

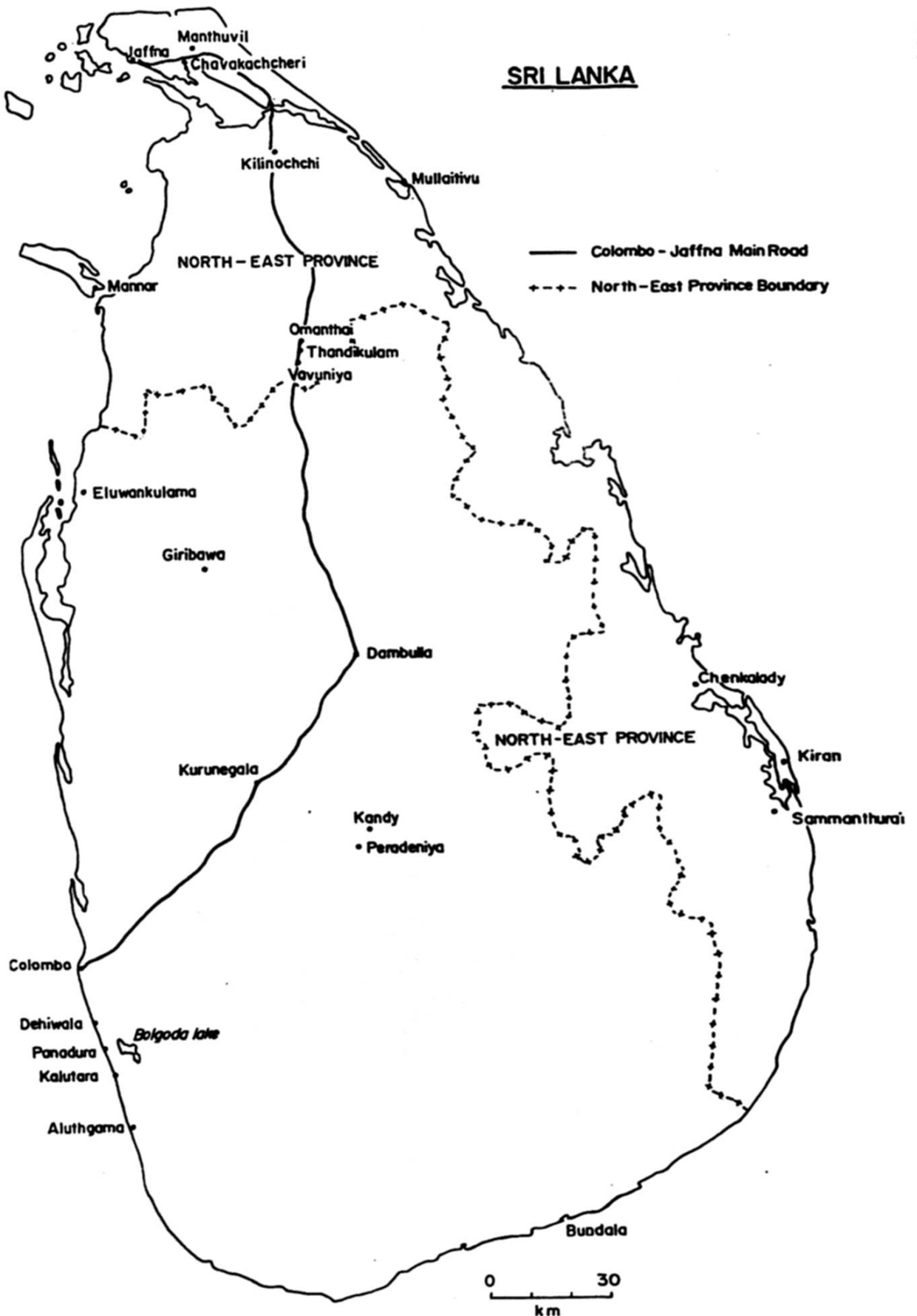
1997

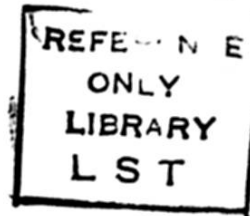
SRI LANKA: STATE OF HUMAN RIGHTS REPORT



LAW & SOCIETY

SRI LANKA





SRI LANKA:

STATE OF HUMAN RIGHTS

1997

**This report covers the period
January to December 1996**



Law & Society Trust
3, Kynsey Terrace
Colombo - 8
Sri Lanka

1997
Y 110
YH-3312
T 2 J

© Law & Society Trust
September 1997

ISBN 955-9062-45-X

342.7
✓ 6023

Contributors

Overview

Law & Society Trust

Integrity of the Person

Elizabeth Nissan

Emergency Rule

Suriya Wickremasinghe

Freedom of Expression and Media Freedom

Sabina Fernando

Judicial Protection of Human Rights

Sumudu Atapattu

A Case Study of the Office of the Ombudsman

Deepika Udagama

The Devolution Proposals: The Human Rights Implications

Vijaya Samaraweera

Environmental Rights and Human Rights

Sumudu Atapattu

Violence Against Women

Radhika Coomaraswamy

Children's Rights

Sharya de Soysa

Internally Displaced Persons and the Freedom of Movement

Mario Gomez

Nationality and Citizenship Laws

Ramani Muttetuwegama

Editors

Kanagananda Dharmananada and Lisa M. Kois

Administrator

Damaris Wickremesekera

Proof Readers

*Sumudu Atapattu; Sunila Galappatti; Dharshini Sivanathan; and
Damaris Wickremesekera*

Resource Support

*Sumudu Atapattu; C.S. Dattathreya; Bimsara Dissanayaka; Sunila
Galappatti; Tilaka Fernando; Devampika Karunasekera;
Navin Perera; Barbara Roth; Katherine Wood; the Nadesan Centre*

Papers reviewed by

*J. F. A. Soza; Nimalka Fernando; Lakshman Gunasekara; Ruana
Rajapakse; Jeevan Thiagarajah; Lalanath de Silva; J. C.
Weliamuna; Ramani Muttetuwegama; and Neelan Tiruchelvam*

Cover

*Prize Winning Drawing by N. G. Ramani Thushari Damayanthi of
Polpagoda Maha Vidyalaya awarded at the Inter School Art
Competition on Human Rights organised by the Law & Society Trust.*

Layout

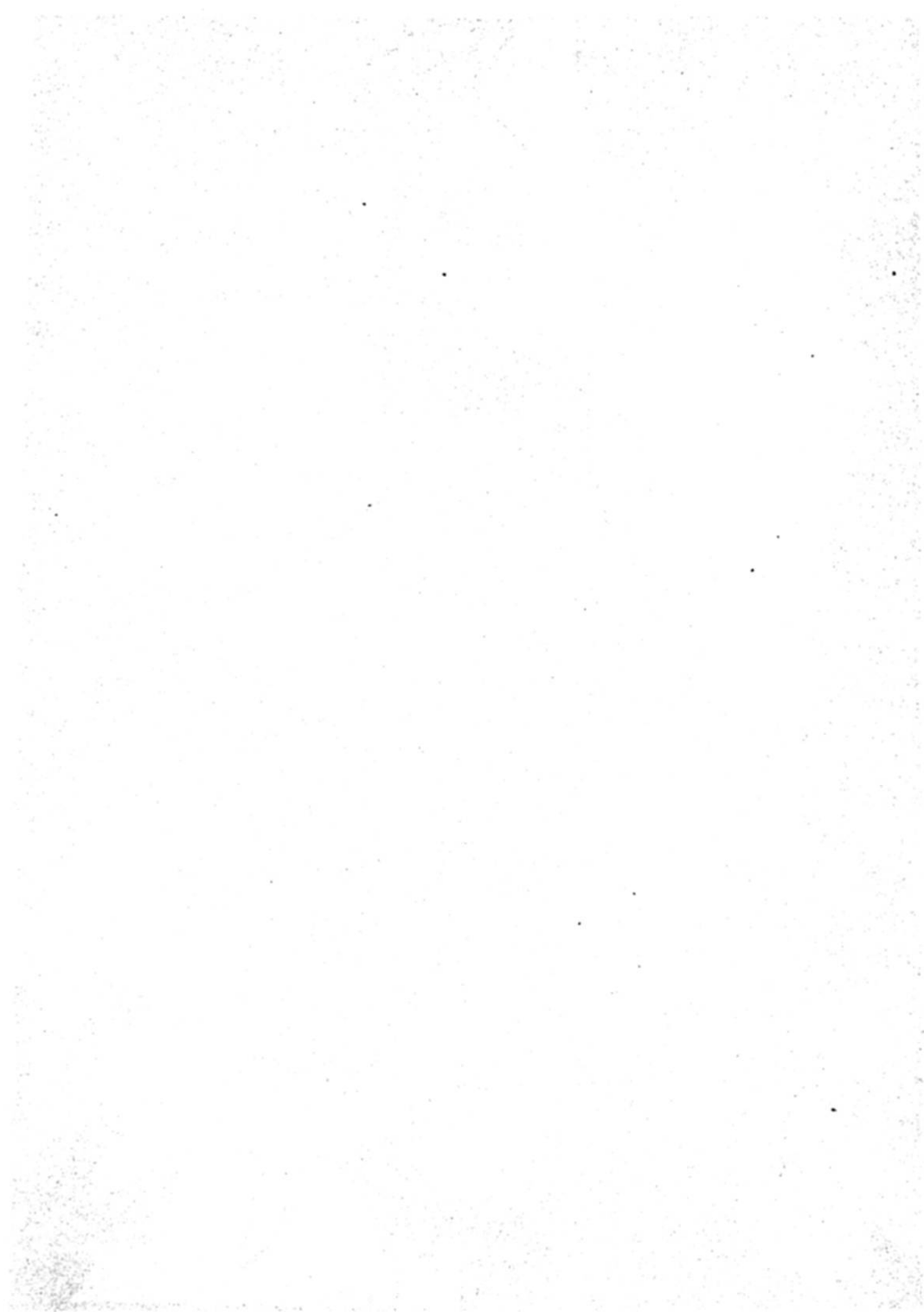
S. Antony Norbert

Printing

Unie Arts (Pvt) Ltd.



B. K. Niroshanthi (13 yrs)
Polpagoda Maha Vidyalaya, Nakiyadeniya.



Contents

List of abbreviations and acronyms	xv
Foreword	xvii
I Overview	1
II Integrity of the Person	11
1. Introduction	11
2. Integrity of the Person and International Human Rights Law	12
3. "Disappearances"	13
4. Extrajudicial Killings	19
4.1 Arbitrary killings by the LTTE	23
5. Arbitrary Arrest and Detention	24
5.1 The detention of travellers from the North to the South and restrictions on freedom of movement	26
5.2 Detentions by the LTTE	27
6. Torture and Ill-treatment	28
7. Investigations into Alleged Violations and the Trials of Perpetrators	29
8. New Initiatives to Protect Human Rights	30
9. Conclusions and Recommendations	31
III Emergency Rule	34
1. Introduction	34
2. Extension of Emergency throughout the Island	35
3. Extension of Life of Local Authorities	35
4. Arrest and Detention	36
4.1 Authorised places of detention	36
4.2 Other rulings in Wimalenthiran's case relating to arrest and detention	39

5.	The Position of Persons who Surrender	45
6.	Censorship	50
7.	The Ban on May Day Processions	51
8.	Essential Services	54
9.	Confiscation of Property	56
10.	The Human Rights Task Force (HRTF)	58
11.	Other Regulations	59
12.	Conclusions	61
IV	Freedom of Expression and Media Freedom	62
1.	Introduction	62
2.	Legal Framework	63
2.1	Constitutional guarantees	63
2.2	International obligations	65
2.3	Relevant legislation	66
2.4	Emergency powers	71
3.	The Nature of the Mass Media in Sri Lanka	71
4.	The Exercise of the Freedom of the Media in Practice	72
4.1	Formal censorship	72
4.2	Unofficial censorship	73
4.3	Censorship and the conflict	73
4.4	Harassment through legal action	74
4.5	Physical attacks on journalists	75
4.6	Pressure on journalists to reveal sources of information	76
4.7	Threats and intimidation of journalists	77
5.	Recommendations and Conclusions	79
V	Judicial Protection of Human Rights	82
1.	Introduction	82
2.	Jurisdiction of the Human Rights Commission of Sri Lanka and the Supreme Court	84
3.	Case Law	85
3.1	Cases under Articles 11, 13(1) and 13(2)	86

3.2	Cases under Article 12	94
3.3	Cases under Article 14	99
3.4	Leave to proceed in relation to the appointment of Dr. Shirani Bandaranayake to the Supreme Court	106
4.	Remedies	110
5.	Conclusion	110
VI	A Case Study of the Office of the Ombudsman	113
1.	Introduction	113
2.	The Legal Framework	114
3.	Independence of the Ombudsman	114
4.	Powers and Functions	115
5.	Deputy Ombudsmen	117
6.	Public Access to the Ombudsman	118
7.	Inquiry Procedure	120
8.	Relief that could be granted	122
9.	Operational Aspects of the Office of the Ombudsman	123
9.1	Accessibility	124
9.2	Nature of complaints and jurisdiction	125
9.3	Inquiry procedure	128
9.4	Enforcement	128
9.5	Lack of adequate resources	129
10.	Conclusions	132
11.	Recommendations	134
12.	Annex I	135
VII	The Devolution Proposals:	
	The Human Rights Implications	138
1.	Introduction	138
2.	The Devolution Proposals	139
3.	The Human Rights Implications	143
4.	Conclusion	146

VIII Environmental Rights and Human Rights	149
1. Introduction	149
2. International Provisions	152
3. Definitions	157
3.1 The environment	157
3.2 Environmental problems	158
4. The Position Under the Constitution of Sri Lanka	159
5. Provisions in the National Environmental Act of 1980	163
5.1 The establishment of the CEA	163
5.2 Abatement of pollution	163
6. Provisions in the Draft National Environmental Protection Act	165
7. Fundamental Rights Litigation	166
8. Major Environmental Problems in 1996	169
8.1 Problems relating to natural resources	169
8.2 Pollution issues	171
9. Positive Action	174
10. Recommendations and Conclusions	175
 IX Violence Against Women	 177
1. Introduction	179
2. Migrant Workers	181
3. Sexual Violence	182
4. Domestic Violence	183
5. War, Militarisation and the Internally Displaced	185
6. The Legal Framework	188
7. National Plan of Action	198
8. The Criminal Justice System	199
9. Support Services for Victim-Survivors of Violence against women	206
10. Recommendations	207
10.1 Gathering of data	207

10.2	Legal framework	208
10.3	The National Plan of Action	208
10.4	The criminal justice system	209
10.5	Support services for victim -survivors	209
X	Children's Rights	211
1.	Introduction	211
2.	Sexual Exploitation	212
3.	Child Labour	217
4.	Recommendations of the Committee on the Rights of the Child	222
5.	Conclusion	224
XI	Internally Displaced Persons and the Freedom of Movement	225
1.	Introduction	225
2.	The Background	226
3.	Numbers	228
4.	The Role of the Military and Defence Authorities	230
5.	The Right to Information	231
6.	Women and Displacement	235
7.	The Vanni	238
8.	The Detention Centres in Vavuniya	241
9.	Jaffna	242
9.1	Freedom of movement	243
9.2	Right to health	243
9.3	Right to education	244
9.4	Right to livelihood	244
10.	The Movement to India	245
11.	Freedom of Association of the Displaced	246
12.	International Standards on Internal Displacement	246
12.1	Definition	247
12.2	Human rights law	247
12.3	Humanitarian law	250

12.4	Analogous refugee norms	252
13.	Conclusions	252
14.	Recommendations	254
XII	Nationality and Citizenship Laws	257
1.	Introduction	257
2.	Citizenship	258
2.1	The effect of citizenship	258
2.2	Categorisation of citizenship	259
2.3	Revocation/annulment of citizenship	263
2.4	Up Country Tamils	263
3.	Residence	265
3.1	Procedure regarding right of entry	265
3.2	Removal of persons (Part V)	266
3.3	Deportation of persons (Part VI)	266
3.4	Right to residency	267
4.	Attempts at Reforms and Challenges to the Law	268
4.1	The Law Commission's proposals	268
4.2	Removal of persons	271
4.3	Fundamental rights	272
5.	International and Domestic Obligations	273
5.1	Domestic	273
5.2	International	275
5.3	Optional Protocol	276
6.	Recommendations	277
7.	Conclusions	277
	<i>Schedule I</i>	279
	<i>Schedule II</i>	282
	<i>Schedule III</i>	285
	<i>Bibliography</i>	290
	<i>Index</i>	296

Abbreviations

<i>A-level</i>	<i>Advanced Level (of the General Certificate of Education Examination)</i>
<i>AG</i>	<i>Attorney-General</i>
<i>AI</i>	<i>Amnesty International</i>
<i>ANCL</i>	<i>Associated Newspapers of Ceylon Limited</i>
<i>ASEAN</i>	<i>Association of South East Asian Nations</i>
<i>CDB</i>	<i>Crime Detection Bureau</i>
<i>CEA</i>	<i>Central Environmental Authority</i>
<i>CEB</i>	<i>Ceylon Electricity Board</i>
<i>CEDAW</i>	<i>Convention on the Elimination of All Forms of Discrimination against Women</i>
<i>CID</i>	<i>Criminal Investigations Department</i>
<i>CMU</i>	<i>Ceylon Mercantile, Industrial and General Workers Union</i>
<i>CRC</i>	<i>Convention on the Rights of the Child</i>
<i>CRM</i>	<i>Civil Rights Movement of Sri Lanka</i>
<i>ECE</i>	<i>Economic Co-operation of Europe</i>
<i>EFL</i>	<i>Environmental Foundation Ltd.</i>
<i>EIA</i>	<i>Environmental Impact Assessment</i>
<i>GA</i>	<i>Government Agent</i>
<i>HRC</i>	<i>Human Rights Commission</i>
<i>HRTF</i>	<i>Human Rights Task Force</i>
<i>ICCPR</i>	<i>International Covenant on Civil and Political Rights</i>
<i>ICESCR</i>	<i>International Covenant on Economic, Social and Cultural Rights</i>
<i>ICRC</i>	<i>International Committee of the Red Cross</i>
<i>IDPs</i>	<i>Internally Displaced Persons</i>
<i>IEE</i>	<i>Initial Environmental Examination</i>
<i>IGP</i>	<i>Inspector General of Police</i>
<i>ILM</i>	<i>International Legal Materials</i>
<i>ILO</i>	<i>International Labour Organisation</i>
<i>ITN</i>	<i>Independent Television Network</i>

<i>JVP</i>	<i>Janatha Vimukthi Peramuna (People's Liberation Front)</i>
<i>LECO</i>	<i>Lanka Electricity Company Ltd</i>
<i>LTTE</i>	<i>Liberation Tigers of Tamil Eelam</i>
<i>MSF</i>	<i>Medecins Sans Frontieres (Doctors Without Borders)</i>
<i>NEA</i>	<i>National Environmental Act</i>
<i>NFEP</i>	<i>Non-Formal Education Programme</i>
<i>NGOs</i>	<i>Non-Governmental Organisations</i>
<i>NMI</i>	<i>National Media Institute</i>
<i>PA</i>	<i>People's Alliance</i>
<i>PTA</i>	<i>Prevention of Terrorism Act</i>
<i>PEACE</i>	<i>Protecting the Environment and Children Everywhere</i>
<i>PLOTE</i>	<i>People's Liberation Organisation of Tamil Eelam</i>
<i>RRAN</i>	<i>Reconstruction and Rehabilitation Authority of the North</i>
<i>SAELR</i>	<i>South Asian Environmental Law Reporter</i>
<i>SLBC</i>	<i>Sri Lanka Broadcasting Corporation</i>
<i>SLFP</i>	<i>Sri Lanka Freedom Party</i>
<i>SLRC</i>	<i>Sri Lanka Rupavahini Corporation</i>
<i>TELO</i>	<i>Tamil Eelam Liberation Organisation</i>
<i>TNL</i>	<i>Telshan Network (Pvt) Ltd</i>
<i>TRO</i>	<i>Tamil Rehabilitation Organisation</i>
<i>TULF</i>	<i>Tamil United Liberation Front</i>
<i>UDHR</i>	<i>Universal Declaration of Human Rights</i>
<i>UGC</i>	<i>University Grants Commission</i>
<i>UN</i>	<i>United Nations</i>
<i>UNHCR</i>	<i>United Nations High Commissioner for Refugees</i>
<i>UNP</i>	<i>United National Party</i>
<i>USCR</i>	<i>United States Committee for Refugees</i>
<i>UTHR(J)</i>	<i>University Teachers for Human Rights (Jaffna)</i>
<i>WIN</i>	<i>Women in Need</i>

Foreword

This report seeks to describe the current status of human rights in Sri Lanka and to assess the extent to which Sri Lanka has fulfilled its obligation to protect the fundamental rights of its citizenry in conformity with its international obligations. Hence, the report represents an important watershed with regard to human rights in Sri Lanka. Constitutional guarantees, legislative enactments and the extent of the current implementation and enforcement of fundamental rights are examined and the impact of the restrictions they contain are discussed. The report deals with the integrity of the person, freedom of expression and media freedom, judicial protection of human rights, devolution proposals, emergency rule, and environmental rights. In addition, separate chapters are devoted to children's right, the plight of displaced persons, violence against women, nationality and citizenship and a case study of the Office of the Ombudsman.

The report was coordinated by the Law & Society Trust. Specific chapters were assigned to individuals with special competence in the relevant areas. The draft were subsequently reviewed for accuracy, objectivity and clarity of presentation. The report was then compiled in draft form and comprehensively edited to ensure that as far as practicable there would be uniformity of style and approach. It is inevitable, however, that there would be some overlap between chapters and that some topics would be dealt with more comprehensively than others. The report also contains a list of international instruments to which Sri Lanka is a signatory and a list of instruments which are yet to be ratified by Sri Lanka. Also attached as a schedule to the report is a list of fundamental rights cases decided by the Supreme Court in 1996. It is encouraging to

note that the government acceded to the UN Convention on the Protection of the Rights of All Migrant Workers and Their Families in March 1996. Although the government announced its intention to accede to the First Optional Protocol to the ICCPR, it has so far not done so.

It is hoped that this report would continue to facilitate dialogue between civil society institutions and the government in ensuring more effective protection and promotion of human rights within Sri Lanka.

Sri Lanka's Constitution mandates that "the fundamental rights which are declared and recognised by the Constitution shall be respected, secured and advanced by all the organs of government.." Sri Lanka is also a signatory to several international human rights instruments, and must ensure that its domestic laws, policies and practices are in conformity with its international obligations. This report is a modest step in the continuing struggle to ensure that the state (and those non-state actors who are legitimately subject to scrutiny in this report) upholds its international and constitutional obligations to respect and safeguard human rights.

The Trust in its effort to raise awareness on human rights issues, organised an inter-school art competition and exhibition in two districts - Ratnapura and Galle - on the themes "The right to a clean environment" and "The right to health". The response to this competition was most heartening and the entries which secured the first three places are included in this report.

Law & Society Trust
Colombo
September 1997.

I

OVERVIEW

Sri Lanka: State of Human Rights 1997, examines the situation with regard to human rights in Sri Lanka during 1996, looking at both the actual and legal state of human rights. Nineteen Ninety Six was, once again, a year characterised by contradiction and conflict between Sri Lanka's human rights policy and its practice. The armed conflict in the North and East continued to dominate the sphere of Sri Lanka's concern with human rights. Although improvements were made from a policy perspective, the actual human rights situation in Sri Lanka continued to deteriorate.

The state of human rights in Sri Lanka in 1996 reflected, in significant measure, the state of a nation engaged in armed conflict within its own territory and among its own people. The hostilities between the Government and the Liberation Tigers of Tamil Eelam ("LTTE") provided both the impetus and the backdrop for much of the conduct and activity which raised human rights concerns.

The armed conflict in the North and East intensified in 1996, greatly affecting the state of human rights in Sri Lanka. Not

only did this intensification add to the already large number of internally displaced persons, but it contributed to a worsening human rights situation, particularly with regard to Sri Lanka's Tamil population. Although situations of armed conflict must be judged by standards distinct from those applicable in times of peace, both the Government and the LTTE failed to comply with basic human rights and humanitarian law.

In particular - as highlighted late in 1996 by the gang-rape and murder of Krishanthi Kumaraswamy, and the subsequent murder of her mother, brother and neighbour allegedly by members of the security forces - disappearances, arbitrary arrests and detentions, torture, and extra-judicial killings increased despite repeated assurances of heightened protection for human rights by the Government.

Krishanthi Kumaraswamy's case was one of a number of reported cases of rape and murder allegedly committed by security forces and thus, in many respects, it was not unique. However, unlike other cases, the Krishanthi Kumaraswamy case aroused widespread condemnation, resulting in national and international attention and mobilisation. The Government responded swiftly to the public pressure, thereby highlighting the importance and potential impact of both public mobilisation and an informed media. Nonetheless, although the Government has articulated a commitment to prosecute such violations of human rights, the lack of effective State remedial mechanisms frustrates any attempt to provide legal redress, thereby engendering a continuing atmosphere of impunity.

Nineteen Ninety Six also witnessed a marked rise in the number of disappearances reported, particularly on the Jaffna peninsula. The Government Agent in Jaffna was reported to have submitted a list of 500 people who had "disappeared" there¹. However, the US State Department Report on Sri Lanka for 1996, released a figure of 300 "disappearances" on the Jaffna peninsula in the second half of the year alone².

For almost 15 years, the armed conflict in the North and East has given rise to a large but fluctuating internally displaced population. At the end of 1996, according to the statistics of the Ministry of Rehabilitation and Reconstruction, there were close to 770,000 internally displaced persons in Sri Lanka. However, such statistics have been contested by some NGO and humanitarian aid officials who claim the Government's figures are under-representative, by at least 70,000 individuals.

In 1996, the standard of living for Sri Lanka's internally displaced population failed to improve substantially from that of the earlier years. Life in the camps for the internally displaced was characterised by overcrowded living quarters, the separation of families, a segregation of sexes, poor sanitation, restrictions on mobility, and little to no access to education and health services.

The violence of the armed conflict extended in 1996 beyond the borders of the conflict zones; Colombo was again a target

¹ *Infra* p. 9.

² *Ibid*

of attacks by the LTTE. In January the Central Bank in Colombo was bombed, killing more than 90 people and injuring many more. In June, nearly 70 people were killed and many more injured when a bomb exploded on a crowded commuter train in one of Colombo's southern suburbs. Such attacks on civilian populations are in clear violation of international humanitarian law.

Access to reliable information on the situation in the North and East was impeded by Government restriction on the media. In 1996, Government-imposed formal censorship for almost half of the year, restriction on the media's access to conflict areas, and the intimidation and harassment of media personnel by State actors and agents characterised what appears to have been an overt and consistent campaign by the Government against the freedom of the media. The Supreme Court dealt a further blow to the freedom of expression in the SLBC Case³ by holding that although freedom of expression should not be narrowly interpreted, it does not guarantee, *per se*, the freedom of, or right to, information. The Court opined that the right to obtain information would be more appropriate under the Article relating to the freedom of thought. This case had nothing to do with the armed conflict in the North and the East, but it does have implications for the ascertainment of truth in respect of the conflict.

³ Sc Application No. 81/95 SC Minutes 30.5 1996.

Emergency rule, which was formerly restricted to the North, East, border areas of conflict and Colombo, was extended to the entire country in 1996. Numerous new emergency regulations were adopted, including a ban on May Day processions. Throughout the year, emergency regulations were consistently used to justify acts that would otherwise have been illegal. The regulations themselves continue to authorise detentions without the legally prescribed minimum standards governing conditions, thereby providing a situation ripe for human rights violations.

In the landmark case of *Wimalenthiran*⁴, however, the Supreme Court had occasion to consider the impact and scope of the emergency regulations. The Court held that emergency regulations: (1) must be published in the Gazette before obtaining legal force; (2) cannot be used as justification for illegal activities; (3) do not allow for the derogation of certain legal safeguards, even in situations where a state of emergency has been declared; and (4) cannot be used as grounds for an arresting officer to act on anything less than a reasonable grounds of suspicion. The Court's ruling was particularly significant because of its apparent call for transparency in the application of emergency regulations, a call that is extremely timely, given the operation of the security forces in the context of the conflict.

⁴ Sc Application 26/94. *Appathuray, Vinayagamoorthy, Attorney-at-law, on behalf of Vijayam Wimalenthiran v Army Commander and others*, judgment of Amerasinghe J, 20 December 1996, p. 15.

Human rights violations did not occur solely within the context of the armed conflict, although that conflict must be understood as diverting resources from the understanding and resolution of problems in other areas. Headlines such as "Assault on Women Detainees", "Man Murders His Wife", "Child Raped by Nine Drivers", and "Returnee from Saudi Commits Suicide" are indicative of the pervasive violence perpetrated against women in Sri Lanka. Despite increasing coverage of such violence by the media, however, there is a dearth of reliable information on the incidence of violence against women in Sri Lanka. The lack of information, compounded by general ignorance among policy makers and the general public about the cause and nature of violence against women, as well as a generally insensitive criminal justice system, impede effective action by a State engaged in a difficult and prolonged internal armed conflict.

Despite the 1995 amendments to the Penal Code, in which laws on rape were strengthened and laws on sexual harassment, trafficking and incest were introduced, effective implementation and enforcement have not followed. Sri Lanka's failure to provide adequate mechanisms of prevention and redress for female victims of violence contravenes its international human rights obligations.

Children's rights have, likewise, been accorded few effective mechanisms of protection, despite recent amendments to the Penal Code introducing tighter provisions on incest, sexual

exploitation of children and pornography. Although numerous cases of sexual exploitation of children and child labour were highlighted in 1996, few were prosecuted.

In respect of the national legal protection and promotion of human rights, a vital function is performed by the Supreme Court in distilling, and giving full meaning to, the justiciable human rights encoded in the fundamental rights chapter of the 1978 Constitution. Yet, despite the importance of the function and the embryonic judicial activism that has begun to permeate reported decisions of the Supreme Court, several problems remain.

First, and most importantly, there is no conceptualisation or implementation of the methodology available to translate the high ideals of constitutionally mandated protection of fundamental rights into action. The focus of the Government has been on the enactment of legislation and not on the empowerment of institutions. For example, after much debate, the Government enacted the Sri Lanka Human Rights Commission Act No. 21 of 1996. Although concern over a possible conflict of jurisdiction between the new Human Rights Commission and the Supreme Court, in relation to the adjudication of fundamental rights claims, was resolved in the final statute, at the end of the year, issues remained as to the exact relationship between the Human Rights Task Force ("HRTF") and the newly formed Commission. It was not clear whether the HRTF, which has acquired experience and expertise

in its work with detainees, would be absorbed by the Commission. By the end of the year, despite enacting legislation, the Commission had not yet become fully functional.

Second, although there were a number of important judgements on Articles 12 and 13 of the 1978 Constitution, dealing with discrimination and detention respectively, there is little in the nature of exhortative conduct rules that emerge from the Court's judgements. Additionally there was a lamentable lack of action in respect of gender or racial discrimination.

In 1996, the Government did, however, adopt a statute recognising the rights of disabled persons. Protection of the Rights of Persons with Disabilities Act No. 28 of 1996 provides that no person shall be discriminated against on the grounds of physical or mental disability and that disabled persons shall have access to education, employment and other social and economic rights.

Additionally, there appears to be growing recognition of the human right to a clean environment. While the scope of such a right is controversial, countries throughout the world are increasingly recognising the right to a clean environment and are encoding this right in their constitutions.

The legal text of the devolution proposals was released in January, 1996 as the political counterpart to the Government's military offensive. The devolution package, which will devolve power from the centre to the regions, carried both substantive

and procedural significance. Although the release of the text engendered widespread public debate, by the end of the year, no further action had been taken. This is of grave concern, given the manner in which the armed conflict both informs and throws into sharp relief almost every aspect of the human rights situation in Sri Lanka. The devolution proposals were, in some respects, the most important development of 1996. Progress on the devolution exercise requires a sense of urgency and purpose.

Another important development in relation to human rights in Sri Lanka was the Government's commitment, in September 1996, to accede to the First Optional Protocol to the International Covenant on Civil and Political Rights, ("ICCPR") which would allow individuals to petition directly the UN Human Rights Committee after the exhaustion of all national remedies. Unfortunately, by the year's end, the Government had not yet deposited the instrument of accession and the thus the Optional Protocol had not entered into force.

Transparency is one of the fundamental objectives of human rights work. It is only when a government, its laws and practices are transparent - open to challenge, criticism and debate - that progress can be made to remedy a situation in which the rule of law has disintegrated and in which the rights of citizens suffer. Thus, it is the intent of this publication to contribute to a climate in which transparency, rather than impunity, reigns. This report attempts to provide a comprehensive picture of the actual and

theoretical situation of human rights in Sri Lanka in 1996. It is hoped that it will contribute to an ongoing dialogue within and between the State and civil society, with an ultimate aim to stimulating change.

II

Integrity of the Person

Elizabeth Nissan*

1. Introduction

During 1996, there was a marked deterioration in the extent to which key human rights relating to the integrity of the person were respected. Of very great concern was the massive increase in the number of reported "disappearances" in the context of the North-East conflict. Instances of extrajudicial killing were also reported, as were widespread arbitrary detentions and continuing torture in custody. In addition to the violations committed by government forces, the Liberation Tigers of Tamil Eelam ("LTTE") also committed numerous violations of humanitarian law, including deliberate attacks on civilian targets. In response to some alleged violations, the government instituted inquiries and brought charges against the suspected perpetrators. However, these cases have proceeded slowly and have yet to reach a conclusion, like several other cases which were brought in earlier years.

Considerable obstacles were placed to the access to information relating to violations of human rights and humanitarian law in

* Specialist on Sri Lanka, Formerly Amnesty International.

the North-East.¹ Throughout the year, journalists were barred from entering the North by the military, except on very few occasions when they were taken on short, accompanied visits. In addition, for nearly six months of the year - from April to October - a formal censorship of material relating to various aspects of the military operations was in force, under emergency regulations. This further restricted the reporting of events in the North-East, including that on matters related to the subject of this chapter.

This chapter first outlines the relevant international human rights principles relating to the integrity of the person, and then describes instances of "disappearances", extrajudicial killings, arbitrary detentions and torture which were reported during 1996. It also looks at the effectiveness of the steps the government has taken to curb such abuses, and describes two new initiatives taken during the year which could have an impact on respect for these rights: the passing of the Act to create a Human Rights Commission; and the decision to ratify the First Optional Protocol to the International Covenant on Civil and Political Rights ("ICCPR").

2. Integrity of the Person and International Human Rights Law

Sri Lanka is a party to the two key international human rights instruments which protect a respect for the integrity of the person: the ICCPR, ratified in 1980 and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or

¹ See chapter IV, Freedom of Expression and Media Freedom, p.62

Punishment, ratified in January 1994. Under international human rights law, Sri Lanka is thus bound to protect her people against violations of the right to life, and to ensure that people are free from arbitrary arrest and detention, torture and "disappearance".²

The Sri Lankan Constitution protects certain fundamental rights, but the protection that it provides falls short of what is required under the ICCPR. First, the Constitution permits a broader range of restrictions to be placed on human rights than is permitted under the ICCPR; second, the Constitution does not guarantee all the rights contained within the ICCPR. Most notably, in this context, the right to life is not given explicit protection by the Constitution. In addition, provisions of the Prevention of Terrorism Act ("PTA") and the Emergency Regulations, seriously curtail the right to freedom from arbitrary arrest and detention, as well as containing other deficiencies.³

3. "Disappearances"

The very marked rise in the number of people reported to have "disappeared" while in the custody of government forces in 1996 gave cause for grave concern. After the military took control of Jaffna and the peninsula in late 1995 and early 1996, there were reports that people who had been taken into custody could no longer be traced; they had "disappeared" with no official

² The relevant provisions of these Conventions are discussed more fully in *Sri Lanka: State of Human Rights 1993* (Colombo, 1994) pp. 27-32.

³ For further discussion of domestic law relating to human rights see *Ibid*, Chapter III, pp. 32-36; and *Sri Lanka: State of Human Rights 1994* (Law & Society Trust, Colombo, 1995) Chapter IV.

explanation of their fate. "Disappearances" were also reported in the East and in Colombo. The exact number involved is unknown, partly because of the great difficulties involved in gaining access to information from the North-East under strictly controlled conditions. Nevertheless, numerous sources report figures in the hundreds. Amnesty International recorded 648 "disappearances" between late 1995 and early 1997 - the highest number it had recorded in Sri Lanka since 1990.⁴ In December 1996, the Government Agent of Jaffna was reported to have submitted a list to the authorities of over 500 people who had "disappeared" in Jaffna.⁵ The US State Department Report on Sri Lanka for 1996, however, released a figure of over 300 "disappearances" in the Jaffna peninsula in the second half of the year, and over 50 "disappearances" elsewhere in the country over the course of the year.

Although the number of reported "disappearances" had reduced by the end of the year, they had not ceased altogether. Amnesty International, for example, documented the case of a 26 year old man who had reported to the Kaithady Army Camp on 10 December 1996, and had not been seen since.⁶

As protest by local and international human rights organisations increased against the deteriorating human rights situation in

⁴ Amnesty International, *Sri Lanka: Highest Number of "Disappearances" Reported Since 1990*, AI Index: ASA 37/10/97, 11 April 1997.

⁵ 'HRTF probes "missing persons"', *Tamil Times* (London 15 December 1996), p. 5.

⁶ Amnesty International, *Urgent Action, "Disappearance,"* AI Index: ASA 37/01/97, 9 January 1997.

Jaffna, the government agreed in November to establish an office of the Human Rights Task Force ("HRTF") in Jaffna, which would be responsible for monitoring the welfare of detainees in Jaffna. In December, the Ministry of Defence announced that it had set up a special Board to investigate the mounting complaints of "disappearances" in the North-East. The Ministry said that their inquiries had sometimes revealed that the missing person had been released, was in a displaced persons camp, or was in custody.⁷

The return to high numbers of "disappearances" marks a significant deterioration in the protection of human rights in Sri Lanka, and has raised fears that there may be a return to the abusive counter-insurgency strategies that were a hall-mark of the past. A regular pattern of "disappearances" in the custody of the security forces was first noted in the North-East in the 1980s, when groups of primarily young men were rounded up by the security forces and subsequently "disappeared". From mid-1983 to July 1987 - when the Indian Peace Keeping Force ("IPKF") became temporarily responsible for the security of the North-East - Amnesty International recorded over 680 "disappearances" from within the custody of Sri Lankan security forces, although the true figure may well have been higher.⁸ The number of people who "disappeared" while in custody then

⁷ INFORM, *Situation Report* December 1996 (Colombo) p. 8.

⁸ There were also a number of "disappearances" in the custody of the Indian Peace Keeping Force while they were responsible for the security of the North-East. See Amnesty International *Sri Lanka: Extrajudicial Executions, "Disappearances" and Torture, 1987 - 1990*, AI Index ASA 37/21/90, London, 1990.

sky-rocketed in the South in the late 1980s in the context of the counter-insurgency campaign against the Janatha Vimukthi Peramuna ("JVP"), when tens of thousands of people disappeared. When the conflict resumed in the North-East in August 1990 these techniques of mass "disappearance" were transferred to that arena: thousands of people "disappeared" in the last months of 1990 as the military took control of new areas, from the LTTE. Since that time, the number of "disappearances" has declined, in 1994 and 1995 only a few cases were reported.⁹

The fact that a large number of "disappearances" are again taking place in Sri Lanka points to the ineffectiveness of the government's steps, to date, to tackle this critical issue. If the issue of impunity is not fully addressed - and to date it has not been - it is all the more likely that "disappearances" will again be committed at times when the security forces concerned believe it expedient to do so, such as immediately after taking control of new areas. It has been at such times that the number of "disappearances" has been greatest in the North-East.

An integral aspect of "disappearance" as a "technique" is that it constitutes a deliberate attempt to hide evidence of other grave human rights violations such as torture and killings in

⁹ See 'Sri Lanka: "Disappearance" and Murder as Techniques of Counter-Insurgency' in Amnesty International, *"Disappearances" and Political Killings: Human Rights Crisis of the 1990s: A Manual for Action* (Amsterdam, 1994) Chapter 2.

custody.¹⁰ This makes it all the more important that impunity not be permitted to prevail. Where investigations reveal evidence of involvement in a "disappearance," the perpetrators must be brought to justice. In addition, it is also essential for the government to treat the enforcement of safeguards on arrest and detention with utmost seriousness. The failure to observe safeguards on arrest and detention and to keep proper records on all persons taken into detention provides a clear opportunity for a prisoner to "disappear" while in custody. The introduction of safeguards on paper provides no protection at all if no genuine attempt is made to monitor their observance and to take effective corrective action when lapses are found. Indeed, it is quite possible that the introduction of formal safeguards without enforcement could be counter-productive, contributing to an increased sense of cynicism and impunity.

The cases of "disappearance" reported in 1996 included people believed to have been held by the military, the police and in the custody of armed Tamil groups which work alongside the security forces. For example, the Tamil Eelam Liberation Organization ("TELO") was reportedly responsible for a "disappearance" at Chenkalady in January 1996.¹¹

¹⁰ "Disappearance" can violate a range of human rights, including the right to recognition as a person before the law, and the right to liberty and security of the person as well as the right to freedom from torture and the right to life. The UN Declaration on the Protection of All Persons from Enforced Disappearances (adopted by the UN General Assembly in December 1992) makes clear in Article 1(2) that the practice of disappearance can never be justified, whatever the circumstances.

¹¹ See "Sri Lanka", in *Amnesty International Report 1997* (AI Publications, UK) 1997, p 291.

The mandates of the three Commissions of Inquiry into "disappearances" which the government had appointed in November 1994¹² were extended during the year. One of the three Commissions of Inquiry had completed its hearings by the end of the year, but had not yet prepared its final report to the President. The government has not made known whether it intends to publish the final reports when they are submitted, nor what kind of action it is likely to take in response to the reports.

In addition to the evidence of "disappearances," the Commissions have also been confronted with major problems faced by relatives of the "disappeared." Numerous relatives have complained of unfair treatment by government officials and members of the security forces, and of great difficulties in obtaining the documentation required to formally register the presumed death of a "disappeared" person. Furthermore, they have complained that compensation payments have been made on an arbitrary basis, and some fear that there may be inadequate funds available to compensate everybody who is entitled to compensation.¹³

The Special Presidential Commission of Inquiry established in October 1995 to investigate allegations that there had been a "torture house" at the Batalanda Housing Scheme of the Fertilizer Corporation, where a police Sub-Inspector had "disappeared" in 1990, continued its hearings throughout the year. One outcome of these investigations was the exhumation of the body of a 24

¹² See *State of Human Rights 1994*, supra n.3, Chapter VI (Law & Society Trust, Colombo, 1995), pp. 102-105.

¹³ INFORM, *Situation Report* December 1996 (Colombo) p. 12.

year old youth who had been buried at Ja-Ela, and the arrest of seven police officers in August 1996.¹⁴

4. Extrajudicial Killings

Illegal killings of unarmed civilians and of prisoners continued in 1996, in contravention of both international human rights and humanitarian law standards.

After the military took control of the Jaffna peninsula, there were several reports indicating a far greater restraint in their relations with the civilian population than had been feared. For example, The University Teachers for Human Rights (Jaffna) ["UTHR(J)"] reported in August 1996 that:

In the 2 ½ months following the return of civilians to Jaffna in April 1996, the armed forces had been surprisingly accommodating in their relations with civilians. A concern for civilian safety has been demonstrated and harassment has decreased substantially... [T]he traditional knee-jerk reaction of reprisal killings of civilians has largely not occurred.¹⁵

Nevertheless, at least 50 extrajudicial killings attributed to the security forces and to armed Tamil groups allied with them were reported during the year,¹⁶ although the true figure could

¹⁴ INFORM, *Situation Report*, August 1996 (Colombo) p. 11.

¹⁵ UTHR(J), *Jaffna: The Contest Between Man and the Beast Within*, Special Report No. 7, 29 August 1996, reprinted in three parts in *Tamil Times* (London), 15 September 1996, p. 22, 15 October 1996, p. 25 and 15 November 1996, p. 21.

¹⁶ *Supra* n 11.

well be higher. Retaliatory and indiscriminate shelling by the army in the Killinochchi area, which killed several civilians, was also reported after the LTTE attack on Mullaitivu camp in July.¹⁷ In addition, UTHR(J) reported that LTTE captives were summarily executed and their bodies disposed of, when they could have been held prisoners.¹⁸ In general, a deterioration in the conduct of the military in the North-East was noted from July onwards. This followed the major military defeat at Mullaitivu and a suicide bomb attack in Jaffna by the LTTE, both of which left scores of people dead.

The largest single incident of extrajudicial killings during the year was the massacre, by government soldiers, of 24 civilians - some of whom were women and children under 12 years old - at Kumarapuram in Trincomalee District on 11 February 1996.¹⁹ The killings were apparently committed in revenge after two soldiers were killed in the vicinity by the LTTE. This was the first large-scale retaliatory massacre by soldiers in over three

¹⁷ INFORM, *Situation Report*, July 1996 (Colombo) p. 8.

