

# LAW & SOCIETY TRUST



## Fortnightly Review

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In this issue, we publish a summary prepared by the Trust of the report *Sri Lanka: A Bitter Harvest* by Elizabeth Nissan. In view of their importance, the Conclusion and the Recommendations are re-produced in their entirety. In her Report, Ms Nissan traces the history of the ethnic conflict in Sri Lanka. She looks at the education system, the employment of minorities in the state sector, the situation of Up Country Tamils who continue to remain marginalised, various efforts at devolution of power, participation by the minorities in the development process and human rights violations by the government as well as militant groups. Among the recommendations she makes are: moving towards a just and democratic resolution to the conflict; implementation of humanitarian law should the armed conflict continue; revision of law to ensure full incorporation of the rights guaranteed under the ICCPR; devolution of power; ending impunity; strengthening human rights institutions; and non-discrimination in the provision of state resources.

In his article on the Governor and the Provincial Council, Mr. R. K. W. Goonsekere looks at the office of the Governor under the 13th Amendment. He calls upon the government to examine the powers of the Governor more closely when amendments to the Constitution are introduced.

## SRI LANKA : A BITTER HARVEST

## GOVERNOR AND THE PROVINCIAL COUNCIL

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#### SRI LANKA : A BITTER HARVEST

(Summary)

Elizabeth Nissan

#### GOVERNOR AND THE PROVINCIAL COUNCIL

R. K. W. Goonesekere

# LAW & SOCIETY TRUST

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# SRI LANKA : A BITTER HARVEST

Elizabeth Nissan\*

## A SUMMARY\*\*

In her report *Sri Lanka: A Bitter Harvest* published by the Minority Rights Group International, U.K.<sup>1</sup>, Ms Elizabeth Nissan traces the history of the on-going ethnic conflict in Sri Lanka between the Government and the LTTE. She states that the conflict, which has been going on for the past 15 years, has claimed tens of thousands of lives, has displaced many more, not to mention the emotional, physical and economic scars that the conflict has engendered. The author states:

*The key issue underlying the conflict in the north and east has been the perception by the minority Sri Lankan Tamil community that the unitary state system has allowed the majority Sinhalese community to dominate national politics at the expense of minorities. As a result, the Tamil community is seen to have suffered severe discrimination and erosion of its political, economic and cultural rights.*

She points out that in addition, the conflict has threatened Muslim interests, security and identity in the north and east.

The report has five main sections dealing with: the state and minorities; the road to Tamil militancy and Indian intervention; minority participation in development; civil and political rights of minorities; and education: perpetuating prejudice. In view of their importance, the Conclusion and Recommendations are reproduced in their entirety.

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\* The author is a freelance human rights consultant, specialising in South Asia. She has written and lectured widely on religion, nationalism and human rights in Sri Lanka. She is currently a Research Fellow at the Institute of Common Wealth Studies, University of London.

\*\* Summary prepared by Sumudu Atapattu, editor, Fortnightly Review.

<sup>1</sup> Founded in the 1960s, the Minority Rights Group is a small international non-governmental organisation that informs and warns governments, the international community, non-governmental organisations and the wider public about the situation of minorities around the world. It has consultative status with the UN Economic and Social Council and a worldwide network of partners.

## 1. THE STATE AND MINORITIES

In the section on the state and minorities, Ms Nissan traces the history from the colonial era of the State's involvement with regard to minorities. Although a few safeguards were incorporated in the 1948 Constitution, two pieces of legislation enacted by the newly independent government rendered stateless and disfranchised about 900,000 Up Country Tamils. The author points out that this helped to lay the foundation for the 'Sinhalisation' of the state from the 1950's. This particular group remains marginalised and the most neglected group to date despite its important role in the economy.

### 1.1 The 'Sinhalisation' of the state and minority rights

The Sinhala only language policy marked a further step in defining Ceylon as primarily a Sinhalese state which led to an intense, but non-violent, protest campaign by the Tamils. The first outbreak of communal violence against Tamils was witnessed in 1956.

The Tamil Language (Special Provisions) Act was passed in 1958 which allowed the 'reasonable use of Tamil' in education, public service entrance examinations and administration in Northern and Eastern provinces. Regulations necessary for the implementation of this Act, however, were not framed until 1966 and then were not implemented.

The watershed in the Sinhalisation of the state, according to the author, came in May 1972 when the Republican constitution was passed. She cites R. Coomaraswamy according to whom the new constitution:

*Was in many ways a symbolic assertion of nationalism.... The 1972 Constitution enshrined the expectations of the Sinhalese Buddhist nationalists without a single concession to the Tamil speaking minority.<sup>2</sup>*

Under the Constitution, Buddhism was given the foremost place. All religions, however, were protected by the fundamental rights chapter subject to certain limitations. Sinhala was defined as the official language of the state. The provisions on minority protection were very weak and subject to wide ranging restrictions.

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<sup>2</sup> See Coomaraswamy, R., *Sri Lanka: The Crisis of the Anglo-American Constitutional Traditions in a Developing Society*, Vikas Publishing House, New Delhi (1984) pp 22, 24 and 31.

## 1.2 Ethnic competition and the university entrance system

The sense of alienation experienced by the Tamils due to the constitutional provisions on religion and language was further reinforced by the United Front government's policy on university entrance. While entrance to university was previously based on merit, a new system introduced in 1971 was designed to ensure that the number of students qualifying from each language medium would be proportionate to the number of students who had sat the examination in that medium. In addition, a district quota system was introduced to compensate those did not have access to good teaching facilities. Although it was designed to benefit those in rural areas, this also had an impact on Tamil students entering university. Although the 1977 UNP regime abolished the standardisation by language medium policy, "the lost faith endangered by changes to the university entrance system was never restored."

