

# LAW & SOCIETY TRUST

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In this issue we publish Dr Vijaya Samaraweera's critique of the State of Human Rights Reports of the Trust. While commending the Trust for its pioneering effort, he makes several criticisms of the reports. He points out that the parameters that are used to evaluate the human rights situation in Sri Lanka are neither clear nor consistent and the terminology used is not clear sometimes, particularly, the references to "North" and "South" in the reports.

We also publish the critiques of two chapters of the 1995 Report which were made at the launching of the 1995 Report: a critique of the Chapter on Children's Rights by Ms Sharya de Soysa and a critique of the Chapter on Freedom of Expression and Media Freedom by Mr Lakshman Gunasekera.

We also publish Ms Sunila Galappatti's interview with Ms Radhika Coomaraswamy on her experiences as the Special Rapporteur on Violence Against Women.

**SRI LANKA:  
STATE OF HUMAN RIGHTS  
REPORTS**

**AND**

**VIOLENCE AGAINST WOMEN**

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# REPORTING ON THE STATE OF SRI LANKA'S HUMAN RIGHTS IN 1995: A REVIEW ESSAY

*Vijaya Samaraweera*\*

*Sri Lanka: State of Human Rights 1995*<sup>1</sup> is the third annual review of the state of human rights in Sri Lanka to be published by the Law and Society Trust (hereinafter, the Trust). This enterprise began with the publication in 1994 of the review covering the year 1993.<sup>2</sup> It was asserted in the 1993 review that it "represents an important watershed with regard to human rights [as it constitutes] ... a first attempt at an annual review of human rights in Sri Lanka undertaken by concerned human rights activists and scholars."<sup>3</sup> The self-congratulatory tone was quite proper. In the past there had been reports on Sri Lanka's human rights,<sup>4</sup> but the *state* of the island nation's human rights had not been reviewed in a systematic and comprehensive manner until the appearance of the Trust's 1993 report. Equally important, the 1993 review could be viewed as a concrete statement on the part of the human rights community within Sri Lanka that there was both a responsibility and a burden placed upon it to report on human rights developments, itself.<sup>5</sup> To the extent that the Trust's endeavour<sup>6</sup> represents a Sri Lankan commitment, it joins publications in the region of South Asia which testify to the growing interest in studying human rights indigenously.<sup>7</sup>

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<sup>1</sup> Ed. Elizabeth Nissan (Colombo: Law & Society Trust, 1996), xvii, 313 pp., 3 illustrations (2 prize winning drawings, map of Sri Lanka). This review will be hereinafter cited as *Human Rights 1995*.

<sup>2</sup> *Sri Lanka: State of Human Rights 1993* (Colombo: Law & Society Trust, 1994) (hereinafter cited as, *Human Rights 1993*).

<sup>3</sup> *Id.*, p.v.

<sup>4</sup> *The monthly Situation Reports* of INFORM and the occasional topical reports of the Amnesty International are noteworthy examples. Amnesty's annual reviews have also covered Sri Lanka but generally speaking these reports are not detailed.

<sup>5</sup> While non-Sri Lankans have contributed to the annual reviews of the Trust, they represent largely a Sri Lankan effort.

<sup>6</sup> *Human Rights 1993*, though published by the Trust, was the outcome of an initiative by it together with INFORM and the Nadesan Centre for Human Rights Through Law (*Id.*, p. v). The subsequent annual publications are entirely the responsibility of the Trust.

<sup>7</sup> As *Human Rights 1993* itself points out, similar efforts had been made in Pakistan (by the Human Rights Commission of Pakistan), Bangladesh (Coordinating Council for Human Rights in Bangladesh), and Nepal (Informal Sector Service Centre). *Id.*, p. v.

When the first review appeared it was unclear, certainly to the readership, whether it would constitute a one time effort or the beginning of a lasting annual event. The publication of the review for 1994<sup>8</sup> signalled the likelihood that the Trust had indeed embarked upon a continued exercise, and this was strongly confirmed by the release of the review for 1995. While there are apparently understandable concerns about the financial viability of the endeavour, this reviewer, for one, fervently hopes that the Trust will continue to produce its pathbreaking annual publication in the future.

This review essay primarily focuses on *Human Rights 1995*, with considerations of *Human Rights 1993* and *Human Rights 1994* to provide, where relevant, illumination of the discussion. The two previous reviews cannot be ignored altogether in considering the 1995 publication. Each succeeding review after 1993 builds upon the picture that had been offered previously, so that there can be found a cumulative record of the general state of human rights over the years. This necessarily means that the previous review has to be examined to determine both the benchmark and the framework for particular documentation and discussion in the subsequent review. In several instances the reader is explicitly referred to the previous year's review for background material relevant and necessary for the current discussion.<sup>9</sup> Even where such references are not found, an examination of the previous year's review would greatly profit the reader who seeks a firmer grasp of the overall developments of the particular issue(s) perused. Certainly the chapter entitled "Legal Background" in *Human Rights 1993* merits reading by those who begin directly with the subsequent reviews.<sup>10</sup> The chapter is striking for its brevity but it discusses the constitutional provisions which form the crucial framework for human rights issues. To be sure, there is reference to the constitutional provisions relevant to the issues covered, in the various chapters of the subsequent reviews but the reader who seeks the overall framework would come away disappointed.

Three issues need to be raised initially. The first is the "touchstone" issue of what standard or yardstick should be adopted in evaluating or measuring the human rights of a nation. This of course is a contentious issue which has excised many a researcher and activist, and I do not intend to revisit, here, the controversy predicated on the universality of the rights versus an argument of cultural relativity.<sup>11</sup> The Trust's reviews do offer a touchstone - as a matter of fact, several touchstones - but there is no consideration of the controversy or of the theoretical (or other) justification for the standard(s) adopted. *Human Rights 1995* seeks "to assess the

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<sup>8</sup> *Sri Lanka: State of Human Rights 1994*, ed. Elizabeth Nissan (Colombo: Law & Society Trust, 1995) (hereinafter cited as, *Human Rights 1994*).

<sup>9</sup> Thus, to provide an example, the chapter on "Emergency Rule" in *Human Rights 1995*, states that the working of the Public Security Ordinance, the statute which provides the legal framework for emergency rule in Sri Lanka, has been explained in *Human Rights 1993*. See, *Id.*, p. 37. Indeed, the subject is covered in considerable detail in, *Human Rights 1993*, "Emergency Regulations", pp. 12-26.