¹⁸ UTHR(J), *supra* n 15. The US State Department also pointed out in their report on Sri Lanka in 1996 that the government held only three LTTE cadres as prisoners of war, all of whom had been captured in previous years. The report noted reasons why only a low number of such prisoners might have been taken captive, but expressed concern at the possibility "that a take-no-prisoners policy was in effect," which would contravene the basic minimum humanitarian standards set out in Common Article 3 of the Geneva Conventions, which applies to internal conflicts.

¹⁹ See UTHR (J), *Trincomalee District in February 1996: Focusing on the Killiveddy Massacre*, Information Bulletin No. 10, 2 March 1996 for a detailed account, and UTHR (J), *The Massacre in Kilivetti, Trincomalee District*, 16 February 1996.

years. Although eight soldiers were arrested for the killings at Kumarapuram, their trial had not started by the end of the year.

Several other extrajudicial killings by the security forces were documented by UTHR(J).²⁰ These involved the killing of individuals or small groups of people. For example, UTHR(J) reported that, on 17 May 1996 five armed men in uniform entered a shop at Manthuvil, killed two of the owners, another man and a child of three, assaulted and raped the two female owners and another woman, and stole some jewellery. Despite an eyewitness, who identified the men as soldiers, a military spokesman said the killings and rape had been committed by the LTTE in order to discredit the army. Another case reported by INFORM concerned Rajanayagam Maharajah, a 17 year-old student in Batticaloa, who was reportedly abducted from his home by masked men in an unmarked van on 22 December 1996. His dead body was handed over to the hospital the next day. The military claimed that he was a member of an LTTE squad who was killed while resisting arrest, but there were several witnesses to his abduction.²¹

Other instances of rape and killing included that of Krishanthi Kumaraswamy, a student at Jaffna Chundikuli Girls' High School, who was returning home on 7 September 1996 after the General Certificate of Education Advanced Level ("GCE A/L") examination when she disappeared from the Kaithady military checkpoint. When she failed to return her mother, brother and a family friend went to search for her. They, too, never returned.

²⁰ Supra n 15.

²¹ INFORM, *Situation Report*, December 1996 (Colombo) p. 9.

Relatives repeatedly sought information from the authorities, but any knowledge of the whereabouts of the four was repeatedly denied. They had all "disappeared." Finally, the bodies were found buried. Allegedly, Krishanthi Kumaraswamy had been gang-raped before being killed; her family and neighbour were then killed after they went to the checkpoint to search for her. Four soldiers and two policemen were charged with the murders. Five other suspects were also charged with helping to dispose of the bodies.²² Such killings of prisoners, when uncovered, illustrate the possible fate of some of the "disappeared."

Deaths in custody were also reported, some of which apparently resulted from torture. These included people held in the custody of the Sri Lankan military and police, as well as armed Tamil groups allied with the government. One person believed to have been killed in custody was Selliah Subramaniam, a textile trader, whose charred remains were found at Giribawa in North Central Province.²³ He had been released on an order of the Supreme Court, but was re-arrested and taken to Vavuniya for questioning. Although burned documents found at the site indicated his identity, the identity of a second body found there was not established. In August, seven officers of the Counter Subversive Unit at Vavuniya were arrested in connection with these two killings, but no trial had commenced by the end of the year.

²² 'Gang-raped and killed', *Weekend Express*, reproduced in *Tamil Times* (London) 15 November 1996, pp. 9-10; *Reuter* report, 18 November 1996.

²³ INFORM, *Situation Report*, August 1996 (Colombo) p. 12.

Investigations into the custodial deaths, which had aroused most public concern in 1995 when over 30 bodies were found in Bolgoda lake and other locations,²⁴ resulted in the arrest of 22 Special Task Force ("STF") personnel under Emergency Regulations. However, these suspects were released on bail in February 1996 and returned to their posts in the STF. Their trials had not commenced by the end of the year.²⁵

4.1 Arbitrary killings by the LTTE

There were several reports of deliberate attacks by the LTTE on Sinhala and Muslim civilians, as well as on Tamil civilians believed to be informers or collaborators. Four alleged collaborators were reported to have been killed in July, for example.²⁶ In addition, following some major offensives, the LTTE is believed to have deliberately killed soldiers who were wounded or who had laid down their arms.²⁷ According to the Geneva Conventions, such individuals should have been released or taken prisoner. Thus, such practice is in clear contravention of Common Article 3 of the Geneva Conventions.

Several major attacks on civilian targets were attributed to the LTTE. In January, the bombing of the Central Bank in Colombo resulted in the deaths of over 90 people and many more were

²⁴ See *Sri Lanka: State of Human Rights 1995* (Law & Society Trust, Colombo 1996), pp 21-23.

²⁵ INFORM, *Situation Report*, August 1996 (Colombo) p. 12.

²⁶ INFORM, *Situation Report*, July 1996 (Colombo) p. 9. Further killings of individuals by the LTTE are reported in UTHR(J) *Jaffna: The Contest Between man and the Beast Within*, supra n 15.

²⁷ Confidential source

wounded. In June the LTTE was reported to have attacked Eluwankulama in Puttalam District, killing 14 Sinhala civilians with machetes. The victims were then burned. In July, in an attack attributed to the LTTE, two bombs exploded on a crowded commuter train at Dehiwala near Colombo, killing nearly 70 people and injuring about 500. A third bomb was found before it exploded. In September, a bus was ambushed at Aranthalawa, Amparai District; 11 passengers were killed (nine of whom were Sinhalese and two of whom were Muslim) and 27 wounded. In December, one person was killed and at least 12 were wounded when gunmen opened fire on a public meeting organised by the TULF at Kiran in the Batticaloa District.²⁸

5. Arbitrary Arrest and Detention

Large numbers of Tamil people continued to be subjected to arbitrary arrest and detention during the year, both in the North-East and in the South. As in previous years, the numbers of people detained rose after major attacks by the LTTE. Thousands of people were detained in these security operations, the majority of whom were released within days after their credentials were checked. However, many people were subjected to repeated arrests, despite there being no evidence against them, and these detentions were thus experienced as a form of harassment. In the South, and particularly in Colombo, Tamil people who could not establish their identity or place of residence were commonly detained, and lodging houses were particularly likely to be

²⁸ These incidents are drawn from various sources, including "Sri Lanka" in *Amnesty International Report 1997*, supra n 11 and *INFORM Situation Reports* for the relevant months.

searched. Arrests of Tamil people in the South were also reported in Panadura, Alutgama and the plantation areas.²⁹

There were also reports of prisoners being held in secret places by the security forces and by armed Tamil groups allied with the government. One prisoner whose case was highlighted by Amnesty International "disappeared" after being arrested by the army in Colombo on 7 March 1996. He was released 22 days later after being held in military custody in an unknown place. Neither his relatives nor the HRTF - to whom all detentions should be reported - were able to trace him.³⁰ The military was also reported to have held people in secret in Jaffna and in the East.

In addition to widespread short-term detentions, hundreds of people were detained without charge or trial for long periods. Amnesty International reported that around 1,600 were detained under the PTA or the Emergency Regulations, 600 of whom were held for over a year.³¹ The great majority of these prisoners were Tamil. In June, Tamil prisoners at Magazine and Kalutara Prisons staged a hunger strike to demand that they either be released or charged and tried. Some had been held for over four years. The strike was called off after the Attorney-General's department promised to resolve the matter, but progress has been very slow.

²⁹ *INFORM Situation Report*, June 1996 (Colombo).

³⁰ Amnesty International, Urgent Action, "Disappearance: Kanapathipillai Sathesh Kumar," AI Index: ASA 37/06/96, 28 March 1996 and Amnesty International, Urgent Action, "Further information...", AI Index: ASA 37/07/96, 4 April 1996.

³¹ *Supra* n 11.

Of particular concern was the failure of the security forces to adhere to the safeguards on arrest and detention that had been introduced in 1995.³² Arrest "receipts" were not always issued to relatives and the HRTF was not always informed of arrests. The welfare of detainees held in Jaffna gave rise to great concern later in the year, especially following the LTTE suicide bomb attack in Jaffna in July, after which the number of arrests rose and the treatment of detainees deteriorated. Although the government said in November that the HRTF could open an office in Jaffna, it had not started to function there by the end of the year.

5.1 The detention of travellers from the north to the south and restrictions on freedom of movement

The arbitrary detention of many thousands of people who attempted to travel out of LTTE-controlled areas of the North to the South continued in 1996.³³ In the latter part of the year the number of people affected rose considerably until in December it was estimated that nearly 15,000 people were in effect detained at Vavuniya.³⁴ Many had been there for more than one month, and some for nearly three months. The "transit camps" were overflowing, and schools had been closed to provide more housing. People in the camps were not permitted to leave and could not have contact with people outside. There were

³² See *Sri Lanka: State of Human Rights 1995*, supra n. 24 (Law & Society Trust, Colombo, 1996), pp. 29-30 and 38-39.

³³ Ibid at pp. 31-2.

³⁴ The information in this paragraph is drawn from INFORM, *Situation Report*, November 1996 and *Situation Report*, December 1996 (Colombo).

sanitation and health problems and the supply of food and drugs was inadequate. Youth were separated from their families. The situation in the camps was hidden from public knowledge until they were visited by Members of Parliament from the TULF and by a medical team led by a UNP Member of Parliament. Journalists had not been permitted access. Although the Ministry of Defence specified several categories of people who were considered suitable for release from the camps, considerable obstacles nevertheless remained in securing the release of even the people within these categories. For example, the elderly mother of a permanent resident in Colombo - who clearly fell within the category of people suitable for release - had to wait for two months before she could travel South, while her son had to make several visits to Vavuniya from Colombo with documents to prove his mother's identity. Given the overcrowded conditions and the long delays in securing permission to travel, some people were reported to have given up hope and returned North.³⁵

5.2 Detentions by the LTTE

The number of prisoners held by the LTTE is unknown. As in previous years, during 1996 the ICRC had access to a very few prisoners held by the LTTE: 20 security forces personnel, 16 Sinhala fishermen and eight crew members of a ferry that the LTTE had taken prisoner in 1995. The fishermen (who had been taken captive in October 1994) were released to the ICRC in December.³⁶ In recent years it has commonly been said by local

³⁵ Confidential source

³⁶ INFORM, *Situation Report*, December 1996 (Colombo) p. 15.

and international human rights organisations that the LTTE is believed to hold some 2,000 prisoners. The current situation is unknown, however, and the fate or whereabouts of most prisoners held by the LTTE remains unexplained, which is a matter of grave concern.

Several cases of extortion, and of the LTTE taking hostages for ransom were reported in 1996. In November Professor Ramakrishnan, who teaches at both Eastern University in Batticaloa and the University of Peradeniya (near Kandy), was abducted from the hostel of the Eastern University campus.³⁷ One million rupees ransom was demanded for his release, which did not take place until January 1997. In October, five jewellers were taken hostage in Batticaloa, one of whom was said to have committed suicide by jumping into a well. The other four were released on 2 December after being held for 40 days.³⁸ Other reported abductions by the LTTE included school girls from Sammanthurai, Amparai District, who were allegedly taken for military training by the LTTE.³⁹

6. Torture and Ill-treatment

The torture of prisoners - both male and female - continued to be widespread, and was reported to have been committed in the custody of the military, armed Tamil groups allied with the government and the police. The rape of women by soldiers in the North became the focus of particular concern during the

³⁷ INFORM, *Situation Report*, November 1996 (Colombo) p. 6.

³⁸ INFORM, *Situation Report*, December 1996 (Colombo) pp. 4-5.

³⁹ INFORM, *Situation Report*, October 1996 (Colombo) p. 7.

year, with several cases reported. Various methods of torture were reported, including being blind-folded for long periods, having bags soaked in petrol or chilli powder placed over the head, being suspended from the thumbs, wrists or ankles for long periods, being burned, having electric shocks applied, being repeatedly submerged in water and being severely beaten, including on the soles of the feet.⁴⁰

Although in 1994 the government introduced new anti-torture legislation which made torture a specific offence,⁴¹ no charges had yet been brought against any torturers by the end of the year. The LTTE was also reported to have practised torture, but no specific details are available.

7. Investigations into Alleged Violations and the Trials of Perpetrators

While the government did initiate inquiries into several reports of serious human rights violations by the security forces and in some cases did bring charges against the alleged perpetrators the process of bringing perpetrators to justice remained very slow. None of the cases brought in previous years, including those brought during the period of the previous government, against alleged perpetrators of grave violations, have yet reached a satisfactory conclusion. Although suspects are often charged, they are frequently released on bail. In many cases the trials have not concluded even several years later. In other cases -

⁴⁰ Supra n 11.

⁴¹ Convention Against Torture and other Cruel Inhuman or Degrading Treatment or Punishment, Act No 22 of 1994.

such as that of the mass graves uncovered in 1994⁴² - there has been no progress at all in the forensic investigations, and the inquiries appear in effect to have been halted. The crucial issue of impunity has thus not been effectively addressed by the authorities. Thus, particularly in the light of the rise in "disappearances" in 1996, there is widespread fear that the result could be a return to high levels of gross human rights violation that Sri Lanka has experienced in the past.

The work of the three Commissions of Inquiry into "disappearances" has already been described above. It is imperative that the government makes their findings and recommendations public when the final reports are submitted to the President, and that it announces the steps it intends to take to provide redress and justice. It must not permit impunity and continuing gross violation of human rights to prevail.

8. New Initiatives to Protect Human Rights

Two new steps were taken in 1996 to advance the protection of human rights in Sri Lanka. First, in July 1996, legislation was passed to set up a national Human Rights Commission ("HRC").⁴³ However, as no members had been appointed to the Commission by the end of the year, it had not started to function. Its broad mandate, which will include inter alia the monitoring of

⁴² See *Sri Lanka: State of Human Rights 1994*, supra n. 3, Chapter 6, pp. 97-102.

⁴³ See *Sri Lanka: State of Human Rights 1995*, supra n. 24, pp. 12 - 14 and pp. 108 - 111 for discussion of the draft legislation and the concerns expressed by human rights organisations about the creation of such a body.

administrative and executive practices relating to human rights and the investigation of alleged human rights violations, will also include an advisory function in respect to protective reforms. The protection of the various rights inherent in the integrity of the person will be clearly within its mandate, as it will have responsibility for monitoring the welfare of detainees and other related matters.

In September, the cabinet announced that Sri Lanka would ratify the First Optional Protocol to the ICCPR. Human rights organisations have long lobbied the government to take this step. The Optional Protocol provides individuals with the right to petition to the Human Rights Committee in Geneva (the body established under the ICCPR to monitor adherence to its provisions) after all local remedies have been exhausted. The decision to ratify the Optional Protocol is welcome, but by the end of the year it had still not been implemented.

9. Conclusion and Recommendations

There is an urgent need for the government to take more effective measures to stem continuing gross human rights violations. The rising numbers of “disappearances” and continuing reports of severe torture demonstrate that the introduction of formal procedural measures can only ever be a part of the solution. They must be matched with the will to ensure that they are implemented and rigorously enforced. Above all, impunity must not be permitted to prevail. While the conflict in the North-East provides the context in which many of the worst of these violations are committed, it cannot provide a “justification” for them. Indeed, if decisive action is not taken to halt them, such

violations may themselves fuel greater distrust, animosity and conflict.

The extent to which Sri Lanka fulfils its obligations under the ICCPR was examined by the Human Rights Committee in July 1995.⁴⁴ The Committee found that Sri Lanka had failed to fulfil its international human rights obligations in both law and practice, and that significant reforms would be necessary in order to fulfil these obligations. This point has also been made repeatedly by local and international human rights organisations. It is imperative for the future of human rights protection in the country - and to provide a foundation for a just and peaceful society in the future - that the government take every possible step to ensure that these deficiencies are remedied.

In relation to the specific violations documented in this chapter, it is important that the government tighten up, and ensure strict adherence to, safeguards on arrest and detention to protect against arbitrary arrests, torture and "disappearance." It needs to ensure that all reports of possible extrajudicial executions, "disappearances" and torture be fully and impartially investigated, that perpetrators be brought to justice, and that victims or their relatives be fully informed of the outcome of the investigations and adequately compensated.

In the context of the armed conflict in the North-East, it is imperative that both parties to the conflict ensure that they take

⁴⁴ The Committee's concerns and recommendations relating to the integrity of the person are summarised in *Sri Lanka: State of Human Rights 1995*, supra n. 24, pp. 35-36.

all possible steps to protect civilians, and that they adhere to at least the minimum humanitarian standards set out in Common Article 3 of the Geneva Conventions, which, *inter alia*, protects prisoners from torture and arbitrary execution.

III

Emergency Rule

Suriya Wickremesinghe*

1. Introduction

This chapter describes the resort to emergency powers during 1996. Emergency regulations are made by the President by passing the normal parliamentary legislative process. This is done under the Public Security Ordinance ("PSO"), the operation of which was described in *Sri Lanka: State of Human Rights 1993*.¹

Emergency rule may be confined to specified geographical areas. This chapter recounts how, in 1996, it was extended to the entire country, enabling postponement of local polls. While regulations relating to liberty of the person were made more severe, and curious changes made to the provisions on surrender, the Supreme Court in a landmark judgment castigated the misuse of powers of arrest and detention and the failure of the authorities to implement legal safeguards. In a creative move, the court relied on an Amnesty International report as corroboration of an initially unacknowledged detention that had taken place in 1993.

* Secretary, Civil Rights Movement

¹ See Chapter 2, Integrity of the Person, pp. 11-33.

Censorship was introduced (and lifted) once again, and a last minute ban imposed on May Day processions. A strike of officers of the Ceylon Electricity Board ("CEB") led to the resurrection of stringent provisions relating to essential-services. A drastic new emergency regulation enabled property to be confiscated on the opinion of the Inspector General of Police ("IGP") and the Defence Secretary that it was connected to the commission of an offence, without there first having to be a court determination of the facts. New emergency regulations on a diversity of subjects were made during the course of the year; these are listed at the end of the chapter. Many long-standing anomalies and complaints about emergency rule remained unaddressed.

2. Extension of Emergency throughout the Island

A significant event during 1996 was the extension, on 4th April, of emergency rule to the whole of Sri Lanka. The emergency had earlier been limited to the North and East and border areas, and Colombo and surrounding areas. The reason given in a statement issued by the Presidential Secretariat was that the LTTE was preparing to perpetrate acts of violence in various parts of the island, especially during local government elections.

3. Extension of Life of Local Authorities

Soon afterwards, the life of local authorities was extended to 31 December 1996 by emergency regulation.² In October 1996 the

² The Emergency (Terms of Office of Local Authorities) Regulations No. 1 of 1996, published in Gazette Extraordinary 918/10 of 10 April 1996, and amendment published in Gazette Extraordinary 919/14 of 18 April 1996. Local government elections in the North had already been postponed by previous emergency regulations. The present regulations relate to the rest of the country.

life of these local authorities was further extended to 14 April 1997.³

4. Arrest and Detention

The period during which a person arrested outside the Northern and Eastern provinces can be held for purposes of investigation without being produced before a Magistrate was increased. Previously, after the first 48 hours, a detention order for purposes of investigation could be made for a period of seven days. By an amendment made in June 1996, the officer who issued the original detention order may, at the end of this initial period, if the investigation so requires it, extend the detention for another fourteen days.⁴

4.1 Authorised places of detention

A series of gazette notifications during the year listed additional authorised places of detention. Three were added in March, one in July, one in September, and 261 in October.⁵

³ The Emergency (Terms of Office of Local Authorities) Regulations No.2 (sic) of 1996 published in Gazette Extraordinary No.945/11 of 17 October 1996. (These regulations should have been numbered 3 of 1996, as in between there were the regulations published in Gazette Extraordinary 945/7 of 16 October 1996 extending the terms of office of local authorities in the North, which should have been No.2 of 1996, but were wrongly numbered 1 of 1996).

⁴ Amended proviso to regulation 19(2) of the Emergency (Miscellaneous Provisions and Powers) Regulations No 4 of 1994 published in Gazette Extraordinary 928/11 of 19 June 1996.

⁵ Gazette Extraordinary Nos. 913/4 of 5 March, 933/22 of 26 July, 940/12 of 12 September and 946/5 of 22 October 1996.

In an earlier chapter on emergency rule⁶ the strange episode of the very belated publication of authorised places of detention was recounted. The publication had taken place in February 1994 after a complaint of ill treatment of a detainee Jude Arulrajah at the Panagoda Army camp was made by Amnesty International, which also pointed out that this was not an authorised place of detention.⁷ Thereafter, a Gazette dated 15 February 1994 contained a notification of Panagoda Army Camp (and the Crime Detection Bureau ("CDB") Headquarters, Gregory's Road, Colombo) as an authorised place of detention. What was striking was that this notification was purported to have been signed by the Secretary to the Ministry of Defence on 1 October 1993; that is four and a half months earlier than the date of the Gazette.

In 1996, the Supreme Court handed down an important decision on the legal effect of this notification.⁸ This was in a fundamental rights application on behalf of one Wimalenthiran who had been arrested on the same day as and detained along with, Jude Arulrajah, the person whose case Amnesty International had taken up. Emergency regulations and any orders and notifications made thereunder are normally operative as soon as they are

⁶ Law and Society Trust, *Sri Lanka: State of Human Rights 1994*, (Colombo, 1995) pp.47 - 60.

⁷ Amnesty International, *"Secret Detention in Colombo: the Case of Arulappu Jude Arulrajah."* AI Index ASA 37/13/94, February 1994. *"Sri Lanka: Balancing Human Rights & Security: Abuse of Arrest & Detention Powers in Colombo"*, (Amnesty International) AI Index ASA 37/10/94, February 1994.

⁸ SC Application 26/94. *Appathuray Vinayagamoorthy, Attorney-at-law, on behalf of Vijayam Wimalenthiran v. Army Commander and Others*, Judgment of Amerasinghe J. 20 December 1996, p. 15.

made; their validity is not affected by a delay in publication in the Gazette. In the instant case, however, the Court found compelling reasons to hold otherwise. Admittedly, the order was dated 1 October 1993. "However, until it was published in the Gazette as required by regulation 19(4), it had no force or avail: it was at the relevant time no more than a private proposal of the Secretary, and the Army Camp at Panagoda, during the period of time relevant to us, fell into the category of unauthorised secret places of detention."⁹

The court pointed out that there was an imperative requirement on the Secretary to **publish in the Gazette** a list with the addresses of all places authorised by him as places of detention. This provision, introduced in June 1993, said the Court, "clearly, in plain words, indicated that secrecy was to be displaced by publicity and openness.... It is no defence that the Secretary at the relevant time was contemplating or had privately decided that the Army Detention Camp at Panagoda was a suitable place for keeping persons in custody."¹⁰

As a result of this interpretation it did not become necessary for the court to decide whether in fact the order had been back-dated by the Secretary. What the judgment does ensure is that no back-dated notifications are of any avail in law, at least insofar as they relate to authorised places of detention.

⁹ Ibid.

¹⁰ Ibid at p 16.

4.2 Other rulings in Wimalenthiran's case relating to arrest and detention

The above ruling regarding publication of authorised places of detention broke new ground, interpreting the emergency regulations in the light of the intention to provide openness and prevent ill treatment in custody and "disappearances." There were several other findings in Wimalenthiran's case that reinforced earlier decisions on arrest and detention under emergency regulations, in so clear and robust a manner as to make this a particularly valuable decision as regards these areas as well. The principles so reasserted included the following:

Firstly, in deciding whether an arrest is in accordance with "procedure established by law," the matter in issue is not what **subsequent investigations** may have revealed, but whether **at the time of the arrest** the person was committing an offence, or there were reasonable grounds for suspecting that he was concerned in or had committed an offence. Even accepting the official version that Wimalenthiran was arrested at a check point by an army sergeant "the suspicions of Sergeant Gunadasa and his fervent hope or even confident and honest assumption, that some evidence may eventually turn up to make his suspicions appear to be reasonable was not sufficient...."¹¹

Secondly, the Court pointed to the fact that the Detention Order subsequently issued "is in a standard form previously prepared into which other information, whether true or false, appropriate or inappropriate, has been routinely inserted."

¹¹ Ibid at p.19.

Thirdly, the court asked the very pertinent question, as to whether, had the person detained been furnished with a copy of the Detention Order; he could have understood why he was being held? The following passage from the judgment clearly illustrates the convoluted and incomprehensible nature of the emergency regulations which have been criticised by human rights organisations over the years to no avail.

In any event, had the person detained been furnished with a copy of the Detention Order, could he have understood why he was being detained? If he had been given a copy of the Emergency Regulations as well, he would have found that regulation 25 provides that:

"Whoever (a) commits any offence punishable under sections 114, 115, 116 or 117 of the Penal Code; or (b) commits the murder or conspires to murder or attempts to murder, or wrongfully confines or conspires or prepares to wrongfully confine, the President or a Member of the Parliament, or a police officer or a member of the armed forces, or a public officer with the intention of inducing or compelling the President, Member of Parliament, police officer or member of the armed forces or public officer to exercise or refrain from exercising in any manner any of the lawful powers of the President, Member of Parliament, police officer, member of the armed forces or public officer; or (c) or in any manner overawes, influences, coerces, prepares or conspires or attempts to overawe, influence or coerce, any person with the intention of inducing or compelling the Government of Sri Lanka, the President, a Member of Parliament, a police

officer, a member of the armed forces or public officer, shall be guilty of an offence...."

What was it the person detained had done?

According to the Detention Order, Wimalenthiran was detained for contravening regulation 25 "read with" regulations 34 and 37. Regulation 34 provides that:

"No person shall knowing or having reasonable cause to believe that any other person is guilty of an offence under any emergency regulation give such other person assistance with the intent thereby to prevent, hinder or interfere with the apprehension, trial or punishment of such person for the said offence."

What was the knowledge of the person detained? Who was the person detained seeking to protect? What was the offence such a person was supposed to have committed? No evidence was adduced by the respondents on these matters.

Regulation 37 provides:

"(a) Whoever becomes aware of an intention or an attempt or a preparation to commit, or the commission of an offence under any emergency regulation shall forthwith give information thereof to the nearest Grama Niladhari or to the officer-in-charge of the nearest police station, (b) any person who wilfully fails or refuses to give the information referred to in paragraph (a) shall be guilty of an offence."

What was the information that the person detained had and failed to disclose?

Fourthly, the court pointed out that the treatment of persons detained was on "a wholesale basis." Such an approach does not

enable the Secretary to discharge his duty to give the person he has directed to be arrested the reasons for doing so, nor does it enable the detainee to make his case to the Advisory Committee appointed under regulation 17(4), for to do so he must know the grounds on which he is thought to be a person who is likely to act in a manner prejudicial to public order. Whether a person is arrested under regulation 17 or regulation 18 "he or she must be given the *grounds* - the material facts and particulars - for his arrest and detention. It is only when a person has such information that he or she will have the opportunity to rebut the suspicion entertained by the person making the arrest or show that there was some mistake as to identity."

Then again the court reiterated that it "has on more than one occasion reminded the Secretary to the Ministry of Defence that he should be able to state that he *himself* came to form the opinion, and that the Secretary would not be acting in conformity with the requirements of regulation 17(1) by acting mechanically as a rubber stamp at the behest of the police and signing Detention Orders without exercising his personal judgment in each case."

Finally, the court also held that there were multifarious other failures to comply with the safeguards contained in the emergency regulations, including the requirement that Wimalenthiran be handed over to the nearest police station (in this case Kotahena) immediately after his arrest; that the HRTF be notified; that his relatives be informed, that the arrest be reported to the Commanding Officer of the area within 24 hours; that a "receipt" be issued by the arresting officer; that the existence and addresses of authorised places of detention be notified to the Magistrate;

that the officer in charge of such places of detention furnish a list of all persons detained there to the Magistrate once in fourteen days; and that the Magistrate visit such place of detention at least once a month when the officer in charge shall ensure that every person detained therein, otherwise than on order of a Magistrate, shall be produced before him. These impressive sounding safeguards, notoriously observed more often in the breach, are to be found in regulations 18(1), 18(7), 18(8), 19(4), 19(5) and 19(6) of the Emergency (Miscellaneous Provisions and Powers) Regulations No.1 of 1993, which were in force at the relevant time.

A significant aspect of this case is the role of, and the reliance placed by the court on the HRTF. The Supreme Court in the first instance directed that the application be referred to the HRTF for inquiry and report in terms of the Monitoring of Fundamental Rights of Detainees Regulations 1991. It directed the HRTF to make an appropriate order under regulation 9 and report to court. The HRTF in due course reported back to the Supreme Court that its officers had visited the detainee at the 4th floor of the CID; that the Army Intelligence Unit had been unable to give a plausible explanation for the arrest and detention; that Wimalenthiran had been in detention for 142 days without being produced before a court of law; and that therefore the HRTF had directed the Secretary to the Ministry of Defence to revoke the detention order and release the prisoner from custody.

A very interesting feature of this judgment is the reliance placed on an Amnesty International ("AI") report on the arrest and subsequent treatment of Jude Arulrajah arrested on the same

day as Wimalenthiran, and held along with him in unauthorised detention. This report was used to corroborate, *inter alia*, Wimalenthiran's claim that he was arrested on 2 October 1993 (and not on 23 October which was the official version). The application on behalf of Wimalenthiran in which he said he was arrested on 2 October was dated 31 January 1994, whereas the Amnesty International Report, which described the case of Jude Arulrajah, arrested on the same day, was published only in February 1994. "The Amnesty International account of the case of Arulrajah," said the Supreme Court, "both with regard to the date of arrest, the places of detention at various times, and the sequence of events, corroborates the version of his co-prisoner Wimalenthiran. There is no reason why Amnesty International should have invented the dates mentioned by them."

An important feature of Jude Arulrajah's case and Wimalenthiran's case is that both complained of having been held initially at a secret place of detention, a sinister tower-like structure off Galle Road Colombo behind the Indian High Commission; Amnesty International published photographs of it. The court asked the HRTF whether it was aware of and had inspected an alleged place of detention belonging to the Army Intelligence Unit near the sea at Kollupitiya, and the Task Force replied in the negative. The court by necessary implication accepted the petitioner's version of his incarceration in this place, when it accepted that the arrest took place on 2 October and not as officially claimed on 23 October. Its finding was as follows:

According to the affidavit of Mr Vinayagamoorthy dated the 31st of January 1994, Wimalenthiran was held at the

secret place of detention by the sea till the 11th of December and then transferred to the Army Camp at Panagoda. On the 15th of December he was handed over to the CID. This is the sequence of events reported by Amnesty International with regard to Wimalenthiran's co-prisoner Arulrajah. The Amnesty International report states that Arulrajah was arrested on the 2nd of October and detained at the Army Camp behind the Indian High Commission until he was transferred "on or about 10 December" to Panagoda Camp and handed over to the CID "on or about 15 December." I am of the view that Wimalenthiran was arrested on the 2nd of October 1993.

5. The Position of Persons who Surrender

A strange amendment was made during the year to the emergency regulations relating to surrender. Regulation 22 of the Emergency (Miscellaneous Provisions and Powers) Regulations dealing with surrender (which had just four short paragraphs), was repealed, and a completely new, long and complicated regulation 22, consisting of 13 paragraphs, was substituted in its place.¹²

Prior to August 1996 the position was relatively simple. A person could surrender in connection with specified offences (such as offences under the Explosives Act, the Prevention of Terrorism Act, the Firearms Ordinance, emergency regulations, etc). Such persons could then be held in the custody of the Commissioner of Prisons for up to 60 days while the police

¹² Amendment to the Emergency (Miscellaneous Provisions and Powers) Regulations No.4 of 1994 published in Gazette Extraordinary 938/13 of 29 August 1996.

carried out investigations. At the end of this period they **had** to be released unless it was decided to detain them under the provisions of regulation 17 or produce them before court under the provisions of regulation 19. This procedure fitted into the general framework of the regulations, and appeared sensible. Persons who surrendered not because they had committed any offence, but simply because the police were looking for them, could hope that they could be cleared of any suspicion and released, if not expeditiously, at least within sixty days.

Rehabilitation, under this scheme, was provided for only by regulations 20 and 21 which enable rehabilitation orders to be made in respect of persons detained under regulation 17 (preventive detention) or regulation 19 (investigative detention) or section 9 of the PTA. There was no connection between surrender and rehabilitation (other than the obvious one that if a surrenderee, instead of being released after sixty days, was detained under regulation 17 he might, as might any other detainee falling within the ambit of that regulation, become subject to a rehabilitation order).

In August 1996, however, the provision relating to surrender was drastically changed. Regulation 22 was repealed and a new, lengthy regulation 22 took its place.

The first important change concerned the **reason** for which a person can surrender. In addition to surrendering "in connection with any offence under the Explosives Act etc." A new reason is added: "or through fear of terrorist activities."

The major innovation introduced in August 1996 by this completely new set of provisions on surrender is that any person

surrendering is automatically subjected to rehabilitation. This is illogical (let alone unjust) in the case of both types of surrendees envisaged. That is,

- A person who surrenders **in connection with an offence** under the Explosives Act etc., is not necessarily guilty. Persons often surrender because they are **suspected** of offences, because they come to know that the authorities are looking for them. There should be provision - as there was before - for their involvement to be investigated within a given time frame and where appropriate for them to be released. Now, however, there is no such provision. They **have** to undergo rehabilitation. There can be a police investigation, but strangely this **can** start only **after** three months. Furthermore, the police investigation does not appear to envisage releasing them if they are cleared but only charging them in a court of law.

- In the case of persons surrendering "through fear of terrorist activities," the word "surrender" is a misnomer. They are not surrendering, they are just seeking protection. This is indeed recognised by designating the Centres "Protective Accommodation and Rehabilitation Centres."¹³ Yet, such persons are also compulsorily subjected to up to two years of "rehabilitation".

¹³ These are different from the Youth Development and Training Centres provided for rehabilitation under regulation 20, but in practice the same centres appear to fulfil both functions.

A person who surrenders must within ten days, be handed over to the Commissioner General of Rehabilitation who assigns him or her to a Centre. Within two months the Commissioner General reports to the Secretary to the Ministry of Defence indicating the nature of the rehabilitation being carried out in respect of the surrendee. The Secretary then "shall make an order authorizing the Commissioner General of Rehabilitation to keep such surrendee in a Centre and to rehabilitate him for a period not exceeding twelve months in the first instance."¹⁴ This period is computed from the date of handing over to the Commissioner General of Rehabilitation. A surrendee may once in two weeks meet his parents, relations or guardians, but this is subject to the permission of the Officer-in-Charge of the Centre. At the end of twelve months the Commissioner General shall send a report to the Secretary, who may then either decide to release the surrendee, or may, on the recommendation of the Commissioner General and the Administrative Board, extend the period of rehabilitation for up to three months at a time, the aggregate of such extensions not to exceed twelve months.¹⁵ If the surrendee is tried and convicted the court may, in imposing sentence, take into account the fact of his surrender (but not, apparently, the period spent under rehabilitation). The Court may also order rehabilitation for such "further period as may be determined by Court;" no maximum term for this is stipulated.

It is possibly due to the strange nature of the new consequences that the requirement has now been introduced that a person

¹⁴ Regulation 22(6).

¹⁵ Regulation 22(9).

surrendering is "required to give a written statement to ... the effect that he is surrendering voluntarily." Persons cannot, however, be expected to anticipate these consequences, and it is submitted that such a statement of voluntariness cannot be taken to legitimise them.

Press reports suggest that these provisions were intended to deal with numbers of young Tamils taken into custody when the army extended its geographical control of the Jaffna peninsula during the course of the year. One heard of such youth being brought to Colombo, and of many of them thereafter ending up in rehabilitation centres. The situation is somewhat unclear, however, since detainees from the North are also kept under rehabilitation orders made under the more familiar, and already existing, regulation 20. An official account¹⁶ of the number of rehabilitation centres and persons undergoing rehabilitation therein as at 1 January 1997 gave the following particulars:

Gangodawila Centre (Colombo District, females only). 11 persons only of whom ten were held on rehabilitation orders under regulation 20 and one was a surrendee held under a rehabilitation order made under regulation 22(6).

Weerawila Centre (Hambantota District). 88 persons held under rehabilitation orders made under regulation 20.

Bandarawela Centre (Badulla District). 57 persons held under rehabilitation orders made under regulation 20 and

¹⁶ Letter dated 10th February 1997 from Assistant Commissioner (Legal) for Commissioner General of Rehabilitation, in response to inquiry by the Nadesan Centre.

30 surrendees held under rehabilitation orders made under regulation 22(6).

These provisions exemplify the need, often voiced by human rights workers, for an official commentary on the meaning of and thinking behind new emergency regulations, and for a requirement that emergency regulations (and not merely the extension of the emergency) should be debated in Parliament. Subjecting emergency regulations to greater scrutiny would, it is hoped, ensure that greater care is taken both as regards their effect and their wording.

6. Censorship

A sweeping censorship was imposed by emergency regulation in April and lifted in October 1996.¹⁷ These regulations were virtually identical to those imposed during 1995, which have been described in *Sri Lanka: State of Human Rights 1995*.¹⁸ The formulation was extremely broad and went well beyond protecting legitimate national security interests. The banned subjects once again included:

- * any operations carried out or proposed to be carried out by the Armed Forces or the Police (including the STF);

¹⁷ The Emergency (Prohibition on Publication and Transmission of Sensitive Military Information) Regulations No.1 of 1996 published in Gazette Extraordinary 919/17 of 19 April 1996. The rescinding of these regulations was published in Gazette Extraordinary No. 944/10 of 8 October 1996.

¹⁸ See pp. 73 ff.

- * the procurement or the proposed procurement of arms or supplies by any such Forces;
- * the deployment of troops or personnel;
- * the deployment or the use of equipment, including aircraft or naval vessels by any such Forces; or
- * any statement pertaining to the official conduct or the performance of the Head or any member of any of the Armed Forces or the Police Force.

A detailed criticism of the regulations was carried in last year's chapter on Emergency Rule. The resort to censorship under the emergency regulations during 1996 is covered in the chapter on Freedom of Expression and therefore is not dwelt on further here.¹⁹

7. The Ban on May Day Processions

Towards the end of April the customary discussions took place at Police Headquarters with representatives of trade unions with regard to the allocation of routes for May Day processions and locations for public meetings. As a consequence the police informed unions in writing of the assembly points, routes and meeting places allocated to them.

On 29 April there was a radio announcement that processions were banned, and unions which had been issued permits were informed by the police that these permits were cancelled as processions in the city of Colombo had been banned for security reasons.

¹⁹ See Chapter IV, p. 62.

The unions protested at this. The General Secretary of the Ceylon Mercantile, Industrial and General Workers' Union ("CMU") by letter of 30 April to the Deputy Inspector General of Police (DIG), Colombo Range, referred to the letter it had received dated 29 April cancelling the permit and said:

I would like you to clarify to me under what Emergency regulation, if any, processions in the City of Colombo on May Day have been banned generally, and by whose order under any Emergency regulation now in force.

You issued the permit dated 26th April 1996 to me after discussion with representatives of my Union and other unions as to the respective routes along which they and the CMU intended to conduct processions on May Day. You did not, at that time indicate, nor were any of the Unions made aware that permission for processions was required under any Emergency regulation. I presumed therefore, that permission for the CMU procession had been granted under the ordinary law relating to the regulation of public processions, which is the Police Ordinance.

In the circumstances, I submit that it is essential, in the interests of my Union and the public interest, that you let me know today itself, or before the procession is due to start at 1.00 p.m. tomorrow on the Galle Road, opposite the Hotel Lanka Oberoi, as to the legal authority under which you have notified me of the cancellation of the permit for that procession, so that I may inform all those who will assemble for the procession at the CMU Headquarters tomorrow, as previously notified, of what you have to say in

*that regard, and as I intend to pursue this matter further thereafter with the state authorities responsible. The denial of the right of public procession on May Day, without proper legal authority and adequate justification, would be a violation of the fundamental democratic right of public procession, in my view.*²⁰

The DIG replied by letter dated 1 May saying simply that the relevant Gazette No.921/6 dated 30 April 1996 "is herewith attached for your information and perusal."²¹ This regulation provided that "The holding of any public procession whatsoever in any part of Sri Lanka is hereby prohibited during the period of 24 hours commencing from 12.00 mid-night of April 30 1996."²²

What is significant is that this regulation on its face was made by the President only on 30 April, and, therefore, could not be the basis of the ban communicated by the police on 29 April.

In the event some trade unions held, or tried to hold, processions despite the ban, with varying degrees of success. There were complaints that trade unions allied to constituent parties of the ruling Peoples' Alliance were not interfered with, while others were broken up.

²⁰ Letter supplied to the writer by the General Secretary of the Ceylon Mercantile, Industrial and General Workers Union.

²¹ Ibid.

²² The Emergency (Public Processions) Regulation No.1 of 1996, published in Gazette Extraordinary 921/6 of 30 April 1996.

8. Essential Services

In May 1996 a strike of officers of the CEB left the whole country without power supply. This prompted the government to introduce a lengthy new regulation²³ relating to Essential Services. The regulation provides for the declaration of services as essential services and in addition as specified services. The latter are essential services in respect of which a person may be required to work outside normal working hours or on public holidays. CEB and Lanka Electricity Company Ltd. ("LECO"), and subsequently the National Water Supply and Drainage Board and the telecommunication service, were all declared both essential services and specified services.²⁴ Absence from work or failure to perform one's work in such services, without lawful excuse, results in vacation of employment, and is also an offence.

A comparison with similar regulations under previous governments, which were roundly condemned by human rights organisations, shows some improvement at this point. The words "without lawful excuse" were not there earlier.

It is also an offence for other persons to impede the carrying on of an essential service or to incite others to do so. There then follows a provision regarding any organisation which in the

²³ New regulation 29A of the Emergency (Miscellaneous Provisions and Powers) Regulations published in Gazette Extraordinary 925/3 of 29 May 1996, as amended by regulation published in Gazette Extraordinary 929/14 of 26 June 1996.

²⁴ The declarations regarding CEB and LECO are contained in the Gazette mentioned above. The declaration of the other two as essential services was published in Gazette Extraordinary 925/9 of 1 June 1996, and as specified services in Gazette Extraordinary 926/11 of 4 June 1996.

opinion of the President is committing or aiding and abetting the commission of any of the above acts. Such an organisation can be proscribed by the President, in which event the following consequences flow:

every member of such organisation shall,
if an employee of the government or a public corporation,
be deemed to have vacated his office, and in addition
shall be guilty of an offence.

Furthermore, the bank account of the organisation is frozen.

Here there has been no tempering of the harshness of the previous provisions.

A similar provision in the Emergency (Miscellaneous Provisions and Powers) Regulations in force in 1992 was criticised by the Civil Rights Movement ("CRM") as follows:

The provision that when the President is of the opinion that members of an organisation are committing an offence, and therefore bans the organisation, every member becomes guilty of an offence, does not say that members have the opportunity of proving that the President was misinformed when he came to his opinion and that in fact no such offence was being committed. Nor, even if the President was right in his opinion, is there provision for a person to escape liability on the grounds that he was unaware of the actions of other members, that he took no part in any decision to commit an offence, or even that he opposed it! The implications of these provisions for trade unions, political

*parties and other organisations whose membership may be spread throughout the country, are appalling.*²⁵

Where a person is convicted of any offence under this regulation, in addition to any other penalty the court imposes, his property is deemed forfeited to the Republic, and any alienation or other disposal of such property effected by such person **after the date of coming into force of these regulations** shall be null and void. Here again one may usefully cite CRM's 1992 observations on similar provisions:

*Thus the trade unionist who voted for the strike and the one who voted against both lose all their property (in addition to going to jail etc.). But this is not all. Any innocent third parties who bought property from them long before the strike was ever thought of find themselves suddenly deprived of what they paid good money for in a transaction totally legal at the time it was entered into!*²⁶

9. Confiscation of Property

A new emergency regulation made during the year contains drastic provisions for the confiscation of property.²⁷ Existing emergency regulations already provide for forfeiture of property as one of the consequences of conviction for certain offences. The present regulation takes matters a step further and provides

²⁵ "Emergency Law and Trade Union Rights," CRM Statement E 01/10/92 of 7 October 1992, p. 3.

²⁶ Ibid.

²⁷ The Emergency (Confiscation of Property) Regulations No.1 of 1996 published in Gazette Extraordinary 937/10 of 22 August 1996

for confiscation in certain circumstances even where there has been no finding by a court that an offence has been committed.

The confiscation takes place on the IGP certifying, with the approval of the Secretary, Defence, that from the information available to him he is satisfied of certain facts. These are:

- * either that the property had been stolen, purchased, acquired or retained for the purpose of furthering the commission of any offence the punishment for which may include the forfeiture of the property of the offender, or
- * that the property belongs to, or is held on behalf of any person, including any person who is not to be found or who is dead, if such person is shown to have been involved in the commission of an offence the punishment for which may include the forfeiture of the property of the offender.