## 2. THE ROAD TO TAMIL MILITANCY AND THE INDIAN INTERVENTION

### 2.1 The start of armed Tamil militancy

While the TULF continued to participate in parliamentary policies, others questioned the value of such an approach as their distrust of the main political parties deepened. The violence against Tamils in August 1977 after the general election left hundreds dead, thousands displaced and their homes and property in the north looted and burned.

The militants took up arms in the 1970s and various small groups were formed including what became the LTTE. The government responded by strengthening security in the north and by granting additional powers to the security forces.

In April 1978, the UNP government passed a law proscribing the LTTE and other similar organisations. This law lapsed in 1980. The Prevention of Terrorism Act (PTA) was enacted in 1979 giving broad powers of arrest and detention to the security forces, and suspending important legal safeguards normally provided under the Constitution which led to widespread human rights violations. According to the author:

*The enactment of the PTA together with the declaration of a state of emergency in the north in July 1979 marked a new phase in security forces operations in the north and fuelled further support for the militants.*

The militancy escalated after the violence of July 1983 which is a turning point in the scale of the conflict. Hundreds of people were killed, thousands rendered homeless and businesses destroyed. What was particularly alarming was the evidence of official involvement in the violence.

In the following month, a constitutional amendment was passed which banned even the peaceful advocacy of separatism. The outcome was that all members of the TULF forfeited their parliamentary seats as they refused to take the oath required under the amendment.

In 1984 a new phenomenon developed, that of disappearances in custody. As Tamil youth became increasingly vulnerable to gross abuses by the security forces solely because of their ethnicity, more and more took to arms. By mid-1985 the armed militants had gained the upperhand in the Jaffna peninsula. However, they tolerated no dissent within the Tamil community, appearing to depend upon intimidation and killing to maintain their hold.

### **3. INDIAN INTERVENTION AND THE INDO-LANKA ACCORD**

Indian intervention culminated in the Indo-Lanka Accord of July 1987 and appeared to address some of the Tamil grievances. The northern and eastern provinces were to be temporarily merged pending the outcome of a referendum to be held in the east on whether the merger should continue. The Accord defined the official language as Sinhala, but said that Tamil and English will also be official languages. It promised a cessation of hostilities and surrender of arms and an Indian Peace Keeping Force could be invited to enforce the cessation of hostilities. The Accord was, however, rejected by the LTTE leader V. Prabhakaran.

In order to implement the Accord, the 13th Amendment to the Constitution was passed in November 1987. It redefined the official languages of the country, making Tamil also an official language and English the link language. In addition, it provided for the establishment of provincial councils. Most Tamil groups, however, complained that under the 13th Amendment, the Centre retained too great a control and that the extent of powers was unclear. Yet again, an exercise in devolution had failed.

The Indo-Lanka Accord and the arrival of the IPKF fuelled anger of the nationalists in the south who viewed it as a breach of sovereignty and the JVP had by then begun to mobilise. The JVP's action and the government's response led to many deaths and disappearances and by the end of 1989 the southern insurgency came to an end.

### **3.1 Withdrawal of Indian troops: the aftermath**

With the assumption of duties by the new President in 1989 who had always been against the Peace Accord, the situation changed. After September 1989 when the IPKF began to withdraw, the LTTE took control of the area. While the IPKF was deployed in Sri Lanka, the LTTE committed numerous abuses, including killings of Sinhalese and Muslim villagers and Tamil 'informants'.

Negotiations between the government and the LTTE broke down after the IPKF withdrawal. In June 1990 the LTTE broke the ceasefire and marked the beginning of 'Eelam War II'. In 1991 an embargo was imposed on the passage of numerous items to the north, including medical supplies, fuel and fertilisers.

### **3.2 Failed attempts at finding a political solution**

In 1991, President Premadasa created a Parliamentary Select Committee to seek a political solution which continued until 1993. The LTTE was not involved but other Tamil parties were. The main stumbling block was the unit of devolution.

### **3.3 Cessation of hostilities and Eelam War III**

When Parliamentary elections were won by the People's Alliance (PA) in August 1994 ending 17 years of UNP rule, there was considerable optimism. The PA promised to negotiate a just peace which would safeguard the rights of all communities. One round of preliminary talks was held between government and LTTE representatives but further meetings were suspended when the UNP presidential candidate, Mr Gamini Dissanayake, was killed by a suicide bomber at an election rally just before the presidential elections.

On 8 January 1995 the government and the LTTE agreed upon a cessation of hostilities. The fourth round of talks did not take place until April and the LTTE set a deadline for the government to implement its four demands: the lifting of the embargo on items without military significance; lifting of restrictions on fishing; the removal of the army camp at Pooneryn; and freedom for LTTE cadres to carry weapons in the east. The LTTE, not being satisfied with the government's response, announced its withdrawal from negotiations and resumed hostilities. The Eelam III had begun.

In July, government forces launched a major military offensive to take Jaffna city which was achieved by December. The LTTE abandoned the city and almost the entire population of the city fled. Estimates of the numbers displaced ranged from the government's 100,000 to the LTTE's

500,000. A censorship on military activities was imposed and no journalists were permitted into the areas of conflict.

### **3.4 The August 1995 proposals for devolution**

In August 1995 President Kumaratunga announced proposals for a new system of devolution to eight regions which would include extensive legislative and fiscal powers. Under this, Sri Lanka would be defined as a 'union of regions', with the regions having considerable powers including law and order, land settlement and education.<sup>3</sup> These proposals, however, do not contain a concurrent list of powers. In January 1996, the government placed these proposals before the Parliamentary Select Committee which was established in 1994 to revise the Constitution. The proposals require a two-thirds majority in Parliament as well as a national referendum.