<sup>10</sup> See, *Human Rights 1993*, pp. 1-11.

<sup>11</sup> Prof. Savitri Goonesekere addressed this debates implications for Sri Lanka in, *Asian Values, Equity and A Sri Lankan Family Policy*, G.C. Mendis Memorial Lecture 1996.

extent to which Sri Lanka has fulfilled its obligation to protect the fundamental rights of its citizenry in conformity with international obligations";<sup>12</sup> this statement is consistent with the assertions made in the 1993 and 1994 reviews.<sup>13</sup> However, *Human Rights 1995* incorporates, without specific acknowledgment, other standards as well - this is a characteristic it shares with the previous reviews. Thus, some chapters evaluate the status of the rights not in terms of international obligations but in terms of the relevant constitutional and legal provisions in force in the country.<sup>14</sup> Some others consider, in addition, how the country's record on the particular bundle of rights measures up to the policy statements issued by the People's Alliance (hereinafter, PA) government in power.<sup>15</sup> Arguments in support of these different approaches can be made, and it could even be argued that given the subject matter covered, in some cases there was no alternative but to move away from the international obligations standard. However, the result of some contributors striking their own path is that there is a sense of desperateness in the treatment of the issues covered in the volume. Indeed, it is legitimate to ask the question, has not the leeway given to some contributors effectively meant the creeping into *Human Rights 1995* of "relativism" which was ostensibly rejected in the first place when "conformity with international obligations" was chosen as the standard? This is not to say that those contributions which deviate from the standard are of poor quality - this, in fact, is not the case. Rather, the argument is that once an overall framework for the analysis has been adopted, it should be consistently adhered to, lest the work gives the appearance that it is merely a collection of disparate analyses without an overarching analytical framework.

The second issue involves terminology, specifically the usages "human rights" and "fundamental rights": do they carry the same meaning, and if not, what is the precise meaning? *Human Rights 1995* draws no distinction between the terms.<sup>16</sup> Documents on human rights unfortunately blur the distinctions of the terms they adopt - this is true of, for example, the *Universal Declaration of Human Rights* (1948).<sup>17</sup> Arguably, there is validity in recognising the two terms "human rights" and "fundamental rights" as being interchangeable but in the case of Sri Lanka it certainly would be an improper practice. Sri Lanka, the term "fundamental rights" has a precise meaning in consequence of the enshrining of specific justiciable rights in

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<sup>12</sup> *Human Rights 1995*, p. xv.

<sup>13</sup> See, *Human Rights 1993*, p. v; *Human Rights 1994*, p. xiii.

<sup>14</sup> See, for example, the chapter on "Judicial Protection of Human Rights" in, *Human Rights 1995*, pp. 94-112. For *Human Rights 1993* see for example, "Emergency Regulations", pp. 12-26, and for *Human Rights 1994*, the chapter on "Respect for Political Rights in Sri Lanka", pp. 14-26.

<sup>15</sup> See, *Human Rights 1995*, "Freedom of Expression and Media Freedom", pp. 57-93.

<sup>16</sup> See, for example, *Id.*, p. xv.

<sup>17</sup> There is an apparent distinction between the terms "human rights" and "fundamental freedoms" in this instrument, yet the use of such additional terms as "fundamental human rights" have the effect of blurring this distinction. See, *Preamble to the Universal Declaration of Human Rights* (1948).

the 1978 Constitution.<sup>18</sup> To be sure, the philosophic foundations of human rights, and concepts and standards relating to the application of human rights do inform Sri Lanka's fundamental rights jurisprudence,<sup>19</sup> but what is asserted before the highest court of the nation is not human rights but fundamental rights. In any case, it requires no supporting arguments to posit that "fundamental rights," in the sense of the constitutional protections offered to the citizenry of Sri Lanka, is something absolutely less than what is universally cognizable as "human rights". Given this, it is puzzling why *Human Rights 1995* (for that matter, *Human Rights 1993* and *Human Rights 1994* as well) chose not to follow the path of exactitude in terminology.

The third issue arises out of the target readership of the Trust's annual reviews. The nature of the targeted readership would undoubtedly be a crucial determinant in the shape and form of any work. *Human Rights 1995*, like the previous reviews, is aimed at both Sri Lankan and international readers. If the international readership was a factor, then surely basic background or amplifying information should have been given in the review when references are made to certain institutions and organisations. To cite an example, the explanation that the PA government is a coalition with a shaky majority in the Parliament would undoubtedly have illuminated a number of issues regarding policy making and policy implementation discussed.<sup>20</sup> Perhaps, much more serious is the adoption in *Human Rights 1995* of certain terms which may mislead and confuse not only the reader with limited knowledge of Sri Lanka but even those who are familiar with Sri Lankan scholarship. Thus, there are references to "upcountry Tamils",<sup>21</sup> an ethnic group which would not be located in the standard writings on Sri Lanka. Again to illustrate, Sri Lanka is effectively divided into three geographical regions - north, east (or, at times conjoined as "northeast") and south - in identifying the situation of both people and places.<sup>22</sup> Arguably, north and east pose no problems (at the very least, there is the reference point of the original provincial demarcations), but what of the "south"? The term, used in contradistinction to "north" and "east" (or, northeast), has entered the lexicon of politicians and some current writings.<sup>23</sup> However, it is submitted that it is an imprecise term which has no

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<sup>18</sup> See, Chapter III of the *Constitution of the Democratic Socialist Republic of Sri Lanka* (1978).

<sup>19</sup> See Sharvananda, C.J.: "Freedom of speech guaranteed by Article 14(1)(a) [of Sri Lanka's 1978 Constitution] goes to the heart of the natural rights of an organised freedom-loving society to impart and acquire information. .... This freedom is not absolute. .... Article 29(2) of the *Universal Declaration of Human Rights* [of 1948] sets forth the cases in which this freedom of expression may legitimately be restricted ....," *Joseph Perera v. Attorney-General*, S.C.Nos. 107-109/86; S.C.M. 25-5-87 (emphasis supplied).

<sup>20</sup> This, for example, is true of the chapter covering the media. See, *Human Rights 1995*, "Freedom of Expression and Media Freedom", pp. 57-93.

<sup>21</sup> See, for example, *Id.*, p. 130.

<sup>22</sup> See, for example, *Id.*, pp. 2-3.