What is significant here is that the determination that property should be forfeited is made by the IGP with the approval of the Secretary, and not by or as a consequence of any decision by a court of law.

The regulation provides that the IGP shall thereafter report the forfeiture to the appropriate High Court which shall place a notice on its notice board and two other places specifying the property and requiring any person interested to make a claim. The court also has the discretion to publish the notice in the press. A claimant may show that he is the lawful owner of the property used for the commission of an offence and did not wilfully allow such use. If he claims as a legal heir of a person who is dead, he is given an opportunity to establish that the

dead person was not involved in the commission of an offence. This latter requirement is particularly onerous as the claimant is asked to prove a negative, and on matters of which he may well have no personal knowledge. If the claimant is successful, the property reverts to him, or if this is not possible, he is paid its value.

The regulations further provide that in all such proceedings the certificate of the IGP, on whose initial determination the forfeiture takes place, shall be admitted as *prima facie* proof of the facts stated therein and he shall not be called as a witness. Nor may he, at any subsequent stage, be summoned or examined as a witness without his consent.

Property forfeited under these regulations is to be used for paying compensation to victims of offenders contemplated by the regulations or for the rehabilitation of such offenders.

10. The Human Rights Task Force ("HRTF")

The renewed HRTF created by emergency regulations in mid 1995²⁸ continued to function, with an active Advisory Group consisting of well known human rights activists as well as representatives of political parties that met once a month.

With the armed forces gaining increasing control of parts of the Jaffna peninsula, including Jaffna town, an HRTF presence in Jaffna became a matter of urgency. In November a delegation of the HRTF visited Jaffna, premises for the office were located,

²⁸ Law and Society Trust, *Sri Lanka: State of Human Rights 1995* (Colombo, 1996) Chapter III pp. 27-56.

staff advertised for and a budget prepared. By the end of the year, however, necessary steps to implement these plans had not been taken by the authorities.

Earlier in 1996 legislation was passed creating a Human Rights Commission, some of the powers of which overlap those of the HRTF; the Commission had not, however, been established by the end of the year. Grave apprehension was felt by human rights organisations, both Sri Lankan and international, lest the establishment of this new Commission should result in an interruption of the monitoring of the welfare of detainees, and a loss of the expertise that officers of the HRTF have gained over the years in the provision of its vitally important service to those who are arrested and detained.

11. Other Regulations

Other regulations made during the year related to the control of entry into buildings in the vicinity of the President's official residence;²⁹ the prohibition of the import of outboard motors exceeding 25 hp;³⁰ the sealing by the police of premises used for harbouring offenders;³¹ the extension of the Prohibited Zone

²⁹ The Emergency (Control of Colombo Security Zone) Regulations No.1 of 1996 published in Gazette Extraordinary 935/21 of 9 August 1996. This was originally to be in force only for three months but an amendment (published in Gazette Extraordinary 947/8 of 30 October 1996) extended it indefinitely.

³⁰ The Emergency (Prohibition on importation of Outboard Motors) Regulations No.1 of 1996 published in Gazette Extraordinary 919/15 of 18 April 1996.

³¹ Amendment of The Emergency (Harbouring of Offenders) Regulations No.1 of 1995, published in Gazette Extraordinary 930/13 of 3 July 1996. On the main regulation see Law & Society Trust, *Sri Lanka: State of Human Rights 1995*.

to include the Hambantota District;³² restrictions on the consumption of electricity necessitated by the severe power shortage during the months of March to September;³³ the registration, painting in prescribed colour, and display of registration numbers of boats operating within territorial waters adjacent to restricted zones;³⁴ the creation of a resettlement and rehabilitation authority of the North which replaces REPPIA (the Rehabilitation of Persons, Properties and Industries Act No 29 of 1987) in the Northern Province;³⁵ the maintenance of essential supplies and services in the Administrative District of Jaffna;³⁶ the rescinding of notices issued under Section 26 of the Local Authorities Elections Ordinance in respect of local authorities in the administrative districts of Jaffna, Kilinochchi,

³² The amendments to the Emergency (Establishment of Prohibited Zone) Regulations No.4 of 1995 published in Gazette Extraordinary 911/1 of 19.2.96.

³³ The Emergency (Restriction on Use of Consumption of Electricity) Regulations No.1 of 1996 published in Gazette Extraordinary 926/11 of 4 June 1996.

³⁴ Amendment to Emergency (Establishment of a Restricted Zone) Regulations No.1 of 1995 published in Gazette Extraordinary 919/16 of 18 April 1996.

³⁵ The Emergency (Northern Province Re-settlement and Rehabilitation Authority) Regulations No.1 of 1996 published in Gazette Extraordinary 904/14 of 4 January 1996. The name was changed to the Re-settlement and Rehabilitation Authority of the North by amendment published in Gazette Extraordinary 926/18 of 7 June 1996.

³⁶ The Emergency (Maintenance of Essential Supplies and Services) Regulation No.1 of 1996 published in Gazette Extraordinary 921/8 of 30 April 1996. This should not be confused with the new regulation 29A dealing with Essential Services introduced in the Emergency (Miscellaneous Provisions and Powers) Regulations which has been described elsewhere.

Mannar and Vavuniya;³⁷ and enabling the report of an officer on active service in the territorial waters of Sri Lanka to be used as evidence without being called as a witness unless the court is of opinion that he should be present.³⁸

12. Conclusion

While the scope of emergency rule increased considerably during the year, both geographically and subject-wise, long-standing complaints remained unaddressed. Emergency regulations continued to authorise the incarceration of persons in police stations and other places without legally prescribed minimum standards governing conditions of detention. The normal law relating to inquests was not restored. The regulations, in particular the Emergency (Miscellaneous Provisions and Powers) Regulations, remain replete with anomalies and inconsistencies. Access remained difficult, and the often repeated request that the text of emergency regulations be published in all three language newspapers remained unheeded. The regulations continued to be made without any official system of sequential numbering, listing or indexing which would enable one to keep track of them and make sure one's collection is complete. Although the Public Security Ordinance provides that Parliament may by resolution amend or revoke any emergency regulation, no such attempt was made during the year. While the extension of the emergency is debated each month, there is no mechanism to ensure parliamentary scrutiny of the regulations themselves.

³⁷ Published in Gazette Extraordinary 953/3 of 10 December 1996.

³⁸ The Emergency (Evidence Special Provisions) Regulations No.1 of 1996 published by Gazette Extraordinary 952/11 of 5 December 1996.

IV

Freedom of Expression and Media Freedom

Sabina Fernando*

1. Introduction

The PA government came to power with promises to restore freedom of expression. These promises spurred the media to be more aggressive, more aware of its collective rights and to be more critical in its reporting of government activity. The government responded by repeatedly calling for "responsible journalism," implying that its practice was rare. There have been many instances of censorship, both formal and informal, and a greater resorting to the judicial process as a means of rapping journalists on the knuckles. This chapter examines the state of media freedom in relation to its exercise in practice, and expands upon the discussions of the legal framework that was dealt with in previous reports.¹

* Lecturer, Faculty of Law, University of Colombo.

¹ See Law and Society Trust *Sri Lanka: State of Human Rights 1994* (Colombo, 1995) chapter VIII, and Law and Society Trust *Sri Lanka: State of Human Rights 1995* (Colombo, 1996) chapter IV.

2. Legal Framework

2.1 Constitutional guarantees

The 1978 Constitution contains provisions which have a bearing on mass media, both on the press and the electronic media. However, the guarantee of freedom of expression in general terms makes no provision for the freedom of information or the right to receive information.

Article 10 of the Constitution guarantees to every person the freedom of thought, conscience and religion, including the freedom to have or to adopt a religion or belief of his or her choice. This fundamental right is not subject to any express limitations and is a right enjoyed by any individual irrespective of whether such a person is a citizen.

Article 14 (1) (a) ensures to every citizen the "freedom of speech and expression including publication." Restrictions on this right may be prescribed by law in the interests of "racial and religious harmony or in relation to parliamentary privilege, contempt of court, defamation or incitement to an offence,"² or in the interests of "national security, public order and the protection of public health or morality, or for the purpose of securing due recognition and respect for the rights and freedoms of others or of meeting the just requirements of the general welfare of democratic societies."³

² Article 15 (2) of the 1978 Constitution of the Democratic Socialist Republic of Sri Lanka.

³ Article 15 (7), *ibid.*

The restrictions set out in Article 15(2) are much broader than those permitted under the ICCPR. According to the ICCPR the freedom of expression and other human rights may only be restricted if "necessary" to promote certain enumerated interests — namely respect for the rights and reputation of others, and the protection of national security, public order, public health and morals. In Sri Lanka, by contrast, restrictions need be neither necessary nor reasonable.

The Supreme Court, which enjoys exclusive jurisdiction to hear and determine questions on the infringement or imminent infringement of fundamental rights by executive and administrative action,⁴ has held, in a series of cases, that the right of the public to know or the right to receive information is necessarily implied in the freedom of expression.⁵ In *Joseph Perera v. Attorney-General* it was held that the freedom of expression also includes the right to receive information and the right to express and circulate one's opinion through any medium or mode.⁶ Additionally, the freedom of discussion, the right to disseminate knowledge and propagate ideas, and the freedom "not only for the thoughts that we cherish but also for the thoughts that we hate" is guaranteed.

In the more recent case of *Fernando v. Sri Lanka Broadcasting Corporation*, the Court held that the petitioner's right to freedom of speech had been breached when a radio programme, which

⁴ Article 126, *ibid* and also Chapter V, on Judicial Protection of Human Rights, pp. 82-112.

⁵ *Visuwalingam v. Liyanage* (1984) 2 Sri LR 123.

⁶ (1992) 1 Sri LR 199.

included various methods of listener participation and in which the petitioner had frequently participated, was abruptly halted during transmission.⁷ The basis for the breach was that this action had the effect of preventing further participation by the petitioner. Although expressing the view that Article 14 should not be interpreted narrowly, the Court did not find that the freedom of speech and expression included the right to obtain information, which it said would be more appropriate under Article 10 relating to the freedom of thought. Consequently, as the case had not been presented on the basis of Article 10, no finding on the right to information or freedom of thought was allowed.⁸

2.2 International obligations

Article 19 of the ICCPR guarantees the freedom of opinion, expression and information, defining the freedom of expression to include "the freedom to seek, receive, and impart information and ideas of all kinds regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice." Sri Lanka's laws do not provide for such a wide interpretation and need to be reformed in order to bring them within the purview of the international standards guaranteed by the ICCPR.

These rights may be subject to certain restrictions, provided these are enacted by law and "are necessary for the respect of

⁷ SC Application No. 81/95 SC Minutes 30.5.1996

⁸ See also Chapter V, on Judicial Protection of Human Rights for a detailed discussion of the case.

the rights and reputation of others, and for the protection of national security or of public order or of public health or morals.”⁹ Derogation from these obligations, however, may only be permitted in exceptional circumstances, according to Article 4 of the ICCPR, “in times of public emergency which threatens the life of the nation.”

2.3 Relevant legislation

There are several laws permitting restrictions on the freedom of expression, and allowing for broader restrictions than those permitted under the ICCPR, thus violating Sri Lanka’s obligations under the treaty.¹⁰

The Parliamentary (Powers and Privileges) Act No 21 of 1953 (as amended)

This Act, whilst strengthening the freedom of speech, debate and proceedings in parliament, also has the effect of imposing restrictions on the freedom of speech and expression including publications of others. The subsequent amendments to the Act enhanced the punitive power of Parliament in cases of alleged breach of privilege, thereby vesting Parliament with punitive powers concurrent with the Supreme Court.

The Penal Code

(a) Provisions relating to offences against the State

Section 118 relates to the offence of bringing the Queen/President into contempt by means of “contumacious, insulting or

⁹ ICCPR, Article 19(3)

¹⁰ See supra n.1

disparaging words, whether spoken or intended to be read, or by signs or by visible representations.”

Section 120 provides a very broad definition of sedition which includes: exciting or attempting to excite feelings of disaffection towards the Government; inciting hatred or contempt towards the administration of justice; procuring by unlawful means the alteration of laws; raising discontent or disaffection among subjects; or promoting feelings of ill will and hostility between different classes of subjects.

(b) Criminal defamation - Section 479

The main thrust of this offence is the punishment of “unfair” character assassinations of public figures. It is inevitable that the possibility of prosecution will discourage criticism of government ministers and policies or the expression of political dissent. As the recent instances of prosecution for defamation indicate, the requirement of the Attorney-General’s approval prior to prosecution has not proven to be an adequate safeguard.

(c) Offences affecting public decency or morals or religious harmony - Sections 285, 286, 287, 291A and 291B

Public Security Ordinance No 25 of 1947

This Ordinance provides for the enactment of emergency regulations or the adoption of other measures in the interests of public security and the preservation of public order. Part II of the ordinance¹¹ being made operative by the president, gives

¹¹ Part II of the Ordinance dealing with Emergency Regulations can only be brought in to operation by virtue of a proclamation of the President under the circumstances set out in Section 2 of the ordinance.

him or her the power to enact emergency regulations which have the effect of overriding, amending or suspending the operations of any law, except Article 155(2) of the Constitution.

Prevention of Terrorism Act No 48 of 1979

This Act provides for making temporary provision for the prevention of acts of terrorism in Sri Lanka and of unlawful activities of any individual, group or body of persons within or outside of Sri Lanka. Part V of this Act prevents the printing, publishing and distribution of certain publications without the written approval of a competent authority.

Obscene Publications Ordinance No 4 of 1927 (as amended in 1983)

This provides that the production, possession, importation, exportation, carrying on, taking part in a business or advertising the availability of obscene publications is a punishable offence. The law prohibits obscene publications without defining what constitutes obscenity.

Public Performance Ordinance No 7 of 1912

This provides for the better regulation of public performances and carnivals and empowers the Minister in charge of the subject of defence to make rules for the regulation of public performances.

Official Secrets Act No 32 of 1955

This is an Act to restrict access to official secrets and secret documents and to prevent the unauthorised disclosure thereof.

It prohibits, inter alia, the disclosure of official secrets, which is defined vaguely and broadly. The communication to and receipt by an unauthorised person of an official secret is made an offence.

Profane Publications Act No 41 of 1958

This is an Act to prevent the writing, production, printing, publication, sale, distribution or exhibition of any profane publication that is an insult to religion and penalises writers, publishers, printers, and distributors. The law preserves the right to fair comment and criticism.

Official Publications (Immunity) Ordinance No 47 of 1946

This provides for immunity from civil and criminal proceedings with respect to the publication or reproduction of any report or other official document the publication of which is ordered by the Government.

There are several laws that apply specifically to the Press. These include:

Newspapers Ordinance No 5 of 1839

This statute seeks to regulate the printing and publishing of newspapers in Sri Lanka.

Sri Lanka Press Council Law No 5 of 1973

This provides for the appointment of a Press Council to regulate and to tender advice on matters relating to the Press, for the investigation of offences relating to the printing or publication of certain matters in newspapers and for matters connected

therewith or incidental thereto. It prohibits publication of profane or indecent matters (which is defined as matter likely to deprave or corrupt). Section 16, in particular, concerns the unauthorised publication of matters pertaining to cabinet decisions, proceedings and documents. These restrictions are too broad and, for several reasons, are contrary to public interest. The law fails to take into account that, given the very short time allowed for the public to challenge a bill for being unconstitutional, such a newspaper publication may be the only source for preparing to mount such a challenge. In other words, the reality of modern journalism is that a leak from government sources is an important source of public information.

The Electronic Media is regulated by:

Sri Lanka Broadcasting Corporation Act No 37 of 1966

This Act established a corporation for the purpose of carrying on the service of broadcasting and for developing, improving and extending the service in the public interest. It also provides the Minister with a discretionary power to issue licences to any person for the establishment of private broadcasting stations.

The Sri Lanka Rupavahini Corporation Act No 6 of 1982

Television broadcasting is governed by this Act. It also provides for the establishment of the Rupavahini Corporation to carry on the business of television broadcasting and to develop the service. Once again, the Minister has the discretionary power to issue licences for the establishment of private television channels. Anyone may be denied a licence if the Minister is not satisfied that he or she has the necessary technical, financial

and professional qualifications for the purposes of establishing and maintaining a private broadcasting station.

The Sri Lanka Telecommunications Act No 25 of 1991

This Act establishes an authority to manage and control the use of radio frequencies and matters relating to geo-stationary satellite orbit in the person of a Director General of Telecommunications. The Authority also has the power to withdraw or suspend the use of a radio frequency. A radio frequency cannot be used except under a licence given by the Authority and an applicant must first satisfy the Authority that he or she is capable of operating such a system.

2.4 Emergency powers

Under emergency rule, inevitably the freedom of expression, in particular the freedom of the press, is adversely affected. Primarily these restrictions take the form of 'competent authorities' who are vested with the power to regulate the press. The effect of this has been most felt in the area of news relating to defence reporting. Unfortunately, the power to regulate has been taken as licence to alter facts and figures.

3. The Nature of the Mass Media in Sri Lanka

There have not been major changes in either the character or the numbers of mass media institutions since their nature was discussed in the Sri Lanka: State of Human Rights Report 1995. In 1996, however, Sri Lanka saw the launching of Dyna Vision, Sri Lanka's first stereo channel, which has a contractual agreement with Turner International/CNN regarding the rebroadcast of its satellite delivered programme.

Formal approval was given in August by the Cabinet for the establishment of a Media Institute. The media institute is to be an autonomous National Media Institute ("NMI"), created by an Act of Parliament. The Institute will be governed by a council of six to ten members including journalists, lawyers and other eminent citizens. Executive power will be vested in a Director General. Until such time that the Institute can be formally established, the government proposes to go ahead with the setting up of such an institution under the existing Press Council Act on the understanding that once the structure of the NMI is legally created it will fall under its purview.¹²

4. The Exercise of the Freedom of the Media in Practice

4.1 Formal censorship

Censorship, first imposed by the PA Government in September of 1995, was subsequently lifted and then re-imposed under emergency regulations on April 19, 1996 prior to the Riveresa II military operations. These regulations were phrased very broadly with no distinction made between information which might genuinely threaten national security (which could then be legitimately restricted by law) and information which should properly be placed before the public. Also, they were applied in an arbitrary manner with all publications being submitted for approval by the Competent Authority on Censorship, a civilian official appointed by the Government, prior to publication. This continued for a period of almost six months, until October 8, 1996.

¹² Ceylon Daily News, 9th August 1996. See also *INFORM Situation Report*, August 1996, pp. 10-11.

4.2 Unofficial censorship

Actions implying a process of unofficial censorship continued to be imposed in an ad hoc and arbitrary manner by the State throughout 1996 under the guise of "responsible journalism."

On April 9, the PA Government temporarily banned radio news broadcasts by the Maharajah Broadcasting Corporation Networks. This was due to a news item broadcast by Sirasa FM and Yes FM radio stations, stating that the government had imposed an islandwide curfew when, in fact, they had not. Rather, the government had extended the operation of the emergency laws to cover the country. Although rebuttals and apologies were promptly made, the CID took into custody six employees at Sirasa FM for questioning including the news director, Sugeeswara Senadhira, and the news editor, Ranjan Priyantha Amarasinghe. The government's actions were widely condemned by the media community as being excessive. The general opinion was that the error had been genuine and had been retracted before too much damage had been done.¹³ The ban on Yes FM was lifted on April 18th, and the ban on Sirasa FM was lifted on May 11.

4.3 Censorship and the conflict

The military refuses, in practice, to permit journalists from either the local or international press free access to visit the North. Excepting a few occasions when journalists were taken to the area under military escort, the military continued this policy

¹³ *INFORM Situation Report*, April 1996, p. 9.

throughout 1996. Thus, the main source of news about the conflict remains the statements issued by the government or the LTTE, with very little opportunity for journalists to investigate the veracity of these statements. Restricted access also affects the investigation and free flow of information regarding humanitarian and human rights concerns, thereby contributing to an atmosphere of impunity.

4.4 Harassment through legal action

The case continues against the Sunday Times' Editor, Mr Singha Ratnatunga, who was formally indicted by the Attorney-General for criminal defamation of the President in March of this year. The charges stem from the publication of an article in the Sunday Times of February 19, 1995 alleging that the President had attended the birthday party of the National List MP, Mr. Asitha Perera, held at the Hotel Lanka Oberoi. According to the article, the President had entered through the rear door and spent 90 minutes there during the early part of the morning. The prosecution claims that the story was completely fabricated and it was deliberately intended to bring disrepute to the President in the minds of the reading public.¹⁴

The Editor of the Sunday Leader, Mr. Lasantha Wickramatunge, and its publisher, Mr. Lal Raj Wickramatunge, were also indicted for criminal defamation for publishing an article under the caption "A promising Government" in the Sunday Leader of September 3, 1995, allegedly bringing the President to disrepute.¹⁵

¹⁴ INFORM *Situation Report*, March 1996, p. 9.

¹⁵ INFORM *Situation Report*, February 1996, p. 10.

Colombo District Judge, Mr. U. L. A. Majeed, made an ex-parte judgment ordering Sumathi Newspapers Ltd., to pay damages in a sum of Rs 50 million to the Minister of Industries, Mr. C. V. Gooneratne, for publishing a cartoon defamatory of him in its newspaper Lakbima.¹⁶

4.5 Physical attacks on journalists

There have been reports of sporadic incidents of violence against journalists, particularly in August and September of 1996. Some of these incidents appear to have been connected with an internal jostling for power within the respective political parties. Others, however, were overt attempts at curtailing freedom of speech by means of blatant acts of intimidation.

Mr. Azzad Sally, the Editor of the Nation Today, was severely injured when a group of thugs assaulted him on August 5th as he was returning from a meeting at the UNP leader's office at Cambridge Place, Colombo.¹⁷ Mr. Sally is said to have been transferred from ward to ward within the Colombo General Hospital and later to a private hospital due to continuing threats and acts of intimidation against him. Although Mr. Sally has identified his assailants, no action has been taken in this case. Internal party manoeuvring has been implied due to allegations that the attack on Mr. Sally is part of the ongoing tussle within the UNP over appointments of Colombo District organisers for the party.

¹⁶ INFORM *Situation Report*, July 1996, p. 11.

¹⁷ INFORM *Situation Report*, August 1996, p. 10.

The Publisher of Siyarata, Mr. Robert Perera, was admitted to the Colombo General Hospital with minor injuries following an attack by several persons near Torrington Square, Colombo, on the afternoon of August 6th. He claims that the reason for the attack was to dissuade him from working for the UNP.¹⁸

Sanjeewa Niroshana, a photo journalist of the Sinhala daily, Lankadeepa, was assaulted by a gang of thugs in the precincts of the Fort Magistrate's Court on September 16th.¹⁹

4.6 Pressure on journalists to reveal sources of information

Investigative journalism is seriously hampered by the lack of respect for, and protection of, the confidentiality of sources. Invariably, threats and acts of intimidation pressurise journalists and editors to reveal their sources, undermining the whole investigative process as well as the credibility of the media.

In July, 1996 the Director of Operations of the Associated Newspapers Corporations Ltd. forced a woman journalist to divulge the name of the person who had provided her with information regarding the Ceylon Petroleum Corporation.²⁰ The Director then telephoned the Chairman of the Petroleum Corporation to whom he gave the name of the alleged source. This incident provoked widespread criticism by media organisations including the Free Media Movement. Although the Director of Operations admitted to the incident he was merely warned by the Media Minister not to repeat such tactics.

¹⁸ INFORM *Situation Report*, August 1996, p. 10.

¹⁹ INFORM *Situation Report*, September 1996, p. 7.

²⁰ The Island, 2 July 1996.

4.7 Threats and intimidation of journalists

Throughout the year the President has made strong statements criticising the media and threatening to curb its activities. In a speech given in April at a meeting organised by the Sudu Nelum Movement in Akuressa, the President criticised the tabloid press and then focused on its dependence, for survival, on government advertising. Yukthiya and Ravaya, newspapers known for their support of the PA Government, responded with strong editorials on April 21, 1996, defending their right to maintain an independent and critical opinion of the state asserting that they were entitled to receive state advertising as a right and not as a favour.²¹

In August, at a public meeting in Nittambuwa, the President threatened that "certain newspapers may have to be closed down on the advice of the military," claiming that "either we close them down, or publish alternative newspapers to counter them." The justification for such statements was that newspapers should not be allowed to hinder the government's war efforts by malicious, false and damaging reporting. Particular mention was made of the Island and Divayina newspapers of the Upali Group. These statements which received much criticism, were seen by many as being indicative of an integral part of the PA's policy on media control.²²

In September the President, while addressing a group of government parliamentarians, stressed the need for the country's

²¹ INFORM *Situation Report*, April 1996, p. 10.

²² INFORM *Situation Report*, August 1996, p. 10.

independent media to report government news accurately. She expressed concern over the allegedly large number of instances in which news pertaining to the government had been distorted, indicating that corrective measures must be taken to combat this tendency. The Sri Lanka Rupavahini Corporation ("SLRC") was particularly targeted for not championing the government's cause, suggesting that the PA Government should also use the SLRC to promote the government's cause as had President Premadasa of the UNP.²³

On July 26, 1996, the editor of the newspaper *Satana*, Mr. Rohana Kumara, and four others were arrested for putting up posters advertising the publication of a new broadsheet, "Madam Hoo."²⁴

Teleshan Network (Pvt.) Ltd. ("TNL") had many run-ins with the government in 1996. September saw the controversy surrounding their coverage of the President's presence at the final match between Australia and Sri Lanka in the Singer Cup Cricket Tournament. Later it was alleged that a Rupavahini cameraman had been threatened and prevented from filming the occasion by Mr. Shan Wickremasinghe, the Chairman/owner of Teleshan and also the brother of the Opposition Leader, Mr. Ranil Wickremesinghe. There were also complaints that certain interviews of government Ministers and MPs recorded by TNL had not been broadcast for allegedly political reasons. TNL rejected the charges, claiming that footage from their telecasts were made available to Rupavahini and that some of the

²³ *INFORM Situation Report*, September 1996, p. 7.

²⁴ *INFORM Situation Report*, August 1996, p. 10.

interviews had not been telecast on the advice of their lawyers to avoid libel.²⁵

On December 29, 1996 at about 2:00 am, several CID officials are said to have visited TNL studios asking for the Chairman of TNL, saying that they wanted a statement from him regarding a report that had been broadcast over TNL radio and television the previous day. According to this report an STF camp at Vellveli had been attacked by the LTTE forcing the security forces to retreat. The same report was also broadcast over the state radio and another private radio station. A few hours after the TNL broadcast, Rupavahini telecast the statement of the IGP saying that the report was incorrect. A TNL spokesman said that no official statement had been issued to them and he reiterated that had such a statement been issued they would have broadcast it. Subsequently, others involved in the event, including Ms. Ishini Wickremesinghe Perera (the News Director of TNL and the daughter of Mr. Shan Wickremesinghe), were detained and questioned under the PTA. There was widespread condemnation of this incident, with the Paris-based Journalists' Rights Organisation accusing the Police of an "unwarranted display of force in dealing with the TNL case."

5. Recommendations and Conclusions

There is an urgent need for the laws affecting media freedom and the freedom of expression to be brought into conformity with Sri Lanka's international obligations under the ICCPR. One of the main deficiencies in the constitutional protection of

²⁵ *INFORM Situation Report*, September 1996, p. 7.

the freedom of expression is the breadth of constitutionally permissible restrictions. Furthermore, the constitutional guarantees of the freedom of expression should incorporate the freedom of expression as including the right to hold opinions without interference and should also explicitly include the freedom of information.²⁶

Censorship has often been imposed in an erratic and arbitrary manner, in blatant violation of the public's right to know. It has also been in violation of international standards of freedom of expression. It is, therefore, suggested that all practices relating to censorship be kept strictly within the framework permitted by international norms, particularly the ICCPR and the Johannesburg Principles on National Security, Freedom of Expression and Access to Information.²⁷

The absence of protection regarding the confidentiality of journalists' sources of information is a serious impediment to investigative journalism and the public's right to know. Accordingly, the right of journalists not to be compelled to disclose their sources of information should be guaranteed by law.

There has been no progress made towards implementing the recommendations of the four committees on media reforms,²⁸ other than the establishment of a National Media Institute which is not yet operational. There remains little or no protection for

²⁶ *Sri Lanka: State of Human Rights 1995*, supra n.1 at p. 52.

²⁷ See *ibid*

²⁸ Supra n 1 at pp 85 ff.

journalists, particularly in relation to the protection of their sources. On the whole, the PA Government appears to be finding it difficult to cope with the concept of an independent media. Given this background it is difficult to envisage the government taking positive steps towards enhancing a culture of independent journalism and media institutions. Consequently, these challenges remain and call for a more activist oriented approach from organisations such as the Free Media Movement in order to protect the freedom of expression and media freedom.

V

Judicial Protection of Human Rights

Sumudu Atapattu *

1. Introduction

Article 126 of the 1978 Constitution confers on the Supreme Court the "sole and exclusive jurisdiction" to hear and determine any case regarding an infringement or imminent infringement of any fundamental¹ right or language right recognised by the Constitution. Such infringement must result from executive or administrative action. Thus, the jurisdiction of the Supreme Court over fundamental rights petitions is restricted to the following:

- (1) The infringement must relate to a fundamental right or language right recognised by the Constitution as embodied

* Senior Lecturer, Faculty of Law, University of Colombo; Consultant, Law & Society Trust.

¹ See the recommendations made by the Law & Society Trust on the draft fundamental rights chapter in 1995, *Fortnightly Review*, Vol VI, Issue No 94 (August 1995) p 12, where it was pointed out that Article 126 should refer to *state action* and not to executive or administrative action.

in Chapters III and IV. Only those rights recognised by the Constitution and which do not fall within any of the exceptions enumerated in the Constitution will be justiciable;

- (2) The infringement must have resulted from an "executive or administrative action", the definition of which has been interpreted by the court on several occasions, and does not include any infringements by the judiciary;²
- (3) The application must be filed in the Supreme Court within one month of the alleged infringement.³

The juridical base for this chapter is the fundamental rights chapter of the 1978 Constitution, as the jurisdiction of the Supreme Court is restricted to those rights which are recognised by the Constitution. Thus, the Court lacks jurisdiction in relation to *human rights* embodied in international instruments to which Sri Lanka is a signatory, unless such rights also constitute fundamental rights.⁴ Examples of rights which are not covered by the 1978 Constitution include the right to life, the right to information and the right to privacy and family life. Several

² See the discussion *infra*. Under Article 120 of the Constitution, however, the Supreme Court also has the jurisdiction to determine the constitutionality of any Bill presented in Parliament, which may, *inter alia*, be contrary to the fundamental rights chapter of the Constitution.

³ Applications under Article 120 must be filed within one week of the Bill being placed on the Order Paper of the Parliament (Article 121).

⁴ See discussion *infra* n. 8, with regard to the distinction between fundamental rights and human rights.

derogation clauses in the Constitution are extended well beyond those recognised in international instruments.⁵

This chapter seeks to review the fundamental rights petitions that have been decided by the Supreme Court during the year under review and to ascertain to what extent the Court has contributed to jurisprudence on the subject, in addition to providing relief to the petitioners.

2. Jurisdiction of the Human Rights Commission of Sri Lanka and the Supreme Court

A concern that was raised in the 1995 Report was the possible conflict of jurisdiction between the proposed Human Rights Commission and the Supreme Court.⁶ The lobby document prepared at the initiation of the Law & Society Trust and presented to the Minister of Justice and Constitutional Affairs in March 1996 pointed, *inter alia*, to this possible conflict.⁷ Pursuant to these representations, a committee was appointed to examine the various recommendations made by the lobby group and it is heartening to note that the subsequent statute, passed by Parliament, takes into consideration the impact of the Human Rights Commission on the jurisdiction of the Court. Thus, section 13 of the Human Rights Commission of Sri Lanka Act No 21 of 1996 provides as follows:

⁵ See in this regard, *Fortnightly Review*, supra n 1.

⁶ See Law & Society Trust, *Sri Lanka: State of Human Rights 1995* (Colombo, 1996) p. 108

⁷ See *Fortnightly Review*, Vol VI, Issue No. 100 (February 1996) p. 1

Where a complaint is made by an aggrieved party in terms of section 14 to the Commission, within one month of the alleged infringement or imminent infringement of a fundamental right by executive or administrative action, the period within which the inquiry into such complaint is pending before the Commission, shall not be taken into account in computing the period of one month within which an application may be made to the Supreme Court by such person in terms of Article 126(2) of the Constitution.

It remains to be seen how the Human Rights Commission will investigate violations of human rights and fundamental rights.⁸

3. Case Law

While the majority of the cases decided in 1995 was primarily concerned with violations of Articles 11,⁹ Article 13(1),¹⁰ and Article 13(2)¹¹ and outnumbered the cases concerned with violations of Article 12, on equality before the law and non-discrimination, the reverse is true for 1996. Of the fundamental

⁸ It must be pointed out that, despite the recommendations of the human rights community, the Act retains the distinction between human rights and fundamental rights, see *ibid*. If this distinction is maintained, it would seem that the National Human Rights Commission's jurisdiction is wider than that of the Supreme Court in certain instances, as the latter's jurisdiction is confined to infringements of fundamental rights as opposed to human rights. The retention of this distinction, however, is not healthy.

⁹ This article deals with freedom from torture, cruel, inhuman or degrading treatment or punishment.

¹⁰ This article deals with freedom from arbitrary arrest and detention.

¹¹ This article deals with the rights of a detained person to be produced before a judge according to procedure established by law

rights cases disposed of in 1996, about 65 percent of the petitions related to violations of Article 12. There is a noticeable decline in the number of petitions relating to Articles 11 and 13(1) and (2). Although incidence of torture and unlawful detention are by no means a thing of the past, the number of petitions to the Court seems to indicate that such incidents are now on the decline. While it could be that such cases have not reached the Court due to disillusionment on the part of potential petitioners, if the true reason for the decline is that such incidents have now in actual fact lessened, then it is a positive development which must be noted by all concerned. It would also seem that people are not hesitant to challenge decisions referring to employment under the clauses relating to non-discrimination and the equal protection of the law. Several petitions also related to violations of Article 14 on the freedom of expression and peaceful assembly.

The year under review also witnessed, for the first time in Sri Lankan history, an appointment to the Supreme Court being challenged by a group of lawyers who claimed, *inter alia*, that their right to practice before an independent judiciary had been jeopardised by the appointment. Although leave to proceed was not granted by the Supreme Court, the case will be discussed in detail in this chapter due to its unprecedented nature.

3.1 Cases under Articles 11, 13(1) and 13(2)

Since most of the petitioners claimed violations of at least two of the above articles, these three articles will be addressed together. A few cases were settled by the parties involved. For example, *S.U. Mahalingam v. OIC, Talangama Police Station*

*and another*¹² involving violations of Article 11, 13(1) and (2) was settled when the respondent formally apologised to the petitioner for his conduct and agreed to pay a sum of Rs 20,000 to the National Defence Fund in lieu of compensation to the petitioner.

The Court was called upon to interpret “executive or administrative action” in *M.T.A. Farook v. OIC, Minuwangoda Police Station and others*,¹³ specifically as to whether judicial action falls within the purview of “executive or administrative action.” The petitioner alleged violations of Article 13 (1) and (2) after he was taken into custody by the respondents and then detained by them on the order of a Magistrate. The court dealt with the two allegations separately.

The main issues were:

- ♦ whether the first and second respondents were acting in accordance with procedure prescribed by law,
- ♦ whether the detention of the petitioner was made in accordance with procedure established by law, and
- ♦ if the answer to the second question is in the negative, had there been a violation of any fundamental right recognised by the Constitution?

The Court answered the first two queries in the negative, finding that there was a violation of Article 13(1) and noting that “even if a law enforcement officer is empowered to deprive a person

¹² SC Application No 179/95 SC Minutes 26.7.1996.

¹³ SC Application No 156/95 SC Minutes 2.8.1996.

of his personal liberty, he must do so strictly in accordance with procedure prescribed by law."

According to the provisions in Article 13(2), Justice Dr Amerasinghe stated that the object of the Article 13(2) is to eliminate arbitrariness and "to afford a person who has been deprived of his personal liberty by executive action, the benefit of placing his case before a neutral person - a judge - so that a judicial mind may be applied to the circumstances and an impartial determination may be made in accordance with the applicable law."

While the Court accepted that a judicial officer may be involved in the violation of a fundamental right through the exercise of his duties, the question in the Farook case is whether such a violation constituted an "executive or administrative action." Referring to previous decisions the Court came to the conclusion that violations of fundamental rights by a judge do not come within the purview of Article 126 of the Constitution "although the judge's decision be erroneous or constitutes a wrongful exercise of judicial discretion even if such decision or wrongful exercise of discretion is based on false or misleading material furnished to him maliciously."

Thus, the Court decided that, although there was a violation of Article 13(2) of the Constitution, it did not have jurisdiction to hear the dispute as the infringement resulted from judicial rather than "executive or administrative action." The Court, however, directed a copy of the judgment to be submitted by the Registrar of the Supreme Court to the Judicial Services Commission "for such action as it may deem to be appropriate."

In *A. Vinayagamoorthy (on behalf of Wimalenthiran) v. The Army Commander and others*¹⁴ the Court had to decide the impact of emergency regulations on the fundamental rights chapter.¹⁵ Here, Wimalenthiran had been arrested at a check-point in Colombo and had been detained, according to the victim, blindfolded continuously for two months in solitary confinement at a house belonging to the Army Intelligence Unit in Kollupitiya. Thereafter, he had been detained on the 4th floor of the Criminal Investigations Department ("CID").

Although the petitioner alleged violations of Articles 11, 13(1), 13(2), 14(1)(g)¹⁶ and 14(1)(h)¹⁷ of the Constitution, leave to proceed was granted only in respect of Articles 13(1) and (2).

In this application, the Court had to consider Article 13(1) and (2) in the light of the Emergency (Miscellaneous Provisions and Powers) Regulations No 1 of 1993 promulgated under the Public Security Ordinance. The Court considered Emergency Regulations 17(1), 18(1) and 19 in particular. According to Article 13(1), no person shall be arrested except according to procedure established by law and Regulation 18(1) provides that "any member of the armed forces may ... arrest without

¹⁴ SC Application No 26/94 SC Minutes 20.12.1996. See also *W.M.A.D.J. Weerasekera v. HQI, Police Station, Kandy and others*, supra n 13.

¹⁵ For a further discussion of the *A. Vinayagamoorthy (on behalf of Wimalenthiran) v. The Army Commander and others* case in reference to Emergency Rule, see chapter III on Emergency Regulations.

¹⁶ This article deals with the freedom to engage in a lawful occupation or profession.

¹⁷ This article deals with the freedom of movement and of choosing the residence within Sri Lanka.

warrant, any person who is committing or has committed or whom he has reasonable ground for suspecting to be concerned in, or to be committing or to have committed, an offence under any emergency regulation ...”

In deciding whether or not the arrest was in accordance with procedure established by law, Justice Amerasinghe stated “the issue is not what *subsequent investigations* may have revealed, but whether *at the time of the arrest* the person was committing an offence, or that there were reasonable grounds for suspecting that the person arrested was concerned in or had committed an offence.” He further pointed out, relying also on Article 13(5) of the Constitution - which provides every person shall be presumed innocent until proved guilty - that no person should be arrested under Regulation 18(1) except where there was a reasonable suspicion that the person concerned has committed an offence. Stressing that the arresting officer need not have clear and sufficient proof of the commission of an offence under the emergency regulations, Justice Dr Amerasinghe stated that he should at least have a *prima facie* basis for conviction.

Although the arresting officer stated that Wimalenthiran was taken into custody as there were reasonable grounds for suspecting him to be concerned with the commission of an offence, no evidence was placed before the Court to support that assertion in order to enable the Court to objectively determine whether there were reasonable grounds for suspicion. Finding that the arresting officer seemed to have acted on some vague, general suspicion, Justice Dr Amerasinghe observed:

The arrest of a person on a speculative basis is insufficient to comply with the procedure established by regulation 18(1). In arresting Wimalenthiran merely on vague grounds of suspicion and not on reasonable grounds of suspicion, the officer making the arrest was not acting in accordance with the procedure established by regulation 18(1) and was therefore acting in violation of Article 13(1) of the Constitution.

With regard to the issue of whether or not Wimalenthiran was informed of the reasons for his arrest, Justice Amerasinghe stated:

Whether a person is arrested under regulation 18(1) or ordered to be detained under regulation 17(1), he or she must be given the grounds for his arrest and detention. It is only when a person has such information that he or she will have the opportunity to rebut the suspicion entertained by the person making the arrest or show that there was some mistake as to identity. In failing to state the grounds for arrest and detention, Wimalenthiran's fundamental right to such information guaranteed by Article 13(1) of the Constitution was violated.

As to whether the victim was informed of the reasons for his arrest, the Court had to ascertain if there was a violation of regulation 18(1) which provides, *inter alia*, that whenever any person is arrested or detained outside the Northern and Eastern provinces by a member of the armed forces, such person should be handed over forthwith to the custody of the officer-in-charge of the nearest police station, or at least within 24 hours of his arrest. Noting that there was a failure to comply with the

mandatory requirement of regulation 18(1), the Court stated that the intention behind that regulation is to ensure that a person arrested is removed as expeditiously as possible from the custody of the armed forces and placed in the custody of civil authorities, as the safety of the citizen is better ensured that way. The Court concluded that there was a violation of Article 13(1) because Wimalenthiran was detained for more than 24 hours and, thus, the army officers had failed to act in accordance with procedure established by law. Justice Dr Amerasinghe further stressed that:

The new regulations of June 1993 introduced several safeguards to ensure the security of persons who are arrested and detained under the Emergency Regulations. In order to prevent or minimize 'disappearances' and abuses, it is of paramount importance that the requirements laid down by the regulations should be strictly observed. They were not intended for merely cosmetic purposes, but for the sake of fulfilling the basic obligation of the State to ensure the personal security and liberty of all persons.

The HRTF which investigated this matter noted in its report received by the Court on the 24 March 1994 that Wimalenthiran had been in detention for 142 days without being produced before a court of law.

As to whether Article 13(2) had been violated, the Court considered regulation 19(2) which provides, *inter alia*, that where a person is taken into custody under regulation 18, he may be held in detention for a period not exceeding 60 days from the date of arrest. Where, however, the person was arrested outside

Northern and Eastern Provinces, he cannot be detained for a period exceeding seven days and unless detained under the provisions of regulation 17, he shall be produced before a Magistrate before the expiry of that period, or released. The Court concluded that if there was no reasonable cause for further detention, Wimalenthiran should have been produced before a Magistrate within 48 hours or if there was reasonable cause for detention, within seven days from 2 October 1993 - the date of arrest - and the failure to do so within the prescribed time was a violation of his fundamental rights guaranteed by Article 13(2).

It is noteworthy that the Court in this case relied on the Amnesty International Report of February 1994 as providing reliable information, *inter alia*, with regard to the date of Wimalenthiran's arrest, the number of days he was detained and the place of detention.

The Court in this judgment enumerated several important principles: first and foremost, it recognised that the Secretary of Defence would not be acting in conformity with the requirements of regulation 17(1) by acting mechanically as a rubber stamp at the behest of the police and signing Detention Orders, without exercising his personal judgment in each case. Secondly, while Emergency Regulations are necessary, they cannot be used to cover illegal activities. In other words, the powers vested in security officers under Emergency Regulations are not unlimited and must be exercised only as the exigency requires. Even during a state of emergency, there are legal safeguards to which a person is entitled and from which there cannot be any derogation. The Court also stated that when arresting a person under Emergency Regulations, the arresting

officer cannot do so on a speculative basis and must act on reasonable grounds of suspicion, which existed at the time of arrest.

3.2 Cases under Article 12

Petitions under Article 12 related mainly to political victimisation, the favouritism of government party supporters in the public service and other discrimination in employment. Several hundred applications were filed to challenge the refusal, by the government, to issue liquor licences to political opponents of the government. Almost all these cases were subsequently settled by issuing the relevant licences.

While most cases were similar and sometimes involved both Articles 12(1) and (2), *Gamini Athukorale and others v. IGP and others*¹⁸ involved violations of Articles 14(1)(a) and (b) as well. It related to the May Day procession and a UNP rally for which permission had been denied by the respondents. The UNP's request for permission from the Kandy Police was refused by the third respondent for "security, logistical and administrative" reasons. The first respondent contended that although the May Day rallies of the main political parties were generally held in Colombo, permission was granted to other political parties to hold theirs at outstation venues. This was held to be discriminatory towards the petitioners and, therefore, constituted a violation of Article 12(1). Such discrimination was due to the respondents' political opinion and, therefore, resulted in a violation of Article 12(2) as well.

¹⁸ SC Application No 137/95 (F/R) SC Minutes 1.8.1996.

The Court further held that, in addition to the violations of Articles 12(1) and (2), there was a violation of the petitioners' right to the freedom of speech and expression guaranteed under Article 14(1)(a) and the freedom of peaceful assembly guaranteed under Article 14(1)(b) of the Constitution.