## **4. MINORITY PARTICIPATION IN DEVELOPMENT**

### **4.1 Socio-economic rights**

A major grievance of the minorities has been their perception that they have been excluded from the benefits of development. The UN Declaration on Minorities requires that national policies and programmes should be planned and implemented with due regard for the legitimate interests of persons belonging to minorities (Article 5). This provision is important in considering the concern of Tamil parties that major development projects, funded by international donors, have not benefitted the north and east. Land settlement or colonisation of the dry zone, together with powers over land allocation, remain major issues between Tamil parties and the state.

Apart from the conflict zone areas, the Up Country Tamils have been the most disadvantaged ethnic minority in the country. Their working and living conditions are poor and have less opportunity than others to improve their situation. In addition, since the 1970s they have been vulnerable to attack.

### **4.2 The right to employment: the State sector**

There is no legal bar on the employment in the state sector of any group of Sri Lankan citizens. Non-citizens, however, cannot be so employed. Thus, many Up Country Tamils were barred from state-sector employment.

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<sup>3</sup> Editor's note: for the text of the devolution proposals, see *Fortnightly Review*, Vol. 93.



Although the 1978 Constitution protects against discrimination, it also contains two caveats concerning language. The Sinhala-only policy of 1956 markedly reduced the access of Tamil-speakers to jobs in the public sector. Figures on employment of minorities in the public sector for 1990 show that Tamil-speakers are poorly represented.

#### **4.3 The right to education**

Education in Sri Lanka is free at primary, secondary and tertiary levels. Stateless persons, however, are not entitled to free tertiary education. The educational disadvantage of the Up Country Tamil community is reflected in the 1981 census figures: that they have the lowest literacy level in the country. There is considerable regional variation in the supply of teachers. While the national teacher-pupil ratio is good (1:23), it is much worse in rural areas and in plantation schools. In the north and east, the armed conflict has had a considerable impact on education.

#### **4.4 Health**

There are considerable disparities in the quality of health service provided in urban and rural areas island-wide. The area where the health services have deteriorated most dramatically in recent years is the north. Malnutrition has also increased in the north.

#### **4.5 The internally displaced**

At the end of July 1994, there were an estimated 525,202 internally displaced people in Sri Lanka, of whom 78% were Tamil, 13% were Muslim and 8% Sinhalese.

### **5. CIVIL AND POLITICAL RIGHTS OF MINORITIES**

The Sri Lankan government and security forces have committed gross violations of the rights of tens of thousands of its people in the context of armed opposition to the state. The rights to life, liberty and security of the person have been most at risk.

In addition, the armed groups opposing the state have committed abuses on a large scale. Many hundreds of Muslim and Sinhalese inhabitants in the east have been attacked and killed by the LTTE while bombs and suicide attacks in Colombo have killed and injured many more.

Other civil and political rights have also been curtailed. Freedom of expression and association have been denied at times, the right to nationality was denied for many years to Up Country Tamils.

## **5.1 Minority rights under the 1978 Constitution**

The 1978 Constitution contains language rights and considerably stronger fundamental rights protection than had been in the previous constitution - freedom of thought, conscience and religion; right to equality and the prohibition of discrimination on grounds of race, religion, language, caste, sex, political opinion and place of birth. Freedom from torture, cruel and degrading treatment and arbitrary arrest, freedom of expression, movement, association etc. are also included. A notable omission, however, is the right to life.

The Constitution provides for the protection of fundamental rights through an application to the Supreme Court which is empowered to grant relief when fundamental rights have been violated by executive or administrative acts. While at first the state bore the cost of compensating victims, individual officers now have to pay the compensation themselves.

## **5.2 Security legislation**

Although some of the most obnoxious features of the emergency regulations have been removed in revisions carried out over the past two years, they still fail to provide the necessary safeguards on abuse and fall short of fulfilling Sri Lanka's obligations under the ICCPR.

## **6. EDUCATION: PERPETUATING PREJUDICE**

Far from fostering a broad knowledge, respect and understanding of the multi-ethnic fabric of Sri Lankan society, the Sri Lankan educational system reinforces and perpetuates the ethnic segregation and exclusivity. Schools are most segregated on an ethnic basis. Teachers are not trained in multiculturalism.

### **6.1 Ethnic segregation in the education system**

Since 1951, the linguistic separation of schools has been supported by state policy. Under the Education (Amendment) Act of 1951 all children must be educated in their mother tongue. Lack of access to English education is seen as a major source of disadvantage.

In addition to the linguistic segregation of schools, separation of schools on religious lines also developed. The change to compulsory education in the mother tongue opened up opportunities to many who had previously been excluded; but the manner in which this expansion of education was instituted increased the ethnic and cultural isolation of different groups of Sri Lankans.

At university level too, ethnic segregation has increased, although for different reasons. Of the eight universities in the country, two now provide only for Tamil-speaking students. All other universities educate members of all of the country's ethnic groups. There is, however, social and academic segregation on ethnic lines.