<sup>23</sup> See, for example, the transcript of Sri Lankan Foreign Minister Lakshman Kadirgamar's interview with the British Broadcasting Corporation of October 12, 1996, as published in, *The Island*, October 15, 1996, p.1.

legitimate place in serious scholarship. "South," as a term referencing a specific region and/or a population concentration in Sri Lanka, is to be found most commonly within the context of the on-going ethnic conflict (this is certainly true of *Human Rights 1995*),<sup>24</sup> and it is precisely here that its usage has its greatest dangers. Surely, at the very minimum, one should take into account the emotive power the term carries. Even if the usage is proper in the context (a position I would reject), what terms do you adopt when the discussion shifts to the other major political development in recent times, the rise of the Janatha Vimukthi Peramuna (hereinafter, JVP) and the state reaction to its activities? That the locus of the JVP's activities is central for an understanding of the social makeup of the membership and the political import of this organisation cannot be doubted.<sup>25</sup> Therefore, *Human Rights 1995* references to the "south" (or, in one instance, "southern") without clarifying which precise parts of the "south" are intended, in its discussions in relation to the JVP,<sup>26</sup> are inexcusable.

*Human Rights 1995* should be evaluated in terms of its avowed goals: on the one hand, of providing a description of the status of human rights, and the other, of determining how far the international obligations with respect to the protection of the rights have been fulfilled.<sup>27</sup> As to the first goal, a multitude of subjects has been covered: the integrity of the person (in effect, issues which implicate the security and safety of the person), emergency rule, freedom of expression and media freedom, the judicial protection of human rights, workers' rights, minority rights, children's rights, right to health, and issues concerning the internally displaced. The organisation of the chapters is somewhat different to the structure followed in *Human Rights 1994*, just as the 1994 review differed from *Human Rights 1993* (the change was much more drastic between 1993 and 1994). The reorganisation is clearly a function of the reality of the human rights situation: issues which come to the forefront in a particular year(s) do not necessarily carry the same import subsequently,<sup>28</sup> and issues which were in abeyance find a recognition (by the public and/or by activists) that merits coverage<sup>29</sup>. Perhaps, a rethinking of the appropriateness of chapter headings also led to some changes. The abandonment of the chapter entitled "Economic and Social Rights" which appeared in both *Human Rights 1993* and *Human Rights 1994*,<sup>30</sup> is welcome, for the implicit hierarchical treatment embedded in the

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<sup>24</sup> See, for example, the chapter on "Integrity of the Person" in, *Human Rights 1995*, pp. 16-36.

<sup>25</sup> See, Gananath Obeyesekere, "Some Comments on the Social Background of the April 1971 Insurrection in Sri Lanka (Ceylon)," *Journal of Asian Studies*, xxiii (3), May 1974: 367-84.

<sup>26</sup> For "south" see, *Human Rights 1995*, p. 4, 211; for "southern" see, *Id.*, p. 209.

<sup>27</sup> *Id.*, p. xv.

<sup>28</sup> Thus, the subject of rights relating to women, which was featured prominently, in *Human Rights 1993* (pp. 201-33) and *Human Rights 1994* (pp. 296-323), received cursory attention in *Human Rights 1995* because, apart from one development, no significant changes took place. *Id.*, p. 8.

<sup>29</sup> This is perhaps true of "*Human Rights and Plantation Workers in Sri Lanka*" in, *Id.*, pp. 129-147.

<sup>30</sup> See, *Human Rights 1993*, pp. 167-200; *Human Rights 1994*, pp. 156-206.

distinction between political rights, on the one hand, and economic and social rights, on the other, has been removed.

In terms of describing the current status, *Human Rights 1995* is in general a success. Of course, the quality of the writing and the comprehensiveness of the treatment varies a great deal but what is offered is thoughtful and substantive. The coverage is balanced, so that the record not only of the government in power, that of the PA, but also that of its predecessor, the United National Party, and of the Liberation Tigers of Tamil Eelam (hereinafter, LTTE) are discussed. Further, the volume as a whole points to the *context* governing human rights in Sri Lanka during the period covered, the on-going "Eelam War" between the government and the LTTE; this context is crucial for the understanding of the developments which took place in 1995. There are also, appended to the writings, "schedules" containing United Nations Human Rights instruments, both those which had been ratified and those not ratified by Sri Lanka, the text of the PA government's Devolution Proposal, and the draft chapter on Fundamental Rights put forward as an amendment to the Constitution of 1978. All these documents are exceedingly valuable for their own sake, as well as for illumination of the discussion in the text and for an understanding of the context.

While *Human Rights 1995* is to be congratulated for its overall descriptive efforts, two major criticisms have to be mentioned. The first concerns the documenting of the assertions made. While the writers of the various chapters have been scrupulous about citing sources, there is one glaring exception. The exception is all the more unpardonable because it comes from the editor. In her chapter entitled "Integrity of the Person", repeated descriptions of events and incidents are provided as "reported" without any reference to supporting sources.<sup>31</sup> This is not to question the integrity of the writer but rather to reiterate what is generally acknowledged, that human rights violations, where possible, should be documented to foreclose the possibility of mere allegations, or indeed rumors, from attaining the status of the "truth" (the former Yugoslavia provides the most noteworthy recent example here). Secondly, the section on "plantation workers" and human rights is full of major historical inaccuracies. This is the only section of the review which attempts to trace relevant historical developments, and in the process the writer not only displays an astonishing nostalgia for British colonial rule but also provides patently wrong historical facts to the reader.<sup>32</sup> At a time when the manipulation of historical developments to suit and advance partisan causes is virtually rampant, the review should be scrupulous with respect to how it approaches historical "facts".

Finally, two other issues need to be mentioned. The first is the bibliography. This is not exhaustive but quite useful. On the other hand, the map of Sri Lanka found in *Human Rights*

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<sup>31</sup> See, for example, *Human Rights 1995*, p. 18.

<sup>32</sup> Thus, for example, the writer makes the claim that since they were "British subjects ... the majority of the island's Up Country Tamils ... had the right to a nationality as citizens of Ceylon (as Sri Lanka was then called), a colony of Great Britain." *Id.*, p. 131. Not only is this a confusing argument but it is also incorrect. The people of Sri Lanka, for instance, were never accorded the status of "British subjects" during colonial rule.