In *L.B.A. Tennakoon v. IGP and others*¹⁹ the issue was whether the manner in which the first respondent exercised his discretion relating to the transfer of the petitioner constituted a violation of Article 12(1). Refuting the contention of the respondents that being in a transferable service, the petitioner had no fundamental right to be at a station of his choice, the Court observed that Article 55(5) of the Constitution "makes it plain beyond any manner of doubt that the powers of appointment, transfer, dismissal and disciplinary control vested in the Executive, even when delegated, are subject to the fundamental rights jurisdiction of this Court."²⁰ According to the Court, Article 126 does not authorise it to usurp the first respondent's discretion with regard to transfers, it does not automatically follow that the Court is debarred from examining whether the first respondent's conduct violated the petitioner's fundamental

¹⁹ SC Application No 192/95 SC Minutes 30.10.1996.

²⁰ Article 55(5) of the Constitution provides that "Subject to the jurisdiction conferred on the Supreme Court under paragraph (1) of Article 126 no court or tribunal shall have power or jurisdiction to inquire into, pronounce upon or in any manner call in question, any order or decision of the Cabinet of Ministers, a Minister, the Public Service Commission, a Committee of the Public Service Commission or of a public officer, in regard to any matter concerning the appointment, transfer, dismissal or disciplinary control of a public officer" (emphasis added).

rights. In concluding that the respondent's action in transferring the petitioner was unreasonable and arbitrary, the Court held that the petitioner's rights under Article 12(1) had been infringed by the first respondent.

In *P. Chandraratne v. National Savings Bank and others*²¹ the Court found that the petitioner and the third respondent were not similarly situated, as they were not equally qualified, and thus there was no violation of Article 12(1). Thus, in order to claim discrimination on the basis that one has been favoured over another, it is necessary to prove that both individuals are equally qualified.

In *K.D.S. Gunaratne and others v. Ceylon Petroleum Corporation and others*, the petitioners alleged that the summary termination of a dealership agreement between the first respondent and the petitioners, infringed their rights under Article 12(1) of the Constitution.²² The respondent's argument was that the action

²¹ SC Application No 642/95 (FR) SC Minutes 13.9.1996.

²² SC Application No 99/96 SC Minutes 31.7.1996.

For another case involving different facts, see *Krishna Mining Co. (Ceylon) Ltd v. Janatha Estates Development Board and others* (SC Application No. 515/95 SC Minutes 12.9.1996) which involved the non-allocation of an allotment of land for purposes of mining and the petitioners alleged a violation of Article 12(1). In holding for the petitioner that such a violation has occurred, the Court directed the respondents to put up the said allotment for sale by public tender within six months.

With regard to the issue whether the application was time barred, the Court stated that the mere fact that the petitioner had some fear or anticipation of a decision, was insufficient and that although the petitioner is entitled to challenge an imminent infringement, he was nevertheless entitled to wait until there was an actual infringement.

did not constitute executive or administrative action within the meaning of Article 126 because,

- (1) the Board took a commercial decision in respect of a purely commercial transaction;
- (2) and the act was done in the exercise of the first respondent's contractual rights under a concluded contract and it was only at the "threshold stage" (i.e. at or before the time the contract was entered into) that, if at all, it could be regarded as executive or administrative action

The Court concluded that the action of the Ceylon Petroleum Corporation constituted executive or administrative action. Refuting the second contention of the respondents, the Court stated that "the principle of equality embodied in Article 12 does not make any exception, in regard to contracts in general, or particular types of contracts, or the stage at which a contract is. Indeed, the proviso to Article 12(2), as well as Article 12(3), militate against the contention that contracts are excluded."

Referring to the decision in *Perera v. Jayawickrema*,²³ the Court further stated that "the principle of equality before the law embodied in Article 12 is a necessary corollary of the concept of the Rule of Law which underlies the Constitution." Pointing out that the powers vested in the State, public officers and public authorities are neither absolute nor unfettered, the Court stressed

²³ (1985) 1 Sri LR 285 at p 301 as cited in *infra* n 24.

that such powers are held in trust for the public, to be used for the public benefit, and not for improper purposes.²⁴

Holding that the Board resolution cancelling the dealership agreement was a violation of Article 12(1), the Court observed that the Board was not entitled to do so without reason and, for the purposes of Article 12, it was immaterial that the action involved a contract.

In *H.M. M. T. Perera v. IGP and others*,²⁵ the Court dismissed the petition on the ground that the petitioner failed to establish unequal or discriminatory treatment on clear and cogent evidence. Although the petitioner's burden of proof is not as high as in criminal cases, unsuccessful cases indicate that it is not always possible to provide such evidence to the satisfaction of the Court.

In *M.P. Wijesuriya v. National Savings Bank and others*²⁶ the Court held that the unwarranted cancellation of a first interview, at which the petitioner was placed first in order of merit and where the marking scheme was generally known, and the decision

²⁴ See also *M.N. Priyangani v. Provincial Director of Education, Kurunegala and others* (SC Application No 339B/95 SC Minutes 30.8.1996) where the same principle was enumerated. Pointing out that Article 12 provides against the arbitrary and unreasonable exercise of discretionary powers, Justice Fernando stressed:

Discretionary powers can never be treated as absolute and unfettered - unless there is compelling language; when reposed in public functionaries, such powers are held in trust, to be used for the benefit of the public, and for the purpose for which they have been conferred - not at the whim and fancy of officials, for political advantage or personal gain.

²⁵ SC (FR) Application No 452/93 SC Minutes 7.10.96.

²⁶ SC Application No 142/95 SC Minutes 31.1.1997.

to hold a second interview for which a different marking scheme, unknown to the petitioner, was adopted, constituted a violation of Article 12(1). In holding that the petitioner was singled out for discriminatory and unequal treatment, Justice Wadugodapitiya stated:

What was done in this case is against all canons of fairplay, where, not only was a competent Board found fault with and the interview cancelled for no objectively valid reasons, but a new Board was appointed to conduct an interview basing itself upon a changed scheme of marking; which new scheme was not notified and was not within the knowledge of the Petitioner.

3.3 Cases under Article 14

Wimal Fernando v. Sri Lanka Broadcasting Corporation and others is an important case which dealt with the link between the freedom of expression and the freedom of information and the need for close scrutiny.²⁷

The petitioner, a participatory listener in the non-formal education programme ("NFEP") of the Sri Lanka Broadcasting Corporation's ("SLBC") education service, alleged that his fundamental right of the freedom of speech and expression, including publication, guaranteed by Article 14(1)(a) of the Constitution, was infringed by the respondents by the sudden cancellation of this programme.

²⁷ SC Application No 81/95 SC Minutes 30.5.1996.

The contentions in this case were as follows:

- (1) freedom of speech is the right of one person to convey views, ideas and information to others;
- (2) communication is the essence of that right;
- (3) communication necessarily postulates a recipient, because without a recipient the right is futile; and
- (4) therefore, freedom of speech implies, and includes, the right of the recipient to receive the views, ideas or information sought to be conveyed.

It was also argued that the petitioner was not a mere listener but a participatory listener and, therefore, stopping the NFEP infringed his right as a participatory listener and, thus, his freedom of speech.

Both counsel agreed, however, that if the respondents were justified in stopping the NFEP, no question of violating fundamental rights would arise.

As to whether the respondents have a right to stifle criticism of SLBC on its own broadcasts, the Court said:

While, of course, such criticism must be deplored when it is without justification, the right to make and publish legitimate criticism is too deeply ingrained to be denied. Here, too, it is relevant to note that the Government's Media Policy was intended to encourage criticism, in the public interest, in order to expose shortcomings. If nothing else, the right to equality requires that the media itself is not immune from justifiable criticism, internally and externally.

In other words, the main contention here was that the freedom of speech **included** the freedom of information, without which the former right/freedom could not be meaningfully exercised. With regard to the question as to whether listeners have a justiciable right to receive information arising out of the freedom of speech, the Court examined four categories of decisions cited by the counsel for the petitioner:

- (1) The first category of decisions dealt with a person's right to receive information which is either related to, or necessary for, the exercise of his own freedom of speech. The cases, however, do not seem to suggest that there is a right to information *simpliciter* (i.e. for one's own edification) and not intended to facilitate the exercise of the freedom of speech. In other words, the right to receive information or (i.e. freedom of information) is connected to the exercise of the freedom of speech and does not stand alone.
- (2) The next category of cases dealt with rights of listeners to reply to adverse comments made about them. The case of *Red Lion Broadcasting Co v. FCC* ²⁸ was contrasted because, here again, the freedom of information was connected to the exercise of the freedom of speech. In any event, the decision was not based on the broad principle of a listener's right to receive information; but rather on the right to equality and the right to information as a means to realising his freedom of speech.

²⁸ (1969) 395 US 367, referred to in the judgment, *ibid*.

- (3) Yet another category related to decisions under constitutional guarantees similar to Sri Lanka suggesting that listeners (or readers) have a right to receive information. Referring to *Joseph Perera v. AG*²⁹ where Sharvananda CJ stated:

Freedom of speech and expression consists primarily not only in the liberty of the citizen to speak and write what he chooses, but in the liberty of the public to hear and read, what it needs....

Public opinion plays a crucial role in modern democracy. Freedom to form public opinion is of great importance. Public opinion, in order to meet such responsibilities, demands the condition of virtually unobstructed access to and diffusion of ideas. The fundamental principle involved here is the people's right to know.

These comments, however, were *obiter* as there was no finding on freedom of speech.

- (4) The final category related to cases the ratio *decidendi* of which is that the right to information simpliciter is part of the freedom of speech. The Court cited *Visuvalingam v. Liyanage*³⁰ where the Court held that public discussion was important in a democracy and that for its full realisation, public discussion demanded the recognition of the recipient's right. The Court added that the

²⁹ (1992) 1 Sri LR 199 as cited in supra n. 32 at p 14.

³⁰ (1984) 2 Sri LR 123 as cited in supra n. 32 at p 15.

fundamental right of the recipient is subject to the same restrictions as are applicable to other fundamental rights.

Having analysed the above categories of cases, the Court concluded that the right to receive information, *simpliciter*, is not included in the freedom of speech and expression. Rather, as concluded in *Stanley v. Georgia*,³¹ a better rationale is that information is the staple food of thought and that the right to information is a corollary of the freedom of thought.

The Court, in stating that Article 14(1)(a) should not be narrowly interpreted, concluded that Article 14(1)(a) includes every form of expression; and that its protection may be invoked in combination with other express guarantees such as: (1) the right to equality; (2) the right to obtain and record information by means of oral interviews, publications, photographs etc; and (3) the privilege not to be compelled to disclose sources of information.

In this case, however, the Court held that the freedom of speech of the petitioner as a participatory listener had been infringed by the action of the respondents.

The essence of this decision is that the freedom of expression extends to other rights in order to make the express guarantees fully meaningful; it does not, however, include the right to information *per se*. Such a right may exist in order to effectively exercise the freedom of expression or speech; it does not, however, exist in the absence of an express provision

³¹ 394 US 557 as cited in *supra* n 32 at 17.

guaranteeing such right.³² The Court, however, failed to state explicitly that the right to receive information should be read into the freedom of thought. The question remains as to whether this can be inferred from the judgment.

In *N.P. Rahuma Umma v. Deputy Minister of Industries and others*,³³ in which a violation of Articles 14(1) (a) and (b) was alleged, the Court had to decide whether the alleged violation³⁴ was due to "executive or administrative action." The argument of the respondent was that even if the petitioner's version was correct, the first respondent did not have a vestige of authority and the alleged acts were not even remotely related to the office

³² It is pertinent to recall here the draft fundamental rights chapter released by the government in July 1995 which provides, *inter alia*, for the right to receive and impart information and ideas. See *Fortnightly Review*, supra n 1, p 5.

³³ SC Application No 120/95 SC Minutes 8.2.1996.

³⁴ The facts were as follows: The petitioner was the principal of a school in Kekirawa. Arrangements had been made to have a formal opening of a newly constructed building for the school, a gathering of students, parents and well-wishes as well as a prize giving. The Chief Minister and Minister of Education of the Provincial Council of the North Central Province were among the invitees.

A few hours before the ceremony was due to commence, a large crowd of persons led by the first respondent (Deputy Minister of Industries) and police officers, had invaded the school premises, demolished the pandol put up to welcome the Chief Guest (the Chief Minister), cut the ribbon and 'officially' declared the building open, and having ordered the persons present to assemble in the school hall, proceeded to make speeches and distribute the prizes.

The petitioner alleged that the action of the respondents resulted in a violation of her rights guaranteed under Article 14(1)(a) [freedom of speech and expression] and Article 14(1)(b) [freedom of peaceful assembly] of the Constitution.

of the Deputy Minister of Industries. In overruling this preliminary objection the Court stated, referring to its decision in *Velmurugu v. AG and others*,³⁵ that:

in view of the vital nature of this constitutional remedy, it is in accord with the aspirations of the Constitution that this court should take a liberal view of the provisions of Article 126 so that a subject's right to the remedy is in no manner constricted by finely spun distinctions concerning the precise scope of the authority of State Officers...

The Court further stated that:

The idea underlying Article 126 is that no one by virtue of his public office or position should deprive a citizen of his fundamental rights without being amenable to Article 126, even though what the official did constituted an abuse of power or exceeded the limits of his authority.

Chief Justice G.P.S. de Silva noted that the Court in *Velmurugu*'s case adopted a **liberal and purposive approach** in construing the expression "executive or administrative action" in Article 126. The Court also cited the case of *Sunanda Deshapriya and another v. Municipal Council, Nuwara Eliya and the Mayor of Nuwara Eliya*³⁶ where it was held that the Mayoress was acting under colour of her office, although the alleged actions were in no way connected to her official duties. Thus, the respondents'

³⁵ Fundamental Rights Decisions (Vol 1) p. 180 at p. 224 as cited in *supra* n 38 at 5.

³⁶ SC Application 884/92, S.C.Minutes 10.3.95 as cited in *supra* n 38 at 6

submission, that the doctrine of acting under colour of office does not apply where a public officer acts totally without jurisdiction and has no vestige of authority, was rejected by the Court as being unsound in law.

In relation to the issue as to whether acts of private individuals can constitute executive or administrative action, the Court stated that:

the act of a private individual would render him liable if in the circumstances that act is executive or administrative. The act of a private individual would be executive if such act is done with the authority of the Executive; such authority transforms an otherwise purely private act into executive or administrative action; such authority may be express, or implied from prior or concurrent acts manifesting approval, instigation, connivance, acquiescence, participation and the like

3.4 Leave to proceed in relation to the appointment of Dr. Shirani Bandaranayake to the Supreme Court³⁷

In their applications for leave to proceed, the petitioners, being Attorneys-at-Law, alleged that their fundamental rights under Articles 12(1), 14(1)(a) and (g) had been infringed by the appointment of the first respondent, Dr Shirani Bandaranayake, by the President as a judge of the Supreme Court.

³⁷ SC Application Nos. 837/96, 833/96, 934/92 and 842/96. SC Minutes 16.12.96.

The principal issue was the interpretation of Article 107 of the Constitution: whether that provision confers on the President the power to appoint judges without any need for consultation or any other form of co-operation. The petitioners alleged that the Chief Justice's recommendation that Dr Asoka Gunawardena, President of the Court of Appeal, be appointed to the Supreme Court was disregarded and instead, Dr Shirani Bandaranayake was appointed on political grounds despite the fact that she did not have any experience as an Attorney-at-Law.

Relying on Article 4 of the Constitution, the Court stated that the Constitution provides that the three organs of government co-operate with each other in order to realise the aims of the Constitution. Pointing out that Article 107 does not expressly specify any qualifications or restrictions, the Court stated:

However, considerations of comity require that, in the exercise of that power, there should be co-operation between the Executive and the Judiciary, in order to fulfil the object of Article 107.

Apart from considerations of comity, those appointments are of such a nature that co-operation between the Executive and the Judiciary is vital. The President, naturally, would be anxious to appoint the most suitable person available... The Chief Justice, as the head of the Judiciary, would undoubtedly be most knowledgeable about some aspects, while the President would be best informed about other aspects. Thus, co-operation between them would, unquestionably, ensure the best result.

Counsel for the petitioners relied on an explanation given by the President, Court of Appeal, in response to the question, "What is the process by which Judges of the higher courts are selected?:"

*Under the Constitution the President of the Republic has the sole prerogative to appoint Judges of the High Court, the Court of Appeal and the Supreme Court. In practice Judges are selected through a process of nomination by the Chief Justice, the Attorney-General and the Minister of Justice.*³⁸

Thus, the Court noted that while the eventual act of appointment is performed by the President, the power to appoint is neither untrammelled nor unrestrained, and ought to be exercised within limits.³⁹ The Court further stated that it has consistently recognised that powers of appointment are not absolute, and quoted from *Premachandra V. Jayawickreme*:⁴⁰

There are no absolute or unfettered discretions in public law; discretions are conferred on public functionaries in trust for the public, to be used for the public good, and the propriety of the exercise of such discretions is to be judged by reference to the purposes for which they were so entrusted.

The Court stated that the issue was whether the petitioners established, *prima facie*, the lack of co-operation between the

³⁸ *DANA*, Vol XIX, Nos 1-4, Jan-April 1994 (emphasis added) referred to in the judgment, *ibid*.

³⁹ The bench comprised Justices Fernando, Amarasinghe, Wadugodapitiya and Wijetunga (hereinafter referred to as "the Court"). The other bench comprised Justices Perera, Ramanathan and Ananda Coomaraswamy.

⁴⁰ (1994) 2 Sri LR 90 at 105 as cited in *supra* n 42.

President and the Chief Justice. The Court however noted that the petitioners did not ask that a request be made to the Chief Justice to furnish any relevant correspondence on this issue.

Furthermore the Court stated that, since the petitioners failed to establish, *prima facie*, the absence of the necessary co-operation, and failed to indicate how they proposed to rectify that deficiency, it would be futile to grant leave to proceed under Article 14(1)(g) - the freedom to engage in any lawful occupation or profession - which according to the petitioners was breached by want of co-operation. Since the petitioners did not claim to have been contenders for the office to which the first respondent was appointed, they could not claim a violation of Article 12(1). They also failed to establish that their rights under Article 14(1)(a) were infringed.

Thus, the Court recognised that the President's discretion, in relation to the appointment of judges, is not absolute and, more importantly, that the usual form of appointment is through a process of consultation with the Chief Justice. In this case, however, the petitioners did not succeed because they failed to prove that there had been no consultation on the issue. It follows that had they been able to prove either that there had been no consultation at all, or that the President deliberately failed to take account of the recommendations of the Chief Justice, the petitioners may have been successful.

Although the applications of the petitioners were unsuccessful, they serve as a deterrent in relation to future appointments based purely on political grounds, and carried out without proper consultation.

4. Remedies

Remedies granted by the Court in relation to infringements of fundamental rights take the form of (1) a declaration that an infringement of a fundamental right has taken place; (2) award of compensation and costs; or (3) an order for corrective or remedial measures to be taken by the State. While, generally, unsuccessful applications have been dismissed without costs, *D.M. Wasana Susantha v. S.S.P. Police Station, Nugegoda and others*⁴¹ constituted a departure from this practice. In this case, the Court ordered costs amounting to Rs 35,000 (Rs 5,000 each) to be paid by the petitioner to the respondents because the respondents had been falsely named and unnecessarily put to much hardship and expense in defending themselves.

5. Conclusion

As noted earlier, there is a marked decrease in the number of cases filed under Articles 11, 13(1) and (2) and a significant increase in the number of discrimination cases filed under Article 12. However, while the number of discrimination cases increased significantly during 1996, no case related either to gender or racial discrimination. The discrimination alleged related mainly to political opinion and favouritism. Thus, from that point of view, the petitions under Article 12 have been narrowly focused. It remains to be seen how the judiciary would treat cases based on gender or racial discrimination and, indeed, whether aggrieved parties would take such cases to court.

The petitions under Article 12 revealed the diverse backgrounds of the petitioners, (for example, the petitioners ranged from

⁴¹ SC Application No 165/95 SC Minutes 30.9.1996.

telephone operators from remote areas to dealers in petroleum products from the metropolis), indicating that the level of awareness of rights under the law is not necessarily dependent on the socio-economic status of the petitioner.

The view that a violation of fundamental rights by the judiciary does not constitute executive or administrative action is rather narrow and leaves the petitioner without a remedy. The Court, while accepting that an action of a judicial officer could constitute a violation of a fundamental right, failed to state how such violation could be remedied. It is submitted that this situation needs to be rectified by stating specifically in the Constitution that a violation of a fundamental right by judicial action is also justiciable under the Constitution.

Nineteen ninety six was no exception with regard to fundamental rights cases. Although there were no path breaking judgments, the Supreme Court, as the ultimate arbiter with regard to violations of fundamental rights, continued its important task of providing relief to aggrieved parties. The role of the Supreme Court is necessarily remedial in nature where petitioners seek relief once a violation of their rights has taken place. While not under-estimating the important role played by the Supreme Court, attention must be paid to preventive measures as well, so that infringements of rights can be minimised. This can be achieved through a well-structured education and awareness raising programme aimed at public officials who are responsible for safeguarding the rights of people. The decisions of the Court have a possible deterrent effect, and these decisions should be used in such awareness programmes to highlight that state violations of the rights of people will not go unchecked or unpunished.

The judiciary in Sri Lanka has generally tended to be conservative in its approach. This has not, however, prevented it from enunciating important legal principles, thus contributing to fundamental rights jurisprudence on various issues. The Supreme Court, in particular, as the highest court in the judicial hierarchy of Sri Lanka, has played an important role in interpreting the Constitution and creating a considerable body of jurisprudence on issues relating to fundamental rights. Thus, the educational role of the Court cannot be ignored.

Under the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment Act No 22 of 1994, which was adopted to give effect to the UN Convention against Torture, the Attorney-General is empowered to file action in the High Court of Sri Lanka in relation to the offence of torture under the Act.⁴² No cases, however, have yet been filed by the Attorney-General under the Act.

⁴² The offence of torture is defined as: "any act which causes severe pain, whether physical or mental, to any other person, being an act which is -

(a) done for any of the following purposes that is to say -

(i) obtaining from such other person or a third person, any information or confession; or

(ii) punishing such other person for any act which he or a third person has committed, or is suspected of having committed; or

(iii) intimidating or coercing such other person or a third person; or

(b) done for any reason based on discrimination,

and being in every case, an act which is done by, or at the instigation of, or with the consent or acquiescence of, a public officer or other person acting in an official capacity" (section 12).

The punishment for a person found guilty under the Act is imprisonment of either description for a term not less than 7 years and not exceeding 10 years and a fine not less than Rs 10,000.00 and not exceeding Rs 50,000.00 [section 2(4)].

VI

A Case Study of the Office of the Ombudsman

Deepika Udagama*

1. Introduction

A salutary feature of the 1978 Constitution of Sri Lanka ("the Constitution") is the introduction of two mechanisms to redress violations of fundamental rights recognised in Chapter III. One mechanism is the fundamental rights jurisdiction vested in the Supreme Court;¹ the other is the Office of the Parliamentary Commissioner for Administration or "the Ombudsman."² While the former was envisaged as a legalistic mechanism, the latter, one can reasonably surmise, was intended to be an informal, easily accessible avenue of redress against violations arising from administrative excesses.

The objective of this chapter is to examine whether the Office of the Ombudsman has been effective in protecting fundamental rights by providing the public with a broad avenue of redress. For this purpose, the legal framework within which the

* Senior lecturer, Faculty of Law, University of Colombo; Consultant, Law & Society Trust.

¹ The Constitution of Sri Lanka, Article 126.

² Ibid, Article 156.

Ombudsman functions will first be examined. This discussion will be followed by an inquiry into the actual practice of the Ombudsman.

2. The Legal Framework

Article 156 of the Constitution requires Parliament to adopt a legal framework for the establishment of the Office of the Ombudsman "charged with the duty of investigating and reporting upon complaints or allegations of the infringement of fundamental rights and other injustices by public officers...."

Almost three years after the adoption of the Constitution, Parliament enacted the Parliamentary Commissioner for Administration Act No. 17 of 1981 ("the 1981 Act") to establish the Office of the Ombudsman, define its powers, duties and functions, and provide for related matters. This Act was extensively amended by Act No. 26 of 1994 after the current PA Administration took office, with the stated aim of expanding the powers of the Ombudsman. These two statutes govern the Office of the Ombudsman at present, operating within the framework of the relevant Constitutional provisions.

3. Independence of the Ombudsman

The Constitution itself declares that the Ombudsman, who is to be appointed by the President, shall hold office during good behaviour (as opposed to during pleasure), thus placing limits on the President's discretion.

An incumbent can be removed only on constitutionally specified grounds, viz. removal by the President on account of ill health,

physical infirmity or by an order, after an address of Parliament.³ The 1981 Act provides that the procedure relating to removal by the last method, including obtaining approval of Parliament for such removal, will be the same as in the case of a removal of a superior court judge as specified by the Constitution.⁴

The age of retirement is specified by the 1981 Act as 68 years.⁵ The salary of the Ombudsman is determined by Parliament and cannot be diminished during term of office.⁶ The 1981 Act further provides that salary shall be charged on the Consolidated Fund.⁷

4. Powers and Functions

As indicated earlier, the Constitution spells out the main functions of the Ombudsman as “investigating and reporting” allegations of infringements of fundamental rights and **other injustices**⁸ by public officers, officers of public corporations, local authorities and other like institutions. The Act describes an “injustice” as including any injustice alleged to have been, or likely to be, caused by any decision or recommendation (including a recommendation to a Minister) or by any act or omission and the infringement of **any rights recognised by the Constitution**.⁹ The rights guaranteed by the Constitution include

³ Ibid, Article 156(4).

⁴ Section 3(7) of Act No. 17 of 1981.

⁵ Ibid, section 3(5)(c).

⁶ The Constitution of Sri Lanka, Article 156(3).

⁷ Section 3(4) of Act No.17 of 1981.

⁸ Emphasis added.

⁹ Section 10 (6) of Act No.17 of 1981 as amended by Act No. 26 of 1994 (emphasis added).

language rights, in addition to fundamental rights and the franchise.¹⁰

However, the 1981 Act incorporates a lengthy list of matters that cannot be the subject of inquiry by the Ombudsman. The list is so over-encompassing that the powers of the Ombudsman seem to be defined more in terms of subjects into which the Ombudsman cannot inquire. Article 11 of the 1981 Act is fully reproduced in Annex I for the information of readers as it is crucial to understand the parameters of the legal powers (or lack of them) of the Ombudsman to assess the performance of the office. For example, the appointment, transfer, dismissal or disciplinary control of public officers are excluded subjects under section 11(b)(v), thus constituting a serious limitation on the powers of the Ombudsman.

The saving grace, however, is that the excluded list of "injustices" can nonetheless be investigated by the Ombudsman, if they amount to an infringement of a fundamental right.¹¹

Curiously, the 1981 Act also authorises the Ombudsman to look into any "decision, determination, recommendation, act or omission of the Ombudsman or of any Deputy Ombudsman" if such act amounts to an infringement of a fundamental right.¹² This provision gives rise to a serious conflict of interest since the Ombudsman is authorised to look into his or her own alleged infringements, thereby resulting in a violation of a fundamental principle of natural justice.

¹⁰ The Constitution of Sri Lanka (1978) chapter IV.

¹¹ Section 11(b)(viii) of Act No. 17 of 1981. See Annex 1.

¹² Ibid, Section 11(b)(viii).

5. Deputy Ombudsmen

The 1981 Act does make provision for the appointment of one or more Deputy Ombudsmen in consultation with the Ombudsman.¹³ The Ombudsman can delegate to a Deputy Ombudsman any of his or her powers, except the power of delegation itself and the power to make the annual report to the President and Parliament.¹⁴

All guarantees pertaining to security of tenure and salary of the Ombudsman apply to Deputy Ombudsmen as well. However, the age of retirement of the latter is 65 years as opposed to 68 years for the Ombudsman.¹⁵

The provision for Deputy Ombudsmen is crucial, considering the need to provide speedy and efficient relief, especially by a mechanism such as the Office of the Ombudsman, envisaged to be an informal avenue of redress that transcends the legal technicalities implicit in court procedures. Furthermore, Deputy Ombudsmen can function at a regional level, thereby obviating the need for all complainants to come to the capital city, Colombo, as is the case when recourse is made to the fundamental rights jurisdiction of the Supreme Court.

Unfortunately, to date, not a single Deputy Ombudsman has been appointed, apparently due to lack of funds.

¹³ Ibid, Section 8(1).

¹⁴ Ibid, Section 8(2).

¹⁵ Ibid, Section 8(6).

6. Public Access to the Ombudsman

In many other countries, the institution of the Ombudsman is characterised by easy access, sometimes through a mere telephone call or a letter. This ease of access sets the institution apart from most other formal human rights redress mechanisms. In fact, easy public access is thought to be the key to the effectiveness of the Ombudsman as a "people oriented," rather than a "technically oriented," institution.

To the great chagrin of the public, however, complainants were denied direct access to the Ombudsman by the 1981 Act. Section 10 of the Act required each complaint to be channelled through a Member of Parliament ("MP") who was to then submit it to the Public Petitions Committee of the Parliament via the Speaker. The Ombudsman could inquire into a complaint only when that Committee was of the view that the complaint disclosed an injustice or an infringement of a fundamental right.

Parliamentary Standing Order No. 128 established a Public Petitions Committee consisting of 10 MPs for purposes of channelling complaints to the Ombudsman. Standing Order No. 25A stipulates the conditions to be fulfilled in submitting a petition to this Committee.

Each petition has to be presented to the Speaker for approval through an MP. It is only with such approval that a petition can be presented to Parliament, after which it will be referred to the Public Petitions Committee.

This convoluted and cumbersome procedure prompted Mr. Sam Wijesinha, the first Ombudsman, to declare in his annual report

for 1984, "Sri Lanka is the only country in the world which filters such petitions through so many levels."¹⁶ He further pointed out that:

the Indian experience [epistolary jurisdiction of the Supreme Court] could be a major break-through in bringing justice to the large mass of people. In parts of Canada a mere telephone call to the office of the Ombudsman could be the basis of an investigation. In some countries the Ombudsman could commence inquiries on his [sic] own initiative.¹⁷

According to the 1984 annual report, a mere 32 petitions were referred by the Public Petitions Committee in that year,¹⁸ while 29 more spilled over from the previous year this after only three years of existence of the Office of the Ombudsman!

In response to wide criticism of such self-defeating technical requirements, in 1994, the newly elected PA Administration initiated amendments to the 1981 Act to enable the public to submit petitions directly to the Ombudsman. If the Ombudsman is of the view that the petition should be entertained under the law, then an inquiry will be made into it.¹⁹

Although this amendment did not go so far as Mr. Wijesinha wished, to allow complaints to be lodged over the telephone or

¹⁶ Parliamentary Series No. 76, Report of the Parliamentary Commissioner for Administration (Ombudsman) for the year 1984 (9 July 1985) p 45.

¹⁷ Ibid, pp 45-46.

¹⁸ Ibid, p. 43.

¹⁹ Section 10 (2) and (3) of Act No. 17 of 1981 as amended by Act No. 26 of 1994.

to permit the Ombudsman to act on his or her own initiative, it did nevertheless, mark a major improvement vis-à-vis public access to the Ombudsman.

In the annual report for 1995, the present Ombudsman points out that subsequent to the 1994 amendment, 5,221 petitions were received directly by the Ombudsman, in addition to the 41 referred by the Public Petitions Committee in that year.²⁰

7. Inquiry Procedure

Once the Ombudsman decides to inquire into petitions directly received or received from the Public Petitions Committee, he or she may inform the head of the respondent institution concerned of his or her intention to conduct such an investigation.²¹

Although the investigation is to be conducted in private, the Ombudsman has the discretion to decide whether or not a hearing is to be held. No person, as of right, can make representations or give evidence at such a hearing. Additionally, no representation through another party is permitted during an investigation.²² The head of an institution is entitled to make representations either orally or in writing. The Ombudsman is given the power to regulate procedure pertaining to investigations and hearings as he or she thinks fit, but subject to the provisions of the Act.²³

²⁰ Parliamentary Series No. 15, Report of the Parliamentary Commissioner for Administration (Ombudsman) for the year 1995 (21 August 1996), p 59.

²¹ Section 15(1) of Act No. 17 of 1981.

²² Ibid, Section 15 (3) and (4).

²³ Ibid, Section 15 (4)(d).

For purposes of investigation, the Ombudsman has been given broad powers; to procure evidence, either orally or in writing; to subject a witness to an oath or affirmation; to summon witnesses in order to examine them or to produce documents or objects in their possession or control and require persons in charge of custodial institutions (like prisons and psychiatric hospitals) to produce any person before the Ombudsman.²⁴ He or she can also enter upon any premises occupied by government departments and the like for purposes of investigation, after notifying the head of the institution.²⁵

The investigation may be discontinued if the Ombudsman is of the view that:

- (i) the complainant has had an adequate alternate remedy or right of appeal;
- (ii) the complainant does not have a sufficient interest in the subject matter of the complaint;
- (iii) there has been an unreasonable delay in submitting a complaint (no time limit, however, is specified);
- (iv) the investigation may be prejudicial to the security, defence or international relations of Sri Lanka; or
- (v) the investigation may be prejudicial to the maintenance of discipline or order in any prison or place of detention.²⁶

²⁴ Ibid, Section 16.

²⁵ Ibid, Section 19 (1) and (2).

²⁶ Ibid, Section 13(1).

Where an investigation is so discontinued, the Ombudsman must inform the complainant and the Public Petitions Committee of that fact.²⁷ The decision, on the part of the Ombudsman, not to investigate a complaint in the first place or to discontinue an investigation that has been initiated may not be reviewed by a court of law.²⁸

8. Relief that Could be Granted

Before the 1994 amendments were adopted, the Ombudsman could only report his determinations, together with any recommendations to redress the grievances, to the Public Petitions Committee. It was then up to the Committee to report to Parliament "its opinion on the action to be taken on the Ombudsman's report."²⁹ As in the case of the submission of complaints, the final redress or relief was also solely within the purview of the Public Petitions Committee. The unsatisfactory nature of this position need not be further elaborated upon.

The 1994 amendment has made a significant change in this regard by empowering the Ombudsman to report his or her determinations, together with accompanying reasons, to the head of the institution concerned, the Minister under whose purview the institution concerned is, and the Public Petitions Committee.³⁰ Where the Ombudsman determines that there has been an infringement of a fundamental right or any other injustice, he or she may make suitable recommendations and require the

²⁷ Ibid, Section 13 (2) as amended by Act No. 26 of 1994.

²⁸ Ibid, Section 14 but see Section 11(b) (viii) discussed in section 4 above.

²⁹ Ibid, Section 17(2).

³⁰ Ibid, Section 17(2) as amended by Act No. 26 of 1994.

head of the institution to notify him or her of the steps proposed to give effect to those recommendations.³¹

The recommendation could be one of the following specified by law; that:

- (i) the matter be re-considered;
- (ii) the omission be rectified;
- (iii) the decision be cancelled or varied;
- (iv) the practice on which a decision, recommendation, act or omission was based be altered; or
- (v) reasons be given for the decision, recommendation, act or omission.³²

If no action is taken within the time period specified by the Ombudsman to give effect to the recommendations, the Ombudsman must forward a report to the President and Parliament.³³

9. Operational Aspects of the Office of the Ombudsman

In the earlier sections, the legal framework within which the Ombudsman operates was described. In this section, the ground reality regarding the operational aspects of the Office of the Ombudsman will be set forth, mainly with a view to assessing the impact of the institution in protecting fundamental rights.

³¹ Ibid, Section 17(3) as amended by Act No. 26 of 1994.

³² Ibid, Section 17(3)(b) as amended by Act No. 26 of 1994.

³³ Ibid, Section 17(3)(c) as amended by Act No. 26 of 1994.

The comments here are largely based on the annual reports submitted by the Ombudsman to the President and Parliament as required by section 18 of the 1981 Act. Reports submitted in 1984, 1985 and 1995 were available for comment. No other report could be obtained. The report for 1996 has yet to be tabled in Parliament.

9.1 Accessibility

A dramatic increase in the number of complaints received by the Ombudsman was observed in 1995, subsequent to the amendments of 1994, which enabled individuals to petition the Ombudsman directly. While the total number of petitions received for the entirety of a twelve year period, 1982 - 1994, through the Public Petitions Committee was 1,075, in 1995 alone, 5,221 direct petitions were received, with 41 from the Public Petitions Committee making a total of 5,262.³⁴ This upsurge can be attributed to the liberalisation of the petitioning procedure, coupled with the increased public awareness of the institution, engendered by the wide publicity given by the local media to the amendments to the 1981 Act.

The statistics for 1995 provided above do reveal a salutary trend brought about by the new reforms to the 1981 Act. Unofficial statistics for 1996 indicate that the upsurge in the number of petitions in 1995 had levelled off to some extent. The number of direct petitions received in 1996 was 2,396, with an additional 36 received from the Public Petitions Committee.

³⁴ *Supra* n 20 at p. 59.

Now that direct access to the Ombudsman has been made possible, a greater awareness among the public of the role and functions of the Ombudsman is crucial for the institution to discharge its objectives effectively. The current Ombudsman, Professor B. Bastiampillai, has prepared leaflets in Sinhala, Tamil and English, to be distributed among the general public, explaining the role and functions of the office, together with basic information about forwarding complaints.

The process of raising public awareness and accessibility to the Ombudsman would be strengthened if Deputy Ombudsmen were appointed who could function at a regional level. Even those members of the public who are aware of the role and functions of the institution perceive it as a distant, centralised institution in the capital rather than one which is in close proximity to their daily lives.

9.2 Nature of complaints and jurisdiction

Most cases reported in the early annual reports relate to land acquisitions and delay in the payment of compensation.³⁵ Such cases are not deemed to relate to fundamental rights. A broad range of human rights, such as the right to property, are not enshrined in the 1978 Constitution of Sri Lanka. It must also be pointed out that the jurisprudence relating to the chapter on fundamental rights developed gradually, with the Supreme Court delineating the parameters of the rights guaranteed by the Constitution over the years. This gradual process of interpretation

³⁵ However, there is no way to ascertain whether cases reported are a representative sample.

also may have contributed to the reluctance on the part of successive Ombudsmen, to categorise many complaints as those pertaining to violations of fundamental rights.

In the report submitted in 1984, the then Ombudsman states:

*The general impression one gets from a preliminary examination of the petitions is that most of them "do not disclose an infringement of a fundamental right or other injustice by a public officer or officer of a public corporation, local authority or other like institution" but mainly deal with matters regarding appointments, transfers and disciplinary control of public and of corporation officers. In terms of section 11 of Act No. 17 [of 1981], I am debarred from inquiring into these matters and as such I had to return 107 petitions...*³⁶

It has to be pointed out that while section 11 does indeed exclude "the appointment, transfer, dismissal or disciplinary control of public officers" from the Ombudsman's jurisdiction, such matters certainly do relate to issues pertaining to fundamental rights - especially the right to equality - and could therefore be inquired into under the exception provided for in the very same section.

Interestingly, the present Ombudsman states in the Annual Report for 1995 that:

Even though it was understood from my office that my predecessors had been earleir [sic] somewhat wary in

³⁶ Parliamentary Series No.59. Report in terms of section 18 of the Parliamentary Commissioner for Administration Act, No.17 of 1981 (24 February, 1984) pp. 31-32.

*inquiring into allegations of violations of fundamental rights, the present Parliamentary Commissioner for Administration ventured into investigating such complaints that alleged that fundamental rights had been violated.*³⁷

Indeed, a number of inquiries reported in the 1995 report relate to alleged violations of the right to equality and language rights. However, the analysis of the complaints is not couched in terms of fundamental rights language. Nevertheless, the acknowledgement by the Ombudsman, of the need to pay greater attention to complaints of violations of fundamental rights, is encouraging.

This commitment will be more meaningful for the protection of fundamental rights if such complaints are inquired into, analysed and if relief is granted employing rights discourse, than merely through the use of reasoning common to other forms of injustices. Such a practice will definitely give rise to a unique body of fundamental rights "jurisprudence," thereby providing guidance to administrators.

On the whole, the biggest institutional drawback to the effective functioning of the Ombudsman appears to be the extensive categories of complaints that are excluded from the jurisdiction of the Ombudsman under section 11(b) of the 1981 Act. In 1995 alone, of the 5,262 cases received, 727 complaints had been rejected under terms of section 11(b).³⁸

³⁷ Supra n 20 at p. 62.

³⁸ Ibid, p 59.

9.3 Inquiry procedure

Although the Ombudsman is not obliged, by law, to hold a hearing in relation to the inquiry process, details culled from the annual reports point to a consistent practice of holding hearings. It is clear that these oral hearings are meant to afford the parties an opportunity at mediation or conciliation. This is certainly a healthy trend.

In the annual report for 1995 the Ombudsman bemoans the fact that, sometimes, there is a tendency on the part of heads of departments to send subordinate officials who are ill prepared or incompetent to effectively participate in the hearings. Therefore, the Ombudsman now makes it "explicit that either heads or responsible duly authorised representatives of departments only be sent so that they could take decisions or arrive at settlements."³⁹

9.4 Enforcement

Although the effective enforcement of the settlement is of the essence, it remains a continually problematic area. The current Ombudsman accuses the heads of corporations more than the heads of other public institutions for non-compliance.⁴⁰

The reforms brought about in 1994 strengthened the hand of the Ombudsman by enabling him or her to communicate directly with the head of the relevant institution regarding the settlement reached, and to provide a time frame within which redress had

³⁹ Ibid, p 69.

⁴⁰ Ibid, p 61.

to be afforded. The reforms also enable the Ombudsman to inform the relevant Minister of the final determination. However, in the event of non-compliance, all that the Ombudsman can do is to forward a report to the President and the Parliament.⁴¹

The absence of strict enforcement powers, such as holding the defaulter in contempt of the authority of the Ombudsman, is an enormous lacuna in the operative legal framework and needs to be addressed without delay. By contrast, the newly constituted Human Rights Commission can enforce its directives through contempt procedures.⁴²

9.5 The lack of adequate resources

On a visit to the Office of the Ombudsman one is, at once, struck by the severe resource constraints under which the institution is compelled to discharge its functions.

The office is housed in a medium sized ordinary residence, rented for the purpose. There is no separate meeting or conference room where the hearings can be conducted with adequate privacy. The hearings, we were told, are conducted in the open sitting room of the house. Twenty two staff members work huddled in the various small rooms of the building. The only one motor vehicle, which also serves as the Ombudsman's official vehicle, has been assigned to the entire office.

⁴¹ Act No. 17 of 1981 Section 17(3)(c) as amended by Act. No. 26 of 1994.

⁴² Section 21 of the Human Rights Commission of Sri Lanka, Act No 21 of 1996.

While computers are often a basic amenity in important government offices, we have been made to understand that permission has been denied to the Ombudsman to use the general funds allocated to the Ombudsman's office, for the purpose of purchasing computers. The Ombudsman, himself, stressed the need to computerise the work of his institution for its effective functioning.

This abysmal situation is certainly a travesty, in the light of the largesse enjoyed by politicians occupying government offices, as well as by their acolytes and assistants. Whether this policy of deprivation is calculated or is due to indifference, it certainly has to be condemned outright. The effectiveness and dignity with which an institution such as that of the Ombudsman ought to function is of utmost importance to the public interest. The indifference displayed by the authorities toward this institution, and for that matter toward most human rights institutions, is not only a denigration of those institutions, but also amounts to a contemptuous treatment of the public.

The situation with regard to the personnel of the institution leaves much to be desired. The current practice appears to be the secondment of personnel by the Ministry of Public Administration. In the report submitted in 1984, the first Ombudsman complains that:

the major drawback of the present system under which the staff of the Parliamentary Commissioner is provided is that the staff belongs to a transferable service and may not be permanent members of the staff of the Parliamentary

*Commissioner. This could have certain difficulties in the performance of my duties....*⁴³

Similarly, the current Ombudsman observes that the:

*reluctance of officers, however, to serve in a small office like that of the Parliamentary Commissioner for Administration is noticeable. Perhaps this is because of the absence of an opportunity to perform "adequate" overtime duties or to receive any other perquisites associated with officers? The provision of some form of incentive may probably lure good officials to work in my office.*⁴⁴

Certainly the poor working conditions on the premises currently occupied would further worsen a mediocre official's motivation and performance.

In 1995 only two cases had been completed.⁴⁵ This slow outcome may well be due to the lack of competent personnel to assist the Ombudsman. Indeed, at present there are no more than two to three senior level administrative officers in the institution. If the Ombudsman's office could independently recruit its staff, with adequate remuneration and satisfactory working conditions, the quality of performance would likely improve by leaps and bounds. As pointed out earlier, Deputy Ombudsmen cannot be appointed at present, due to inadequate funds allocated to the institution.

⁴³ Supra n 16 at p 31.

⁴⁴ Supra n 20 at p 71.

⁴⁵ Ibid at p 95.

10. Conclusions

The Office of the Ombudsman has been in existence since late 1981. Taking all factors into consideration, one cannot come to a reasonable conclusion that the institution, in its near 16 years of existence, has had a positive impact on the advancement of fundamental rights in the country.