## CONCLUSION

The return to war following the collapse of negotiations between the government and the LTTE has had a massive impact on the lives of people living in the north and east, most critically with the displacement of hundreds of thousands of people from their homes in the north. The war has produced an immediate humanitarian crisis which needs to be addressed urgently. With the military denying journalists' access to the conflict zones, and with censorship imposed on local media reporting of military affairs during the main offensive, it has been impossible for reliable, independent accounts of the conduct of the war and the condition of the displaced to emerge. The intimidating verbal attacks made by the government in the latter part of 1995 on the work of major international humanitarian agencies working in the north and east - including the ICRC - has further hindered the free flow of information on crucial human rights and humanitarian issues connected with the war. The few outside agencies that do have representatives working in the war zones fear that their space for work might be threatened if they speak out on these issues. Even the question of just how many displaced people there are has been much contested by the government. In the propaganda battle between the LTTE and the government, the government appears intent on conveying an image of the situation which minimises the suffering of those involved, rather than conducting its relief operations in an open and transparent manner.

The current situation is riddled with paradox. On the one hand, a government is in power which has presented the most ambitious proposals for devolution to date: proposals which might have offered a real chance of peace. On the other, the resumption of war has produced the most serious humanitarian crisis in the country to date; never before have people been displaced on such a scale. As the conflict continues, distrust and intransigence deepen. The conflict has generated its own momentum and will not easily be settled.

Restructuring the state is a major, but necessary, undertaking if the conflict is to be resolved. It has been clear since independence that the very form of the state (as a unitary parliamentary structure) militates against the realisation of minority rights. Majoritarian rule in Sri Lanka has resulted in the alienation of minorities with tragic consequences for all. Substantial devolution of powers is therefore a precondition for a lasting solution to the conflict. Negotiations over the years on these issues have shown some progress, notably in the acceptance by the major parties in the south that

substantial devolution to the regions is necessary; nevertheless agreement on the actual powers involved and especially on the units to which they would be devolved may still prove elusive. The fate of the proposals for devolution put forward by the government in August 1995 remained most uncertain in early 1996.

Devolution alone - however extensive - would not provide a complete solution, however. Issues of equity in the distribution of the state's overall resources, and the relative advantage and disadvantage of different communities and classes, remain important. And within the units of devolution, safeguards would also be needed to ensure the protection of basic human rights and the effective remedies are available for all.

Until very recently, no area of Sri Lanka was completely mono-ethnic, although there are clear ethnic majorities in certain areas. Only when the LTTE drove Sinhalese and Muslim residents out of the Jaffna peninsula in 1990 did the area become exclusively Tamil (leaving aside the presence of the Sri Lankan military in some parts of the peninsula). The conflict has created a hardening of ethnic lines in the north and east, and the potential for considerable violence between communities. Adequate safeguards to protect minorities living within each region, as well as individuals, must be created. The danger of ethnic exclusivism and the break-up of the state along ethnic lines must be guarded against, while also recognising the rights and interests of the various groups living in any region. The experience of life under the LTTE in Jaffna has shown that those who rule in the name of one ethnic group may well suppress basic freedoms within it.

While a restructuring of the state, together with wider constitutional and legal institutional reforms - including the strengthening of human rights protection - appear to be preconditions for the conflict to be resolved, there is also considerable other work that needs to be done towards achieving that goal. The issues addressed in this report are not exhaustive, but they do indicate some key areas in which long-term programmes of work are needed.

The state does not take issues of discrimination seriously enough: it has not implemented the official language policy, for example, so Tamil-speakers remain at a severe disadvantage in their dealings with the state in very many contexts at local and national level and are implicitly excluded from the 'national community' that is being served or addressed by the state and its representatives. Much greater priority and resources need to be given to addressing this issue.

In the planning and implementation of development projects, too, it is essential that a greater awareness of the ethnic dimensions of development be cultivated. In the planning of development programmes overall, attention needs to be paid not only to reaching the most deprived groups in society, but to the overall distribution of the benefits of development. Group perceptions of relative

equity in development are of critical importance, and need to be addressed seriously. The impact of projects on ethnic relations needs to be considered at national as well as local levels.

The state also continues to provide an education to children which does little to foster harmonious coexistence, instead reinforcing prejudice based on exclusivist understandings of history and ethnicity. This helps people to 'justify' the current conflict as being almost inevitable - the continuation of ancient, almost innate, hostilities. Considerable effort needs to be made to rethink the nature of the history and related subject-matter that is taught in schools and to develop new teaching materials. Associated with this task is the development of materials for more general use to promote democratic norms of pluralism and tolerance.

An associated issue is the nature of media coverage of Sri Lankan society and the conflict. Although the minority of intellectuals and political activists who challenge nationalist assumptions in history were given greater public voice after the PA government came into power in 1994, the mainstream media still generally reinforces the kind of images and prejudices already examined in the context of education. Few attempts are made to convey the reality of daily life for civilians living in the north and east. Even before censorship was imposed and access to the area became impossible, hardly any journalists attempted to cover the conduct of the war. They relied instead on the information supplied by the government, on the one hand, and the LTTE on the other. Yet, the need for considerably greater awareness and understanding of the lives of others is abundantly clear if the major shifts in public understanding and consciousness that are so necessary for the resolution of these issues are to be achieved.

## **RECOMMENDATIONS**

### **Moving towards a just and democratic resolution to the conflict**

Military means will not resolve the conflict; a process of negotiations leading to a political solution remains necessary. A demonstrable commitment to finding a peaceful solution is required from both sides. Both sides should consider inviting a neutral third party - acceptable to all involved - to assist in the development of this process.

Certain steps need to be taken irrespective of the armed conflict to enhance human rights protection and to build trust and good faith within and between communities. Others relate directly to the conduct of the conflict. Taken together, their implementation would also help lay the foundations for a just and sustainable resolution to the conflict.