1995 (which is the same map which appeared in the previous two volumes) is woefully inadequate. It is cluttered with unnecessary information, and where there is relevant information - for example, provincial boundaries and the location of important population centers - the poor quality of reproduction makes identification almost impossible.

In considering the second goal, assessing the extent to which Sri Lanka has fulfilled its obligations to protect the rights of its citizenry in conformity with international obligations, it is of course relevant to bear in mind, as previously pointed out, that *Human Rights 1995* employs other standards as well. If we are to restrict ourselves to those chapters which abide by the *announced* standards, it is clear that there is a very methodical attempt to test Sri Lanka's human rights record in relation to specific international obligations to which the country has agreed. In many cases, the discussion extends to pointing out the international standards to which the country does not subscribe and the imperatives that prompt the call for Sri Lanka to embrace these as well. In general, international standards are not absolute in that they can be qualified under circumstances elaborated in the instruments in which they are enshrined.<sup>33</sup> It is not entirely clear to this reviewer whether *Human Rights 1995* is inflexibly wedded to the substantive standards or recognises deviations which are in accordance with those formally sanctioned. There is also the issue of judging Sri Lanka's record by standards which have no formal international recognition. This not to dispute the validity of discussing the Sri Lankan situation in relation to those conditions which are receiving "increasing" recognition as rights<sup>34</sup>. Rather, it is an expression of concern that "rights," which lack the legitimacy accorded by international conventions, may willy-nilly enter the domain of authoritativeness.

What does *Human Rights 1995* reveal about the overall state of human rights in Sri Lanka in the year 1995?<sup>35</sup> The contextual background to human rights during this period is of course crucial: in essence, the context is on one side, a balancing by the government of national security concerns and its obligations to uphold and protect rights, and on the other, the LTTE's determination to wage war with every possible means at its disposal, including the massacring of innocent civilians and the assassination of public personalities. The LTTE merits attention because of the territorial control it exerted over parts of the island. Human rights have not received acknowledgment from the LTTE, let alone respect, and its record is absolutely abysmal. Unlike the year 1994, when state power was successively in the hands of the UNP and the PA, in 1995 the government in power was the PA. As to be expected, the review reports a general deterioration of the government's human rights record, in particular after the resumption of the war by the LTTE in April 1995. This was particularly true of freedom from arbitrary arrest and detention, freedom from torture and disappearance, and freedom of expression. Clearly the PA government failed to honor the commitment it made to protect

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<sup>33</sup> See, for example, the qualifications with respect to freedom of expression observed by Sharvananda, C.J. in note 20 above.

<sup>34</sup> *Human Rights 1995*, p. 14. The reference here is to "right to health."

<sup>35</sup> This discussion is necessarily cursory. By focusing on particular subjects I do not mean to imply that those not mentioned are insignificant.

human rights prior to coming into power (which commitment was in fact reiterated again and again after assuming power). Despite this failure, the government also took steps which were meaningful in terms of human rights. On the one hand, these steps were concrete, for example the amendments to the Penal Code (relevant in particular to the enhancement of rights respecting women), ratification of the International Labour Organisation Convention No. 87 on Freedom of Association and Protection of the Rights to Organise, the adoption of the National Workers, Charter, and several legislative changes which impacted rights of children. On the other, there were proposals which, if eventually implemented, could have a remarkable impact upon the context within which human rights are operationalised. Three of these are particularly noteworthy: the PA government's Devolution Proposals, which offered a political solution to the ethnic conflict through the effectuation of constitutional reforms, proposal for the establishment of a National Human Rights Commission, and amendments to the fundamental rights chapter of the constitution (of the three undoubtedly the most disappointing in terms of what was offered substantively).

While an evaluation of state action is crucial, it is also important that the role of the Supreme Court as the constitutionally mandated protector of fundamental rights be considered. A reading of *Human Rights 1995* makes it clear that the jurisprudence relating to fundamental rights is still evolving and that the eventual direction which the Supreme Court will take as an *institution* has yet to be made clear. Some individual justices revealed their impatience with conduct violative of rights,<sup>36</sup> yet this cannot be viewed as the harbinger of a new era, the abandonment of the judicial restraint which has characterised the Court's approach to fundamental rights since 1978; judicial activism, so categorically embraced by the Supreme Court of India, is not for the Sri Lankan Supreme Court.

Finally, I would like to briefly note a characteristic feature of the Trust's reviews published so far (this is something which deserves greater scrutiny and I intend to return to it on a separate occasion). The publications are all infused with an unarticulated, yet quite discernible, fundamental assumption, which I identify as the "ideological" assumption that the enshrining of rights in formal documents, *without more*, will protect human rights. This certitude is dominant in the discourse on human rights, a discourse which, in fact, has so far not encountered an effective competing epistemology. The repeated harking back to "universal" rights, the celebration of rights incorporated in Sri Lanka's constitutional and legal scheme, arguing the imperatives of ratifying those rights which have yet to be formally received in Sri Lanka, are all reflective of the underlying assumption of both the validity and viability of the institutionalisation of rights. Equally, this is evidenced by the "Mandarin" doctrinal analyses of the Supreme Court's decisions regarding fundamental rights, analyses which are meaningful only to the legal profession and not to the wider society.

The underlying assumption of the Trust's publications, I believe, needs to be subjected to a searching theoretical critique as well as to questioning on sheer pragmatic grounds. Most

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<sup>36</sup> See, the comments on the conduct of the Police by Justice Kulatunga in, *Abasin Banda v. Sub Inspector of Police Hanguranketha*, SC Application No. 109/95 quoted in, *Human Rights 1995*, pp. 100-01.

obviously, the assumption has the consequence of ignoring much of what is important to truly understand law. To be fair, the reviews do not view the state of human rights very narrowly. As previously pointed out, they have sought to contextualise the rights in Sri Lanka. However, what is offered is the *broader political context*; there is no discussion of the social environment. To be fair again, given the nature of the undertaking perhaps it was not incumbent upon the reviews to consider social concomitants of "law-in-action" - perhaps, even a valid claim could be made that what is suggested here would require a different sort of study altogether. Nonetheless, it is arguable that the state of human rights cannot be properly explained without attention being devoted to both political and social dimensions. Thus, it is legitimate to ask questions such as, how have the rights been conceptualised by the people for whom they are meant? What was the particular social and/or political context which prompted the assertion of the rights? What are the ideological or other premises that bear upon the decision-making of the justices of the Supreme Court? or, What are the social and political effects of the decisions of the Court? Some clues to frame the proper answer to the last question, for example, are found in *Human Rights 1995* - the comments of Justices Amarasinghe and Kulatunga on the inefficacy of the sanctions available to the Court, for instance<sup>37</sup> - but they remain unexplored. In the "postmodern" era of critical studies of law, the status of human rights deserves more than just description.

