairman of the Polling Station Commission was in charge of the ballot counting. The Chairman invited the staff of the respective polling stations, political party agents, and observers to check the seals and serial numbers of the boxes and thereafter opened them. Ballot boxes from nine stations were counted in each counting station visited. The ballot boxes had been transported by car, motorbike, cart, boat and helicopter. Helicopters were used for areas which proved inaccessible due to the roads being washed off; it was used in the district of Snuol in the Kratie province.

I was able to visit three counting stations in the districts of Prek Brasab and Chlong, Kratie Province during the course of the day.

At each counting station the number of ballot papers in each box corresponded with the number of votes (as indicated on the voter register) cast at each polling station. In the case of a discrepancy on the ballot paper or a spoilt vote the Chairman made it a point to refer the case to the international, local and party observers.

The presence of CPP soldiers was observed outside a counting station, in Cholong District, Kratie Province. This could be attributed to the fact that the area had previously been a CPP stronghold, but in the present election according to the preliminary count the FUNCINPEC party had won with ease.

Once the counting had been completed the Chairman prepared the minutes of the ballot count. This along with the list of voters, valid and invalid ballots, unused ballot papers, records of objections and complaints were delivered to the Commune Electoral Commission (CEC). The CEC would in turn collect the minutes and other documents and deliver it to the Provincial Electoral Commission (PEC). The PEC would prepare consolidated minutes of the polling results in the province or municipality concerned. Thereafter the PEC would deliver a list of the consolidated minutes, valid and invalid ballot papers, unused ballot papers, record of objections or complaints to the National Election Commission (NEC). The NEC would collect and check all polling results and decide on the results. If there have been no serious irregularities or violations the NEC would announce its recognition of the election results. Article 112 of the Law on the Election provides that if there are serious irregularities which affect the result of the election, the NEC will refuse to recognise the results at the polling station(s), and that the political parties would be informed accordingly. In these particular cases, a new election could be held for such polling station(s) within eight(8) days of the decision.

Due to the complaints lodged by the opposition parties (primarily the FUNCINPEC and Sam Rainsey parties) the NEC has held back the announcement of the final result. The NEC has stated that it cannot investigate all the complaints as most of them are unsubstantiated.

According to reports the NEC has now decided that it would not investigate any more complaints. Therefore, it is now the decision of the political parties to form a new government or to face a constitutional crisis. This crisis has arisen due to the fact that no party has won a clear majority with enough seats

to form a government. The final results show that the ruling party - the CPP - has won 64 seats, the FUNCINPEC Party 43 seats and the Sam Rainsy Party 15 seats. One hopes that the official results are accepted and the swearing in of the new National Assembly members would take place on the 24th of September 1998 as scheduled.

Conclusion

The electoral process in the province of Kratie was credible. The general view expressed by a majority of the international observers of the National Assembly Election was that it appeared credible.

I was greeted warmly by all PEC, CEC and Polling Station Officials at every juncture. The main feature was that they are willing to listen, learn and were very concerned that the election regulations be strictly adhered to. It was refreshing to note that at a majority of the polling stations the officials and the different party agents were sitting together for their midday meal in absolute comradarie.

There were a number of international observer groups, which included observers from the United Nations known as the Joint International Observer Group, the European Union funded Observation Unit, the Volunteers for the Cambodian Election and ANFREL. Local observer groups included COMFREL and the Neutral and Independent Committee for Free Elections in Cambodia, which also included international volunteers.

This report would not be complete if mention is not made of my colleague Ms Fritzie Chavez of ANFREL and specifically of Mr Samreth Vanna of ADHOC (Kratie Province) and Mr Yin Soriya my Interpreter; it is due to their individual efforts which made the mission successful and incident free.

[Background material for the report was provided by ANFREL and COMFREL]

Forthcoming

SRI LANKA: STATE OF HUMAN RIGHTS 1998

For the first time, the report will cover

- * *Equal Opportunity*
- * *Rights of Persons with Disabilities*
- * *Right to Education*
- * *Migrant Women Workers*

In addition to the topics generally covered (freedom of expression, emergency rule, judicial protection of human rights, children's rights, internally displaced persons and integrity of the person).

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