## **Implementation of Humanitarian Law**

Should the armed conflict continue, all parties should insist that combatants adhere to at least the basic standards of humanitarian law contained in common Article 3 of the Geneva Conventions and Additional Protocol II to the Geneva Conventions, which is concerned with the protection of victims of internal armed conflict. In accordance with these principles, the LTTE should immediately cease its recruitment of children. Both parties should cease using civilians as human shields. The Government should ratify the Additional Protocol II to the Geneva Conventions. Once ratified, its provisions - which contain important protections for civilians - would automatically become binding on all parties to the conflict.

## **Constitutional and legislative reform**

Sri Lankan law and practice violates the requirements of the International Covenant on Civil and Political Rights (ICCPR). Revisions to the Constitution currently in preparation should ensure the full incorporation of all rights guaranteed under the ICCPR and guarantee that any restrictions will not exceed those permitted under the ICCPR. Internationally recognised principles on minority rights protection, including those contained in the UN Convention on the Elimination of All Forms of Racial Discrimination and the UN Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities, should also be incorporated. In addition, the Constitution should provide for judicial review of all existing and future legislation. A thorough review of all existing legislation - including the Prevention of Terrorism Act and the Public Security Ordinance under which emergency regulations are issued - is also required to ensure its conformity with Sri Lanka's international human rights obligations. Any discriminatory provisions - such as those applying to Up Country Tamils, who are citizens by registration - should be removed.

## **Proposals for Devolution**

In principle, MRG supports participatory devolution arrangements as a means of enhancing minority rights protection and building peace. These must address the roots of the conflict, and also incorporate safeguards and grievance mechanisms to prevent renewed conflict developing. The full range of rights of members of all groups - wherever they live in a country and whether they form a majority or a minority within any devolved unit - must be fully protected and promoted, with access to effective remedies readily available.

## **Ending impunity**

The appointment of Presidential Commissions of Inquiry into disappearances is a welcome step towards this goal. However, the government still needs to show a firm commitment towards ending the impunity with which these and other grave human rights violations have been carried out over many years. It should also empower the Commissions to investigate disappearances committed before 1988. All reported human rights violations should be fully and impartially investigated, the findings should be made public, and wherever there is sufficient evidence to bring perpetrators to trial, they should be prosecuted.

## **Strengthening human rights institutions**

The government has published a Bill to create a Human Rights Commission. However, its provisions do not fulfil the standards for such bodies as contained in the UN Principles relating to the Status of National Institutions, adopted at the UN Commission on Human Rights in March 1992. If a Human Rights Commission is to be created, it should at least fulfil these minimum standards. It is also important that a thorough review be made of all existing state human rights institutions, in order to ensure that there is no duplication or confusion of roles, and that they can coordinate their functions.

## **Minorities and development**

Due regard for the ethnic dimensions of development, and the need for minority participation, should be incorporated into development policy, as well as into the planning and implementation of specific projects, in accordance with the UN Declaration on the Rights of Minorities. Particular attention needs to be paid to the impact of development projects on ethnic relations, whether or not the particular project specifically targets a minority group, and on the overall distribution of the benefits of development between different groups in society.

## **Education and strengthening of civil society**

Measures to secure the long-term demilitarisation of society, reconciliation and strengthening of the institutions of civil society, should be integral to the development process. The development of education policies, practices and materials which seek to promote understanding and respect for the fundamental rights and freedoms of all, while promoting and celebrating cultural diversity, is one important strand of this process. The development of a public service media which promotes similar values is also crucial, as is the work of non-governmental organisations.

The Sri Lankan government should also follow the principles outlined in Articles 28 and 29 of the UN Convention of the Rights of the Child (1989), and the UNESCO Convention Against Discrimination in Education (1960).

### **The internally displaced**

Particular attention needs to be paid to ensuring the basic human rights and long-term security of the internally displaced. Forced evacuation should be halted, as should forced resettlement. When conditions permit, the displaced should have the right to return to their place of origin.

### **Non-discrimination in the provision of state resources**

The principle of non-discrimination is fundamental to human rights and a pre-condition to establishing trust among the population. National policies and programmes should therefore be planned and implemented with due regard for the legitimate interests of minorities, as specified in the UN Declaration on the Rights of Minorities. Equitable access to state resources -including employment, education, health care - should be ensured. The full implementation of the official language policy is crucial in this regard, as at present monolingual Tamil-speakers remain greatly disadvantaged in their dealings with the state. More equitable access to broadcasting in all languages also needs to be provided.

### **Humanitarian action**

The freedom of expression and association of both intergovernmental and non-governmental humanitarian organisations has become increasingly constrained in both government and LTTE-controlled areas of the island. All parties need to recognise the important role played by such organisations and to ensure that they are able to fulfil their legitimate functions without harassment, interference or threat. It is also essential that no obstacles be placed on the free flow of information on matters of humanitarian and human rights concern. Both sides must ensure that nothing impedes the flow of adequate humanitarian provisions, including both food and non-food items, to the affected civilian population.

### **The rights to seek asylum**

The right of Sri Lankans to seek asylum overseas is increasingly threatened. It is essential that all countries, where refuge is sought, ensure that asylum seekers are granted their full rights under the UN Convention Relating to the Status of Refugees.