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*Id.*

## CRITIQUE OF THE CHAPTER ON CHILDREN'S RIGHTS\*

*Sharya de Soysa\*\**

In her critique of the chapter on Children's Rights in the Sri Lanka: State of Human Rights 1995, Sharya de Soysa first outlined the areas in which children's rights were addressed, those of the war situation, penal reform, marriage registration ordinance and the Kandyan marriage and divorce act. She referred back to the report of 1994, as dealing with Children in Special Situations, in breach of criminal law, primarily those of abuse, sexual exploitation and employment. She said that government efforts to prevent these violations have not been effective, leaving the situation in much the same condition, in spite of a few improvements. Ms. de Soysa said this reflected a state of apathy with regard to children's rights, and said that in some cases the government really could not justify the usual argument that measures are delayed due to lack of financial resources. She said that excessive funding was not necessary to implement some of the recommendations made by the Geneva Convention, namely the universal principles and standards of the "best interest of the child," as well as the "respect for views of the child," and the "non-discrimination principle." She said the Committee on the Rights of the Child had noted the government's failure to enforce these principles.

Ms. de Soysa said the key issues concerning children's rights in the war situation were those of children living in conflict regions, of displaced children and of child combatants. She said that as regards displaced children there were no accurate figures available. Ms de Soysa said that the assumption was that displaced children in government areas would have access to basic supplies and that some established norms would apply to these children. She said, therefore, that the report was chiefly concerned with the vulnerability of children living in conflict areas, displaced children in LTTE held areas and those children forced into combatance.

Ms. de Soysa spoke of the international standards pertaining to internal conflict which would best be used to protect the rights of these children. She referred to the 1949 Geneva Convention, and particularly to Article 3 and Protocol II. She said that Article 4.3 of Protocol II, dealing particularly with children, was especially important. She remarked that this latter had yet to be ratified. Article 38 of the Convention stipulated that children under 15 years of age should not be engaged in war. It also entreats the state to take all feasible measures to ensure the care and protection of children affected by armed conflict. While there is sympathy for the government's predicament in dealing with an organisation like the LTTE, this cannot compensate for its failure to put in place many of the international standards regarding the rights of children.

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\* Summary of the presentation made by Ms. Sharya de Soysa at the launching of Sri Lanka: State of Human Rights 1995.

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Moving on to the issue of law reform, Ms. de Soysa addressed changes in the penal code and marriage laws. She spoke of the new offences introduced into the Penal Code and of the increased penalties assigned to some existing offences. She commented that the introduction of a minimum sentence for certain offences against children illustrated, in itself, that these offences were regarded with more gravity than before. She expressed her concern, however, that some ambiguities in the expression of the existing laws, would often thwart the aim of the law, as had already been seen with the sentences for rape.

In the area of marriage laws, Ms. de Soysa said that amendments had been made to the stipulations concerning marriages conducted under General Law and Kandyan Law though not to those under Islamic Law. She said that 18 years had been made the minimum age for marriage under both amended laws. She said that this also being the age of majority, the consent of guardians or competent persons, called for by Kandyan Law, has become irrelevant. Therefore, Part 3 of the Kandyan Marriage and Divorce Act, which deals with the consent of a guardian ought really to be repealed. She said that the assumption of the writer of the report was that the legal minimum age for marriage being that of majority would similarly override the need for the consent of a guardian under General Marriage Law as well. She said, however, that under General Marriage Law the consent of a guardian is required for those marrying under the age of 21 and the Age of Majority Amendment Act passed in 1989 maintains that the age of majority does not affect certain age limits existing in the legislature. The above laws need to be examined for contradictions with the non-discrimination clause of the Geneva Convention.

She went on to discuss the observations of the Committee on the Rights of the Child and stressed the Committee's concern at the government's failure to take sufficient notice of Article 4 of the Geneva Convention, which calls for the state to do all it can to implement the requirements of the Convention. She also spoke of the Committee's displeasure at observing that only a very small proportion of the national budget was assigned to the protection of children and that certain fundamental general principles of the Geneva Convention are not reflected in the national legislature. Ms. de Soysa spoke of the Committee's noting a significant failure to implement Article 12, the principle concerning respect for the views of the child. She spoke also of the deficiencies in the implementation of the best interest and non-discrimination principles.

She commented on the depth of the discussion in the report, of both law reform and administrative methods concerning the rights of children. She went on to say that the situation in Sri Lanka, with regard to children's rights, has changed little during the course of 1995 and the legal reforms of 1995 are not nearly comprehensive. She pointed out that the survey demonstrates that there is still much to be done to ensure the Rights of the Child which has only been dealt with superficially thus far.

## CRITIQUE OF THE CHAPTER ON MEDIA FREEDOM\*

*Lakshman Gunasekara\*\**

At the outset, I must note that an invitation to a person of the state-controlled media to perform a task of assessing a report that is significantly critical of the State, is itself perhaps an appreciation of the progress made in recent years.

I find that the chapter on 'Freedom of Expression and Media Freedom' is an admirably systematic examination of the legal framework within which media freedom existed in Sri Lanka during the year in review. Since I do not have any background in law, however, I am unable to comment on the legal aspects. My approach to this document is to evaluate the legal and technical magnifications of the observations made in this chapter from the perspective of a practitioner in communication and a human rights activist. In general terms, I can say that I am in complete agreement with the main conclusions of this chapter. However, I will point out later the limitations of evaluating the degree of freedom of expression in Sri Lanka, from a largely legalistic viewpoint.

Section 4 of the chapter correctly observes that the People's Alliance government should be credited with the easing of the severe self-censorship brought by an extreme level of repression that prevailed during successive regimes of the United National Party. The dramatic change was personally experienced by this writer, and most practitioners in the field would share in this appreciation of the healthy resurgence of freedom in the media.