One of the primary reasons for this situation is the legal fetters imposed by the 1981 Act, which did not permit the public direct access to the Ombudsman. Another major reason relates to the large number of subjects which are excluded from the purview of the Ombudsman's mandate under section 11(b) of the 1981 Act. It also appears that either through a narrow understanding of fundamental rights, or for other reasons, complaints that could have been treated as pertaining to alleged violations of fundamental rights, have not been treated as such. It is heartening to note that the current Ombudsman has publicly recognised this shortcoming and has pledged to give due consideration to those complaints pertaining to violations of fundamental rights.

It is hoped that the reforms brought about by Act No. 26 of 1994, permitting direct access to the Ombudsman, will make the institution perform its role in a manner relevant to the needs of the public.

It has to be pointed out, however, that despite the liberalisation of access, the categories of subjects falling outside the jurisdiction of the Ombudsman remain unchanged; the reforms of 1994 have not addressed that aspect of the 1981 Act. It is hoped that future reforms of the law relating to the Ombudsman

will seek to remedy the existing unsatisfactory situation in that regard.

While the thrust of the 1994 reforms was progressive, the absence of a strong political will on the part of successive governments to make it possible for human rights related institutions - such as that of the Ombudsman - to function effectively by, providing adequate resources and financial autonomy, renders the whole exercise a farce and adds to the cynicism of an already cynical public. This is especially so in the face of the blatant squandering of public funds for perquisites of politicians and their acolytes, while institutions that promote good governance and democracy wither for want of resources or adequate powers.

The situation with regard to the Office of the Ombudsman is symptomatic of the emphasis placed on superficial aspects of institution-building by successive governments. Initially, laws are enacted to establish institutions, and pious public statements are made by politicians. However, such actions are often followed by weak appointments and neither adequate powers nor adequate personnel or finances are provided for the institution to perform its role in an effective manner. In Sri Lanka this phenomenon is particularly noticeable in respect of human rights institutions. Politicians must recognise that human rights institutions are essential in preserving democracy and political stability in the country, as they provide the public with fora to air grievances against the state.

11. Recommendations

1. Section 11(b) of the 1981 Act should be reviewed and amended so that the excluded categories of subject matter are reduced as far as possible. The anomaly created by section 11(b)(viii) also ought to be remedied.

In the meantime it is hoped that the Ombudsman will liberally interpret the clause that makes it possible to investigate any excluded subject matter if the facts disclose an infringement of a fundamental right.⁴⁶ For this purpose it is essential to adopt a broad view of the concept of fundamental rights and also to analyse the actual situations employing rights discourse.

2. It is recommended that Section 17 (as amended in 1994) be further amended so that the Ombudsman may issue directives that could be enforced through contempt procedure as in the case of the newly established Human Rights Commission.
3. It is imperative that adequate resources be provided to the Office of the Ombudsman so that it could discharge its functions effectively. An assessment of needs should be carried out by relevant authorities, taking into consideration the views of the current as well as past Ombudsmen, before computing the annual allocation of funds. The provision of necessary funds must be prioritised. Parliament should play a major role in ensuring that

⁴⁶ Section 11(b).

necessary funds are made available to its Ombudsman. It is also imperative that the Ombudsman be given sufficient discretionary powers over expenditure rather than having to await approval from the Treasury and the Presidential Secretariat, as is the current practice. The Ombudsman ought to be financially accountable to Parliament, through the Auditor General.

4. It is essential that adequate resources be made available, especially so that Deputy Ombudsmen could be appointed to function at a regional level under the 1978 Constitution.
5. The staff of the office of the Ombudsman ought to be recruited independently, having due regard to the needs of the office.
6. The proposed constitutional reforms should mandate an Ombudsman for each unit of devolution. This measure is essential to increase access to justice and also to enhance the principle of the devolution of power itself.

ANNEX I

Section 11 of Act No 17 of 1981

Nothing in this Act shall authorize the Ombudsman to investigate or report upon -

- (a) any complaint or allegation of the infringement of a fundamental right or other injustices alleged to have occurred prior to the commencement of the Constitution;

- (b) any allegation of an injustice not amounting to an infringement of a fundamental right, relating to -
 - (i) the exercise, performance or discharge of any power, duty or function under the Public Security Ordinance or the law for the time being in force relating to public security;
 - (ii) any decision, recommendation, act or omission of any attorney-at-law acting as legal advisor to, or appearing in any proceeding for, the State, any public corporation, local authority or other like institution, including the Attorney-General, Solicitor-General or any legal officer of the department of the Attorney-General, or any attorney-at-law acting under the special authority of the Attorney-General;
 - (iii) any person who is or was a member of the Armed Forces, Police Force or other Forces charged with the maintenance of public order, so far as the matter relates to -
 - (a) the terms and conditions of his service; or
 - (b) any order, command, decision, penalty or punishment given to him in his capacity as such member;
 - (iv) the institution of civil or criminal proceedings or the conduct thereof, and any decision or recommendation therefor;

- (v) the appointment, transfer, dismissal or disciplinary control of public officers;
- (vi) any decision, recommendation, act or omission of the Auditor-General;
- (vii) any decision, recommendation, act or omission of the Commissioner of Elections; or
- (viii) any decision, determination, recommendation, act or omission of the Ombudsman or of any Deputy Ombudsman.

VII

The Devolution Proposals: The Human Rights Implications

Vijaya Samaraweera*

1. Introduction

The making of a new constitution for Sri Lanka, which began in 1994 with the deliberations of the Parliamentary Select Committee on the Constitution ("the Select Committee"), reached a significant stage in August 1995, when the People's Alliance ("PA") government placed before the public its proposals for the devolution of power from the centre to the periphery.¹ The proposals, quickly dubbed the "devolution package,"² marked

* Visiting Senior Fulbright Fellow; Consultant, Law & Society Trust.
¹ For the text of the government's devolution proposals and President Chandrika Kumaratunga's Address to the Nation introducing the proposals see, *Fortnightly Review*, Vol. V, Issue 93 (June & July 1995), pp 3-20, and *Sri Lanka: The Devolution Debate* (International Centre for Ethnic Studies, Colombo, 1996) pp 113-33. While Law and Society Trust, *Sri Lanka: State of Human Rights 1995* (Colombo, 1996) did not examine the devolution proposals in detail, it republished the text of the proposals as Schedule III (pp 248-61).

² One commentator has described these proposals more as a "pre-constitutional document than a statement of governmental policy," see Lakshman Marasinghe, "Some Thoughts on the Devolution Package" in *Sri Lanka: The Devolution Debate*, supra n 1 at p 11. Given its later metamorphosis, this distinction is moot.

the first step of the process which the government envisaged would culminate in the incorporation of concrete provisions for devolution in the proposed new constitution. The process took an important turn in 1996 but, by the year's end, the final outcome remained indeterminate. This chapter seeks to appraise the substantive features of the devolution proposals from the perspective of human rights.

2. The Devolution Proposals

The devolution package was framed and presented by the PA government within the wider context of Sri Lanka's democratic polity and national economy.³ However, there is little doubt that it was conceived and introduced by the government as a formula for the resolution of the protracted "Eelam War" for separatism; it offered the minority Tamils specific constitutional provisions they could adopt as providing for the proper framework for their subscription and allegiance to the majoritarian Sinhalese polity.

There were a number of obvious considerations in the conception of the package. First, although military operations against the LTTE were conducted with renewed vigour by the government, and at various times the ultimate defeat of the LTTE was publicly forecast, it was manifest that the separatism issue was not one which could be resolved by force of arms. Secondly, there was the recognition that the existing constitutional and legal order

³ See, President Kumaratunga's Address in, *Fortnightly Review*, supra n.1, pp 3-8; G.L. Pieris, "Towards Effective Devolution" in *Sri Lanka: The Devolution Debate* supra n 1 at pp 3-10.

for the devolution of power from the central government to the provinces, comprised the 13th Amendment to the 1978 Constitution and the Provincial Councils Act of 1988, was both unsatisfactory and inadequate for the fulfilment of the political aspirations of the Tamil community. Thirdly, it was obvious that the incorporation of a more comprehensive set of fundamental rights in the new constitution,⁴ as contemplated by the deliberations of the Select Committee since November 1994, alone was insufficient. Fourthly, Indian intervention was no longer a factor in Sri Lankan policy making with respect to the ethnic issue. This situation was dramatically different to that which existed prior to the PA rise to power in 1994, when the Indo-Sri Lanka Accord of 29 July 1987 between Indian Prime Minister Rajiv Gandhi and Sri Lankan President J.R. Jayewardene effectively determined the constitutional changes and legal measures that were adopted in relation to devolution.⁵ Finally, international opinion, including most importantly the aid donor countries, continued to press the government to offer meaningful political solutions for ending the war.

The devolution package carried provisions of both substantive and procedural significance. The substantive significance lies in the fact that the proposals marked a departure from the constitutional path hitherto followed, represented and symbolised in the 13th Amendment to the 1978 Constitution adopted in 1987, for the sharing of power between the centre and the

⁴ Law Society Trust, *Fortnightly Review*, Vol. VI, Issue 94 (August 1995).

⁵ See, S.D. Muni, *Pangs of Proximity: India and Sri Lanka's Ethnic Crisis* (1993).

periphery. The proposals contained in the package did not simply constitute a re-casting of the measures then in existence with slight modifications. Rather, they represented the re-thinking of the nature of the Sri Lankan polity and state in the context of the imperative of an explicit re-apportionment of both power and responsibility between the centre and the regions (the term chosen to replace "provinces").⁶

Procedurally, the package was significant because the public was given the opportunity, as a first step, to examine and comment upon a concrete formulation before its being subjected to review by the Select Committee. In fact, the public comments which it evoked eventually led to several changes in its development as the draft constitutional provisions. This, however, does not mean that the people of Sri Lanka have the "ownership of changes". With the exception of the opportunity to comment on the package, they were not given a direct participatory role in the constitution-making. There is a further implication: since the draft constitution as a whole was not made public in 1996, the evaluation of the devolution package necessarily focused only on its intrinsic merits and could not consider it in relation to the other constitutional provisions.

Both in format and in substance the draft constitutional provisions relating to a devolution of power, which the government submitted to the Select Committee in January 1996, were significantly different from the devolution package of August

⁶ For further analyses of the substantive features of the devolution package see *Sri Lanka: The Devolution Debate*, supra n 1.

1995.⁷ In place of the principles which were, as the package intended, to form the basis for the re-definition of the constitutional foundations of a plural or multicultural society⁸ within a united and sovereign "Republic of Sri Lanka" (the replacement for the "Democratic Socialist Republic of Sri Lanka"), the draft provisions offered the "Preamble" to the proposed constitution which spelled out, much more categorically, the substance of the constitution. Again, instead of setting out details of the "Structure of Devolution" of the package, the draft embodied three chapters of the proposed constitution: Chapter I on "The People, the State and Sovereignty," Chapter II on "Buddhism," and Chapter III on "The Devolution of Power to Regions." These format changes and the substantive modifications incorporated therein, were manifestly designed to meet the public criticisms which had emerged since August 1996. Thus, the provisions relating to the territorial integrity of the polity and the inalienability of sovereignty, detailed in the draft constitutional provisions, stemmed from the fear expressed in certain quarters that devolution had the real potential of disintegrating the republic

⁷ For the draft provisions of 16 January 1996 see, Ministry of Justice and Constitutional Affairs, *Draft Provisions of the Constitution Containing Proposals of the Government of Sri Lanka Relating to Devolution of Power, Including a Commentary on the Draft Constitutional Provisions*, Colombo, 1996. For a detailed discussion of the draft provisions see, *Sri Lanka: The Devolution Debate*, supra n 1. This volume also republished the draft provisions as Appendix C, pp. 134-67.

⁸ The draft devolution provisions opt for the term "plural society." See, the Preamble in *ibid* p. 7.

by the opportunity it afforded to the regions to actively seek separation from the state. The chapter on Buddhism was clearly intended to allay the deep suspicion expressed by some individual Buddhists and Buddhist organisations, that the place which had been accorded to Buddhism under the 1978 Constitution would be diluted by the proposed constitution.

The draft devolution proposals envisage the establishment of Regional Councils for every region, with the separately constituted Capital Territory, comprising the cities of Colombo and Sri Jayawardenapura-Kotte, excluded from this arrangement. The executive power of the Region would be vested in the Governor of each region, acting on the advice of the Board of Ministers and thus the power itself will be exercised by the Board of Ministers. The legislative power vested in the Region will be exercised by the Regional Council. As for the judiciary, there will be a High Court in each Region which will have original criminal jurisdiction and appellate and revisionary jurisdictions with respect to decisions of the lower courts. The draft provisions also provide for conflict resolution mechanisms for problems and conflicts arising in inter-regional and centre-regional relationships. Most importantly, the respective subjects and functions of the centre and the regions are specifically enumerated in the draft.⁹

3. The Human Rights Implications

If human rights are taken to mean, as is the case in conventional analysis, the vesting in the people of a given set of specific

⁹ See, Chapter III, *supra* n 7 at pp. 12-27.

rights (in any number of variants) which, in the contemporary situation, is constitutionally mandated or otherwise legally protected, then the draft provisions for devolution ostensibly have no relevance to a discussion on human rights. But, if human rights are conceptualised broadly and are interpreted from the perspective of the political framework within which they are to be enjoyed and protected, the devolution of power from the centre to the periphery is significant.

The draft provisions for devolution - in concrete terms Chapter III of the constitutional proposals of January 1996 - are not concerned with human rights or fundamental rights *per se*. Rather, they embody the PA government's proposed political re-definition of the institutional arrangements for governance. Viewed in strict constitutional terms, the draft provisions elaborate on the measures formulated for the exercise and enjoyment of the sovereignty inherently vested in the "People" of Sri Lanka.¹⁰ Sovereignty includes the powers of government, fundamental rights and the franchise. Thus, devolution is, in all respects, central to the constitutionally mandated institutional means proposed for the exercise of sovereignty, whether the exercise is to take the form of legislative, executive, judicial action or, for that matter, the election of legislative representatives.¹¹

¹⁰ As Article 3 of Chapter I of the draft provisions declares, "in the Republic of Sri Lanka, sovereignty is in the People and is inalienable." See *supra* n 7 at p. 9.

¹¹ See, Article 3(a) to 3(e) of Chapter I, *ibid*.

The human rights regime which will be put into place by the proposed constitution is primarily the function of the chapter on fundamental rights. However, the importance of such other provisions as the Preamble and the Directive Principles of State Policy of the Constitution, for example, should not be minimised. The draft provisions for devolution cannot be dismissed as unimportant in terms of either human or fundamental rights, for devolution implicates all institutional arrangements for governance, and

the fundamental rights which are by the Constitution declared and recognized shall be respected, secured and advanced by all organs of Government, and [these rights] shall not be abridged, restricted or denied, save in the manner and to the extent hereinafter provided.¹²

It is arguable that devolution is premised on the assumption that, for there to exist a fully-fledged citizenry in the polity, there must be the assurance of full and meaningful participation in the political process. In other words, there should be a greater democratisation of the polity; the essential strength of the civil society would arise from this. Particularly in the context of the country's plural society and the contemporary experience of this legacy, this necessarily requires the validation of the ethno-sectarian geography of the country in governance, through the devolution of power from the centre to the regions. It is true that the draft devolution provisions do not provide the precise unit of devolution or the manner of delineation of the regions.

¹² Article 3(d) of Chapter I, *supra* n 7 at p. 9 (emphasis added).

This task is left to the Select Committee, under the First Schedule of Chapter III.¹³ This will undoubtedly, be a contentious exercise. It is also obvious that the fundamental logic of devolution will be defeated if the regions, as they emerge from the deliberations of the Select Committee, do not reflect the reality of the ethnic composition of the population distribution of the country. While the principal issue will be to what extent and in what ways the population concentration of the Tamil people in the North and East will be given recognition, attention will certainly also have to be paid to how other minorities, in particular the Muslim community in the East, should be treated, in giving shape and form to the regions.

4. Conclusion

By the end of 1996, the ultimate fate of the devolution proposals remained unknown. In fact, even the outcome of the deliberations of the Select Committee, on the draft devolution proposals, were not publicly released. Further, no information was available as to the place of devolution within the framework of the proposed constitution itself. This is true, for example, with respect to the specific provisions of the fundamental rights chapter of the new constitution, which rights are, after all, envisaged to be advanced and protected by the institutional arrangements which will come into being under devolution. Similarly, whether the proposed Regional High Courts would be vested with the jurisdiction to determine fundamental rights cases, as had been advocated in some circles, is an issue for which no definitive answer can be provided at this stage.

¹³ See, *Ibid* at p. 25.

With reference to the Directive Principles of State Policy found in Article 27(4) of the 1978 Constitution, the provision which speaks of the opportunities which the state should provide for the participation of the people at every level in the national life and government,¹⁴ Sharvananda C.J. wrote, that "healthy democracy must develop and adapt itself to changing circumstances. The activities of central government now include substantial powers and functions that should be exercised at a level closer to the People."¹⁵ The draft provisions for devolution, when viewed from this standpoint, address the political process and the greater democratisation of Sri Lanka, and advances advancing this cause much farther than contemplated by the 13th Amendment. The question remains, of course, whether structures of government which are supposed to advance the cause of democracy will alone bring about the ultimate effective empowering of the people.

The devolution proposals were neither framed nor presented in terms of advancing human rights; the chapter on fundamental rights is the vehicle which provides the constitutional guarantees of rights. Although the proposals were intended to address, within the context of the political process, the grievances of the Tamil community in particular, they were not designed to promote self-determination of the Tamils or to advance group rights. There

¹⁴ "The State shall strengthen and broaden the democratic structure of government and the democratic rights of the People by decentralising the administration and by affording all possible opportunities to the People to participate at every level in national life and in government," Article 27(4), *The Constitution of the Democratic Socialist Republic of Sri Lanka* (1978).

¹⁵ *In Re the Thirteenth Amendment to the Constitution* (1987) 2 Sri L.R. 326.

is nothing in the proposals that comports with the rights enumerated in a number of international instruments relevant to minorities, such as Article 27 of the ICCPR or Article 2 of the International Convention on the Elimination of All Forms of Racial Discrimination.

Nevertheless, it is arguable that devolution is not only consistent with, but also works toward, the fulfilment of the spirit and the underlying premises of the international human rights instruments. As a matter of principle, devolution, in providing institutional arrangements for a greater, and perhaps more meaningful participation of citizens in the political life of Sri Lanka, can conceivably create the conditions within which "everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights."¹⁶ To that extent, the draft provisions for devolution may be viewed as measures which have the capacity to advance and protect human rights in Sri Lanka, though they were not presented in such terms to the public, by the PA government. To put it somewhat differently, the argument is that there is an inextricable connection between the political framework and the assertion of human rights. Further, and more specifically, if devolution succeeds as the political solution to the ethnic conflict in Sri Lanka, it will effectively remove the context in which the most categorical human rights violations have occurred in the recent past: the theatre of war.¹⁷ Surely, such an outcome is one "peace dividend" the value of which would be incalculable in human rights terms.

¹⁶ Preamble to the ICCPR.

¹⁷ The context of the war is a theme which runs through virtually the entire volume, *Sri Lanka: State of Human Rights 1995* supra n 1.

VIII

Environmental Rights and Human Rights

Sumudu Atapattu*

1. Introduction

The right to a clean environment is increasingly being recognised as a basic human right¹ and, more particularly, as a socio-

* Senior Lecturer, Faculty of Law, University of Colombo; Consultant, Law & Society Trust.

¹ These rights are generally referred to as "third generation rights" although some human rights scholars are against such categorisation on the ground that human rights are indivisible. It is also the official UN policy that all human rights are of **equal value, indivisible and interdependent**. See Alfredsson, "Human Rights Activities of the United Nations" prepared for the Human Rights Course organised by the Danish Centre for Human Rights, Copenhagen (January 1997). See also the General Assembly Declaration on the Right to Development, Resolution 41/128, GAOR 41st Session, Suppl. 53, p 186.

The fact remains, however, that some of these rights have attracted recognition long after the so called first and second generation rights have been recognised. Thus, the right to a clean environment is yet to be regarded as a basic human right by some as being akin, for example, to the right to life.

economic right in many jurisdictions² and international instruments.³ This generally means that every human being has the right to live in a clean environment adequate for his well-being. The pioneering efforts of the Indian Supreme Court have paved the way for the recognition of environmental rights as human rights in the region.⁴ The concept of "sustainable development"⁵ has become accepted in terminology and combines the right to development⁶ with environmental

² See Kiss & Shelton, *International Environmental Law* (1991) (Transnational Publishers Inc.) pp 21 ff. They point out that constitutions and laws of some forty states now incorporate the right to a clean environment: "Most noteworthy is the fact that almost no constitution adopted or revised since 1970 ignores this new right" (at p 27).

³ See the new South African Constitution and the African Charter on Human and Peoples' Rights (Article 24 provides that "All peoples shall have the right to a general satisfactory environment favourable to their development") and the discussion, *infra*.

⁴ See for a discussion of the Indian Supreme Court decisions, Rosencranz, Divan & Noble, *Environmental Law and Policy in India: Cases, Materials and Statutes* (1991, 2nd reprint 1995) (Tripathi, Bombay) pp 56 ff.

⁵ See *Our Common Future*, the Report of the World Commission on Environment and Development (1987) (Oxford University Press, U.K) and Sands, "International Law in the Field of Sustainable Development," *British Yearbook of International Law* (1994) p 303.

⁶ See General Assembly Resolution 41/128, GAOR 41st Session, Suppl. 53 p 186. The precise definition of this right is unclear - it is more likely to encompass several rights. Many writers, however, continue to be critical of this right: see generally, Crawford (ed) *The Rights of Peoples* (1988) (Clarendon Press, Oxford) and particularly, Brownlie, "The Rights of Peoples in Modern International Law," *ibid* at p 1 and also Law & Society Trust, "Minority Protection and Development Cooperation," paper presented at the Consultation on Group Rights (Cambridge, August 1995) (unpublished).

protection. It also incorporates the right of future generations to a clean and healthy environment.⁷

Given the crucial role played by the environment and the indiscriminate way in which the environment and natural resources have been exploited, it is crucial to give adequate attention to environmental rights, as the very survival of mankind may depend on a clean and healthy environment. The consequences of the greenhouse effect,⁸ the depletion of the ozone layer,⁹ etc., are global in dimension and thus no single state can take action to combat these phenomena; concerted international action is necessary.

⁷ See the landmark decision of the Supreme Court of the Philippines in which the rights of future generations were upheld: *Juan Antonio Oposa and others v. The Honourable Fulgencio S. Factoran and another*, Republic of the Philippines Supreme Court G.R No 101083 reproduced in *the South Asian Environmental Law Reporter*, Vol 1(3) September 1994 p 113. This case was brought by a number of minors through their parents praying for the cancellation of the existing timber licence agreements. It was held, *inter alia*, that the petitioners had the right to sue on behalf of succeeding generations because every generation has a responsibility to the next to preserve the rhythm and harmony of nature for the full enjoyment of a balanced and healthy ecology.

⁸ Greenhouse effect is the accumulation of certain pollutants, particularly carbon dioxide, in the atmosphere as a result of which solar radiation is trapped in the atmosphere. For the consequences of this, see *Our Common Future*, supra n 5 at p 176.

⁹ *Ibid* at pp 33 and 177. The ozone layer which is in the stratosphere protects the earth from harmful ultraviolet radiation from the sun. The chlorofluorocarbons (known as CFCs) used as refrigeration chemicals, in aerosols and in the manufacture of plastics are causing the ozone layer to deplete.

This chapter seeks to discuss how far the right to a clean environment has been incorporated into the law of Sri Lanka. Since this right has not been discussed in previous issues of this report, it is necessary to cover developments before the year under review, in order to place the discussion in context. The chapter also draws from the experience in India where the judiciary has played a pivotal role in developing environmental rights in the country.

2. International Provisions

Although there are two schools of thought in the relevant literature regarding the content of the right to a clean environment, at the international level, it is not difficult to trace the evolution of this right.

Some argue that the right to a clean environment is not yet part of international law and that its character derives from both economic and social rights - such as the right to health, livelihood and property¹⁰ - and civil and political rights - such as the right to life. It is also argued that the right to a clean environment is not an individual right but a collective right.¹¹ Others argue that it is a procedural right in that, individuals have the right to participate in the decision-making processes about their environment, the right of access to information about the environment, and the right to administrative and judicial remedies with respect to environmental concerns.¹² This school of thought

¹⁰ See Dupuy, referred to in Birnie & Boyle, *International Law & The Environment* (1992) (Oxford University Press, U.K.) at p 191.

¹¹ Ibid at p 193.

¹² Shelton, 28 Stanford JIL (1991) p 103, referred to in Birnie & Boyle, *supra* n 10 at p 191 n 6.

seems to find favour with legal scholars and avoids the defects¹³ inherent in the other approach.

Kiss and Shelton, while not disputing the right *per se*, favour the second school of thought. They point out that in speaking of a right to a clean environment, it is necessary to determine the right's content and exact dimensions. In the human rights field, procedural rights exist to ensure that substantive rights are guaranteed and respected. Similarly, in the field of environmental protection, one needs to elaborate these procedural rights such as public participation,¹⁴ public hearings and injunctions. They also stress the importance of duties in this regard: "unlike many other branches of law, environmental law is characterised by its elaboration of comprehensive rights and duties."¹⁵

Despite the divergence of views, there is no doubt that there is an emerging consensus on the issue. It is also possible to reconcile the two schools of thought. Since the right to a clean environment was not regarded as a traditionally recognised human right, there was a need to couple it with other recognised rights - hence the first school of thought. On the other hand, there is no doubt that certain procedural rights are accorded to people with regard to the environment - hence the second school of thought.

¹³ Thus, issues such as whether the right to a clean environment is an individual right or a collective right; whether it is a substantive right or a procedural right; or whether it stands alone or in conjunction with other rights are not clear.

¹⁴ According to them, "the participation of citizens in concrete cases of environmental conservation is the true realization of the right to environment," *supra* n 2 at p 26.

¹⁵ *Ibid* at p 25.

The Stockholm Declaration on the Human Environment which was adopted at the United Nations Conference on the Human Environment in 1972,¹⁶ and which is generally considered as constituting the foundation of modern international environmental law,¹⁷ explicitly recognises the right to a clean environment as a fundamental right:

*Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations.*¹⁸

This provision is also important from the point of view that it deals with the responsibilities of people in relation to the environment. Fundamental rights should be coupled with fundamental duties not only towards the present generation, but also towards future generations.¹⁹

Article 1 of the Draft Articles proposed by the World Commission on Environment and Development Expert Group on Environmental Law provides that, "all human beings have the fundamental right to an environment adequate for their health and well-being."²⁰ Recognising that this formulation is vague,

¹⁶ UN Doc A/CONF.48/14, 16.6.1972.

¹⁷ See Birnie & Boyle, *supra* n 10 at p 39.

¹⁸ Principle 1, *supra* n 16 (emphasis added). It must be noted, however, that while the Declaration *per se* is not binding, some provisions, particularly Principle 21, have become part of customary international law.

¹⁹ See Kiss & Shelton, *supra* n 2 at p 22.

²⁰ Munro & Lammers (eds) *Environmental Protection and Sustainable Development: Legal Principles and Recommendations* (1986) (Graham & Trotman, London) pp 38 ff.

the report points out that the adjective "adequate" was intended to make it clear that there are limits to the right recognised in Article 1. It further points out that this right cannot yet be considered a well-recognised principle under contemporary international law.²¹

While Principle 1 of the Rio Declaration on Environment and Development,²² adopted in 1992 at the United Nations Conference on Environment and Development, is not binding on states, its significance lies in its recognition of the important link between human beings and the environment. It provides that "Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature."

International conventions on the subject also recognise this link and contain provisions on sustainable development. The Convention on Biological Diversity, for example, provides, in Article 1, that the objectives of the Convention are, *inter alia*, the conservation of biological diversity, the sustainable use²³ of its components, and the fair and equitable sharing of its benefits. The Climate Change Convention also embodies this

²¹ Ibid at p 40.

²² See 31 *International Legal Materials* (ILM) (1992) p 876 and Earth Summit Agenda 21 (The United Nations Programme of Action from Rio) (UN Publication - Sales No: E.93.1.11, 1993).

²³ "Sustainable use" is defined as: "the use of components of biological diversity in a way and at a rate that does not lead to the long-term decline of biological diversity, thereby maintaining its potential to meet the needs and aspirations of present and future generations," Article 2 of the 1992 Convention on Biological Diversity, ILM (1992).

principle and provides that "The Parties have a right to, and should, promote sustainable development."²⁴ The Convention does not, however, define the term "sustainable development."

The International Covenant on Economic, Social and Cultural Rights, while not expressly recognising this right, refers to the need to improve environmental and industrial hygiene in the context of the right to physical and mental health. Other instruments which recognise the link between health and the environment include the Additional Protocol to the Inter-American Convention on Human Rights (Article 11); the ECE Charter on Environmental Rights and Obligations; the Convention on the Rights of the Child [Article 24(2)(c)]; and the General Assembly Resolution 45/94.²⁵

At the regional level, the ASEAN Agreement on the Conservation of Nature and Natural Resources provides that the parties shall take necessary measures "to maintain essential ecological processes and life-support systems, to preserve genetic diversity, and to ensure the sustainable utilisation of harvested natural resources under their jurisdiction in accordance with scientific principles and with a view to attaining the goal of sustainable development." Here, again, there is no definition of sustainable development.

It is noteworthy that UN bodies have begun to consider the inter-relationship of the environment and human rights and, by General Assembly resolution 1990/7, appointed a Special

²⁴ Article 4 ILM (1992) p 851.

²⁵ See Birnie & Boyle, *supra* n 10 at p 193 and n 16 at p 193.

Rapporteur to study the environment and its relation to human rights. This resolution affirmed "the inextricable relationship between human rights and the environment."²⁶

3. Definitions

3.1 The environment

A single, precise definition of the 'environment' is not easy to find. A very broad definition would include ecosystems as well as historic buildings, archaeological sites and biological diversity.²⁷ A very narrow definition may include only the natural environment, excluding the human-developed environment.²⁸ A compromise can be found in many of the international conventions.²⁹

In Sri Lanka, the National Environmental Act ("NEA") No 47 of 1980 (amended by Act No 56 of 1988) defines "environment" as:

The physical factors of the surroundings of human beings, including the land, soil, water, atmosphere, climate, sound,

²⁶ Resolution on Human Rights and the Environment, E/CN.4/Sub.2/1990/59, p 25. See also the UN Human Rights Commission Resolution 1990/41 (6 March 1990) which stressed the importance of preserving life-sustaining ecosystems for the promotion of human rights, as cited in *supra* n. 2.

²⁷ See for example, the World Charter for Nature, GA Resolution 37/7, which refers to "nature" as opposed to the "environment."

²⁸ See the definition adopted in the 1979 Geneva Convention on Long-Range Transboundary Air Pollution, 27 ILM (1979) p 1442. Reproduced in *Selected Multilateral Treaties in the Field of Environment*, Kiss (ed) UNEP Ref Series 3, p 519.

²⁹ See, for example, the definition of pollution in the 1982 Law of the Sea Convention, 46 UKTS (1982).

*odours, tastes and the biological factors of animals and plants of every description.*³⁰

This definition seems to exclude the man-made environment, although ecosystems are not explicitly mentioned, their role can be inferred from the words used. Nonetheless this is not a very comprehensive definition.

3.2 Environmental problems

When reference is made to environmental problems, the general tendency is to include only problems caused by pollution. Pollution is only one category of environmental damage and excludes such problems as those arising, for example, from deforestation. Thus, very broadly, three categories of environmental problems can be identified, although these are also necessarily inter-linked:

- (1) environmental problems that have arisen as a result of development. While 'development' is an essential feature of modern society, industrialisation has given rise to many environmental problems, pollution being the major issue.³¹

³⁰ Article 33 of the NEA. For the definition of pollution in the NEA, see discussion *infra*.

³¹ In Sri Lanka there have been many serious pollution issues: the discharge of black liquor into the Walawe river from the Embilipitiya paper factory, cement dust emitted by the Puttalam cement factory, water pollution caused by tanneries, textile industries etc. Globally, examples of such issues are the greenhouse effect and ozone depletion. Acid rain is another example of an international air pollution issue, the consequences of which are of a long-range, see *Our Common Future*, *supra* n 5 at pp 34, 178-181. For the effects of pollution (can be categorised as air pollution, water pollution and noise pollution) see, Kupchella and Hyland, *Environmental Science* (2nd ed) (1989).

- (2) environmental problems that have arisen as a result of non-sustainable practices in relation to natural resources. Natural resources, renewable and non-renewable, have been subjected to non-sustainable uses, both nationally and internationally. In Sri Lanka, deforestation is a particular problem that leads, *inter alia*, to soil erosion, changes in weather patterns, a loss of habitat for wildlife and a loss of biodiversity. Globally, deforestation contributes to the greenhouse effect.
- (3) environmental problems that have arisen as a result of urbanisation and population growth. While these include water pollution (due to the increased demand for clean water and contamination, due to inadequate sewage disposal) and air pollution (due mainly to vehicular traffic), unsanitary living conditions, a lack of proper facilities for the disposal of garbage and sewage, particularly in cities, have given rise to many health problems. In addition, poverty alone has had disastrous effects on natural resources as it has given rise to indiscriminate exploitation of natural resources.³²

4. The Position Under the Constitution of Sri Lanka

The 1978 Constitution of Sri Lanka does not guarantee the right to life. It also does not specifically endorse the right to a clean

³² See Atapattu, "An Introduction to Environmental Law in Sri Lanka" paper presented at the Workshop on "Sensitization of Lawyers on Environmental Law and Forming a Countrywide Network" organised by Mihikata Institute (December 1995) (unpublished).

environment. While the Indian Constitution does not guarantee the latter, the Supreme Court of India has held that the right to life which is guaranteed under the Indian Constitution includes the right to a clean and healthy environment.³³

Although the fundamental rights chapter is silent on these issues, the Directive Principles of State Policy and Fundamental Duties chapter of the 1978 Constitution specifically refers to the protection of the environment and provides in Article 27(14), that: "The State shall protect, preserve and improve the environment for the benefit of the community." These Directive Principles "shall guide the Parliament, the President and the Cabinet of Ministers in the enactment of laws and the governance of Sri Lanka for the establishment of a just and free society."

According to Article 28(f) among the fundamental duties of every person in Sri Lanka is the duty "to protect nature and conserve its riches" [Article 28(f)].

Article 29 of the Constitution, however, provides that the provisions in the chapter on Directive Principles do not confer legal rights or obligations on or upon the state and are thus not enforceable in any court or tribunal. In other words, the state cannot be held accountable for not protecting, preserving or improving the environment.

Conversely, the Indian Supreme Court, undeterred by similar provisions in the Indian Constitution, has increasingly cited

³³ *Supra* n 4 at p. 57.

these principles as being complementary to fundamental rights.³⁴ Further, the High Court of Andhra Pradesh has interpreted Article 48A of the Indian Constitution, the counterpart article to Article 27 in the Sri Lankan Constitution, as imposing an obligation on the government, including the courts to protect the environment.³⁵

The fundamental nature of the right to a healthy environment was stressed by the Philippines Supreme Court in the case of *Juan Antonio Oposa and others*.³⁶ The petitioners' complaint focused on the right to a balanced and healthful ecology, which was incorporated in the 1987 Constitution. Although this right was not incorporated in the Bill of Rights, it was articulated in the Declaration of Principles and State Policies. The Court stated:

While the right to a balanced and healthful ecology is to be found under the Declaration of Principles and State Policies and not under the Bill of Rights, it does not follow that it is less important than any of the civil and political rights enumerated in the latter. Such a right belongs to a different category of rights altogether for it concerns nothing less than self-preservation and self-perpetuation the

³⁴ See *Som Prakash Rekhi v. Union of India*, AIR (1981) SC 212, at pp 221-2 as cited in supra n 2. See also *MC Mehta v. Union of India*, AIR 1988 SC 1037; *Rural Litigation and Entitlement Kendra, Dehradun v. State of Uttar Pradesh*, AIR 1988 SC 2187; *Kinkri Devi v. State of Himachal Pradesh*, AIR 1988 HP 4.9 referred to in Rosencranz, supra n 4.

³⁵ See *T. Damodar Das v. The Special Officer, Municipal Corporation of Hyderabad*, AIR (1987) AP 171 at p 181 as cited in supra n 4.

³⁶ Supra n 7.

*advancement of which may even be said to predate all Governments and Constitutions. As a matter of fact, these basic rights need not even be written in the Constitution for they are assumed to exist from the inception of humankind.*³⁷

Unfortunately, the Sri Lankan judiciary has not been so innovative. The only instance where the Directive Principles were used in relation to environmental rights was in *The Environmental Foundation Ltd and others v. The Attorney-General and others*.³⁸

The phrase "protect, preserve *and improve*" the environment needs closer scrutiny. The obligation is not simply to preserve and protect the existing environment which may be degraded anyway. The obligation extends to *improving* the environment which means that an action may lie in courts, if a state agency fails to take steps to improve a degraded environment. If the Sri Lankan courts move in the direction of the Indian courts, it may be possible to compel a state agency by way of a *writ of mandamus* to take action to improve the environment.

³⁷ Ibid at p 128 (emphasis added).

³⁸ *South Asian Environmental Law Reporter*, Vol 1(1), First Quarter 1994, p 17. In view of the importance of this case, it will be discussed later in detail.

5. Provisions in the National Environmental Act of 1980

5.1 The establishment of the CEA

Until the enactment of the National Environmental Act ("NEA") in 1980, no comprehensive statute took a holistic approach to addressing environmental protection. The previous statutes dealt either with a segment of the environment such as, the Fauna and Flora Protection Ordinance, the Forest Ordinance, the State Lands Ordinance, and the Municipal Councils Ordinance or on a piecemeal basis such as, the Soil Conservation Act - which was distinct from the Forest Ordinance and was administered by a different body - without paying adequate attention to the possible impact on other segments of the environment, or the environment in its entirety. This sectoral approach gave rise to many problems and an urgent need was felt to adopt a comprehensive statute and to establish a central regulatory body with island-wide jurisdiction. The Central Environmental Authority ("CEA") was established by Act No. 57 of 1980, and was amended in 1988 to give the CEA more regulatory powers. The NEA, however, is proposed to be amended again.

5.2 Abatement of pollution

While the NEA does not specifically embody the right to a clean environment, the Act's definition of "pollution", the abatement of which is one of the functions of the CEA, needs closer scrutiny,

Pollution means any direct or indirect alteration of the physical, thermal, chemical, biological, or radioactive properties of any part of the environment by the discharge, emission, or the deposit of wastes so as to affect any beneficial use adversely or to cause a condition which is

*hazardous or potentially hazardous to public health, safety or welfare, or to animals, birds, wildlife, aquatic life, or to plants of every description.*³⁹

Thus, adverse effects of pollution on public health, safety and welfare are recognised in this definition.⁴⁰ It could be argued that the priority given in the NEA to abate such pollution is an indirect recognition of the right of human beings to an environment free from pollution. The CEA is under a statutory duty to take steps to regulate industries which emit waste,⁴¹ so that pollution remains within acceptable limits. There are two main mechanisms which are available to the CEA to regulate pollution and to achieve sustainable development:

- (1) **The Environmental Protection Licence ("EPL") procedure:** According to the provisions in the NEA, every person, including industry, emitting waste needs to obtain an EPL stipulating certain terms and conditions as well as emission levels for pollutants. Thus, emitting or discharging waste from an industry without a licence is an offence and, under this mechanism, the CEA can monitor activities of industries likely to cause pollution; and

³⁹ Article 33 of the NEA (emphasis added). It is interesting to compare this definition with the definition of pollution in the international conventions which specifically state that pollution is caused by man. See, for example, Article 1(1) of the 1979 Geneva Convention on Long-range Transboundary Pollution, *supra* n 28 which states: "Pollution is the *introduction by man*, directly or indirectly,..." (emphasis added)

⁴⁰ Some, of course, have argued that this is a very anthropocentric definition and one needs to recognise pollution damage on ecosystems, irrespective of any damage to human beings. See Birnie & Boyle, *supra* n 10 at p 406.

⁴¹ Defined in Section 33 of the NEA.

- (2) **The Environmental Impact Assessment ("EIA") procedure**: According to the provisions in the NEA, every prescribed project⁴² being undertaken anywhere in Sri Lanka needs to have an EIA or an Initial Environmental Examination ("IEE") report prepared. This is an important tool given to the public, because every EIA or IEE has to be made available for public comment.⁴³

6. Provisions in the Draft National Environmental Protection Act

The draft National Environmental Protection Act includes, as an objective of the path on sustainable development⁴⁴ right of all people living in the country, to an environment adequate for their health and well-being. Draft Article 5 reiterates the right by providing explicitly that "every person is entitled to an environment adequate for health and well being" and that such

⁴² Gazetted as those projects which require the preparation of an EIA.

⁴³ See the provisions in the NEA, Part IV C, section 23BB(3), which stipulate that such EIA document should be made available for public comments for a period of 30 days within which **any member of the public** can refer his comments to the CEA or other project approving agency. This is a mandatory requirement under the law. The project approving agency can also hold a public hearing at its discretion. See also the provisions in the Coast Conservation Act of 1981 which adopts a similar procedure, although the EIA process itself is not mandatory under that law. See Atapattu, "Environmental Impact of Infrastructure Development Projects" in *Infrastructure Development in Sri Lanka: Regulation, Policy and Finance* (Euromoney Publications, Jersey) (1997) p 73.

⁴⁴ According to draft Article 2, "Every person shall make every practicable effort to follow the path of sustainable development." Draft National Environmental Protection Act (May 1996).

person shall be entitled to institute legal proceedings for the enforcement of such a right. It also recognises the right of non-governmental organisations to institute proceedings to the right either on their own behalf, or on behalf of a class of people.

While such provisions are welcome, the right to a clean environment cannot be considered a *fundamental right*, unless it is also embodied in the Constitution. Unless it is thus embodied, a violation of this right cannot constitute the subject matter of a fundamental rights petition. Such a right should be afforded to *every person* as opposed to citizens only.

7. Fundamental Rights Litigation

As mentioned earlier, the only case so far to have used the fundamental rights chapter of the Constitution in relation to environmental damage was the case of *The Environmental Foundation Ltd and others v. The Attorney-General and others*.⁴⁵

The Environmental Foundation Ltd. ("EFL"), a prominent environmental NGO, filed a fundamental rights petition on behalf of a group of residents in the Nawimana area, in relation to a damage to health and property caused by the blasting operations at a quarry in the vicinity. The main complaints of the petitioners were as follows:

- (1) unbearable noise and severe vibrations from the blasting and from a stone-crusher;

⁴⁵ See supra n 38. Although this case was decided before the year under review, given its relevance to the present discussion and given that it is, so far, the only case which deals with fundamental rights and directive principles of policy, a careful analysis is warranted here.

- (2) thick smoke caused by explosions giving rise to respiratory problems;
- (3) danger to life and property caused by pieces of rock being projected onto their villages, 300 metres away;
- (4) hearing problems due to noise;
- (5) children suffering from frequent headaches, dizziness and nightmares;
- (6) structural damage to houses caused by vibrations; and
- (7) damage to the water table as a result of the deep bore holes dug by the quarry workers, causing wells to dry up and the consequent inability to cultivate crops.

The petitioners alleged the violation of their rights under the following provisions of the Constitution: (1) Article 3, "sovereignty is in the people and is inalienable and includes fundamental rights"; (2) Article 11, "no person shall be subjected to torture or to cruel, inhuman or degrading treatment"; (3) Article 14(1)(g), "every citizen is entitled to the freedom to engage in any lawful occupation"; (4) Article 14(1)(h), "every citizen is entitled to the freedom of movement and of choosing his residence within Sri Lanka."

Although a settlement was negotiated and the petitioners were able to obtain relief, the Court did not proceed to the merits of the case. This case is important in several respects:

- (1) Leave to proceed was unanimously granted to the 2nd to 21st petitioners, thereby recognising their right to seek redress by way of a fundamental rights petition for an environmental problem;

- (2) Leave to proceed was also granted, by a 2 to 1 majority, to the 1st petitioner, the Environmental Foundation Ltd., subject to any objections to its *locus standi*, thereby recognising the possibility of public interest litigation in relation to fundamental rights petitions;⁴⁶
- (3) Directive principles of state policy were cited by the petitioners, along with the relevant fundamental rights provisions, thereby recognising the possibility of coupling the former with the latter; and
- (4) The case also recognised the possibility of proceeding by way of a fundamental rights petition, even in the absence of either a right to life clause ⁴⁷ or right to clean environment clause in the Constitution.