## GOVERNOR AND THE PROVINCIAL COUNCIL

*R.. K. W. Goonesekere*

The office of the Governor of a Province was created by the 13th Amendment and his role in Provincial Administration is emerging as one of the controversies in implementation of the Provincial Council System. Why this should be so is to be answered by looking at the manner in which the Constitution was changed. As important a legislative measure as this amendment of the Constitution had to fit into the procedure laid down for examination of Bills for Constitutional consistency before it is enacted. Fortunately this Bill and the connected Provincial Council's Bill were not Bills which were endorsed as urgent in the national interest or the Supreme Court would have had only a period of 3 days to determine its constitutionality with only the assistance of the Attorney-General. Political parties, organisations and individuals would have had no right to express views for or against the Bill. As it was, the President first made a reference to the Supreme Court as he was entitled to do, and the Public also had one week within the Bills being placed on the Order Paper of Parliament to petition the Supreme Court for the purpose of either challenging or supporting the Bills. It is an important function of the Supreme Court to determine whether provisions of a Bill are inconsistent with the Constitution.

Even so, one week to prepare the Petition to the Supreme Court and the written submissions setting out the grounds on which the court's jurisdiction was being invoked proved to be a daunting task. As Senior Counsel for one of the leaders of a Political Party opposing the Bills I realised this only too well. One could never do justice to the briefs in such haste and so it was in my case that a consideration of the role of Governor in relation to the Executive powers of the President was only briefly touched. In fact, the Provincial Council's Bill which contained important provisions relating to the Governor did not receive adequate attention. The focus was definitely on the 13th Amendment.

The Constitution also gave the Supreme Court only 3 weeks from the date of the President's Reference for communicating its decision. Ordinarily, this might appear sufficient time but when you consider that, in addition to the Presidential Reference 49 Petitions were filed in respect of both Bills most of them opposing the Bills, the Court was faced with an enormous problem. If every one of the petitioners and the Attorney-General were to be heard (and they had a right to be heard) the 3 weeks time now reduced to two weeks as a result of the President's Reference would be totally inadequate. The Court was compelled to apportion 7 days for hearing oral submissions of all counsel and 7 days for preparing its determination. Petitioners were severely restricted in point of time in presenting their case.

Justice Wanasundera in his determination referred to this unsatisfactory feature when he said that in a case described as "the most critical, the most important and the most far-reaching that had ever arisen in our courts" the Petitioner's themselves "were barely able to open their case and develop it to their satisfaction." Regarding the time given to the judges for their determination he had this to say: "In our ordinary day to day work, in cases of no great importance, we are accustomed to take five to six weeks after the conclusion of the hearings to deliver our judgment. In a case of this magnitude and importance, the time allotted seem therefore totally inadequate to attend to it as we would wish." Nevertheless, his determination is outstanding in the analysis of the many complex issues that were raised and in particular, the Governor's executive power.

The two Bills were the outcome of the Timpu talks and were predicted in the Indo-Sri Lanka accord. It is no secret that the inspiration for the Provincial Councils came from the States structure in the Indian Constitution. In India there is a Parliamentary Government at the centre where real executive power is vested in the Prime Minister and the Cabinet is responsible to the Parliament and the President is only the nominal Executive. The same system obtains in the States with the difference created by the fact that the Governor is not an elected office but a nominee of the Prime Minister. The Governor is the head of the State and also the representative of the Centre.

In the Indian Constitution, Part VI deals with the States and Chapter II refers to the executive i.e. Governors and Council of Ministers. Chapter III has provisions dealing with the Governor in relation to the State Legislature. These sections give a fairly clear picture of the role of the Governor as a political figure and some of these provisions with modifications have now been incorporated into Chapter XVII A of our Constitution but not in the same orderly fashion. Problems of interpretation of what in any case is a complex relationship have become more difficult as a result of this and a more important difference. In our Constitution the President who is elected by the Country is not a figurehead but exercises de facto executive power with a Cabinet drawn from Parliament, appointed by him and subservient to him. By contrast, the structure of power in the Province is different because the Governor is not the counterpart of the Executive President. In both Constitutions nearly the same words are used, namely that the executive power of the Governor is exercised by him either "*directly or through the Ministers or the Board of Ministers* (only in our Constitution) or through officers subordinate to him." In India this is consistent with the situation at the centre but definitely not so in our case. We have an Executive Presidential System in the Centre and a Westminster-model in the Provinces. Our President under the Constitution is not required to act on the advice of anyone but not so in the case of the Governor as we shall see. We can proceed to examine the different aspects of the Constitutional provisions relating to the Governor.

## 1. Appointment

The Governor is appointed by the President (Article 154B (2)). Where the same party rules at the Centre and in the Province such appointee is generally acceptable and this was the situation after the first elections to the Provincial Councils, except the North-East. Even so the Indian experience has shown that it is "best to consult the State Chief Minister while appointing the Governor, and a convention has thus grown accordingly."<sup>1</sup> This is particularly to be recommended where the political complexion of the Province differs from that of the Centre. In India it is sometimes urged that not only consultation but concurrence of the Chief Minister must precede the appointment in order to prevent an unwanted person being forced on the State as Governor. As Mahajan comments, "for the smooth working of the Indian Federal Structure, it is necessary that the person to be appointed as the Governor should be such as to inspire confidence from both the Centre and the State concerned."

## 2. Removal

The Governor is appointed for a period of five years but holds office during the pleasure of the President and can be removed without reasons being given. The Governor can resign which is what usually happens when there is a change of Government at the Centre. There is no provision for impeachment of the Governor in the Indian Constitution. But we have an impeachment provision where the Provincial Council can present an address to the President advising the removal of the Governor on the ground of violating the Constitution, misconduct or corruption involving the abuse of powers of his office or bribery [(Article 154B (4)]. This corresponds to the impeachment of the President in Article 38(2) and the procedure in both cases is the same. This provision underlines the fact that the Governor must have the confidence of the Provincial Council.