At the same time, the chapter is correct in observing that this new-found freedom did not continue to grow smoothly in 1995 after the initial easing of the previous government's repression. This was partly the result of the souring of relations between large sections of the mass media and the Government. The new media freedom enabled a vociferous media to emerge: as combative than ever before, and resorting to attacks on the government and major government personalities. Sensational campaigns against the ruling political parties, including gossip column speculation on the private life of the President, were among the kinds of provocative media behaviour that spurred on the government politicians to selectively berate media organisations. This intense antagonism also set the stage for the several instances of intimidation and physical harassment of journalists.

There were several negative legalistic impositions on communication practitioners and media organisations; for example, the swift, drastic legal actions filed by the government against some mainstream and critical media organisations in response to the slightest apparent violations of norms and legal proprieties. Several cases of arrest and detention of journalists took place and

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\* Presentation made at the launching of Sri Lanka: State of Human Rights 1995.

\*\* Deputy Editor, *The Observer/Sunday Observer* and Sri Lankan Correspondent, 'the Yomiuri Shimbun' of Japan. Revised for publication.

would seem to have served no purpose other than to intimidate communicators and their institutions.

One example of the disproportionate State response to communicational activity was the deportation of the Christian missionary, Kenneth Mulder, apparently for the circulation of 'seditious' pamphlets. Even more worrying were the physical attacks that have occurred against journalists, which are incongruous with a government committed to media democracy.

This kind of anti-democratic behaviour - however low in incidence it may be, when compared to the UNP era - is but a continuation of the same style of politics as in the past. It is a clear indication of the strength and depth of a certain kind of general political culture in the country as whole - a culture with a strong authoritarian element. In this light, one cannot be surprised at the continuing infringements on media democracy even if on a smaller scale than in the past. After all, a change in political parties need not necessarily bring about a change in the political culture that pervades the country. While authoritarian behaviour may not be unexpected. It is certainly not acceptable, and every step must be taken, including loud criticism to ensure that this tendency is not allowed to mushroom into repression.

As regards censorship, the chapter has correctly pointed out that the censorship imposed on the news media by the Government towards the latter part of last year was, in practice, far wider in scope than actually provided for in the regulations introduced for this purpose. A little more comprehensive and more precise discussions of the censorship in the report would have helped not only to emphasise the importance of this issue but would also have enabled readers to be alert to the various implications of the censorship. It must be pointed out that much of the censorship carried out thus far in the current period of operation of the regulations cannot be justified in strict terms of military confidentiality or national security.

While in principle, the use of censorship ought not to be completely condoned in a situation of a severe crisis of the State (especially a military contingency), any abuse of censorship powers for other purposes must immediately be criticised and ways sought to avoid a repetition of such abuses. When the censorship was first imposed under the PA regime in late 1995, the Free Media Movement, of which I am a member, did not immediately demand its revoking. Instead we issued an early warning urging the Government not to repeat the abuses of the last regime. I remember the time we took to discuss and agree on the slogan "Censorship brings another era of repression - Defend the people's rights to know."

It must be said, however, that the media community has appreciated the fact that the censorship under the PA government has largely been carried out in a liberal manner as compared with the enforcement of censorship during the UNP's rule. What the media has been demanding is that the government should introduce measures to ensure that whatever censorship there might be, will be narrowly specific in scope and restrained in its enforcement. Following several instances of censorship which went beyond the strict boundaries of the censor regulations, the Free Media Movement now takes the position that the powers of censorship are being abused, and that censorship, as it is currently enforced, must be lifted.

It is this censorship, and the other instances of impositions on the communication media that show the contradiction between the government's stated policy of media democracy and the actual conditions of expression and communication. The Minister of Media continues to emphasise the government's liberal policy and, commendably, has remained in consultation with media institutions and groups of media professionals. However, little has been done to implement the numerous proposals by no less than four specialist committees on such matters as laws pertaining to expression and communication, media training and the working conditions of media professionals.

There are useful comments in this chapter on the proposals for constitutional reform made by the Ministry of Justice and their impact on media freedom. The chapter has also duly recorded the government's continued failure to divest state control of the Associated Newspapers of Ceylon Limited, a promise made by the People's Alliance in its election manifesto.

This report is right in saying that the situation concerning the freedom of expression and media freedom in 1995 "could best be described as a paradox." While on the one hand, the atmosphere of fear gradually disappeared and the government appeared to be committed to institutional reform and an enhanced guarantee of freedom, on the other hand, the principles espoused were contradicted by the police action against media personnel, the hurried serving of criminal indictments against newspaper editors, and sweeping official and also unofficial censorship. When substantial changes had been hoped for, these incidents and developments are, naturally, disappointing.

I am in broad agreement with the report in feeling that one cannot be satisfied with the state of media freedom in the country today, although there have been some significant improvements to the situation as it existed before.

This chapter, however, is limited to an analysis of the *legal framework* providing for the right and the ability to communicate. An adequate analysis of the conditions of freedom of expression and the right to communicate must go beyond any legal framework. Such an analysis must also look beyond the mere right of individuals to 'freedom of expression'. A proper analysis must examine the function of communication in society and the *communication structures*, including the structures of mass media. Communication (of all kinds) plays a significant role in sustaining communities and in forming and maintaining community identities. There needs to be an assessment of the capacity of a given society's communication structures as a vital social function to facilitate communication - both inter-personal and inter-group. Thus, an evaluation of the legal framework alone is wholly inadequate.

In a sense, communication is a celebration of community, and the ability of communication structures to adequately enable the conveyance of aspirations, views, needs, and feelings of people and groups is a measure of the state of the freedom of communication and expression. This paradigm is particularly relevant to Sri Lanka given the violent and long-lasting conflict between different ethnic communities in this country.



Indeed, the Sri Lankan predicament makes it imperative that there be a critical assessment of the role of the mass media, especially the mainstream mass media, in enabling communication in the Sri Lankan society, particularly the communication of community interests and aspirations. It is possible to argue that the mainstream mass media has contributed to *imbalances* in communication - to facilitating the articulation of some community interests more than those of others. Ethnic minority communities have been provided less opportunity for the articulation of their interests and their identities. Even worse, such communities have been subjected to actively hostile communication including hostile stereo-typing. Other minority groups, such as those of alternate sexual orientation also lack this 'freedom to express' themselves because of the lack of avenues of expression.

A more complete analysis of media freedom and freedom of expression would not only place the responsibility of media freedom solely on the State and the legal framework drawn up by the State. Instead, it should consider the actual communication structures as being equally important and places the onus for improvement on the media institutions and communication practitioners as well.