Although the petitioners were able to get the relief sought, the court was denied the opportunity to proceed to the merits of the

⁴⁶ In this regard, it is important to note the *Ahunagalle Zoo Case* in which the Court of Appeal recognised the *locus standi* of NGOs to seek relief by way of a writ of *certiorari* and *mandamus*. Relief was, however, denied on the merits. In this case, the EFL, filed an application for writs of *certiorari* and *mandamus* against the Minister of Public Administration, Plantation, Industries and Parliamentary Affairs; Director, Wildlife Conservation; and the owner of the private zoo, Mr M. Mohammed, praying, *inter alia*, for a writ of *certiorari* quashing the permit issued to the owner and a writ of *mandamus* compelling the Director to revoke the permit on the ground that the owner had contravened the provisions of the permit and in terms of the 1993 amendments to the Fauna and Flora Protection Ordinance the permit issued to carry on a private zoo was illegal.

⁴⁷ It may be recalled here that the way the Indian Supreme Court proceeded was to interpret the right to life clause as including the right to a clean environment, *supra* n 4 at p 57

case. Had they proceeded, this would, undoubtedly, have been a landmark case concerning environmental rights and fundamental rights in Sri Lanka.

8. Major Environmental Problems in 1996

Many environmental problems were highlighted in the media during the year. Some of these problems were the subject of litigation.

8.1 Problems relating to natural resources

It was reported that potato cultivators encroaching on natural forest cover in the Horton Plains region, particularly in the important catchment area of Thotapolakanda, has given rise to many problems. Such problems were caused by the breaking of the soil for cultivation; the clearing of forests; the draining of excess water, the applying of fertilizer and pesticides; and by tractors working on the plains, which added to air pollution in the area. Potential long-term effects include an upset in the water table; the removal of the sponge effect, resulting in absorption of less water; the increased air pollution, the use of pesticides;⁴⁸ and the exacerbation of the greenhouse effect.⁴⁹

Perhaps the issue that gave rise to the biggest environmental outcry last year was the proposal relating to the Upper Kotmale hydro power plant. The Ceylon Electricity Board's ("CEB")

⁴⁸ See Perera, W.R.H., "Thotapolakanda - an Environmental Disaster?" in Ceylon Daily News, April 10, 1996.

⁴⁹ See also Wickremaratne, D., "Lanka threatened with desertification" in Ceylon Daily News, April 16, 1996; and Punchihewa, G.G., "The impact of development projects on wetlands - Bundala" in Island, October 19, 1996.

proposal to construct a 150 Megawatt hydro power plant at Talawakelle was rejected by the CEA in 1994 due to the possible destruction of three major waterfalls - St. Clair Major, St. Clair Minor and Devon - and the reduction of water by 50% in four others. The appeal of the CEB to the Secretary, Ministry of Environment was rejected on the basis that viable alternatives had not been properly discussed.⁵⁰ The proposed power plant would have resulted in the evacuation of about 6000 families and the inundation of the Talawakelle town.⁵¹ The proposal was revived by the CEB in 1996 and, amidst much protest, a new EIA prepared by the CEB was handed over to the CEA. The CEA made the EIA report available for public comments and also held a public hearing. The CEA is expected to announce its decision with regard to this project in early 1997.⁵²

⁵⁰ See also Perera, S., "Allegations of CEB ignoring environmental damage" in *Island*, October 4, 1996.

⁵¹ See "Environmentalism slams proposed hydro power project at Talawakelle" in *Ceylon Daily News*, November 12, 1996.

⁵² This project generated much public debate: see Withanage, H., "Energy Crisis, Upper Kotmale, Waterfalls and Coal Power" in *Island*, July 10, 1996; Senaratne, S. de.S., "The Upper Kotmale hydropower project (UKHP) and Environmental concerns" in *Island*, August 14 and 15, 1996; Bulankulame, S.W.P., "Upper Kotmale hydropower project" in *Ceylon Daily News*, September 19, 1996; "Energy Crisis, upper Kotmale, waterfalls, and coal power" in *Ceylon Daily News*, September 20, 1996; Perera, S., "The Controversial Kotmale Project" in *Island*, October 12, 1996; S. Sriyanada, "Upper Kotmale Hydropower project - CEA, CEB, public air views" in *Sunday Observer*, October 13, 1996; Chandrasinghe, D.P., "Events which lead to 1996 power crisis in Sri Lanka" in *Island*, November 28, 1996; "Upper Kotmale Hydropower project" in *Island*, December 10, 1996; Perera, S., "Will CEB be successful this time?" in *Sunday Island*, December 22, 1996; Perera, S., "Call for President to Intervene" in *Island*, December 28, 1996.

8.2 Pollution issues

The possible environmental effects of the proposal to set up an oil refinery and power plant in Hambantota in the South of Sri Lanka were highlighted in an article entitled "Hambantota Refinery Proposal - A Major Environmental Threat to South".⁵³ The proposed site borders the Karagan Lewaya, one of the major lagoons in the South and part of the Hambantota - Bundala complex. It is also in close proximity to the Bundala National Park which is the only wetland in Sri Lanka declared under the Ramsar Convention as a wetland of international importance. The major concern is that of oil spills which could pose a great danger to the south coast fisheries, marine life, and the Karagan Lewaya, a unique ecosystem below sea level providing a habitat to varied forms of fauna and flora, including migratory birds.⁵⁴

Bundala National Park was the centre of another controversy last year. Plans to set up a 897 acre prawn farm bordering the Bundala National Park met with protests from environmentalists who claimed, *inter alia*, that the EIA report prepared by the proponent did not deal with any mitigatory measures. One of their major concerns was the possible increase in salinity in

⁵³ See Island, 14.04.1996. This article was based on the Environmental Impact Assessment comments of Fauna International on the proposed project.

⁵⁴ See also Perera, S., "Refinery Project proponent has over-estimated benefits says TEC report" in Island, 1.10.1996. The proposal is to set up an integrated petroleum refinery and a power plant on a Build-Own and Operate (BOO) basis on a 1,000 acre site at Hambantota within the catchment of the Karagan Lewaya and in close proximity to the Bundala National Park.

groundwater caused by the proposed prawn farm. The proposed site, located adjoining the Koholankala saltern, was identified as a sensitive area under the Wetland Conservation Project of the CEA.⁵⁵

A proposal by the Ministry of Fisheries to set up two major prawn farms in Weligama and Tangalle in the South of Sri Lanka met with strong protests from local residents and environmentalists. Prawn farms not only destroy mangroves and shoreline vegetation, which affects cultivation as well as fisheries; but also cause both health problems and ecological problems due to water pollution from the release of effluents from these farms.⁵⁶

The plight of a large number of residents in the Ekala-Ja Ela area, suffering from water borne diseases from wells that had been polluted by septic tanks was highlighted in the press in September.⁵⁷ Although the analysis of bacteriological samples from the wells showed faecal pollution, the authorities, including the CEA, however, have failed to take any action, despite the fact that the issue was brought to their attention by the affected residents almost two years ago.⁵⁸

⁵⁵ See Perera, S., "Plans to set up prawn farm at Bundala angers environmentalists" in *Island*, 11.12. 1996.

⁵⁶ See Wickramage, F., "Environmentalists protests setting up of prawn farms" in *Ceylon Daily News*, 26.05.1996.

⁵⁷ See Kappagoda, D.B., "Pollution of Drinking Water in Ekala-Ja-Ela Soars" in *Island*, 11.09.1996.

⁵⁸ See also, Jayasooriya, L., "Dehiwala-Mt. Lavinia septic tanks and cess pools" in *Ceylon Daily News*, 12.09.1996 for a similar problem in the Dehiwala-Mt. Lavinia area.

In a landmark case, the Additional District Judge and Magistrate, Homagama, ordered the closure of a sulphuric acid factory in Ranala that was decreed a public nuisance. Action was filed on behalf of the affected residents by Mihikatha Institute, an environmental NGO, under section 98 of the Criminal Procedure Code for the abatement of a public nuisance.⁵⁹ At the conclusion of the inquiry, the Magistrate stated that the respondent factory had not, even in 1996, complied with certain conditions laid down in the EPL issued by the CEA in 1991. The sulphur content in certain places in the vicinity, particularly in well water, exceeded the specified limits. Coming to the conclusion that the factory was a public nuisance affecting the health of the people in the vicinity, the Magistrate ordered the factory to be closed.

The proposal to set up a tannery complex at Bata-Atta near the Kalametiya Lagoon (proposed to be declared a Ramsar site, under the Ramsar Convention) and Bird Sanctuary has caused alarm among the local communities who anticipate adverse environmental and health effects.⁶⁰ Tanneries emit high levels of pollution⁶¹ and the stench emanating from the storage of raw hides and from the process of tanning itself, is unbearable. Groundwater contaminated by the chemicals used in the process

⁵⁹ See Goonathilaka, T., "Judge orders closure of sulphuric acid firm" in Ceylon Daily News, 4.12. 1996.

⁶⁰ See Welabada, L., "Tannery near Kalametiya irks residents" in Sunday Observer, 29.12.1996.

⁶¹ See the Regulations prescribed under Section 23Z of the NEA which require the preparation of an EIA in relation to chrome tanneries and vegetable tanneries, if the production capacity exceeds 25 and 50 tonnes per day, respectively.

also causes serious health problems. The potential impact on cultivation, fauna and flora is causing concern among the residents.⁶²

9. Positive Action

The National Forest Policy and the Forestry Master Plan recognise the right of people in relation to forest estates and the public trust duty of the State. A task force was appointed in 1996 to revise the Forest Ordinance, to bring it in line with the new policy. This includes community and joint management of forest resources.

Regulations on emission levels for noise were gazetted under the National Environmental Act in May 1996. Regulations on hazardous waste were also gazetted in the year under review.

The EIA process, which allows for public participation and access to information, has proved to be a significant tool as it has been possible for many controversies to be resolved within the process itself, rather than at a later stage.

A Bill to amend the National Environmental Act was approved by the Cabinet last year and will be placed before Parliament soon. The Bill seeks to confine the EPL procedure to listed activities only and to remove IEE reports from public participation although these reports will remain a public

⁶² See *supra* n 60 for the comments of an official at the Department of Wildlife Conservation to the effect that the Department is opposed to the proposal as it would definitely bring adverse effects to the Kalametiya animals' habitat.

document. It is hoped that these amendments will make the implementation of the NEA more manageable and would eliminate unnecessary delays.

Public Nuisance laws have been re-activated in relation to environmental issues resulting in the filing of over 200 cases under section 98 of the Code of Criminal Procedure in 1995/96, with a success rate of over 60 per cent.⁶³

10. Recommendations and Conclusions

The present chapter surveyed the extent to which the right to a clean environment has been recognised in the law of Sri Lanka and how such law has been implemented during the year under review. While there is no cause for complacency, there is reason to be optimistic: the authorities concerned cannot turn a blind eye to environmental neglect and degradation anymore, and courts are more willing to grant redress to victims of environmental pollution. Above all, people, and particularly environmental NGOs, are vigilant and the media has played an important role in highlighting environmental problems.

A more liberal approach to *locus standi* by courts and the recognition of the right to a clean environment as a fundamental right would be welcome developments. In addition, the strict implementation of existing laws relating to environmental protection is necessary, without taking into consideration extraneous factors, if the present situation is to be improved.

⁶³ Source: Environmental Foundation Ltd.

If the important tools given to the public by way of public comments, EIAs,⁶⁴ etc., are to be properly exercised, the public must be educated so as to enable them to utilise these tools in a responsible manner. Development is necessary, but development must be economically, socially and environmentally sustainable in the long-term.

While it is important for people to be aware of their rights, so that these rights can be exercised, they must also be more concerned about their responsibilities towards environmental protection. This aspect is generally overlooked and it is recommended that environmental NGOs should, in their public educational campaigns, highlight how individuals can contribute towards improving the environment. Vigilance about possible violations of rights and law enforcement, alone, are not sufficient to preserve and improve the environment.

The rights in this field are two-fold: rights that can be exercised during the decision-making process and those which can be exercised once a violation of a right has taken place. While public participation in the EIA process etc., falls into the former category, legal and administrative remedies fall into the latter. Both of these are important roles, although the latter is necessarily remedial in nature. Thus, the public should be encouraged to exercise their rights in the former category in a responsible manner so that the need to resort to remedial rights may be minimal.

⁶⁴ EIAs are highly technical documents which laymen would not be able to understand.

IX

Violence Against Women*

Radhika Coomaraswamy**

Assault on Women Detainees

On the 12th of April, seven women detainees at the Welikada Prison had been assaulted by suspected drug addicts who were also in prison at the time.¹

Seventy women arrested in Maradana

More than seventy young women from Mannar and Vavuniya who were living in a lodge in Maradana have been taken into custody.²

Man murders his wife

From Dimbula Estate near Nuwara Eliya P. Saraswathie, a young wife had been beaten, murdered and burnt by her husband,

* The author would like to thank The Home for Human Rights, Colombo, for the compilation of newspaper clippings on violence against women during the year 1996 and for making the information available to her.

** Director, International Centre for Ethnic Studies; UN Special Rapporteur on Violence against Women, Its Causes and Consequences

¹ Virakesari, 22 April 1996

² Midweek Mirror, 6 March 1996

owing to the dissatisfaction of her husband's family that he had married a woman of a different caste.³

Child raped by nine drivers

A 14 year old girl who had left home due to family problems was taken away by an uncle, a scooter cab driver, who allegedly raped her in a cemetery at Katugastota. The alleged rapist called 8 other scooter cab drivers and sold the girl to them for a fee of Rs. 1000/- each. The nine suspects have been arrested.⁴

Returnee from Saudi commits suicide

A 45 year old mother of three children who had gone to Saudi Arabia to work as a house maid returned after 40 days with burn marks all over her body inflicted by her employer. Her salary had not been paid. On the day she arrived home, she committed suicide by taking acid.⁵

Death Penalty by Tigers

Somalingam Vani (30) an E.C.G. technician attached to the Batticaloa hospital was abducted and killed by Tigers on the 10th of May and her body was left near the Vantharoomulai University with a placard stating "This is the punishment for traitors."⁶

³ Virakesari, 17 April 1996

⁴ Midweek Mirror, 29 May 1996

⁵ Virakesari, 30 May 1996

⁶ Thinamirasu, 19 May 1996

1. Introduction

This chapter will attempt to portray issues with regard to violence against women in Sri Lanka by first attempting to outline the pattern of violence as it appears to be emerging from the facts and figures available from local institutions. It will then move on to a discussion of the legal framework and government policy, especially the recent amendments to the Penal Code and the National Plan of Action adopted by the Ministry of Women's Affairs.⁷ The analysis will continue with an assessment of the criminal justice system and, finally, include a discussion of the social service measures necessary for an effective programme aimed at eradicating violence against women in Sri Lanka. The discussion will not be limited to the period under review since there have been no chapters on this theme in this report in previous years and it therefore becomes necessary to set out the appropriate framework for the discussion.

Violence against women is pervasive in Sri Lankan society but it is rarely reported to the criminal justice authorities. Newspaper reports make it clear that violence against women in Sri Lanka takes place in the family, in the community and is also perpetrated by the State. Violence in the family includes incest, wife battery, traditional practices such as virginity tests, and violence against elders and women members of the extended family. Violence in the community, as reported in the newspapers, includes rape, sexual harassment, violence against migrant workers, trafficking and prostitution. Violence by the state includes violence against

⁷ See the discussion *infra*.

women in custody and that which is perpetrated during times of armed conflict.

There have been signs that, in recent times, there has been a greater willingness to report the cases of violence and to seek vindication. Despite the regular cases of violence reported in the newspapers, according to the Department of Census and Statistics,⁸ in the year 1992, there were 3,608 cases of violence against women. In 1982, ten years earlier, there were 2,688 cases; indicating a near one-third increase in the rate of crimes during the decade. Although no data is available for 1996, women's activists are certain that the number had increased further. Statistics do not answer whether this increase is due to an increase in the violence itself or to a greater desire or ability, on the part of the women, to report the crime.

Thirty-one percent of the cases in 1992 involved "assault by a knife," which was the largest category of violence against women, while homicide accounted for nine percent. Ten percent of the reported cases were of rape.

The Women and Children's Unit at Police headquarters maintains statistics with regard to the cases of violence against women that actually come before it, and its respective units around the country. In 1995, they recorded only 877 cases of major crimes and 51,431 minor offences. The classification of major crimes and minor offences within this format must be questioned. For

⁸ *Women and Men in Sri Lanka*, Department of Census and Statistics, Ministry of Finance, Planning and Ethnic Affairs and National Integration, Colombo (1995) p 96

example, torture is listed as both a major crime and a minor offence. The largest category under major crimes is grievous hurt with a weapon which is also reflected in the earlier census data. The largest group in the minor offences category, involving 31,378 cases, was "abuse/insult/intimidation." The category is not sub-divided so there is little clarity as to what an offence entails. Given the large numbers, it would be necessary to further pursue what is actually meant by this category.⁹

2. Migrant Workers

Violence against migrant workers is an area of special concern. During the period 1988-1994, 201,689 women sought employment abroad as migrant workers, 78% of whom sought work as housemaids or domestic workers. The vast majority of these women were in their twenties and thirties.¹⁰ Although exact statistics with regard to those who have suffered violence are not available - particularly since much of it goes unreported - sensational cases of suicide, murder followed by suicide, and physical evidence of violence have, from time to time, been reported in the Sri Lankan newspapers. One such case, reported above from 1996, was of a woman returning from Saudi Arabia with burn marks all over her body.¹¹ Another case reported that the parents of a woman worker in Saudi Arabia lodged a complaint that their daughter had been killed and that her body lay at the mortuary in Kuwait.¹² Other repercussions

⁹ Women and Children's Investigative Unit, Police Headquarters, "Offences Against Women for the Year 1995."

¹⁰ Department of Census and Statistics, *supra* n 9 pp. 92-94.

¹¹ *Supra* n 6.

¹² *The Island*, 23 August 1996

of employment in the Middle East were also reported, such as the case of a woman who abused two children, aged 6 and 8, left in her care by their mother, who was working in West Asia, and who was subsequently arrested by the police.¹³

3. Sexual Violence

The newspapers provide regular information of cases with regard to violence against women in situations of rape and domestic violence. Ten percent of all cases with regard to violence against women are cases of rape, although many argue that this is a clear case of under reporting. The most notorious case of rape in the community, which was reported in 1996, involved the interdiction of a judicial officer on rape allegations. The 15-year-old victim lost her parents during an LTTE attack in Ampara. She was adopted by a woman doctor in Gonagaldeniya, Horana. She had allegedly been abused by the doctor, had run away from the home and had subsequently had been taken into the custody of the Ruwanwella Police. When she was produced before the Magistrate, he ordered the girl to be kept in his custody until such time as the Department of Probation and Child Care Services was informed. She was taken to the official residence of the Magistrate in Kegalle and made to perform household chores. While residing at the Magistrates home, the girl was allegedly raped three times by the Magistrate. The Magistrate's wife became suspicious and, when she suspected the girl was pregnant, reported the matter to the Police. The medical officer (Colombo)

¹³ Midweek Mirror, 6 November 1996

confirmed the wife's suspicions that the girl had been raped and was pregnant.¹⁴

The case did not end there. The judicial officer was exonerated and reinstated on the advice of the Attorney-General after a second medical examination overturned the finding that the girl was pregnant. The wife was thereafter accused of having acted maliciously. The medical officer who conducted the first medical examination refused to comment when contacted by the media.¹⁵ This divergence in medical opinion has been received with scepticism and a full fledged inquiry into the affair has been demanded.

4. Domestic Violence

Although the Department of Census and Statistics and the Police do not break down the statistics in terms of domestic violence or violence committed by 'intimates', it may be that many of those injured by knife are, in fact, cases of domestic violence. Sonali Deraniyagala in a study for the women's NGO, Women In Need ("WIN"), interviewed 200 women in an urban low income neighbourhood and found that 60 percent of the women had been victims of domestic violence sometime during the period of their marriage.¹⁶ Another report, also undertaken by WIN in 1991 in four areas, found that the rates of domestic violence

¹⁴ The Island, 10 December 1996, "Judicial Officer interdicted on rape allegation" by Sumadhu Weerawarne and Srian Bulathsinhala.

¹⁵ The Island, 16 January 1997, "Grave errors by AJMO?," by Sumadhu Weerawarne.

¹⁶ Sonali Deraniyagala, *An investigation into the Incidence and Causes of Domestic Violence in Sri Lanka*, Women in Need, (Colombo, 1992) p. 9

averaged around 35% in the areas of Hamillewa, Nochchiya and Colombo but in Pitakande, 77% claimed that they were victims of domestic violence.¹⁷ A definitive all-island survey on domestic violence has yet to be conducted.

The most controversial case of domestic violence in 1996 was the case of Anoma Nayana Priyanthi. It is, perhaps, Sri Lanka's first dowry death case. According to her mother, Anoma died of burn wounds when her husband and mother-in-law filled her mouth with rags and set fire to the rags. She could not tear off her burning clothes because her hands were also bound. Anoma was a mother of three children. She stayed with her husband and mother-in-law in Siyabalape. As the dowry she brought to the marriage was half an acre of land and Rs. 300,000, there were constant arguments between Anoma and her husband regarding the adequacy of the dowry. The case was particularly horrendous because Anoma had made several complaints to the Sapugaskande police and then gone to her parent's home. Repeatedly, however, her husband would come and take her away. There was no evidence that the police did anything in this case, despite Anoma's repeated complaints. Although the husband and the mother-in-law claimed it was a suicide, the medical officer who conducted the post-mortem found that the burns were not due to suicide. A verdict of homicide was returned by the coroner and the husband was taken into custody.¹⁸

¹⁷ Tehani Mathew, "Work Placement: Report on Domestic Violence" paper prepared for MSc Degree in Applied Psychology, University of Colombo, (Colombo), p.7

¹⁸ Daily News, 19 February 1996, "Police directed to produce husband before magistrate" by Madhubashinee Dayabandara.

5. War, Militarisation and the Internally Displaced

For over a decade, Sri Lanka has experienced violent conflict in the North and East of the country as well as in the South, especially during the period 1987-1991. Women are victims of the conflict in many ways: first, as direct victims; second, as refugees; and third, as family members who have lost their male relatives. They are also increasingly becoming involved as combatants, taking an active role in the rank and file of militant and government war machines.

Sri Lanka has no record of how many women have been directly affected by the war. The number killed in the South as well as in the North and East has not been recorded as a statistic. It is difficult even to estimate the numbers. However, 1996 witnessed some highly publicised cases which highlighted the problem of rape and murder during times of armed conflict. One such case, which received international attention, was the case of Krishanthi Kumaraswamy, a student from Jaffna, when she disappeared from the Kaithady check point. After allegedly having been gang raped, her body was found along with the bodies of her mother, brother and neighbour.¹⁹ For the first time in Sri Lanka there was a multi-ethnic response to this event and women and men from all ethnic groups protested the crime and kept a weekly vigil until the accused men were charged in courts.²⁰ The protests

¹⁹ See Weekend Express, Colombo, Saturday, 27 October 1996, p.9, "11 security men at Jaffna check-point gang rape Tamil student" by P Thevanayagam; the Sunday Leader, 27 October 1996; the Virakesari, 23 October 1996 p. 7, "Last Rights by Police" by F. Jansz. For a detailed description of the case, see Chapter 1, Integrity of the Person.

²⁰ See Mid Week Mirror, 13 November 1996, p.8 "Vigil against Violence" by S. de Chikera.

were organised by a coalition of concerned individuals and NGOs, spearheaded by Home for Human Rights and Women for Peace.

Besides being direct targets of violence during war, women are victims as internally displaced persons and as refugees fleeing the conflict. The Ministry of Shipping, Ports, Rehabilitation and Reconstruction claims that there were 785,187 people displaced at the end of 1996. Although there is no gender disaggregated data, there is a general perception that approximately 60-70 % of the people displaced were women.²¹ These are official statistics and the actual figure is expected to be much higher. The UTHR(J) has chronicled the life of the internally displaced, especially after the government offensives launched throughout the year. There are queues, under-resourced camps with bare toilet facilities, segregation of the sexes, separation of families, a lack of medical facilities and a long wait for bureaucratic clearance so that families could move on from the transit stop in Vavuniya to their destinations in other parts of the country. The extremely taxing process of security clearance has also left room for a measure of corruption.²² Women, who are the majority of the displaced, face enormous hardships, often separated from their sons and husbands while awaiting clearance.

Women are also victims of conflict because their male relatives have been killed by internal war or disturbances. In 1994, 21%

²¹ Sepali Kottegoda, "Female Headed Households in Situations of Armed Conflict," *Nivedini*, Vol. No 2 December 1996, p.11

²² See UTHR(J) *Jaffna: The contest between Man and the Beast within*, Special Report No. 7, 19 August 1996.

of the households in Sri Lanka were female headed, up from 16% in 1981.²³ Sepali Kottegoda writes that the increase in female headed households is seen to have been the result of the "political upheavals Sri Lanka has experienced in the form of social strife" and that even population figures had increased, with women comprising 59% of the population.²⁴

The loss of the spouse or male relative has a major impact on the lives of women. They are often forced to become primary breadwinners with a minimum of skills. Additionally, the violent nature of the death with which they have to deal, accentuates their trauma. As Kottegoda writes: "At the personal level, the loss of a spouse and/or sons is, in itself, an event of great sadness in any circumstances and a sudden loss additionally causes shock. The loss of such an individual in the context of a socio-cultural milieu which sets high value on men and enforces a dependence on men, has a particular impact on women who suddenly find themselves in situations of being the main decision-makers and economic providers for the families."²⁵ Sri Lanka still has not comprehensively studied and provided programmes for women victim-survivors of the armed conflict - women who carry the mark of a society's brutality in their own private lives.

Finally, as women are incorporated into the lower rungs of military forces, they are victimised as combatants in war. Both the Sri Lankan security forces and the LTTE have begun sending women to the war zones. The LTTE has made a cult of this

²³ Sepali Kottegoda, *supra* n 22, p.10

²⁴ *Ibid* at p. 11

²⁵ *Ibid* at p.13

activity, with women Tigers playing an important role in mortal combat. Feminists differ in their perception of women in the fighting forces. Some feel that such involvement is a step toward equality. Others are of the view that the process of involving women in military combat signals the militarisation of civil society and that those who value non-violence and human rights must look, with scepticism, at the growing number of women serving military machines, without effective power or control.²⁶ This new class of women is rarely acknowledged, being classified as, "terrorist" or "soldier" in the statistics. As victims of violence they challenge our commitment, as a society, to the values of non-violence and human rights, in the development of an open and democratic society.

6. The Legal Framework

Sri Lanka is a signatory to the Convention on the Elimination of all Forms of Discrimination Against Women ("CEDAW"). Although the Convention itself does not specifically address violence against women, General Recommendation 19 of the CEDAW Committee, formulated in 1992, deals entirely with violence against women. It states clearly that gender based violence is a form of discrimination that seriously inhibits a woman's ability to enjoy rights and freedoms on a basis of equality with men.²⁷

²⁶ See Radhika Coomaraswamy, "Woman of the LTTE" in *Frontline*, 10 January 1997, p.61.

²⁷ See Committee on the Elimination of Discrimination Against Women, 11th Session, General Recommendation 19 CEDAW/C/1992/L.1/ Add. 15.

Sri Lanka also voted for the United Nations Declaration on the Elimination of Violence Against Women when it was passed by the General Assembly in 1993. The Declaration defines violence against women as:

any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life"²⁸ and divides violence against women into three categories: (a) violence against women in the family, which includes battering, sexual abuse of female children in the household, dowry related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation; (b) violence against women in the community, which includes rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution; and (c) violence against women by the State.

Article 12(2) of the Constitution of Sri Lanka states that "no citizen shall be discriminated against on the grounds of ... sex." Article 12(4) adds that "nothing in this Article shall prevent special provision being made by law, subordinate legislation or executive action, for the advancement of women, children or disabled persons."

²⁸ United Nations General Assembly Resolution 48/104 of December 1993, Report Number A/48/629

Given the interpretation by CEDAW that violence against women is an act of gender-based discrimination, Sri Lanka, having ratified CEDAW, must accept the import of General Recommendation 19 and treat violence against women as an act of sex discrimination prohibited by the equality provisions of the Constitution.

Besides the constitutional imperative towards non-discrimination, Sri Lanka has also adopted the Women's Charter to guide its policy imperatives. According to Article 16 of the Charter:

The state shall take all measures to prevent the phenomenon of violence against women, children and young persons in society, in the workplace, in the family as well as in custody, in particular such manifestation of it as rape, incest, cruel, inhuman or degrading treatment.

Such measures shall include:-

- (i) the promotion of legislative reforms not only in terms of the substantive law but also with regard to preventive and punitive measures which would clearly recognize the rights of the women victims of violence;*
- (ii) the promotion of structural reforms within the law enforcement machinery and sensitisation of enforcement authorities so as to strengthen the capacity to deal with crimes of violence directed against women.*

- (iii) provision of support to non-governmental organisations, community based organizations and programmes which provide support and counselling services to women victims of violence, including those affected by armed conflict and civil strife.*

Despite these laudable initiatives at the international and national levels, the actual quality of protection afforded to women in Sri Lanka is greatly determined by the Penal Code. The Penal Code of Sri Lanka, enacted in 1833, does not reflect many of the changes in other similar jurisdictions with regard to efforts to combat violence against women. It has no category of domestic violence as a crime and thus cases must be tried - if at all - under general provisions of assault and grievous hurt, thereby failing to reflect the special situation of violence against women in situations of intimacy. In the same vein, until recently, the Penal Code did not contain a provision on incest or paedophilia. In addition, the Penal Code reflected outdated notions of a woman's character in the provisions on rape and physical manifestations of resistance, the test for successful prosecution of rape. The cautionary rule, which created judicial precedent requiring corroboration, by other evidence, of the witnesses' testimony also prevented effective action against rape.

The Penal Code (Amendment) Act No. 22 of 1995, passed by Parliament in November 1995, attempted to rectify some of these anomalies. Although some improvements were made to the Penal Code with respect to violence against women, there are many who feel that the Amendments did not go far enough to protect women and punish violations of women's human rights.

The most significant amendments relate to rape. A new section 363 was introduced which places emphasis on the woman's consent but not on the term "against her will." According to this section,²⁹ a man is said to commit 'rape' who has sexual intercourse with a woman under circumstances falling under any of the following descriptions:

- (a) without her consent even where such woman is his wife and she is judicially separated from the man;
- (b) with her consent when her consent has been obtained by use of force, or threats or intimidation, or of hurt, or while she was in unlawful detention;
- (c) with her consent when her consent has been obtained at a time when she was of unsound mind or was in a state of intoxication induced by alcohol or drugs, administered to her by the man or by some other person;
- (d) with her consent when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is, or believes herself to be, lawfully married; or
- (e) with or without her consent when she is sixteen years of age unless the woman is his wife who is twelve years of age and is not judicially separated from the man.

²⁹ The Penal Code (Amendment) Act No. 22 of 1995 (referred to as "The Amendments") section 363

The provisions focus primarily on the issue of victim consent and outline situations which are considered rape even when there is consent, such as the statutory rape of a child or when consent is given without full mental capacity.

The amendments have omitted the previous requirement that the act of rape should be "against the will" of the woman concerned. This provision required evidence of actual physical injury as indicative of her resistance. In addition, a new explanation has also been introduced to the section which states that "evidence of resistance such as physical injuries to the body is not essential to prove that sexual intercourse took place."

The amendments in section 364 also recognise distinct categories of rape, considered to be aggravated rape, which require harsher sentences.³⁰ Aggravated rape includes cases of gang rape and custodial rape including rape by: public officers or persons in positions of authority over the victim; persons on the management or staff of a remand home or other place of custody established by law; or employees of women's or children's institutions. Aggravated rape also includes rape, by a person on the management or staff of a hospital, of a woman in the hospital.³¹ The amendments introduce salutatory provisions dealing with minimum sentencing for rape and aggravated rape. The minimum sentence for rape is seven years and for aggravated rape, ten years.³² The maximum sentence for rape and aggravated rape

³⁰ Amendments, section 364

³¹ Dhara Wijayatilake, "Abuse of Women - Problems and Remedies" in *Fortnightly Review*, Vol. VII, Issue No 107 (Law & Society Trust, Colombo, September 1996) p. 4.

³² Amendments, section 364 (1), section 364(2), section 364 (3)

is 20 years. The amendments also allow for a measure of privacy by prohibiting the publication of any matter which may make known the identity of the victim.³³

One unique feature is that the amendments also introduce the concept of marital rape between judicially separated spouses.³⁴ Although the original draft contained a reference to marital rape in general, the final provisions only recognise and prohibit marital rape between couples who are judicially separated. Although the notion that a husband cannot rape his wife is a widely held patriarchal norm in most jurisdictions, the principle has been gradually eroded by judicial construction in many commonwealth countries.

It is unfortunate that Sri Lanka has not sought to follow the more progressive legal developments throughout the world. The age of consent plays an important role in determining whether there is rape within the marriage. The present amendments create a major anomaly. Sexual intercourse with a child under the age of sixteen is statutory rape, unless she is your wife. Sexual intercourse with a wife under twelve is also statutory rape. Girl-children between the ages of twelve and sixteen are, therefore, unprotected by statutory rape laws if their community allows marriage under the age of sixteen. Many commentators have argued that these contradictions which attempt to satisfy community feelings, not only create an anomaly in the law, but also lead to the exploitation and brutalisation of the girl-child.³⁵

³³ Amendments, section 365C

³⁴ Amendments, section 363(a)

³⁵ Professor Savitri Goonesekere in her intervention at the Medico-Legal Society discussion on "Abuse of Women-Problems and Remedies," Colombo (1996).

Although some aspects of the new amendments on rape are welcome, they are not as far reaching as other changes in commonwealth jurisdictions. The definition of rape is limited to sexual intercourse and does not include other acts which are equally degrading or offensive. Most jurisdictions include such aspects as oral sex or the insertion of objects into the genitalia as rape, even though there is strictly no sexual intercourse.³⁶ The Sri Lankan amendments attempt to deal with sexual abuse by introducing section 356B which seeks to address all grave acts of sexual violence that do not amount to rape, including homosexual acts of violence as well,³⁷ (feminists have preferred that these acts also be recorded) as a manifestation of rape, carrying the same stigma, and not as a separate category. Ironically, this category of sexual violence in the amended Sri Lankan law also carries the same sentencing structure as the rape provisions.

In addition, although the amendment recognises the concept of custodial rape, it is not as far reaching as the provisions in the Indian Constitution, which shift the evidentiary presumption in situations of rape and therefore require the authority concerned to present evidence that such a rape actually did not take place. Although the provisions sound draconian, it must be understood that, in the case of custodial rape, the institution concerned is

³⁶ For example, see South Australia Criminal Law Consolidation Act, 1976, section 3; Victoria Crimes Act 1958, section 2A(1); NSW Crimes Act 1900, section 61A; New Zealand Crimes Act 1961, section 128, as cited in Preliminary report submitted by the Special Rapporteur on Violence Against Women, Its Causes and Consequences, [UN Document E/CN.4/1995/42] p. 46.

³⁷ Amendments section 365A, and 365B.

the site of all the evidence. Therefore, the state is in a better position to deal with evidentiary requirements than the victim, who will only have her testimony and any physical evidence from her corporeal body, as evidence.

Women's rights activists have, for a long time, been urging the withdrawal of the cautionary rule, addressed by judges to the jury, requiring the independent corroboration of a woman victim's testimony. In cases involving the offence of abduction and other similar offences, the evidence of the victim is sufficient without corroboration. It is believed that the exception in terms of rape allegations represents patriarchal attitudes with regard to women victims. In *Punchibanduge Wijesinghe Rajaratne v. The Attorney General*,³⁸ decided in 1996, the Sri Lankan Court of Appeal finally determined that independent corroboration of a victim-survivor's testimony in cases of rape is not necessary. The case, which involved a five year old girl - she was 17 by the time the case was decided by the Court of Appeal - involved such a horrendous case of child rape that the judges were moved to say that the cautionary rule may be ignored so long as the jury is satisfied with the veracity of the evidence. The cautionary rule given to the jury - that it is unsafe to convict a person on the uncorroborated testimony of the woman victim - continues to exist, but in certain cases the jury may decide otherwise if it is "satisfied with the truth of her evidence."³⁹ This increasingly discretionary rule is inadequate in itself and legislation should

³⁸ Court of Appeal of CA13/94 decided on 18 February 1996, Minutes 23.01.96.

³⁹ Ibid.

be adopted to remove the cautionary rule from the purview of judicial instruction.

Besides rape, the amendments, for the first time, introduce the crime of sexual harassment into the Penal Code.⁴⁰ Sexual harassment replaces the crime of "outraging the modesty" under the previous section 345. While the earlier section required assault or the use of criminal force, the new section also includes the "use of words or actions" which cause sexual annoyance or harassment. The explanation also covers sexual harassment in the workplace or any other place, by a person in authority. Sexual harassment, as a criminal offence, is punishable. There is no minimum sentence, but the maximum sentence is five years. There is also provision for the payment of a fine.

Before the amendments in 1995, incest was not a crime in Sri Lanka, although it was recognised for purposes of prohibiting marriage registration. The new section 364A challenges the earlier deference to the doctrine of privacy and considers incest, as defined by the Marriages (General) Ordinance, to be a crime. The crime of trafficking is also recognised for the first time in section 360A.⁴¹ It replaces the earlier provisions relating to slavery. The buying or selling or bartering of any person for money or other consideration is now made an offence. The provision is particularly concerned with the fate of children, as are many other amendments to the Penal Code. These provisions deal with the adoption and sexual exploitation of children.⁴²

⁴⁰ Amendments, section 345.

⁴¹ Amendments, section 360A.

⁴² Amendments, sections 286A, 308A, 364A.

Although this topic is covered in a separate chapter on children, it is important to note that the provisions have an important impact on violence against the girl-child, an integral part of a study on violence against women.

7. National Plan of Action

In addition to the legal reforms introduced in 1995, the Ministry of Women's Affairs put forward a National Plan of Action for Women in Sri Lanka.⁴³ One of the main themes in this plan of action is violence against women, including strategies to combat that violence in society. The National Plan of Action identifies the prevalent forms of violence against women to include rape, incest, domestic violence and sexual harassment. Among the strategies called for to combat these forms of violence against women is state condemnation of such violence, as well as a recognition that violence against women is a violation of human rights in keeping with the Vienna Declaration on Human Rights.⁴⁴ The strategy also entails the enactment of legislation to cover domestic violence and the review and reform of provisions in the Penal Code. The Plan of Action calls for abortion to be legalised in cases of rape, incest and fetal abnormalities.

The Plan of Action also suggests that an authority to monitor incidents of violence against women be established, and that such an authority work closely with the media and the police

⁴³ *National Plan of Action for Women in Sri Lanka: Towards Gender Equality*, Ministry of Transport, Environment and Women's Affairs (1996).

⁴⁴ For a full discussion see Preliminary Report submitted by the Special Rapporteur on Violence Against Women, *supra* n 37.

desks involved with cases of violence against women. This should lead to the creation of a database so that a more accurate picture with regard to violence against women may emerge. The Plan of Action calls for support groups, comprising NGOs, and public and private agencies, to be created at the national and provincial level to assist victims and to help the government receive and collect data on violence against women. The strategy also calls for change in the evidentiary procedure set forth in the Evidence Ordinance and for the adoption of legislation to allow for public interest litigation in this field. It further highlights the need for a greater awareness of the issues with regard to violence against women at all levels of society.

The National Plan of Action not only speaks about the traditional spheres of violence against women in society but also deals with the problem of displaced persons, torture, disappearances and armed conflict. In all these cases, the Plan comments on the woeful lack of support services for women's victim-survivors of violence. There is a need to enable and assist women who are survivors of violence by establishing crisis centres at the provincial level. According to the Plan, these centres would not only assist women through the legal and administrative processes but also conduct programmes and projects to enable women to cope with their new roles and responsibilities resulting from loss, grief and trauma.

8. The Criminal Justice System

The police have to be given a thorough training on how to deal with this kind of crime. They don't know how to talk to a woman victim. Their very tone and speech terrifies me.

Having women police officers to attend to this type of crime is not enough. The policeman too should be given to understand that this is a crime against society.

Victim-survivor of rape⁴⁵

Those days, when I used to go and tell the police they would come and advise the two of us and that was all. I used to go and complain and they came and advised us. That was a hell of a thing - finally I went and blasted the police saying that what was the justice in it for me - why couldn't they beat him up for beating me - they go and beat up the other thieves and all those they take into custody? Otherwise, what's the point? Every day, I get beaten and that was all - he gets away scot free. Then one day the police actually beat him up - thoroughly. After that he was somewhat scared.

Victim-survivor of domestic violence⁴⁶

This *ad hoc* and sometimes extra-legal response of the criminal justice system is a major obstacle to the campaign for the eradication violence against women. The police are often the first contact that victim-survivors of violence against women have with the criminal justice system in charge of vindicating

⁴⁵ Kamalini Wijayatilake, "Rape" in *Violence Against Women :- Voices of Victims and Activists*, Centre for Women's Research, Colombo, (1997) p.5

⁴⁶ Maithree Wickramasinghe, "Domestic Violence" in *ibid*, at p. 86. Although police brutality must not be condoned, this quote serves as a powerful example of the desperation many victim-survivors experience when official state organs, such as the police, fail to treat their complaints seriously.

their rights. The general perception of survivors and activists, as presented in the research volume, *Violence Against Women, Voices of Victims and Activists* recently published by the Centre for Women's Research, is that the police, and much of the criminal justice system, do not adequately respond to the needs of women victims. Women's organisations also agree. In a note explaining some of the problems that arise in working with the police on issues of violence against women, Pearl Stephen, one of the leading organisers in the field writes: "There is no gender consciousness among the Police, Court Officials and the general public. [They] are unsympathetic to the violence suffered by the victim."⁴⁷

As a response to the call for the police to be more sensitive to women, the Police have established desks devoted to women and children at the headquarters and in eight divisions in Mount Lavinia, Kandy, Tangalle, Negombo, Kuliyaipitiya, Galle, Kalutara and Chilaw. According to information from the police, other units will be set up shortly.⁴⁸ The desk at the headquarters is under the supervision of a senior Deputy Inspector General of Police. This desk and the units around the country are staffed by women police. In actual fact, the units are confined to dealing with minor offences of violence against women. Rape, for example, is still handled by other units staffed by men, although there have been attempts to train women police officers to deal

⁴⁷ Pearl Stephen, "Note to Professor Goonesekere," edited by and made available to the author by Professor Goonesekere.

⁴⁸ Premila Divakara, "Police View on Violence Against Women," note prepared for Professor Savitri Goonesekere and made available to the author by Professor Goonesekere.

with this crime. As part of the process, women police officers in charge of these desks have been instructed to entertain complaints and also conduct inquiries and investigations. The police view is that these desks should also maintain a close liaison with government and non-governmental authorities, in attempting to deal with their cases. They have also been instructed to collect data on the violence that is actually perpetrated against women and children. The statistics are apparently collected on a monthly basis. The police officers of these desks have also been authorised, in association with school principals in their areas, to organise awareness training programmes for students of grade seven and upwards. The workshops and training courses deal with preventive action and awareness building among young people.⁴⁹

Despite these attempts, most groups working in the field of violence against women are still not satisfied that sufficient effort has been placed on eradicating violence against women. In the first place, the stigma that such violence carries prevents cases from being reported. Police officers are very candid in admitting that only a fraction of the crimes committed against women in the home, the community or by the state are actually reported.⁵⁰ The stigma attached to reporting cases of violence against women can only be countered if there is an effective national campaign on violence against women, which condemns such violence and calls on women to come forward and make their complaints. Although the National Plan of Action calls for

⁴⁹ Ibid p. 30.

⁵⁰ Ibid.

such a campaign, there has been no concerted implementation of the strategy and there is no indication that such a campaign will begin in the near future.

The attitude of police personnel, as well as that of prosecutors and judges, is another factor which has been highlighted as negating any effort to force the criminal justice system to vindicate women's rights. As Pearl Stephen writes, "police personnel do not seem to be aware of changes in the Penal Code and relevant procedures. The senior officers may have the knowledge, but the officers who handle the day to day work are quite ignorant of relevant laws which is a serious handicap to all concerned."⁵¹

The need to have special courses and training workshops to sensitise both male and female police officers, as well as members of the Attorney-General's office and the judiciary, is imperative. The training of police should begin at the Police Training Institute and should be conducted at other levels as well. As for the judiciary, the question of sensitisation is more difficult, as some judges may not be ready to accept the fact that they need sensitisation. In this context, examples from other countries such as India, where NGOs have held sensitising workshops for the judiciary and where such sensitisation has had an admirable effect on judicial practice, may provide a framework for introducing such training in Sri Lanka.

Besides the difficulties relating to prevailing attitudes, another important reason why women do not bring their cases to court

⁵¹ Stephen *supra* n 48.

relates to the problem of laws delays. A particular case of gang rape in Kandy took place in November and it has taken over ten months to conduct investigations. Among the reasons given for the delay are the lack of personnel, inadequate transport and the lack of priority given to the case.⁵² This delay in investigation frustrates and scares the victim-survivor since her abusers are free and she is subject to continuing harassment and ridicule. This type of stress deters many women from even considering filing a complaint if they are raped. In addition to delays in investigation, there are delays in the courts, often resulting in abusers being freed on bail, which then creates greater stress for the victim concerned.