## 3. Functions And Powers

- (I) Chief Minister and Board of Ministers. The Governor appoints the Chief Minister and on his advice the other Ministers. *The Chief Minister's Case*<sup>2</sup> has ruled that the Governor cannot claim an unfettered right in the selection of the Chief Minister and that his decision is subject to judicial review on the ground of unreasonableness.

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<sup>1</sup> Mahajan, Indian Constitutional law.

<sup>2</sup> In the Supreme Court SC Ref. Nos 2/93 and 3/93 S.C.M. 16.8.93 and in the Court of Appeal (1993) (2 SLR 294).

This is not a matter in which the Governor can take refuge in a Presidential direction. The question is: does the power of appointment carry with it the power of dismissal of a Minister or the Ministry? We can expect that Indian Conventions and practice and judicial interpretations will play a part in reaching a satisfactory solution.

- (II) Right to summon and prorogue of the Provincial Council [Article 154B (8) (a) (b)].
- (III) Right to dissolve the Provincial Council [(Article 154 (B) (c)].
- (IV) Right to grant pardon to convicted persons subject to President's directions [(Article 15 (B) (9)].
- (V) Right to address Provincial Council or to send messages with respect to a pending legislative measure [(Article 154 (B) (10)].
- (VI) Right to call for information relating to the administration of the affairs of the Province and proposals for legislation, and to submit to the Board of Ministers any matter on which a decision has been taken by the Minister [(Article 154B (11)].
- (VII) Right to give assent to a Provincial Statute or return it to the Provincial Council with a message.
- (VIII) Right to reserve a statute for reference by the President to the Supreme Court for determination as to its constitutionality (Article 154 H).
- (IX) To comply with directions given by the President when an emergency is declared (Article 154J and Article 154K).
- (X) To report to the President that the administration of the Province cannot be carried on in accordance with the provisions of the Constitution (Article 154L).

The above catalogue of powers and functions are found in the 13th Amendment but other powers are to be found in the Provincial Councils Act as amended by Act Nos. 28 and 29 of 1990.

- (XI) Right to make rules for the allocation (sic) of business among the Ministers [(Section 15(1)].

- (XII) To regulate by rules the custody of the Provincial Fund and payment of moneys into such Fund [(Section 19(5)].
- (XIII) To make rules regulating all matters connected with the custody of, payment of moneys into and withdrawal of moneys from the Emergency Fund of the Province [(Section 20 (3)].
- (XIV) To consider and recommend to the Council Provincial Statutes relating to financial matters (Section 24).
- (XV) To cause to be laid before the Provincial Council the annual financial statement.
- (XVI) To authorise the issue and expenditure of funds from the Provincial Fund where the Provincial Council is dissolved before the annual financial statement has been approved (Section 27A).
- (XVII) To appoint, transfer and dismiss and exercise disciplinary control of officers of the Provincial Public Service Commission (PPSC) and delegate such powers to the Provincial Public Service Commission (Section 32). To alter vary or rescind any appointment, order of transfer and dismissal made by the PPSC (S.33(8)).
- (XVIII) To appoint persons to the PPSC (Section 33).
- (XIX) To prescribe conditions for the delegation of the powers of the PPSC to the Chief Secretary or any officer of the PPSC.
- (XX) To communicate to the Chairman of the Provincial Council his opinion that a member of the Council has expressly repudiated or manifestly disavowed obedience to the Constitution and thereby to disqualify such member from sitting and voting as a member of the Provincial Council [(Section 5(3)].
- (XXI) To communicate to the President that more than one half of the membership of the Council have expressly repudiated or manifestly disavowed obedience to the Constitution or that the Council has for all intents and purposes ceased to function and such Council stands dissolved [(Section 5(a)].

These considerable powers make the office of the Governor an important one. Are they part of the executive powers vested in the President and now 'shared' with the Governor? It is not proposed to deal with this difficult question except to refer to Section 15(2) of the Provincial Council's Act

which states "all executive acts of the Governor, whether taken on the advice of his Ministers or otherwise, shall be expressed to be taken in the name of the President," and that the Governor's orders and instructions are to be made out and executed in the name of the President. Does this fact require a qualification of the statement made earlier in the paper that while the Executive Presidential System is found in the centre it is a truly Parliamentary Government that operates in the Provinces? The marriage of these two systems is ill-fitting having regard to Article 4(b) which vests executive power in the President and no one else.

#### **4. The Governor and the Chief Minister**

It has taken a long time to get to the point of this paper which is the part played by the Chief Minister or Board of Ministers in the exercise of the Governor's executive powers. The list of Governor's powers makes it abundantly clear that there are numerous instances when the Governor can act in his discretion and without reference to the Chief Minister. In this connection it is pertinent to refer to Article 154(F)(2) which provides that in unclear areas it is the Governor who decides whether he is required to act in his discretion and his decision is made final and not subject to review. But the provision continues to state that the exercise of the Governor's discretion shall be on the President's direction. This does not mean that the Governor is required to exercise his discretion in all cases on the President's direction. Such an interpretation was expressly rejected in the *Chief Minister's Case* where the President's direction was explained in terms of the need for ensuring uniformity in the grey areas only.

The important question is in what circumstances the Governor is required to act on the advice of the Board of Ministers or Chief Minister. There is an express provision that in the matters set out in Article 154(B)(8) the Governor must act on the advice of the Chief Minister, that is, in summoning, proroguing and dissolving the Council. But it is qualified by the requirement that the acceptance of advice is dependent on the Governor's satisfaction that the Board of Ministers commands the support of the majority of the Council. There is no indication how this antecedent fact is to be ascertained, but it is clear enough that where this is not in issue the Governor must act on advice. This is particularly important when a Council is dissolved. Dissolution before the due term of office is an act of the Governor and has grave consequences. The members of the Council vacate their seats and the Chief Minister and the Ministers cease to hold office, and do not continue to function until fresh elections are held, unlike in the case of the Prime Minister and Cabinet of Ministers [(Article 48(1)]. In India, however, the Supreme Court has upheld the constitutional right of the Minister to continue in office after dissolution.