### SRI LANKA STATE OF HUMAN RIGHTS 1995

The Law & Society Trust's Sri Lanka State of Human Rights 1995, the third report in the series, will be on sale from the 16th of September 1996 at all leading bookshops and at the Law & Society Trust, No.3, Kynsey Terrace, Colombo 8.

The report considers civil and political rights focusing on the integrity of the person, freedom of expression and media freedom and judicial protection of human rights. In the area of socio-economic rights the report examines workers' rights focusing on the National Workers' Charter, trade union rights and rights of plantation workers; and health and human rights. In addition, separate chapter are devoted to children's rights, the plight of displaced persons and the rights of minorities.

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## **Ms Radhika Coomaraswamy comments on her second year as UN Special Rapporteur on Violence Against Women**

*Sunila Galappatti\**

I asked Ms Coomaraswamy whether her perspective on the problem of violence against women has changed since her appointment as Special Rapporteur to the UN. She said that before the appointment her perspective was determined by her experience dealing with violence against women in Sri Lanka and that her international role has shown her how universal and pervasive the issue really is. She said that, despite cultural differences, the broad issue of violence against women is universally relevant to a degree she had not expected.

Ms Coomaraswamy said that when taking on a UN post she was aware of its limitations, and that by the very nature of her role as an international officer under the UN, she would not be able to make dramatic changes to the issues with which she came into contact. She said instead, that what she can hope for is to help change attitudes, while lobbying for legislation and urging vigilance in the implementation of this legislation.

When asked what connotations her position carried to the receptiveness of governments and other organisations, she said that governments were certainly more receptive to her now than they would have been if she had been making inquiries in her personal capacity. At the same time she said that the very governments who voted for the creation of her post and signed the UN Declaration on the Elimination of Violence Against Women, have a tendency to treat the problem as a trivial issue. She said, for example, that although on becoming Special Rapporteur she wrote to all governments, inquiring into violence against women in their countries, only a handful of these have replied or made any response to her concerns. In fact she said that even of the replies she did receive, some were far from comprehensive. For example, one reply simply made the sweeping declaration that violence against women was not a phenomenon that took place in that country. Ms Coomaraswamy said, on the other hand, that she has found NGOs to be very helpful and responsive to her inquiries.

Ms Coomaraswamy went on to say, however, that government responses differ depending both on the individual government and the issue being discussed. She spoke of the three countries in which she had had field experience - Poland, Brazil, and South Africa, on the issues of trafficking, domestic violence and rape, respectively. She said that the governments of these countries were very concerned about the issues in question and responsive in their wish that these issues be addressed. On the other hand she felt that the Japanese government gave her a sanitised view of the issue of "comfort women" in Japan.

I asked Ms Coomaraswamy whether it was difficult to work with what had to be an international perspective. She commented that the drive to eliminate violence against women really was an

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\* Programme Assistant, Law & Society Trust.

international concern in that it was the international community, of NGOs, not governments, that made the problem of violence against women into an issue. She pointed out that it was the coming together of NGOs dealing with a wide range of women's issues at the Vienna Conference on Human Rights in 1993, that led to an international awareness which is central to the strategies developed to combat violence against women.

Ms Coomaraswamy said that while some issues such as female genital mutilation are localised, the international experience is relevant even in addressing specific issues based on such grounds as cultural and religious practices. She said that there is no single root cause for the poor treatment of women but that a range of factors are involved. Not only are there many causes of violence against women, but there are several players involved in each of the causes. Among the causes for the widespread existence of violence against women are historical unequal power relations between the sexes, ideologies surrounding conceptions of the relative roles of men and women, the control of female sexuality, the lack of economic independence given to women, and government inaction. For example, traditions and stereotypes unjust to women are fostered by male partners, the family unit, the state and even the women themselves. One is therefore dealing with the elimination of a phenomenon that has penetrated society at all level and exists in the very foundations of the world's patriarchal societies.

Ms Coomaraswamy said that while the nature and extent of issues differ from country to country, she was "surprised at the commonality" she found in her work. She said that even the identification of and response to the problems by different governments were very similar as were the prevailing social attitudes towards an issue. She said that there were slight differences in circumstances, for example in Brazil, a "defence of honour" is traditionally considered an acceptable justification of violence against women and countries sometimes have different religious laws and punishments involving violence against women. The largest issues, those of domestic violence, rape, and the abuse of women in armed conflict, were universally prevalent.

When asked how difficult it is to develop policies and recommendations in universal terms, Ms Coomaraswamy replied that it is possible to develop policies and model legislation regarding various issues constituting violence against women because of the universality of the vast proportion of the issues and the similar legal structures operating in several countries. Such model legislation she said would be "useful across cultures." At the same time, specific recommendations such as on how the training of the police force or the attitudes of the judiciary may be improved would naturally be specific to the needs and conditions of individual countries.

Ms Coomaraswamy said that the actual implementation of policies in taking steps towards the elimination of violence against women would, of course, be done at a local level rather than an international one. However, she feels that international mobilisation on issues is essential to their resolution. She said that the role of the international community is to sensitise and act as a watchdog. She feels that the international and local roles are complementary ones, where local action is galvanised by international pressure.

I asked Ms Coomaraswamy what was different in her second year as a Special Rapporteur. She

said that she now finds amongst governments a general awareness of violence against women as a human rights issue. She said that in her first year, the work "was new, both for them and for me" and that in her second year she senses the difference to lie in a greater awareness of the issues by numerous governments.

When asked whether she faced any conflict between her personal perspective on eliminating violence against women, and the official policies of the UN, Ms Coomaraswamy said that there was a fundamental difference in how she has to approach issues now compared with the work she did in the past. She said that she came very much from the NGO tradition of rights oriented confrontation and activism. She said that the UN has a more judicious role to play and calls for impartiality in the resolution of problems. She said, for example, that she can no longer participate in demonstrations and such like, and that in this sense there exists "a tension" between her current work and that done previously. She said, however, that she has been able to adopt other strategies, especially as her role now is taken more seriously.