The actual trial is often a humiliating process for the victim-survivor. In the words of one woman victim:

I have had to attend court on several days. But although so much time has passed I still do not know if the culprits will be charged in the High Court. Each time I attend court I go through the trauma. The defence lawyer even said that I knew the accused very well and that I myself lifted his sarong. He also said that this happened to me through someone else and that I was falsely accusing his client. The police are prosecuting. But I feel that they are not competent enough. I feel betrayed and let down by the system. The culprits get away. Soon after the accused was released on bail, he was working at the garage as if nothing had happened. He can do the same thing to another woman, can't he? Honestly, I feel so angry and frustrated at times. I assure

⁵² Ibid.

you, if no justice is done through the courts, I myself will knife him in open court.

Victim-survivor of rape⁵³

With so much emphasis placed on the woman's consent in court proceedings, it is often the woman's character rather than the defendant's culpability that is on trial. As the above case illustrates, defence lawyers are ready to invent stories which further humiliate the witness. Commonly, cross examination by the defence lawyer forces the victim-survivor to relive the crime, as well as the trauma of the crime, often requiring her to disclose intimate details of her personal life. For this reason in some countries trials relating to violence against women take place in camera - especially in instances of rape. Although new amendments to the Penal Code give the victim this option, the problem of laws delays and the fact that she must nonetheless defend her character and reputation remain immense obstacles for women who seek redress through the criminal justice system.

In addition to the process of the trial, the sentencing structure has been widely criticised. Judges frequently give suspended sentences or very minor sentences, such as one year imprisonment, for rape. When asked, judges have intimated that they give low sentences because the investigation of the cases is so bad that they have to accept plea bargains in order to impose on the perpetrator, some form of punishment.⁵⁴ The police maintain, in their defence, that the judiciary is not sensitive

⁵³ Supra n 46 at pp. 3-4.

⁵⁴ Conversation with Professor Savithri Goonesekere, January 1996.

and does not always give justice to women. Whatever the reason, it is hoped that the new amendments, which require a mandatory minimum sentence of seven years, will force the judiciary to treat the crime of rape seriously. In other areas such as that of domestic violence, we await fresh legislative initiatives which would allow for more activist intervention by the courts, with a wide array of available remedies. Such legislation is being proposed by those working in the field of violence against women in Sri Lanka.⁵⁵

9. Support Services for Victim-Survivors of Violence against Women

Victim-survivors of violence against women have very few centres to turn to in situations of crisis. There are two agencies concerned with violence against women - one located in Colombo the other located in Kandy - which attempt to provide counselling services for women. The centre in Colombo, WIN, is a non-profit making organisation dealing with diverse cases such as bigamy, rape, divorce, and domestic violence. Fifty to sixty per cent of their cases relate to domestic violence.⁵⁶ WIN provides counselling, legal aid, financial help, as well as a small shelter for women and is run by dedicated women including an executive director, two full time counsellors, four lawyers and several administrative and project personnel. The shelter is run by a supervisor cum housekeeper who is on call 24 hours a day.

⁵⁵ The National Committee of Women is considering putting forward such legislation.

⁵⁶ *Supra* n 18 at pp. 23-24.

The other organisation that works with women is the Women's Development Centre in Kandy, which is also a non-governmental organisation that works on issues of violence against women in co-operation with the Department of Probation and Child Care services and the Police Department. They provide counselling and legal aid and accompany victims to courts if there is a necessity. They also maintain a shelter.

Besides these two organisations, there are no other crisis centres for victim-survivors of violence against women on the island, the lack of which is an important reason why women do not report cases or vindicate their rights. Both the Women's Charter and the National Plan of Action require that the provision for services to victims be given high priority. The government claims it has no resources and NGO alternatives are lacking in many parts of the island. Experience from other parts of the world has proved that crisis centres act as a catalyst for the improvement of the situation in cases of violence against women. They provide services for the victim-survivor so that she is not alone and they often galvanise the police into action. The Kandy Women and Children's Police Desk is reputed to be effective because of the active mobilisation of the Women's Development Centre. Without the catalytic effect of crisis centres working in close rapport with the police, victim-survivors often will remain silent and invisible.

10. Recommendations

10.1 Gathering of data

The Department of Census and Statistics and the women and children's units of the Police should collect specific data with

regard to violence against women. In addition, analysis should be undertaken comparing the number of reported cases of violence against women with the number of successful prosecutions and actions by the police; so that criminal justice processes relating to violence against women, and their impact on violence against women, may be better understood. In addition, universities and NGOs involved in women's studies should be given access to this data so that a systematic analysis of the statistics may be undertaken.

10.2 Legal framework

With regard to the legal framework, amendments should be introduced to remove the cautionary rule on the corroboration of the rape victim's testimony through amendments to the Evidence Ordinance. In addition, the sections on marital rape, custodial rape, and the definition of rape should be revised to bring them in line with recent reforms in other commonwealth jurisdictions. Special legislation for domestic violence should also be adopted.

10.3 The National Plan of Action

The National Plan of Action is a comprehensive document drawn up by public officials, academics and NGOs, which highlights the action that must be taken by various authorities to confront violence against women. The National Committee for Women and the Ministry for Women's Affairs should formulate a comprehensive project proposal based on the Plan and attempt to gather resources and personnel for its implementation.

10.4 The Criminal justice system

The Police Training Institute, and other institutions involved in police training, should be compelled to ensure gender sensitisation of the police force and the development of specialised skills relating to violence against women. A new curriculum, and the training of trainers should be implemented with assistance from other commonwealth jurisdictions that have similar training programmes. The women and children's units should be given more resources and better training so that they may actively intervene in situations of violence against women.

In addition to the police, NGOs, the universities and the Judges Training Institute should conduct seminars and courses for judicial officers so that they are made more sensitive to gender issues; particularly to cases involving violence against women. Health workers and forensic experts should also be made more aware of their role in the effective prosecution of criminal cases relating to violence against women. The development of examination kits for cases of sexual violence may be a step in that direction.

10.5 Support services for victim-survivors

Since experience has shown that effective support services for victim-survivors galvanise the effective prosecution of cases of violence against women, it is important to develop a network of women's organisations throughout the country to give support to victim-survivors. There should be a concerted plan to provide shelters, legal and psychological counselling and advocacy, including victim accompaniment to police stations, health

institutions and throughout the criminal justice system, to provide victim-survivors with a sense of solidarity and to help them mediate state systems. The Ministry of Women's Affairs and NGOs should collaborate in drafting a nation-wide plan so that the services provided are not restricted to the two major cities.

Refugee women and women who are victims of the armed conflict are groups that require social support and solidarity. Given the years of conflict in both the North and the South, there are a large number of women from all ethnic groups who have been either directly or indirectly affected by political violence and war. It is important that a national plan be adopted to address their material and psychological needs. This plan should identify the problem of violence against women as one of the major concerns of Sri Lankan national policy and should be implemented in partnership with NGOs. As the experiences of other countries have demonstrated, it is only through an effective partnership between NGOs and the government that effective programmes to eradicate violence against women will be developed and implemented.

X

Children's Rights

Sharya de Soysa*

1. Introduction

Nineteen ninety six was a disappointing year in the area of Children's Rights. In 1995 we saw the amendment of the Penal Code, the Marriage (General) Ordinance and the Kandyan Marriage and Divorce Act. The amendments to the Penal Code dealt, *inter alia*, with the sexual exploitation of children and covered rape, homosexual exploitation of children and pornography. The reforms were characterised by enhanced penalties for offences committed against children. The amendments to the Marriage (General) Ordinance and the Kandyan Marriage and Divorce Act focused on the lawful age of marriage, raising it to 18 years, except in the case of Muslims. Nineteen ninety six, however, saw no significant legislation dealing with children. Despite comments and recommendations of the United Nations Committee on the Convention of the Rights of the Child in 1995, no legislative reform with respect to children's rights has been made, thus calling into question the priority given to the rights of the child in Sri Lanka.

* Associate Professor and Dean, Faculty of Law, University of Colombo.

This year's review will focus on the numerous reported cases of sexual exploitation of children, on child labour and on areas that call for reform.

2. Sexual Exploitation

Article 19 of the Convention on the Rights of the Child ("CRC") provides that the state shall protect the child from all forms of abuse and maltreatment, whether physical or mental, or sexual, while the child is under the care of parents, guardians or other care-givers. In addition, Article 34 deals more extensively with sexual exploitation.

Child rape is on the increase in Sri Lanka, with incidents reported throughout the country.¹ The tougher laws that came into operation in 1995 do not appear to have had a significant impact in decreasing the number of rape cases. According to Police records, 69 rape cases were reported within the first three months of 1996.² Police sources state, however, that due to a general lack of awareness, the new laws fail to act as a deterrent. An increase in rape cases is evident from the statistics made available by the Commissioner of Prisons. In 1983 there were 51 recorded cases of rape; in 1992, there were 121 recorded

¹ Island, 26 January 1995 reported a case of rape and subsequent suicide in Payagala South. Sunday Times of 2 July 1995 reported a case of rape resulting in conviction in Talangama South. Sunday Observer of 21 April 1996 reports a conviction for rape in Narampanawe in the Menikhinne area. In *Rajaratne v. AG*. [CA 13/94 decided on 23/1/1996], a conviction and sentence of the rape of a five year old child was affirmed. The rape had taken place at Meemannawalla in the Anuradhapura area.

² Island, 30th June 1996.

cases; in 1994, 94 cases and in 1995 there were 162 recorded cases of rape. There have been disquieting indications that incest and unlawful intercourse are on the rise as well.³

Whilst incidents of child rape are not confined to any particular part of Sri Lanka, child prostitution appears to be most prevalent in the western coastal region, particularly in the resort areas frequented by tourists.⁴

In 1996, after the Penal Code reforms of 1995 came into operation, a more stringent approach to sentencing was noticed. Thus, in April 1996 a 57 year old man, charged with having raped a six year old girl, was sentenced to 10 years rigorous imprisonment, and fined Rs. 50,000 in the High Court of Kandy. The judge ordered the fine to be deposited in the National Savings Bank in favour of the victim.⁵ Failure to pay, in accordance with the Court order, would result in a further imprisonment for five years.⁶

Nineteen ninety six saw a noteworthy decision of the Court of Appeal. In *Rajaratne v. AG*⁷ the accused-appellant had been charged with the abduction and rape of a five year old child. The High Court found the accused not guilty of the first charge of abduction, but guilty of the second charge of committing rape. He was convicted and sentenced to a term of 18 years'

³ Information, Police Department.

⁴ "Sexual abuse of children in Sri Lanka," Ceylon Daily News, 17 September 1996.

⁵ "Ten Years RI, fined Rs 50,000 for rape of girl," Sunday Observer, 21 April 1996.

⁶ Ibid.

⁷ Supra n 1.

rigorous imprisonment and a fine of Rs 10,000, with two years further imprisonment in default of payment. The fine was to be paid as compensation to the victim. The conviction and sentence was affirmed by the Court of Appeal. In the Court of Appeal, the accused-appellant argued that in cases of rape, a conviction can be sustained only if the evidence of the victim is corroborated by independent testimony. The Court, however, rejected this argument. Referring to *Themis Singho*,⁸ *R. v. Dharmasena*⁹ and *Karunasena v. The Republic of Sri Lanka*,¹⁰ the Court held it proper for a jury to convict on the uncorroborated evidence of the complainant when the evidence is of such a character as to convince the jury that the complainant is speaking the truth. Justice Ismail, with Justice Gunesekera concurring, found that the requirement of corroboration had not crystallised into an absolute rule of law. The Court distinguished the case from *Premasiri v. The Queen*,¹¹ in which conviction based on the uncorroborated testimony of a complainant was set aside by the Court of Criminal Appeal. The Court in *Rajaratne v. AG*¹² however, observed that the Court of Criminal Appeal in *Premasiri's Case*¹³ had set aside the conviction only because the complainant's evidence was unsatisfactory.

Prior to the Penal Code (Amendment) Act of 1995, extremely lenient sentences were imposed for sexual offences against

⁸ (1944) 45 NLR 378.

⁹ (1956) 58 NLR 15.

¹⁰ (1975) 78 NLR 63.

¹¹ (1971) 77 NLR 86.

¹² *Supra* n 1.

¹³ *Supra* n 11.

children, in some part due to the lack of laws addressing, in particular, the sexual exploitation of male children. For example, a French doctor charged in the Kalutara courts, prior to the enactment of the amendments, pleaded guilty under section 365A - which dealt with "Acts of gross indecency between male persons" - after he was found naked on a bed with five boys between the ages of 12 and nineteen. He pleaded guilty and was sentenced to a two year suspended sentence and a fine of Rs. 1500/-. A similar sentence was imposed on a Canadian teacher who was also charged and who pleaded guilty under the same section. The new Section 365, however, precludes such sentences. Acts of gross indecency are now punishable, when committed between adult parties, with sentences up to two years. When the offence is committed between a person over 18 years in respect of a person under 16 years, the punishment must be no less than ten years' rigorous imprisonment. The awareness of paedophilia, moreover, appears to have increased and the monitoring of such cases by non-governmental organisations, such as Protecting the Environment and Children Everywhere, ("PEACE") has led to a more systematic investigation of alleged offences. It was reported in October 1996 that a special Police team had taken a suspected Swiss paedophile into custody and rescued three victims from his home in Negombo.¹⁴ A later report revealed that bail was refused by the Chief Magistrate and Additional District Judge.¹⁵

¹⁴ "Suspect Paedophile in Custody," Ceylon Daily News, 17/10/96.

¹⁵ "Bail refused for Swiss Businessman," Island, 25/10/96.

In 1996, there were numerous reports of the alleged sexual abuse of children in orphanages. Reports were published of destitute children in the Dambulla/Sigiriya area who were taken to a nearby three star hotel and sexually abused. One report highlighted two orphanages in this context, one of which allegedly had not been registered as an orphanage, for failure to meet with the required standards.¹⁶ This raises the wider issue of regulatory mechanisms for orphanages, and their effectiveness. Where, as in this case, registration had been refused, action should have been taken against those who had, nonetheless, set up the home, in violation of the provisions of the Ordinance. There is no indication, however, that this took place.

The Orphanages Ordinance¹⁷ requires the compulsory registration of orphanages, and provides that, on or after March 1944, no new orphanage shall be established unless registered under the Ordinance.¹⁸ The Ordinance visualised the appointment of a Registrar of Orphanages for the whole of Sri Lanka, or for any specified area under whom Inspectors of Orphanages would act.¹⁹ Every application for the registration of an orphanage must be made to the Registrar appointed for the area in which the orphanage is situated, duly signed by the Manager of the Orphanage,²⁰ and submitted to the Minister.²¹

¹⁶ Sunday Times, 27/10/96.

¹⁷ No. 22 of 1941

¹⁸ Ibid, section 2 read with section 19(1).

¹⁹ Ibid, section 4 and Section 5(2).

²⁰ Section 6(1) (a)(b)(c).

²¹ Section 6(2).

The Minister may refuse the registration of an orphanage.²² The establishment of an orphanage in contravention of any provision of the Ordinance amounts to an offence under the Ordinance and is punishable with a fine not exceeding five hundred rupees, or imprisonment for a period not exceeding three months. Undoubtedly, the sanctions are inadequate and will have to be strengthened. Even so, the author has not been able to find a single reported case in the law reports which involved a prosecution under the Orphanages Ordinance.

The Department of Probation and Child Care Services stated, in 1996, that 50 unregistered homes would be shut down.²³ Unfortunately, such action only takes place when a scandal is exposed. In this instance previously mentioned, the issue that brought about the official reaction was a case where investigations had revealed that at least 11 children below the age of 15 had been sexually abused by both locals and foreigners. The President of the Board of Trustees of the home was produced before the Magistrate and remanded pending further investigations. No further data about the case is available.²⁴

3. Child Labour

As disquieting as the cases of sexual abuse of children, were the reports on abusive child labour reported in 1996. Nearly 500,000 children are estimated to be employed in Sri Lanka, of

²² Section 6(3).

²³ "Child sex home to be shut," *Sunday Times*, 19/01/97.

²⁴ *Ibid.*

whom about 75% are employed in the plantation and urban sectors.²⁵ The case of Nilusha Kumari was exposed both in the English and Sinhala press.²⁶ This eight year old child was brought to hospital with over 1100 wounds. According to the reports her right hand had been broken, her hair uprooted and her body burnt by her employer, a teacher and mother of three. Her history revealed that her family had been displaced owing to the conflict and was living in a camp for the internally displaced when she was given over to her employer. The child was examined by the Judicial Medical Officer who reported her condition.²⁷

The case of Roshini Jayatilleke, a ten year old, was similar. When brought by neighbours to the Kurunegala hospital for treatment, the child was found to be physically and mentally distraught. She spoke of being battered often by her mistress, for not performing her chores to perfection. Whilst it was reported that the child was handed over to the Department of Probation and Child Care Services, there is no further information available on the action taken.

Quite apart from the violation of the Penal Code in these cases, are the violations of the labour laws of the country. Although the law is quite clear, there is no indication that legal action took place. The minimum age of employment is twelve years, as established by regulations under the Principal Ordinance, the

²⁵ "Five lakhs of Sri Lankan Children illegally employed," *Island*, 1/7/96.

²⁶ "Destitute child's plight: an eight year old child with 1100 wounds" (translation), *Lankadipa*, 19/12/1996, "Torture - the price of poverty," *Sunday Island*, 15/12/96.

²⁷ *Ibid.*

Employment of Women, Young Persons and Children's Ordinance. The regulations also list a series of occupations in which children over the age of 12, but under the age of 14, cannot be employed; including conservancy or scavenging work, clearing of forests, fishing, dining work in night clubs etcetera. Additionally, children between the age of 12 and 14 are subject to protective regulation relating to domestic service.

The Principal Ordinance prohibits the employment of children during school hours, or between 8 pm and 6 am, and for more than two hours a day on days when they are required to attend school. It also proscribes lifting, carrying or moving heavy objects, as this is likely to cause injury to children.²⁸

Young persons between the ages of 14 and 18 are not precluded from engaging in any particular industry, trade or occupation; but the regulations provide limits on the maximum hours of work. Children under 16 years cannot be employed for more than nine hours in any one day, including overtime, or for more than 50 1/2 hours in any week. Young persons between the ages of 16 and 18 cannot work on any one day for more than 10 hours, inclusive of overtime, and, in any one week, for over 55 1/2 hours. These provisions do not apply to young persons employed as domestic servants.

Paid or unpaid family work is a commonly seen Sri Lankan society and both the Principal Ordinance and the regulations appear to recognise that reality.²⁹ Thus, the Principal Ordinance,

²⁸ Section 13(1) of Employment of Women, Young Persons and Children Ordinance No. 47 of 1956.

²⁹ Ibid, section 19(1) Regulations, 11th April 1958 Section 2(II)(III).

while prohibiting night work in industrial undertakings, excludes any undertaking in which any family members are also employed.

These laws and regulations already in place appear to have had little impact on the incidence of child labour in the country.³⁰ Nineteen ninety six did not see the recommendations of the Technical Committee on Child Labour (1994) coming into force.³¹ These recommendations addressed a number of pertinent issues, and the recommendations will be recapitulated. A uniform minimum age of employment of 15 years was recommended. The advantage of this recommendation is that it is far less complex than the existing law, which allows for children to be engaged in certain types of occupations provided that they are above the minimum age of employment, which is 12 years. The existing law, quite apart from raising the question as to whether the minimum age of employment ought to be as low as twelve years, is more difficult for potential employers to understand and for law enforcement officers to monitor. The Committee further recommended that the minimum age of employment be linked with compulsory education regulations. Whilst an

³⁰ Statistics on child labour is difficult to obtain and the figures cited range between 500,000 and one million. Savitri Goonesekere states that estimates of those under 19 who are working could be between one and two million. Included in that figure, however, are those who are in terms of the current legislation legally employed in that they are over the minimum age of employment. See *Child Labour in Sri Lanka: Learning from the Past*, ILO (1993, Geneva) p 1. See also Jill Grime, "An Investigation into Children's Rights in Sri Lanka," SIDA (1994) p 17 where she quotes the figure of 500,000.

³¹ Committee appointed by the Minister of Health and Social Services.

announcement was made as early as May 1995 that schooling would be made compulsory, 1996 did not see the promulgation of the necessary legislation. The Committee notably excluded the prohibition relating to the employment of children under the age of 15 years where relevant, to children engaged in family activities after school hours. Nor was the prohibited age to have any effect on vocational training and skills development, provided that the child's wishes were ascertained. The Committee also looked carefully at the issue of law enforcement, and found that the Labour Department, in general, and its Women and Children's Bureau in particular, were understaffed and lacked resources for effective monitoring and inspection. A response has been to accord Probation Officers the same powers as Labour Officers.³²

Provincial authorities too, in the Committee's view, needed to be involved in the monitoring of child labour violations. The regulation of labour and safety in mines is under the central government's control.³³ However, employment planning and special employment programmes relating to the province find a place in the concurrent list, and thereby become an area of activity in which both the provincial government and the central government may engage.³⁴

³² Informal discussion Ms Pearl Weerasinghe, Department of Labour.

³³ List II (Reserved List) Constitution of Sri Lanka, Thirteenth Amendment.

³⁴ List III (Concurrent List) Constitution of Sri Lanka, Thirteenth Amendment.

4. Recommendations of the Committee on the Rights of the Child

Many of the concerns expressed by the Committee on the Rights of the Child,³⁵ after considering the initial report of Sri Lanka in 1995, remain unaddressed. This section will concentrate on those recommendations that do not entail greater financial allocations for children which, in the current context of an internal armed conflict, may not be feasible.

The Committee noted with concern that some of the general principles of the Convention including, in particular, the principle of non-discrimination embodied in Article 2, the principle of the best interests of the child found in Article 3, and the principle of respect for the views of the child found in Article 12 are not reflected in national legislation. With regard to the principle of non-discrimination, the Committee pointed out the disparities between the three different legal regimes - the General law, the Kandyan law and Muslim law. The reforms of October 1995, after the Committee's report, relating to the lawful age of marriage, continue to violate the principle of non-discrimination since such reforms only brought about changes to General law and the Kandyan law. Given the reluctance, on the part of the government, to increase the lawful age of marriage for Muslims, it seems likely that future reforms will follow the same pattern.

³⁵ This Committee is established under the Convention on the Rights of the Child. See *Sri Lanka: State of Human Rights 1995* (Law & Society Trust, Colombo), pp 175 ff (hereinafter referred to as "the Committee").

The best interests principle, which has not yet been incorporated into legislation, has been introduced in judicial decisions. Other conflicting rules of General law - for example, the preferential right of the father, and the rule that custody ordinarily ought to be given to the innocent spouse - do not necessarily give way to the best interest standard.³⁶ The non-incorporation of the best interest standard into legislation is due to Sri Lanka's piece meal approach to law reform. The enactment of a comprehensive Children's Code or Act has not been attempted. Instead, the approach is to amend various statutes dealing with particular areas of child law.

The other general principle not found in Sri Lankan child law, and referred to in the report of the Committee, is that relating to respect for the views of the child. The Committee observed that the views of the child are not taken sufficiently into account within the family, the school and the juvenile justice system. Once again, given the absence of a comprehensive Code or Act, it is difficult to see how this principle will find legislative recognition.

The Committee observed that the legal provisions relating to juvenile justice were not in line with the principles found in the Convention. In particular, the Committee focused on the low age of criminal responsibility and the status of children between the ages of 16 and 18, who are treated as adults under Sri Lankan law. Both areas of concern could be easily addressed with amendments to the Penal Code and the Children and Young Persons Ordinance.

³⁶ Fernando (1968) 70 NLR p 534.

The law relating to sexual exploitation and abuse of children has been substantially revised and brought in line with the Convention. One recommendation of the Committee, which has received inadequate attention, is the aspect of victim support.

The Committee expressed reservations about corporal punishment, which they found persists in Sri Lankan society and is accepted in the schools. 1996 saw no changes in this regard.

The Committee called for greater regulation of domestic adoption, noting that legislative reforms had only taken place with regard to international adoption. No changes have taken place in the area of domestic adoption.

5. Conclusion

Nineteen ninety six was an abysmal year for children, so far as law reform was concerned. Given the fact that the Committee on the Rights of the Child had expressed concern on a number of areas and made detailed suggestions and recommendations, one would have expected 1996 to have been a year of reform, for child law. The impetus for law reform as far as children are concerned seems to have died out. The only response visible in 1996 was in relation to cases of blatant violations of certain rights of children, in particular, to those involving physical or sexual abuse.

XI

Internally Displaced Persons and The Freedom of Movement

Mario Gomez*

1. Introduction

For almost 800,000 Sri Lankans the freedom of movement, guaranteed by the 1978 Constitution and international covenants, remains an illusion.¹ This group, which has been closest to the ethnic conflict, have had little freedom in choosing their places of residence, work, study or leisure. They have had little choice in opting to remain, or to flee. These choices have been determined for them by other, and more powerful, actors. As a group, they are identified by a common history of forced displacement. And as a group they continue to have fewer opportunities to meet their basic needs than those Sri Lankans who have not been displaced.

* Lecturer, Faculty of Law, University of Colombo; Consultant, LST.

¹ Article 14(1)(h) of the Constitution of Democratic Socialist Republic of Sri Lanka (1978) and Article 12 of the ICCPR. Article 16 of ILO Convention No 169 Concerning Indigenous and Tribal Peoples in Independent Countries, in addition states that such peoples shall not be removed from the lands, they occupy unless relocation of these peoples is considered necessary as an exceptional measure and takes place with their free and informed consent.

This chapter will look at some of the issues pertaining to those persons who have been displaced by the conflict. The chapter focuses on a cluster of five issues: displaced women; the role of the military in shaping relief and rehabilitation; the difficulties in obtaining information as a result of government and LTTE restrictions; the situation in the Vanni, Vavuniya and Jaffna; and the movement of the displaced to India. A summary of some of the relevant international and domestic standards on internal displacement is presented at the end of the chapter. The status of those repatriated from Switzerland; the situation in the East and in Puttalam; questions relating specifically to displaced children; and the processes of reconstruction that have been initiated in the North, are not examined in this chapter.²

2. The Background

Sri Lanka has had a fluctuating displaced population for almost 15 years. This population has been spawned by the ethnic conflict, currently being fought out between the forces of the Sri Lankan government and the LTTE.

When the initial movement of people began, there was some hope that this displacement and dislocation would be temporary. This hope did not materialise and, while some of those who

² The governments of Sri Lanka and Switzerland signed an agreement which provides for the repatriation of a specified number of unsuccessful asylum applicants from Switzerland. See *Sri Lanka: State of Human Rights 1994* (Law & Society Trust, Colombo, 1995) pp 266-268. Puttalam is home to several thousand Muslims who were forcibly evicted by the LTTE in 1990. See *Sri Lanka: State of Human Rights 1993* (Law & Society Trust, Colombo, 1994) p 286.

were forced to flee in the initial stages of the conflict have resettled, thousands more have since been displaced, and many who had re-settled have since been displaced again. Many of those who are currently displaced have been displaced several times over.

In the early 1990s, the situation with regard to the displaced population was relatively stable. The LTTE had *de facto* control over most of the Jaffna peninsula while the government forces made an attempt to regain control in the East. In 1992 and 1993 many people were re-settled in the East, in Mannar, and in some other areas, under a government sponsored initiative. Others returned from refugee camps in Southern India through an UNHCR sponsored initiative.³

Previously, the state and NGOs had focused almost exclusively on providing relief and assistance. This was based on the belief that displacement was a short-term phenomenon which needed to be addressed through additional short-term provision.

As displacement acquired a semi-permanent flavour, however, approaches changed. The emphasis shifted to helping the displaced 'take responsibility for their lives' and to trying to foster a sense of independence in the displaced. Less attention was given to 'handouts' and increased attention to activities which were geared to words establishing self reliance. Thus, access to employment emerged as a major concern. In the wake of the October 1995 offensive, however, the emphasis shifted again to 'relief and assistance' because of the massive

³ *Sri Lanka: State of Human Rights, ibid at pp 256 – 306.*

displacement which took place and the humanitarian consequences which ensued.

October 1995 was the turning point. The Sri Lankan armed forces, which had, until that point, been content to let the LTTE control most of the Jaffna peninsula, launched a major operation to take control of the peninsula. Thousands left as a result of this operation.⁴ Many left because of LTTE pressure to do so, while others fled the shelling and bombing that accompanied the operation. In December 1995, the Sri Lankan armed forces took control of a largely empty Jaffna town and in April 1996, after a further operation, they resumed control of much of the Jaffna peninsula. It was estimated that the Sri Lankan armed forces controlled between 60 and 80 percent of the Jaffna peninsula at the end of 1996.

The experiences of many of the displaced have varied. While they share a common experience, in that they have all been uprooted and forced to flee, their experiences as displaced persons have differed depending, *inter alia*, on their geographical location, their ethnic background, the interaction they have had with local and international NGOs, and their relationship with the local population.

3. Numbers

According to the Ministry of Rehabilitation and Reconstruction there were 768,356 people displaced within the country at the

⁴ See Mario Gomez, *People in Between* (Washington DC: US Committee for Refugees, 1996). Excerpts in *Fortnightly Review*, in Vol VI, Issue No. 103 (Law & Society Trust, Colombo) May 1996 p 35.

end of 1996.⁵ However, NGOs and some humanitarian officials allege that there are a large number of people in the Vanni who are not taken into account in these figures since they do not receive assistance from the government. A recent news report said that there were about 70,000 displaced persons in the Vanni not receiving relief.⁶

<i>Numbers Displaced (Approx.)</i>	
<i>December 1994</i>	<i>525,000</i>
<i>October 1995</i>	<i>649,049</i>
<i>December 1995</i>	<i>1,017,181</i>
<i>May 1996</i>	<i>839,161</i>
<i>October 1996</i>	<i>770,837</i>
<i>December 1996</i>	<i>768,356</i>

Source: Ministry of Rehabilitation and Reconstruction

In addition, it is estimated that about 200,000 people have sought refuge overseas, some of whom have applied for asylum. As many as 100,000 are estimated to be in Southern India. Between 6,000 to 12,000 are thought to have sought refuge in South India in 1996.⁷

⁵ Ministry of Rehabilitation and Reconstruction, *Issue of Dry Ration/ Cash & WFP Assistance as at 31/12/1996*. This figure is based on the number of persons receiving food and other assistance from the government.

⁶ "Poser hits refugee life in Vanni." C Kamalendran, *Sunday Times*, 20 April 1997, p 1 (lead story).

⁷ NGO estimates.

4. The Role of the Military and Defence Authorities

The Sri Lankan military and defence apparatus plays a crucial role in determining the extent and nature of the humanitarian response to the displaced. Almost all supplies sent to the conflict areas require clearance from the Ministry of Defence which can sometimes take many months. In the second half of 1996 for example, a large supply of medicines was held up because the Medical Board of the Ministry of Defence had not met. In October 1996 the Commanding Officer of Jaffna stressed the military's role in relief and rehabilitation efforts when he met some members of international humanitarian groups. He observed that rehabilitation and relief could be undertaken only in consultation with the military.

It is extremely unlikely that the military's role in shaping humanitarian responses to the displaced will be diminished. Everything points to a significant voice for the military in determining the extent of relief offered to the displaced and in shaping the nature of the rehabilitation that takes place in those areas under government control. NGOs and humanitarian officials complain that, while civilian authorities in Colombo show a concern for the plight of the displaced, the military's focus is only on security and strategic concerns. The Ministry of Health has, on at least three occasions, requested Medecins Sans Frontieres ("MSF") to re-establish the damaged Jaffna Teaching Hospital. On all these occasions the Ministry of Defence had refused permission.⁸

⁸ *Counterpoint*, Vol 4, March 1997 (Ravaya Publications) p 40 – Interview with Dr Guillermo Bertoletti, Country Director for MSF.

5. The Right to Information

Information coming out of the conflict areas is poor. The government has kept a tight rein on information through censorship and by preventing journalists and human rights activists from travelling to the conflict areas. From 19 April to 8 October, 1996, a censorship on news relating to military operations was enforced. The emergency regulations under which the censorship operated were broadly framed and infringed upon international standards on freedom of expression and national security.⁹ Although the censorship was supervised by a Competent Authority on Censorship, in practice the regulations were applied in an arbitrary manner.¹⁰

Apart from the formal censorship that was in force for a six month period in 1996, physical access to many of the conflict areas was nonetheless not permitted. While there was no official ban, entry into the conflict areas was difficult for journalists and human rights groups. Occasionally, representatives of the media were taken by the military on closely supervised visits to the North. The Sri Lankan public has thus been forced to rely on press releases from the Ministry of Defence and the LTTE, neither of which can be relied upon for objectivity or depth of coverage. Most of the video footage of the conflict seen by Sri Lankan viewers is produced by the Sri Lankan Ministry of Defence.

Those who have the greatest degree of access to the conflict areas are members of the relief organisations and members of

⁹ Elizabeth Nissan, *"Reform at Risk,"* (Article 19, London, 1997) pp 8-9.

¹⁰ Ibid.

international humanitarian organisations, who unfortunately do not publicise their findings. Information has also been manipulated by the LTTE. For the LTTE, the sophisticated and manipulative use of information has been a crucial component of their strategy. For both the government and the LTTE, the control of information has been seen as part of the conflict being fought on the ground.

Perhaps the only exception to the government policy was the permission, granted in November 1996, to a two member team from the US Committee for Refugees ("USCR"), a group based in Washington D. C.¹¹ The organisation's initial request to visit Sri Lanka was turned down in August. Subsequently, however, approval for the team's visit was granted and the Sri Lankan government facilitated the team's visit to Jaffna. The team was flown to Jaffna in a government aircraft and was given complete freedom in relation to the people it met in Jaffna. They also visited the Vanni and met with representatives from the LTTE. Their visit into the Vanni was facilitated by the UNHCR.¹²

Some parts of the country with a high concentration of displaced persons, such as Vavuniya town and certain sections of the Eastern Province, were accessible to the media and to human rights activists. The mainstream media provided some coverage of events in these areas in 1996. The frequency of articles in the mainstream media, including some sections of the

¹¹ The US Committee for Refugees has been monitoring the situation in Sri Lanka for many years and has published several reports.

¹² Hiram Ruiz and Katie Hope, *Conflict and Displacement in Sri Lanka* (US Committee for Refugees, Washington DC, 1997).

government controlled media, increased, pointing to a heightened interest in the plight of the displaced. Much of the analysis, however, was shallow. Nonetheless, since the Jaffna peninsula and the Vanni are not easily accessible, the conditions of the majority of those displaced by the conflict could not be investigated first hand by the media or by human rights groups. The University Teachers for Human Rights, Jaffna ("UTHR(J)") is one of the few groups that publishes regular reports on the conflict, collected from sources based in the North and the East.

The formal censorship in force for six months in 1996, and the informal restrictions on travel to the areas of conflict, infringed upon the public's right to information concerning the conflict and the living conditions of the displaced. These restrictions also had a negative impact on the right to free expression of the displaced and their freedom to communicate, through the media and human rights defenders, with others in the country. There was very little opportunity for an independent investigation of human rights and humanitarian issues in the conflict areas.¹³

The vague and all encompassing concept of 'national security' provided the grounds for restriction and was used to justify a range of governmental acts. In the case of the displaced, national security provided the justification for the censorship and for the blanket ban on physical access to the conflict areas. It was also national security that was used to justify the inhumane treatment of those detained in camps in the government controlled territory in Vavuniya, which is examined

¹³ Supra n 8.

in the section below. Unfortunately, the state retains, for itself, a monopoly on the definition of national security.

There are no express international norms regarding when the right to information and free expression may be restricted in the context of armed conflict. In October 1995, a group of human rights activists and international lawyers, after an examination and analysis of the relevant international standards, observed:

Any restriction on the free flow of information may not be of such a nature as to thwart the purposes of human rights and humanitarian law. In particular, governments may not prevent journalists or representatives of intergovernmental or non-governmental organisations with a mandate to monitor adherence to human rights or humanitarian standards from entering areas where there are reasonable grounds to believe that violations of human rights or humanitarian law are being, or have been, committed. A government may not exclude journalists or representatives from such organisations from areas that are experiencing violence or armed conflict except where their presence would pose a clear risk to the safety of others.¹⁴

¹⁴ *The Johannesburg Principles on National Security, Freedom of Expression and Access to Information*, Principle 19, see *Sri Lanka: State of Human Rights Report 1995* (Law & Society Trust, Colombo, 1996). These principles were drafted by a group of experts in October 1995 in South Africa, at a meeting convened by ARTICLE 19, the International Centre Against Censorship, in collaboration with the Centre for Applied Legal Studies of the University of Witwatersrand.

This standard has been, and continues to be, flouted in Sri Lanka. It was flouted by the Sri Lankan government and armed forces, and by the LTTE. The right to information of the public in relation to the situation of the displaced was denied.¹⁵ The right of the displaced to free expression was similarly denied since very few channels of communication existed between them and the rest of the public.¹⁶ The right of human rights defenders and media persons to investigate and report on violations of human rights and humanitarian law in relation to the displaced was also violated.¹⁷

6. Women and Displacement

Women constitute the biggest group among displaced populations worldwide.¹⁸ This is also true of the Sri Lankan situation in which their number significantly exceeds that of the men.

In addition to the problems shared by the other internally displaced, women also face gender based discrimination and

¹⁵ Article 19 of the ICCPR. In *Visuvalingam v Liyanage* [(1984) 2 Sri LR 123 at 129-132] the Supreme Court held that the right to free expression includes the freedom of the recipient to information. The right to free expression is embodied in Article 14 (1) (a) of the Constitution of the Democratic Socialist Republic of Sri Lanka.

¹⁶ Article 19 of the ICCPR and Article 14 (1) (a) of the Constitution of Sri Lanka recognise the right to free expression.

¹⁷ See also Amnesty International, *Human Rights Defenders: Breaching the Walls of Silence (Issues at stake in the UN Draft Declaration on Human Rights Defenders)* IOR 40/07/95 (August 1995).

¹⁸ Francis Deng, *Report of the Special Representative of the UN Secretary General on Internally Displaced Persons*, submitted to the 52nd session of the Commission on Human Rights, E/CN.4/1996/52, 22 February 1996, p 16.

are exposed to gender specific violence and exploitation.¹⁹ Francis Deng, on his visit to Sri Lanka in November 1993, found that some women had been raped prior to being displaced.²⁰ The incidence of rape in the conflict areas appears to be on the increase.²¹ In one such incident, despite strong government condemnation and the commencement of legal action, no action had been taken by the end of the year although the incident took place in September 1996. The USCR team quotes an official international organisation who observed that, "rape in Jaffna is widespread" and a woman in Jaffna, who stated that women are "scared to come out of their homes because of the fear of rape." The report goes on to note that many cases are not reported because of the fear of retribution and the social stigma attached to rape.²² At least one incident of rape was reported from the Vavuniya detention centres.²³

The collapse of community and family structures, including the support of the extended family, has made displaced women even more vulnerable. Their displacement has increased their economic and physical insecurity.²⁴ In her initial report the

¹⁹ Preliminary Report of Radhika Coomaraswamy, the UN Special Rapporteur on Violence Against Women, E/CN.4/1995/42, 22 November 1994, para 294. See also the chapter on Violence against Women.

²⁰ Deng 1995 Report, para 30, *supra* n 18.

²¹ See UTHR (J) *Jaffna: The Contest between Man & The Beast Within*, Special Report No 7, 29 August 1996, pp 16 – 18.

²² *Ibid.*

²³ *Ibid* at p 32.

²⁴ See generally, Roberta Cohen, *Refugee and Internally Displaced Women*, The Brookings Institution - Refugee Policy Group Project (1995).

UN Special Rapporteur on Violence against Women noted that limited access to health care and food is one of the main problems faced by refugee and internally displaced women generally.²⁵ Women have also been forced to assume many of the responsibilities of family life after displacement. Thus, displaced women are more likely to seek work or engage in economic activity than men.

International human rights law recognises the family as the basic unit of society and as being in need of protection and support.²⁶ Human rights law also protects the right to privacy.²⁷ Displacement has affected these rights significantly.

The conflict has affected the privacy of the family life of displaced families in situations where the family has remained together and has survived the conflict. The conditions of existence for most of the residents in camps has resulted in outrageous invasions of privacy, especially that of women. Their "areas" of habitation are sometimes cordoned off only by old sarees and other pieces of rags. A representative of a donor agency who visited Vavuniya in November 1996 observed that at least two women had been forced to give birth in the overcrowded, unhygienic and, some would argue, inhumane, detention centres in Vavuniya town. USCR observes that two babies were still born in the Vavuniya detention centres in 1996.²⁸

²⁵ Para 310, *supra* n 17.

²⁶ Article 16(3) of UDHR, Article 10(1) of the ICESCR and Article 23 of the ICCPR.

²⁷ Article 12 of the UDHR and Article 17 of the ICCPR.

²⁸ *Supra* n 11 at p 32.

7. The Vanni

The Vanni consists of large sections of the Mullaitivu, Killinochchi and Mannar districts in the North and North Central regions of Sri Lanka. The Vanni has now become the refuge for large numbers of displaced persons who have fled the conflict. Some sections of the Vanni are controlled by the LTTE and others by the government forces. The situation in the Vanni remained grave throughout 1996.

People started moving into the Vanni in large numbers, following the government's assault on Jaffna town in October and November, 1995. The displaced initially sought refuge in the eastern part of the Jaffna peninsula and then moved further south across the lagoon into the Vanni.²⁹ In April 1996, the government launched a second operation to take control of the rest of the Jaffna peninsula. This caused a further movement of people into the Vanni. In July 1996, government forces launched an operation to take control of Killinochchi town. Many of the town's residents, and the displaced living in the town were forced to leave and take refuge with the other displaced in the Vanni jungles.

The Government Agent of Vavuniya³⁰ released a report in November 1996 stating that the displaced population in the Vanni was 570,000. About 207,000 had been displaced prior to the military offensives of October 1995 and April 1996.

²⁹ See *People In Between*, supra n 4.

³⁰ The Government Agent ("GA"), who is a representative of the Central Government in Colombo, is found in every district.

Approximately 363,000 persons were displaced after these two military operations, according to the GA, Vavuniya. In addition to the displaced, there are about 180,000 others resident in the Vanni.

These figures are contested by the government which contends that there are only about 150,000 displaced in the Vanni.³¹ As a result, the volume of food and other supplies authorised by the government is, according to NGO and humanitarian officials, considerably less than the necessary quota. The government argues, as it has been doing for many years, that many of the supplies sent to the LTTE controlled areas go to the LTTE to nourish and support its cadres, and do not reach the displaced. NGOs and humanitarian officials allege that the government deliberately controls food and other supplies going into the Vanni, so as to induce the population to move back to Jaffna. This is an allegation the government denies.

The USCR team met 'a number of people' in the Vanni who told them that they had not received food aid and did not have the means to purchase food.³²

Corruption is rampant in Vavuniya and the Vanni. During March and April PLOTE imposed a tax of Rs 3000 (\$55) for every truck that passed through the Vanni.³³ This severely affected the distribution of food supplies between 13 March and 10 April.³⁴ The 'tax' was reimposed in May for a short period.

³¹ Supra n 12 at p 18

³² Ibid at p 20.

³³ Report of an international humanitarian official.

³⁴ Ibid.

A local anthropologist, who spent two weeks in Vavuniya, noted that sometimes adversaries would co-operate for personal gain. Some of the former militant groups such as PLOTE and TELO engaged in extortion and the harassment of humanitarian officials and displaced persons.³⁵ There are also reports that these groups have been responsible for incidents of torture and murder.

Access to health care, according to NGO and humanitarian officials, is poor. There were, at the end of the year, only two small hospitals - one in Mallavi and one in Akarayankulam - which were both severely overcrowded. The Killinochchi hospital, which is the biggest health facility in the area, did not function. Drugs were in short supply, with the situation in the third quarter of the year being particularly bad. There was also an acute shortage of staff. The incidence of malaria and respiratory tract infections was high. Some officials observed that it had been the worst 'malaria season' in three years. According to the UTHR(J), medical supplies to the Vanni were cut by 75 percent by the Ministry of Defence.³⁶

The two member team from the USCR observed:

Driving along roads in the Wanni, one sees mile upon mile of newly built shelters housing displaced people. While some appear fairly sturdy, many are flimsy and seem unlikely to withstand rough weather. ... Continued fighting and shelling, and inadequate nutrition, water, health care

³⁵ UTHR(J), *Vanni: A People Crushed Between Cycles of Violence*, Information Bulletin No 12, 22 October 1996, pp 1, 10-11.

³⁶ Ibid p. 6

*and shelter, all place the population at risk. Lack of economic opportunities and education compounds the problems.*³⁷

8. The Detention Centres in Vavuniya

Vavuniya was previously the border town that marked the end of government controlled territory and the beginning of LTTE controlled areas. The checkpoint at Thandikulam, slightly north of Vavuniya, was where one made the crossing. This picture has changed slightly after the government forces took control of Jaffna. There is now territory north of Vavuniya where the writ of the Sri Lankan government holds. However, there is still a large area, south of the Jaffna peninsula and north of Thandikulam, controlled by the LTTE. Thandikulam thus remains the 'border post.'