The act of dissolving two Councils is now being challenged in Courts on the ground that the advice of the Board of Ministers had not been sought and the Governor's act was contrary to Article

154(B)(8). The position has been taken that a Governor who forms an opinion that there is maladministration in the affairs of the Province is entitled to dissolve the Council.<sup>3</sup>

Executive acts in regard to devolved matters can be exercised by the Governor directly as stated in Article 154C but in accordance with Article 154F. In the routine day to day matters executive power is exercised by Ministers and subordinate executive officers. Article 154(1) lays down the general rule that the Governor when acting directly exercises his functions in accordance with the aid and advice given by the Board of Ministers. This is, however, qualified by permitting him to deviate from the rule where the *Constitution* requires him to exercise any function in his discretion. Taking Article 154C, 154F(1) and (2) there appear to be three situations:

- (1) where the Governor must act on advice;
- (2) where the Governor can act in his discretion without reference to the Board of Ministers; and
- (3) where it is uncertain whether any particular function falls under (1) or (2). Article 154F (2) which has already been considered above gives the proper solution in instances of abuse. The Governor is not entitled to abuse the decision-making power given to him by Article 154F (2) by arbitrarily and unreasonably reducing the scope of (1) above.

The only solution is for healthy conventions to develop in the interest of Parliamentary Government and good administration. However, as India has found, judicial interpretation may be the last resort.

A question has arisen in regard to the appointment and dismissal of members of the Provincial Public Service Commission. Appointments are made by the Governor and in practice they are nominees of the Chief Minister. The Sabaragamuwa Province after the change of Government at the centre, a new Governor was appointed by the President. The Provincial Council had a Board of Ministers from the Opposition. The Governor sought the resignation of the members of the PPSC and when they refused, removed them and appointed three others in their place. In the North-Western Province in a similar situation the Governor without removing the existing members appointed four new members. In both cases the respective Boards of Ministers were not consulted by the Governor. The Board of Ministers of the two Councils challenged the Governor's action in

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<sup>3</sup> The Sabaragamuwa Provincial Council and North-Western Provincial Council cases. In its recent judgment, the Court of Appeal held that the dissolution of the Provincial Council was illegal.

separate writ Petitions on grounds of violation of the Constitution and unreasonableness. In the *North-Western Provincial Council Case* the Appeal Court quashed the appointment of the additional four members as an unreasonable exercise of power. *The Sabaragamuwa Provincial Council Case* is pending. Additionally, the members who were removed from the Sabaragamuwa PPSC petitioned the Supreme Court alleging political discrimination by executive action. This application is also pending.

It is interesting that the Governor who gave no grounds in his letter of removal, in the Affidavits to Court justified his action on the sole ground of need to restructure the PPSC i.e. to have his nominees. Section 33(2) of Provincial Council's Act permits the Governor to remove a member "for cause assigned." It is also clear that the two Governors decided that this was a matter in which they could act in their discretion. But it can be argued that this not being a function assigned to the Governor by the Constitution he is not entitled to take a decision under Article 154F(2).

These are some of the questions that have arisen in the short period that the Provincial Council System has been in operation. It is hoped that the exercise of the Governor's powers will be more closely examined when the amendments to the Constitution are introduced.



## **NEWS OF THE TRUST**

### **Visitors to the Trust**

Several people visited the Trust during February and March. Mr. Alan Phillips, Director, Minority Rights Group International, visited Sri Lanka in February. Among the issues that were discussed was the possibility of sending a representative from the Trust to the Minority Rights Group's meeting in Geneva so that an intervention could be made on the situation in Sri Lanka. Jill Umbach and Claude Perras (Asia Regional Director) of the Canadian Center for International Studies Cooperation (CECI) visited the Trust in March. Their aim was to identify a working partner in Sri Lanka in the event that a project that they had bid for in Canada was successful. Issues that were discussed ranged from the current situation in Sri Lanka to the institutional strength of the Trust and other NGOs in Sri Lanka.

Two representatives from Amnesty International also visited the Trust in March, one of whom was Ingrid Massage of the Asia and Pacific Programme. Many issues of mutual interest were discussed and, in particular, the problems involved in producing annual reports. The Trust's State of Human Rights Report and the viability of catering to the needs of different segments of the society were also discussed.

Micha Ramakers, Assistant Director of the European Human Rights Foundation, Brussels, visited the Trust in March. Many issues of mutual interest were discussed, including the Trust's State of Human Rights Report. Jan Willem A. Bakker, Project Co-ordinator of PIOOM (Interdisciplinary Research Programme on Root Causes of Human Rights Violations), Leiden University, visited the Trust in March. Among the issues that were discussed were the State of Human Rights Report and the CIPART project.

### **Devampika joins the Trust**

Devampika Karunasekera joined the Trust in March as a Programme and Administrative Assistant. She completed her studies at the Methodist College and later at the Ladies' College and holds an Honours Degree in Information Systems from the Manchester Metropolitan University, U.K. She is also an editor at the United Nations Association of Sri Lanka. Since joining the Trust, she has assisted with the finalisation of the CIPART Report and the ICJ Report.

### **Farewells**

The Trust bade farewell to Amali Abhayaratne who left the Trust in March to pursue higher studies. We wish her every success.

*If undelivered please return to:*

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