When asked whether things were improving, she said that "the international movement has really made a mark." She said governments are now willing to make formal actions such as the amendments to the Sri Lankan Penal Code, which they would, perhaps, not have done before. She stressed the word "formal," however, commenting that the agents of change, such as the judiciary and the police, still showed room for improvement in many countries. She said that the structures to implement government decisions are still not in place. However, there has been considerable improvement in the situation of women which she said would have been unimaginable twenty years ago. She said in Sri Lanka important changes could even be traced over the last five years. Ms Coomaraswamy said that there is certainly a tangible change in the attitudes of policy-makers though perhaps not yet in those of the general public.

Ms Coomaraswamy said that her work remains "both encouraging and depressing." While change is certainly taking place in the improvement of the lives of women, she said that the accounts of victims of violence are a gruelling reminder of "how horrible the world can be."

## **Looking back at 1996.....**

1996 was a particularly busy year for the Trust. Despite the power cuts that paralysed the entire country, the Trust was able to complete several on-going projects and launch new projects.

The Citizens' Participation in Democracy Project (CIPART) was completed this year and the final report was handed over to the Asia Foundation in August. This project generated important data on the perceptions of people with regard to the legal system, the actual experience of people with the legal system, the problems faced by litigants and the important role played by the law enforcement agencies. It also discussed legal aid, legal education and human rights NGOs. The data generated by the study would be invaluable for future projects on legal and judicial reform.

### **Evaluation of Trust's activities**

An evaluation of the Trust's activities was carried out by two independent evaluators nominated by NOVIB. While complimenting the Trust for the significant contribution it had made to research and to society, several suggestions were made to improve the work of the Trust. One important suggestion was the necessity to move away from projects funding to programmes funding and to identify a three year programme of activities within which individual projects could be located. Pursuant to the evaluation, a strategic planning meeting was held at the Trust to plan a programme of activities for the coming years.

### **Input into the national debate**

The Trust continued its programme on debating issues of national concern. The highlight of this programme was the intervention in relation to the National Human Rights Commission Bill where several amendments were carried out to the Bill as a result of the lobby document prepared under the auspices of the Trust for which a select committee was appointed by the Minister. Other Bills for which interventions were made included: the Goods and Services Tax Bill; Rehabilitation of Public Enterprises Bill and the Rights of the Disabled Bill.

### **State of Human Rights Report 1995**

The Trust produced its third annual report on the human rights situation in Sri Lanka which was launched formally in September. Mr C.T. Janz, Chairman of the Human Rights Task Force, chaired the session. In addition to the topics covered in the previous volumes, this report discussed two areas hitherto unaddressed in the previous volumes: right to health and the situation of plantation workers.

## **Law and Economy programme**

The Trust constituted a steering committee consisting of eminent people in the field to advise the Trust on the Law & Economy Programme, particularly to formulate a three year plan of activities under the programme. The 1996 National Law and Economy Conference was successfully completed in November with participants from various institutions. The theme of the conference was *Privatisation*. The keynote address was delivered by the Honourable Minister of Justice and Constitutional Affairs, Professor G.L. Peiris, and the inaugural session was chaired by Dr Nissanka Wijeyeratne, Chairman of the Trust.

The papers presented at the 1995 Conference together with a few additional papers are being published by Law Asia Practice, Hong Kong, and the expected publication date is mid January 1997. The publication which was edited by Sumudu Atapattu looks at the legal and policy issues relating to infrastructure development in Sri Lanka. It is hoped that this publication would help policy makers, academics and students as well as possible investors on issues relating to infrastructure development in Sri Lanka.

## **Health and Human Rights Desk**

The Health and Human Rights Desk of the Trust has prepared several booklets for free distribution on issues relating to HIV and Human Rights. These booklets deal with the right to work, right to education, non-discrimination etc. The main aim is to educate the general public on issues relating to HIV and AIDS, how the disease is spread and how it could be prevented. They also discuss how AIDS patients should be treated by the society. The booklets will be printed in all three languages.

## **New projects**

As part of the institution building project in Bangladesh, the Trust organised a Regional Law and Economy Conference in Devenber in Dhaka, Bangladesh with panelists from Sri Lanka, Bangladesh and Pakistan. The theme of the Conference was *Investment and Legal Infrastructure*. The Conference was inaugurated by the Honourable Minister of Finance of Bangladesh, Shah A.M.S. Kibria. His Excellency the High Commissioner of Sri Lanka, Mr S.B. Atugoda also attended the inaugural session. Sumudu Atapattu of the Trust presented a paper on *Infrastructure Development and Environmental Impact: Laws in Sri Lanka and Bangladesh* while Neelan Tiruchelvam chaired the panels on Laws and Policy Relating to Capital Market and Infrastructure Development. Damaris Wickremesekera of the Trust also attended the Conference. Mr Justin Meegoda, President and Chief Executive Officer of Vanik, Sri Lanka, presented a paper on Project Finance.

The Trust has been nominated by the Ministry of Justice to co-ordinate the commercial law reform programme spanning a period of five years and is to secure multilateral donor funding.

## **Interns and scholars.**

The Trust continued its internship programme during 1996. Two interns joined the Trust for a period of three months in 1996: Matthew Starnes of the McGill University and Rawnak Jahan of Odhikar, a coalition of human rights NGOs in Dhaka, Bangladesh.

The Trust also had the privilege of receiving a distinguished scholar from the United States who will be with the Trust for a few months. Dr Vijaya Samaraweera came to Sri Lanka on a fulbright fellowship and devotes two days of the week to the activities of the Trust. He carried out an evaluation of the State of Human Rights Reports of the Trust and many valuable suggestions were made to improve the reports.

## **Conferences and workshops**

The Trust's staff attended several conferences and workshops overseas. Manjula Soysa attended a workshop on law reform organised by Project LARGE, India, in January and presented a paper on Intellectual Property Law in Sri Lanka.

Sumudu Atapattu was awarded a fellowship by the United Nations to attend the 32nd Session of the International Law Seminar in Geneva. This was held in conjunction with the 1996 session of the International Law Commission.

Menique Amarasinghe attended a training workshop on International Trade Agreements in Calcutta in August which was organised by the Consumer Unity and Trust Society (CUTS) of New Delhi.

Damaris Wickremesekera, Neelan Tiruchelvam and Sumudu Atapattu attended the Regional Law and Economy Conference in Dhaka, Bangladesh in December.

We shall be grateful if our readers could inform us whether you receive the Fortnightly Review regularly. We also welcome your suggestions on how to improve our publication.

Thank you.

***We would like to wish our readers  
a happy and peaceful New Year!!!***



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