On 22 October the government suddenly opened the Thandikulam checkpoint. In a period of about two weeks, approximately 13,000 people crossed from the LTTE controlled territory into the government controlled town of Vavuniya. Prior to this, entry into Vavuniya was tightly controlled by the security forces and by the LTTE. Many of the 13,000 were people who had been displaced several times in the space of about one year: from Jaffna to Chavakachcheri, from Chavakachcheri to Killinochchi, from Killinochchi to Omanthai and from Omanthai to Thandikulam.³⁸

³⁷ Supra n 11 at p 19.

³⁸ "Dr Thiruchelvam on displacements (sic) in Vavuniya" news report of a speech made by TULF member, Neelan Tiruchelvam, in Parliament, *Ceylon Daily News*, 16 November 1996.

While many of the 13,000 expected that they would now be able to reach Colombo, travel abroad, return to other areas, or return to Jaffna, they were instead held in 11 detention centres in Vavuniya town. Seven of these centres were schools, and, as a result, education in these schools came to a halt. About 8,500 students were affected, many of whom were preparing for public examinations. By the middle of November, about 6,500 of those detained in Vavuniya had been sent to Jaffna by ship. NGOs and humanitarian officials were unanimous in condemning the state of the detention centres. They were crowded, with poor sanitation facilities and little access to clean drinking water. Some centres had only one toilet for every 100 people. At the end of November there were still about 8,000 persons in the detention centres in Vavuniya. According to the *Sri Lanka Monitor*, a publication of the British Refugee Council, approximately 50 young people have disappeared from the detention centres.

Vavuniya is also home to another group of displaced persons, some of whom have been repatriated from India. This group lives in UNHCR administered camps and enjoys a better standard of living. Thus, even within short distances of each other, different groups of displaced persons undergo varying experiences.

9. Jaffna

People started trickling into Jaffna in April 1996 soon after the Sri Lankan armed forces took control over major sections of the peninsula. By April 1997 it was believed that between

250,000 to 300,000 of the 500,000 people who had fled Jaffna between October 1995 and March 1996, had returned.³⁹

According to UTHR(J) the armed forces had initially made a genuine effort to forge cordial relations with the civilian population. However, relations were soured by an LTTE suicide bomb attack on 4 July which killed the Brigadier in charge of Jaffna and a retired police officer, both of whom had good relations with the civilian population.⁴⁰ A major LTTE attack on the Mullaitivu camp later that month, which caused the security forces to lose over 1000 members, further worsened relations.

9.1 Freedom of movement

Freedom of movement was a major concern with security checkpoints being a regular and irritating feature of life in Jaffna. Travelling from an uncleared area to a cleared area could only be done through one check point. That nearly 700 disappearances have taken place since the government forces took control of Jaffna is documented in another chapter.⁴¹

9.2 Right to health

There was an acute shortage of doctors, nurses and midwives in the Jaffna peninsula. As of October 1996 there was no specialised doctor at the Jaffna Teaching Hospital - the major

³⁹ See Supra n. 6 and C Kamalendran, "Give me a home", Sunday Times, 20 April 1997, p 2, quoting the Government Agent, Jaffna.

⁴⁰ Supra n 21, pp 5 - 9.

⁴¹ See Chapter 2 on the Integrity of the Person.

health facility in the peninsula prior to the October operation. Several requests by the Ministry of Health to MSF to re-start the Jaffna Teaching Hospital had not received clearance from the Ministry of Defence, by the end of the year.

9.3 Right to education

By the middle of October, around 98,000 students were back in schools.⁴² This is about 49 % of the student population of 200,000 who were in schools in the Jaffna peninsula prior to the October 1995 military offensive. About 4,300 teachers (65 %) had returned to their teaching positions by this date. There were around 6,500 teachers prior to the launch of the October 1995 operation.⁴³ Four hundred and twenty four of the 486 schools had re-opened by the end of October 1996, with 42 at new locations. Sixty two schools remained closed.

9.4 Right to livelihood

Farming is the major source of livelihood, with paddy and vegetables being the major crops. Farming has resumed although paddy yields are lower in comparison to the other areas of the country. Access to fertilizer was a problem because its supply into the peninsula was restricted due to security concerns. Urea, which was a widely used fertilizer, has ceased to be available because it can be used to make explosives. Marketing the agricultural produce from Jaffna is difficult. Colombo was the main market for vegetables produced in Jaffna. However,

⁴² According to the GA, Jaffna.

⁴³ Ibid.

with restricted access between Jaffna and Colombo, marketing agricultural produce in Colombo is difficult.

10. The Movement to India

Tamils have sought refuge in South India since the ethnic violence of 1983. At one time there were 210,000 displaced persons in South India. Between 6,000 and 12,000 people are believed to have sought refuge in India between July and December 1996.⁴⁴ According to the USCR, there were about 100,000 displaced persons in South India in November 1996: 60,000 in camps and the rest in cities across the Tamil Nadu State.⁴⁵

Both the Tamil Nadu state government and the Indian government have provided assistance to the displaced. After the assassination of Rajiv Gandhi, the Indian government tried to encourage the displaced to return to Sri Lanka by cutting facilities to the camps, imposing restrictions on employment and preventing NGOs from having access to the displaced population. Many returned to Sri Lanka in a process that involved the UNHCR. The UNHCR did not have access to the camps but was able to interview the returnees after they volunteered to return, and before they boarded the ship that took them to the eastern port of Trincomalee. Some of the restrictions have now been eased by the Tamil Nadu government.

⁴⁴ NGO estimates. However, USCR says the figure is around 5,000. See *Conflict and Displacement*, supra n 12 at p 35.

⁴⁵ Ibid.

USCR interviewed about 20 of the newly arrived displaced in India, none of whom indicated that they had been forced to flee by the LTTE. The crossing is made under hazardous conditions and may cost each person between Rs 5,000 – 10,000. Many did not survive the crossing and others were intercepted by the Sri Lankan navy.

11. Freedom of Association of the Displaced

The freedom of association of the displaced is denied absolutely in those areas controlled by the LTTE. There is little opportunity for the displaced to organise and lobby issues as the LTTE controls the expression of views and ideas which run counter to its own. Camp committees, where they exist, are controlled by the Tamil Rehabilitation Organisation ("TRO"), an LTTE allied organisation which operates in the Vanni.

In government controlled areas, camp committees exist, but the opportunity for the displaced to make a real impact on the extent of relief and displacement policy is extremely limited.

12. International Standards on Internal Displacement

There are few international standards on internal displacement. The few that are directly applicable, and the others that are of a more indirect relevance, are scattered among the different humanitarian, human rights and refugee instruments. There is, as yet, no single codification of the applicable and relevant norms relating to internally displaced persons. The few that do directly apply are observed more in the breach.

A recent initiative to identify the relevant international standards and the gaps that exist in the current law has been

made by Francis Deng, the Special Representative of the U.N. Secretary-General on Internally Displaced Persons. A compilation and analysis of relevant legal norms was released by the Special Representative as an appendix to his 1996 report.⁴⁶

12.1 Definition

Internally displaced persons have been defined as:

*persons who have been forced to flee their homes suddenly or unexpectedly in large numbers, as a result of armed conflict, internal strife, systematic violations of human rights or natural or man-made [sic] disasters; and who are within the territory of their own country.*⁴⁷

12.2 Human rights law

International human rights law does not deal specifically with internal displacement. Yet, it is possible to identify some rights which are of immediate relevance to the displaced:

The freedom of movement and the freedom to choose one's residence contained in Article 13 of the Universal Declaration of Human Rights ("UDHR") and Article 12 of the ICCPR. A similar guarantee is provided by Article 16 of ILO Convention No 169, relating to indigenous peoples, which states that such peoples shall not be removed from the lands which they occupy unless a relocation of these

⁴⁶ Francis Deng, *Compilation and Analysis of Legal Norms*, UN Doc. E/CN.4/1996/52/Add.2, 5 December 1995.

⁴⁷ *Ibid*, at pp. 5-6.

peoples is considered necessary as an exceptional measure and takes place with their free and informed consent.

The freedom of movement includes the right to leave one's place of origin; the right to change a temporary living area; the right to return to one's home; and the right to cross international borders and seek asylum abroad. It should also include the right not to be forcibly resettled or expelled from one's own country. Such a right can be restricted only on the ground of national security, public order, public health or morals or to protect the rights and freedoms of others.

The non-derogable right to life contained in Article 3 of the UDHR and Article 6 of the ICCPR and the corresponding right to live with human dignity.

The right to an adequate standard of living, including adequate food, clothing and housing and to the continuous improvement of living conditions contained in Article 11 of the ICESCR.

The non-derogable right to recognition everywhere as a person before the law contained in Article 6 of the UDHR and Article 16 of the ICCPR. Thus, the loss of identification documents during flight should not result in the submergence of a displaced person's legal personality and a denial of access to government services or the courts.

The right to be protected from discrimination contained in Articles 2 and 7 of the UDHR, Articles 2 and 3 of the ICESCR and Articles 2, 3 and 26 of the ICCPR.

The Vienna Declaration states that great importance must be given to the promotion and protection of the human rights of "groups which have been rendered vulnerable."⁴⁸ It goes on to observe that:

*States have an obligation to create and maintain adequate measures at the national level, in particular in the fields of education, health and social support, for the promotion and protection of the rights of persons in vulnerable sectors of their populations and to ensure the participation of those among them who are interested in finding a solution to their own problems.*⁴⁹

Because of their vulnerability - economic, psychological and physical - internally displaced persons would qualify for enhanced protection. Since they have been in a continuous state of displacement for a period of time, and in some cases have been displaced several times over, and therefore rendered vulnerable for that period, they should be entitled to claim the benefits of limited affirmative action programmes. Affirmative action has been justified in those cases where the group has been historically discriminated against. It attempts to guarantee that the discriminated group has access to education, work and other resources. In the case of the internally displaced, since their displacement has resulted in a denial of equal access to opportunities and resources, a short term programme of affirmative action would be justified.

⁴⁸ Vienna Declaration and Programme of Action, para 24, adopted 24 June 1993, UN Doc. A/Conf.157/24 (13 October 1993).

⁴⁹ Ibid.

One of the major lacunae in international protection for internally displaced persons is the lack of a specific international organisation mandated to work with them.⁵⁰ However, existing international organisations have begun to pay more attention to the problems of the internally displaced. In some instances, organisations such as the UNHCR have creatively interpreted their mandate, so as to be able to respond to some of the problems caused by internal displacement.

12.3 Humanitarian Law

If a situation in a country is characterised by continuous and organised armed clashes, principles of international humanitarian law apply. These principles impose obligations on the parties to the conflict, both state and non-state actors, and are applicable in cases of conflict of an international and non-international nature. The principles are contained in the four Geneva Conventions of August 1949 and the Additional Protocols of 1977. The major objective of humanitarian principles is to limit violence and to protect people from abuses of power by the combatants.

Sri Lanka is a party to the Geneva Conventions but not to the Protocols. However, the provisions of the Geneva Conventions and the Additional Protocols relating to the humane treatment of civilians, and the applicability of these principles, 'without adverse distinction', to all persons, are now widely recognised as being a part of customary international law.⁵¹

⁵⁰ See generally Roberta Cohen and Jacques Cuenod, *Improving Institutional Arrangements for the Internally Displaced*, The Brookings Institution - Refugee Policy Group Project (1995).

⁵¹ Francis Deng, *supra* n 46 at p 8.

Common Article 3 of the Geneva Conventions and Protocol II are directly applicable to conflicts of a non international nature. They set forth a basic standard of conduct which parties to the conflict are bound to observe in relation to civilians.

Article 17 of Protocol II prohibits the displacement of civilian populations unless the security of civilians is threatened or military reasons so demand. If civilian populations are displaced under these circumstances, measures should be taken to see that they are "received under satisfactory conditions of shelter, hygiene, safety and nutrition." Article 17(2) states, "civilians shall not be compelled to leave their own territory for reasons connected with the conflict." There are also prohibitions on attacks against civilian populations, the starvation of civilians and attacks on objects indispensable to civilian survival.

Common Article 3 and Additional Protocol II expressly prohibit 23 different acts, ranging from murder and torture to indecent assault. Protocol II further provides that, where essential supplies are lacking, the state concerned must agree to the mounting of relief operations which are humanitarian, impartial and conducted without distinction.

The educational rights of children are guaranteed under Protocol II. Article 4(3) guarantees children the right to receive an education in keeping with the wishes of their parents. Steps should also be taken to facilitate the reunion of children with their parents. In addition, the Protocol prohibits the recruitment of children under 15 years of age, for use in the conflict.

Protocol II applies not just to the "High Contracting Parties" but also to "organized armed groups ... under responsible

command" exercising control over territory. Sri Lanka is not a signatory to Additional Protocol II.

12.4 Analogous refugee norms

According to the principle of *non refoulement* - which constitutes the core of refugee law - persons cannot be forced to return to a country where their lives or fundamental freedoms are in danger. An analogous right should apply to the internally displaced as well. The freedom of movement which applies to all persons in a territory, should specifically guarantee a person the freedom not to be forced to return to a situation in which his or her life or fundamental freedoms are in danger.

In 1993 the Sri Lankan government issued a set of resettlement guidelines drafted in consultation with NGOs. The guidelines provide a strong base on which to build international standards in this area. The guidelines note that re-settlement involves not only the transfer of people to their original places of residence, but also the creation of a congenial environment in which to live without fear, and the provision of the necessary social and economic infrastructure so that the re-settlers may resume their normal life with confidence.

13. Conclusions

Displacement has affected peoples lives profoundly. It has jeopardised their physical security. It has affected their quality of life and potential for physical and emotional growth. Family and community life has been almost totally destroyed. In some cases, their identity as a people is at risk, this being especially true of those recently evicted from the North. The opportunity

for cultural activity hardly exists. Camp life has forced them to endure outrageous invasions of their privacy. Their capacity and ability to work has been affected. And, on a different but equally important level, their ability to participate in and influence the political process has been eliminated. In effect, several of their rights - civil, cultural, economic, political and social - continue to be infringed.

The current status of the displaced highlights, more than ever, the need for a permanent solution to the underlying causes of the conflict. At the same time it reinforces the need for the major actors in the conflict - the armed forces, the LTTE and other militant groups - to conform to basic principles of humanitarian and human rights law in their interaction with each other and the civilian population.

The conditions of the displaced can and do vary from week to week. In addition, their access to health care, water, sanitation, education and work varies a great deal, depending on where they are located and the governmental and non-governmental entities with whom they are forced to interact. That they are discriminated against as a result of the conflict, is clear. Some have argued that displacement has the potential to create new opportunities for the displaced. However, it is only occasionally that such potential is realised. Other evidence indicates that the displaced are generally 'worse off' than the 'non-displaced.' Displaced persons have neither the capacity nor the opportunity to influence the major actors to the conflict which profoundly shapes their lives.

The essence of the freedom of movement is the ability to move freely within a region or country, and the freedom to set up residence in an area of one's choice. Forced displacement and mass transfers of people violate this right. The right to remain, or the right not to be displaced, is not expressly articulated in human rights or humanitarian law. Instead, it flows by implication from the freedom of movement. For the over 800,000 internally displaced, this right, together with its accompanying social, economic and psychological implications, is being violated every day.

14. Recommendations

The Sri Lankan government, the LTTE and other militant groups, should respect and observe the principles of humanitarian law contained in the Geneva Conventions and the Protocols, and the principles of human rights law contained in the International Covenants. All actors to the conflict should ensure that civilian life and property are respected and guarantee the safety of structures and institutions necessary for civilian survival.

The Sri Lankan government should invite the Special Representative to the UN Secretary-General on Internally Displaced Persons, Francis Deng, to make a follow up visit to the country. The government and the LTTE should permit Dr. Deng to have full and free access to the displaced populations and the areas of conflict.

The Sri Lankan government should invite the ICRC to re-establish a safety zone around the Jaffna Teaching Hospital and

other hospitals in the conflict areas. The armed forces of the Sri Lankan government and the LTTE should respect the neutrality of these safety zones.

The Sri Lankan government and the LTTE should permit humanitarian organisations and human rights groups to have full and free access to the displaced population and the conflict areas. Specifically, local NGOs, and other humanitarian groups should be permitted to begin humanitarian operations in the Jaffna peninsula.

The Sri Lankan government and the LTTE should permit journalists and other media personnel to have full and free access to the displaced populations and the areas of conflict. The government or the LTTE may legitimately restrict the movement of a journalist or a member of the media only if the life or security of others is put in danger.

The government and the LTTE should provide displaced women with adequate opportunities to participate effectively in the planning of the life in camps. Participation needs to go beyond mere representation in camp committees. Women need to be given the capacity to formulate and present their needs and views effectively.

The government should refrain from using schools to house displaced persons. Where schools are being so used, the government should make arrangements to promptly transfer the displaced to some other locality and resume teaching and educational activities in those schools.

The government should take immediate steps to re-establish all damaged hospitals and ensure that they become operational.

The supply of all relief to the displaced, including food, medicine, fertilizer, and non-nutritional items, should be co-ordinated by a representative body. This body should consist of representatives from the Ministry of Rehabilitation and Reconstruction, the Reconstruction and Rehabilitation Authority of the North ("RRAN"), local and international humanitarian organisations, and the military.

The Sri Lankan government should ensure that relief to the displaced and rehabilitation of the areas of the North and the East are not determined solely by military and security concerns.

The Ministry of Rehabilitation and Reconstruction should set in motion a process to draft legislation that will recognise and provide for the enforcement of the rights of the displaced. This process should begin in consultation with local NGOs and other humanitarian organisations working with the displaced. Sufficient work has taken place at the international level that has identified relevant human rights and humanitarian norms pertaining to the displaced. These rights should be recognised by domestic legislation and a method should be provided for their effective enforcement.

XII

Nationality and Citizenship Laws

Ramani Muttetuwegama*

1. Introduction

As this is the first time this report specifically addresses nationality and citizenship laws in detail, this chapter will seek to clarify the legal position on citizenship and the right to residency, and to examine the political climate within which the legislation operates. The chapter will, in addition, discuss several developments which took place during 1996. In conclusion, the chapter will provide an analysis of the international and domestic obligations affecting these issues and recommend changes to the legislation and the subsidiary legislation, in order to ensure compliance with such obligations.

In 1996 there were no legislative changes at the domestic level in either citizenship or residency laws. However, the right to citizenship, residence and nationality can be assessed within the context of the government's expressed commitment, made in September 1996, to ratify the First Optional Protocol to the International Covenant on Civil and Political Rights ("ICCPR"),¹ and the challenge, in 1996, to a decision made, on

* Attorney at Law.

¹ GA Resolution 2200A (XXI) of 16 December 1966. The government has yet to accede to the Optional Protocol at the time this paper is being written.

the basis of a fundamental rights violation, under the Immigrants and Emigrants Act No. 20 of 1948.

2. Citizenship

2.1 The effect of citizenship

The Citizenship Act ("the Act") expressly provides that the nationality of a citizen of Sri Lanka is Sri Lankan.² The question arises then as to the nationality of persons resident in Sri Lanka, some of whom have been residents for generations, who are not citizens of Sri Lanka. It is unfortunate that the Act collapses the concept of nationality (the formulation of which is open to much debate) together with the very legal and technical definition of citizenship, thereby not only depriving persons the right to citizenship but also denying them the right to determine their own nationality. Although the Act follows the international law on the issue of nationality,³ the concept of nationality is, in the present context, not simply a legal issue and must, thus, be distinguished from citizenship *per se*, and be given the widest possible definition.

Citizenship carries various privileges that are not available to non-citizens. The fundamental rights under Articles 12(2)⁴ and

² Act No. 18 of 1948, section 3.

³ See, for example, the Hague Convention on the Conflict of Nationality Laws.

⁴ This Article embodies non discrimination on grounds of race, religion, language, caste, sex, political opinion, place of birth or any one of such grounds. The Constitution of the Democratic Socialist Republic of Sri Lanka (1978).

14(1)⁵ of the 1978 Constitution, for example, are guaranteed only to the citizens of the country.⁶ Additionally, Article 89 of the Constitution and Section 2 of the Registration of Electors Act No. 44 of 1980 restrict the right of franchise to citizens. Article 14(1), however, provides that a person who is not a citizen of Sri Lanka, but who has been resident in the country for a period of 10 years immediately preceding the Constitution, has the same rights as a citizen.

2.2 Categories of citizenship

According to the Act, citizenship is acquired through descent,⁷ registration,⁸ or by applying for dual citizenship.⁹ Article 26 of the Constitution provides that there shall be no distinction between persons who are citizens of Sri Lanka by descent and those who are citizens by registration.

(i) Citizenship by descent

Citizenship may only be transferred by a father, or male paternal ancestors, to "legitimate" children. Legitimation occurs not only if the parents are married before the child is born, but also if

⁵ This Article embodies the freedoms of speech and expression including publication, peaceful assembly, association and to form and join a trade union, to practise a religion including teaching and worship, to promote one's own culture and to use one's own language, to engage in a lawful business or occupation, of movement and of choosing one's residence, to return to Sri Lanka; *ibid*.

⁶ Articles 10, 11, 12(1), 13(1) to (7) extend to all "persons," *ibid*.

⁷ Sections 4-9, *supra* n 1.

⁸ Part III, *supra* n 1.

⁹ Sections 11 and 19 *supra* n 1.

the parents marry after the child's birth. A married woman is deprived of the ability to transfer her Sri Lankan citizenship to her children. Even posthumously children acquire citizenship via their father.

The reference to a woman's capacity to transfer citizenship is merely incidental to the Citizenship Act, which states that:

*any reference to father, paternal grandfather or paternal great grandfather ... shall in regard to persons born out of wedlock and not legitimated, be deemed to be a reference to mother, maternal grandfather and maternal great grandfather.*¹⁰

Although in the limited "not legitimated" instance, a woman is able to transfer citizenship to her child, only her male ancestors are of relevance in determining her child's citizenship if the reference point moves beyond the child's mother.

(ii) Citizenship by registration

Persons may be registered as citizens if: (1) they have parents who either were, or had a right to be, citizens by descent; (2) they are a spouse, widow or widower of a citizen; or (3) they are persons capable of making a "contribution" to the country.

Under Section 11, of the Act the Minister has the discretion to grant citizenship to all persons of full age and sound mind who ordinarily reside in Sri Lanka, by registration on the following grounds:

¹⁰ Section 9 *supra* n 1.

- (a) A person whose mother is/was a citizen by descent, may apply for citizenship by registration if:
 - (i) the applicant is married and has been resident in Sri Lanka throughout a period of seven years preceding the application; or
 - (ii) the applicant is not married and has been resident in Sri Lanka throughout a period of ten years preceding the application.
- (b) A person whose father was a citizen or had the right to Sri Lankan citizenship by descent, but had forfeited or lost his citizenship, may be registered at the discretion of the Minister, who may refuse applications on the basis of public policy.

Thus, although application for registration on the basis of one's mother's citizenship is automatically granted, as long as the applicant complies with the other provisions of the section, application on the basis of one's father's citizenship is subject to the test of public policy, the sole judge of which is the Minister. Further, whilst there is no residency requirement for persons applying on the basis of their father's citizenship, the residency requirement, when applying on the basis of a mother's citizenship, is strictly enforceable.

Either way, registration of citizenship should be on the basis of the parental right. There should be no differentiation on the basis of the parent's gender. Such differentiation is inherently discriminatory.

A person of full age and sound mind, who ordinarily resides in Sri Lanka and is the spouse, widow, or widower of a citizen by descent or registration, also has the right to apply for citizenship by registration, after residency in Sri Lanka for one year. This right is restricted by the Minister's discretion to reject applications on the ground of public interest.¹¹

Although the section itself is gender blind, administrative practice indicates that while female spouses are occasionally granted citizenship, male spouses are almost never considered under this section. However, according to administrative law the seemingly final powers of the Minister are not as absolute as they appear; the courts have held that there is no unfettered discretion in public law, and that a decision which reveals an error on the face of the record is voidable. In these circumstances, it may be possible to challenge a rejection of an application for citizenship on the ground of gender discrimination.¹²

The Minister's discretion to register persons as citizens of Sri Lanka on the basis of service rendered, professional or academic eminence, or commercial contribution is limited, under section 13, to 25 persons a year, under section 13A, to 200 every year, with an aggregate of 1000 persons altogether.

(iii) Dual citizenship

The Minister also may make a declaration granting dual citizenship¹³ to a person, based on the capacity of the applicant to contribute to Sri Lanka.

¹¹ Section 12, *supra* n 1.

¹² See section 2.2 for details of challenging of refusals of residence visas.

¹³ Sections 11 and 19, *supra* n 1.

2.3 Revocation/Annulment of Citizenship

Citizenship by registration may be revoked by the Minister on the basis of non residence, offences or false declarations under the Act, or offences against the State under the Penal Code. Offences under the PTA cannot be used to deprive one's citizenship.

The Minister has the right to revoke an individual's dual citizenship status on the basis that the person is no longer of any benefit to Sri Lanka. Although most decisions of the Minister under the Act are final, the Act does not expressly state that a decision to revoke dual citizenship is final and it may, therefore, be open to challenge. There are no recorded cases of challenges to a decision of the Minister, however.

Citizenship by descent cannot be annulled by anyone except the citizen concerned.

2.4 Up Country Tamils

The most devastating effect of the Citizenship Act was the deprivation, in 1948, of citizenship rights to an estimated 900,000 persons who were resident in Sri Lanka but could not claim citizenship because of their ancestry. The purely political decision to disenfranchise this population, on the basis that their elected representatives included an overwhelming number of persons oriented towards left wing politics,¹⁴ affected Sri Lankan politics for successive years, and was finally sought to be disposed of only in 1988.

¹⁴ See Elizabeth Nissan, "Sri Lanka - A Bitter Harvest," Minority Rights Group (London), 1996 pp. 10-11.

Two agreements signed in 1964 and 1974 between the Governments of Sri Lanka (or, at the time, Ceylon) and India divided the Up Country Tamils between the two countries for the purpose of granting citizenship. The Indo-Ceylon Agreement (Implementation) Act was enacted in order to implement these agreements. However, by 1986, 94,000 persons exceeding the number agreed upon by the two Governments had applied for citizenship in Sri Lanka. Thus, a new law was enacted,¹⁵ increasing the number of Up Country Tamils who could be registered in Sri Lanka and providing for the registration of the children, born after 1964, of the persons covered by the Agreement and the Act. The Act also provides that any person of Indian origin, other than the 975,000 persons covered by the original agreements, would be eligible for citizenship in Sri Lanka.¹⁶

Although the Act of 1986 estimated that the 469,000 persons who applied for Sri Lankan citizenship would be granted citizenship in about 18 months, two years later, only 236,000 persons had been granted citizenship. This was partly due to the cumbersome system of registration laid down in the Act. In 1988, a new provisional Act¹⁷ provided that all persons who had applied for Sri Lankan citizenship as of the date of the Act - November 11, 1988 - would become citizens of Sri Lanka.

¹⁵ The Grant of Citizenship to Stateless Persons Act No. 5 of 1986.

¹⁶ Section 7, *ibid.*

¹⁷ The Grant of Citizenship to Stateless Persons (Special Provision) Act No. 39 of 1988.

Several thousand persons who applied for Indian citizenship remain in Sri Lanka, awaiting the processing of their applications. These persons are expressly prohibited from applying for Sri Lankan citizenship under the 1986 Act. However, whether they could apply for citizenship under Part III of the Citizenship Act (which deals with citizenship by registration) has not been clarified to date.

3. Residence

3.1 Procedure regarding right of entry

The Immigrants and Emigrants Act provides that any person who is not a citizen of Sri Lanka requires permission to enter the country unless his or her presence is covered under Section 2.¹⁸ Section 2 includes persons (and their dependants) who are in Sri Lanka for official purposes, under the employment of the Government of Sri Lanka or certain international agencies. A dependent is defined as a wife, the individual's or his wife's unmarried/widowed/divorced/daughter/niece/sister/granddaughter, parent or wife's parent, son/grandson/nephew/brother, who is under the age of 21 or disabled and unable to support himself.¹⁹

All persons entering Sri Lanka must obtain a valid endorsement on their travel documents at the point of entry. The Act prohibits endorsements in certain cases,²⁰ including those relating to persons of "unsound mind," those deemed undesirable in the

¹⁸ Section 8, Immigrants and Emigrants Act.

¹⁹ Section 54, *ibid.*

²⁰ Section 11(2), *ibid.*

opinion of a medical practitioner, or those determined to be "prostitutes," "procurers" or "persons living on the prostitution of others." The Minister is also empowered to prohibit the admission of persons on a variety of grounds.

Under the section 14, visas may be granted with the concurrence of the Minister.

The powers under this Part are often exercised on the basis of entirely subjective decisions. However, unfortunately, no procedure for appealing against these decisions is contemplated by the Act.

3.2 Removal of persons (Part V)

Persons who fail to comply with the provisions of the Act or the conditions under which a visa was granted, or who have over-stayed a visa or had a visa cancelled, may be removed from the country on the basis of an order of the Minister, which is final. The Minister may recover, from the person so removed, the cost incurred in the removal.

3.3 Deportation of persons (Part VI)

The Minister is empowered to make a deportation order in respect of any person upon the same grounds as those relevant for the refusal of an endorsement. The Minister has the added power of deporting persons on the basis of public interest. A deportation order, unlike an order for removal, is not final and can be challenged. However, a deportee may not re-enter the country.²¹

²¹ Ibid.

3.4 Right to residency

The Act empowers authorised officers to search any letters, written messages, memoranda or any written or printed matter including plans, photographs and other pictorial representation.²²

Section 25 of the Act empowers the Minister to restrict the freedoms of movement and association, and impose further conditions on persons, on the basis or public interest.

All persons married to Sri Lankan citizens need to apply annually for a residence visa, unless they are covered by some other provision of the Act.²³ The procedure differs depending on whether the application is made by a male or a female. Thus, although females only have to demonstrate the fact of the marriage, males are required to establish their ability to support themselves and their spouse. Each applicant must earn a sum of US\$ 9,000 each year and must deposit a sum of US\$ 25,000 in a bank that cannot be released, except with the recommendation of the Controller of Immigration and Emigration.

Persons with business or professional interests may apply for visas under a special category. While an investor needs to remit US\$ 150,000, and a further sum of US\$ 25,000 per dependant, a professional has to remit a sum of US\$ 1,500 and US\$ 750 per dependant. Persons residing in the country under this

²² Section 19, *ibid.*

²³ Section 4(4) of the Immigrant and Emigrant Regulations 1956.

scheme become eligible for citizenship after residing in the country for a period of three years.

Instructions regarding changes in the regulations are sent to persons who are registered as residents, under the various headings. However, no prior notice is given of changes in the requirements. Visas are most often granted on an annual basis. This, as well as the fact that no warning is given of the changes in rules and regulations under the Act, results in a fair amount of disruption to family and commercial life.

The amount of money to be demonstrated and deposited by male spouses adds up to almost two million rupees, a sum far beyond the means of most persons resident in Sri Lanka.

4. Attempts at Reform and Challenges to the Law

4.1 The Law Commission's proposal

In 1995, the Law Commission submitted proposals to amend the Citizenship Act in order to confer upon Sri Lankan women the right to transmit citizenship to their children. The proposal rested on the argument that transmission of citizenship by descent must exist upon the principle of gender equality.

The Commission's proposals were based on the incompatibility of sections 4 and 5 of the Act with the fundamental rights guaranteed by Articles 12(1) and 12(2) of the Constitution. These sections clearly violate the provisions on equality and non-discrimination on the basis of gender, by disqualifying a woman, unless she is unmarried, from transmitting citizenship to her children.

The Commission made submissions on the basis of the Citizenship Act of India. From its inception in 1955, the Act provided separately for acquisition of citizenship by birth and by descent. Acquisition of citizenship by birth was always possible through both parents. Citizenship on the basis of descent was possible along grounds similar to those set forth in the Citizenship Act, until 1992, when the Indian Act was amended to permit the transmission of citizenship via either parent, regardless of the parents' marital status.

The Commission recommended that since the Age of Majority Act was amended to confer majority on a person at the age of 18, the provisions of the Citizenship Act, which still refers to persons over the age of 21, be amended accordingly.

This report was submitted via the Ministry of Justice to the Ministry of Defence, the Ministry in charge of citizenship, immigration and emigration. In its response of December 1995, the Ministry of Defence warned against the dangers of isolated thinking on the proposed amendments, based on the concept of human rights.

The response from the Ministry invoked all the familiar grounds of a small island paranoid about the effect of opening the floodgates to an inward flow of foreigners. The response noted that the northern area of Sri Lanka and the southern area of India are both populated by the same ethnic group, and that the breakdown in the monitoring of illegal immigration was a causal factor of the militancy in the North. The letter also mentions polygamous relationships in South India.

The Ministry warned against marriages of convenience and noted the sale of babies to foreigners as a possible indication that many Sri Lankan women might market themselves as a vehicle for Sri Lankan citizenship. The Ministry provided statistics to the effect that only 1,064 women, and a small number of children, had applied for citizenship under the Act since its inception.

Finally, the Ministry proposed that a group of experts in the field of demography, sociology, ethnology and natural resource management be appointed to consider the proposals.

In 1996, a Committee was appointed to consider the Commission's proposals. In fact, the Committee heard representations from both the Controller of Immigration and Emigration, and a representative of the National Commission on Women. Unfortunately, a series of changes in the Department of Immigration and Emigration, and the attendant changes in the Ministry of Defence, have led to a suspension of the consideration of these proposals. The Controller of Immigration was removed from the post and, in the meantime, the Head of the Committee was, himself, appointed the Acting Controller of Immigration and Emigration.

Although these responses are dated 1995, they are indicative of the attitude toward change to the Citizenship Act. This is especially striking as the response deals with many issues that would not otherwise be affected by the amendments proposed by the Commission, regarding the transmission of citizenship by women to their children.

The most disturbing aspect of the resistance to changing the Citizenship Act or granting the right of residence to foreign, male spouses, is a further indication of the prevailing gender bias. Officials appear unable to imagine that there would be any threat of female non citizens of Sri Lanka swamping the country. The assumption is that women are completely unproductive and not threatening.

The Ceylon Workers' Congress, which has traditionally represented the Up Country Tamils in the political sphere, has continuously refused to join in a demand for parity on the ground of gender. The group of persons most affected are the children of women who are registered citizens of Sri Lanka married to persons still awaiting the processing of their applications.

4.2 Removal of persons

In April 1996, Dr. Jane Russell, a British citizen and resident of Sri Lanka, was deported from Sri Lanka on the basis that she had over-stayed her visa. In 1995, when Dr. Russell's visa was not renewed, she challenged the refusal through an application to the Supreme Court on the basis of a fundamental rights' violation. However, the Court refused Dr. Russell leave to proceed and held that the Controller of Immigration and Emigration had properly exercised his discretion under the Immigrants and Emigrants Act. Dr. Russell's contention was that, as an investor in Sri Lanka, she had submitted all the documentation required of her, including an endorsement of the extension of her visa from the Board of Investment, to the Department of Immigration and Emigration. Not only did the Department fail to extend her visa but also, and once the visa

had lapsed, removed her from the country on the very basis that it had lapsed.

To date, mystery surrounds the circumstances of Dr. Russell's deportation from Sri Lanka. On 12 April she was arrested on the basis of a traffic offence. She was transferred to the maximum security wing of the remand prison in Kandy where she stayed overnight, and then held, for one day, in remand custody in Colombo. Before being deported, she was held at the detention centre for illegal immigrants, which, reportedly, has no provision for the separate detention of women, as required under the Code of Criminal Procedure.

The deportation of Dr. Russell highlights the inadequacy of the provisions under the Immigrants and Emigrants Act. While Dr. Russell had provided the Controller of Immigration and Emigration with all necessary documentation, the Act provides the Controller with wide powers of discretion to grant or deny applications for residence visas. If these powers of extension and renewal are final, one is faced with the possibility of arbitrary decisions that cannot be challenged. The pitfalls of the issue being at the sole discretion of the Controller are further highlighted when one takes into consideration that a commission investigated the activities of the Controller of Immigration and Emigration, less than six months after Dr. Russell's departure from Sri Lanka.

4.3 Fundamental rights

Nineteen ninety six also saw the filing of an application on the violation of fundamental rights in the refusal of a visa to the husband of a Sri Lankan woman. However, the case is still pending.

5. International and Domestic Obligations

5.1 Domestic

The Citizenship Act and the Grant of Citizenship to Stateless Persons Act discriminate against several categories of persons in the following manner:

- (1) married women are deprived of the right to transmit citizenship to their children, unlike married men;
- (2) under section 10 of the Citizenship Act, the rights of children of female citizens of Sri Lanka are different from the rights of male citizens;
- (3) while citizenship by descent may not be taken away, persons who are citizens by registration may have their citizenship cancelled by the Minister;
- (4) only men are able to transfer citizenship by descent to their grandchildren;
- (5) by virtue of the Indo-Ceylon Agreements of 1964 and 1974 and the 1986 Act, some Up Country Tamils are deprived of the right to citizenship;
- (6) the Citizenship Act provides different categories of descent for "legitimate persons" and those who are deemed "illegitimate;"
- (7) the basis for refusing citizenship by registration differs, depending on the category one falls under; and
- (8) citizenship by registration may be cancelled by the Minister, whilst citizenship by descent may only be renounced by the citizen.

Further, administrative procedures under these Acts have resulted in almost no foreign male spouses of Sri Lankan citizens being granted citizenship under the Act.

The Immigration and Emigration Act also creates a variety of problems:

- (1) the conditions imposed on male spouses of Sri Lankans differ from those imposed on the female spouses of Sri Lankans;
- (2) only residence visas are available to persons who are legally married to Sri Lankans;
- (3) the powers, held by the Minister and Controller of Immigration and Emigration, in relation to deportation and refusal to issue visas are extremely wide;
- (4) the regulations made under this Act remain invisible to the public; and
- (5) no procedure for appeals is available against the decisions made under the Act.

Article 12 of the Constitution prohibits discrimination on the basis of various issues including gender and race.²⁴ The freedom of speech and expression, the freedom of association and assembly and the freedom of movement²⁵ are guaranteed to citizens only.

²⁴ Article 12(2) *supra* n 5.

²⁵ Article 14(1), *supra* n 5.

5.2 International

Sri Lanka is a signatory to various international instruments including the UN Convention on the Elimination of all Forms of Discrimination Against Women ("CEDAW"), the UN Convention on the Rights of the Child ("CRC"), and the ICCPR.

All three instruments require State parties to desist from discrimination on the basis of gender,²⁶ and CEDAW requires that all necessary steps, including amendments to the law, be taken to prevent such discrimination. Article 9 of CEDAW, in particular, requires that women have equal rights to those of men, with regard to their children.

According to the CRC, a child is someone under the age of 18. Both the CRC and the ICCPR prohibit discrimination on the basis of birth and its attendant circumstances.²⁷

The importance of a child's right to nationality is stressed by the CRC and the ICCPR. The CRC links nationality with identity and provides that the right to nationality must exist from birth, as opposed to coming into effect at some future date.²⁸

Both the ICCPR and the CRC recognise the right to privacy, including that of correspondence.²⁹ The ICCPR also requires that all persons lawfully within a territory must have a freedom of movement within it. Restrictions on the freedom of movement

²⁶ Article 2 of CEDAW, Article 2 of CRC and Article 2 of ICCPR.

²⁷ Article 2 of CRC, Articles 2 and 24 of ICCPR.

²⁸ Articles 7 and 8 of CRC and Article 24 of ICCPR.

²⁹ Article 16 of CRC and Article 17 of ICCPR.

can only occur for purposes of national security, public order, public health or public morality.³⁰ A child's right to family reunification, including the right of a child and the parents to be permitted to enter and leave a country on that basis, is expressly provided for in Articles 9 and 10 of the CRC.

Article 13 of the ICCPR provides that the expulsion of an alien lawfully within a territory may only be undertaken in accordance with the law. The law must provide a framework for appeals against expulsion, which may only be suspended on the basis of compelling reasons of national security.

5.3 Optional Protocol

In the absence of any special appeals structure in either set of laws, and considering the difficulty of negating gender bias in administrative orders, the impact of the Government's decision to accede to the First Optional Protocol to the ICCPR is of special significance. The Optional Protocol permits individual complaints, regarding violations of the ICCPR to the Human Rights Committee, the monitoring body under the ICCPR. As discussed earlier, the Sri Lankan law on citizenship is in breach of the ICCPR on several grounds. However, it is important to keep in mind that, under Article 2 of the Optional Protocol, access to the Committee is dependent on the exhaustion of all domestic remedies.

³⁰ Article 12 of ICCPR.

6. Recommendations

It is recommended that measures be taken to:

- (1) amend the Citizenship Act, to remove the discrimination clauses in sections 4 and 5 on citizenship by birth and by descent;
- (2) repeal section 9 of the Citizenship Act which refers to persons who are not "legitimate;"
- (3) amend sections 11 and 12 of the Citizenship Act, to provide for application for registration of citizenship by persons over 18 rather than over 21;
- (4) allow for and create a system to accommodate challenges to decisions under the Immigrants and Emigrants Act;
- (5) restrict the grounds upon which visas may be denied; and
- (6) expand the right to citizenship, on the basis of residence consistent with the provisions in Article 14 of the Constitution.

7. Conclusions

As far as the issue of citizenship and residence is concerned, there was no advancement made in 1996. In fact, the probability that the amendments recommended above will be adopted in the near future seems extremely remote. The commitment, in policy, to accede to the Optional Protocol was the only remotely positive issue that arose in 1996. It is hoped that the government will take steps to accede to the Optional Protocol as soon as possible.

It may be possible to persuade the authorities to view some of these recommendations in a more positive light on the basis of the recognition, contained in Article 14(1) of the Constitution, that persons who reside in Sri Lanka for a period of ten years have the same rights as a citizen. Intensive lobbying efforts, on the basis of Sri Lanka's international and domestic obligations, and attempts to address the fears and suspicions revealed in the Ministry of Defence's response to the recommendations of the Law Commission, must also be undertaken, by persons interested in these issues.

Schedule I

UN Human Rights Instruments Ratified By Sri Lanka (December 1996)

1. *International Covenant on Economic, Social and Cultural Rights 1966*
2. *International Covenant on Civil and Political Rights 1966 (including the Declaration under Article 41)*
3. *Convention on the Prevention and Punishment of the Crime of Genocide 1948*
4. *Slavery Convention 1926 and the Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery.*
5. *Convention for the Suppression of the Traffic in persons and of the Exploitation of the Prostitution of Others.*
6. *ILO Convention (No 29) concerning, Forced Labour 1930*
7. *ILO Convention (No. 98) concerning the Application of the Principles of the Right to Organize and Bargain Collectively*
8. *ILO Convention (No. 135) concerning Protection and Facilities to be Afforded to Workers Representatives in the Undertaking*
9. *Convention on the Nationality of Married Women 1957*
10. *Convention on the Rights of the Child 1989*
11. *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field 1949*

12. *Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea 1949*
13. *Geneva Convention Relating to the Treatment of Prisoners of War 1949*
14. *Geneva Convention Relating to the Protection of Civilian Persons in Time of War 1949*
15. *International Convention on the Elimination of All Forms of Racial Discrimination 1966*
16. *International Convention on the Suppression and Punishment of the Crime of Apartheid 1973*
17. *Convention on the Elimination of All Forms of Discrimination against Women 1979*
18. *UNESCO Convention against Discrimination in Education 1960*
19. *ILO Convention (No. 100) concerning Equal Remuneration for Men and Women Workers for Work of Equal Value*
20. *ILO Convention (No. 103) on Maternity Protection*
21. *ILO Convention (No. 160) on Labour Statistics*
22. *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984*
23. *Hague Convention Relating to the Inter-Country Adoption of Children*

24. *ILO Convention (No. 87) Concerning Freedom of Association and Protection of the Right to Organize*
25. *Convention on the Prohibition of Bacteriological Weapons 1972.*
26. *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.*

Schedule II

UN Human Rights Instruments Not Ratified By Sri Lanka

1. *Optional Protocol to the International Covenant on Civil and Political Rights*
2. *Second Optional Protocol to the above aiming at the abolition of the death penalty 1989*
3. *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity 1968*
4. *ILO Convention (No. 105) concerning the Abolition of Forced Labour*
5. *Declaration regarding Article 21 of the above (relating to the entertainment of complaints by one State Party against another)*
6. *Declaration regarding Article 22 of the above (relating to the entertainment of complaints by individuals)*
7. *Convention on the International Right of Correction*
8. *ILO Convention (No. 102) concerning Minimum Standards of Social Security*
9. *Convention Relating to the Status of Refugees 1951*
10. *Protocol to the 1951 Refugees Convention 1967*
11. *Convention Relating to the Status of Stateless Persons 1954*
12. *ILO Convention (No.143) concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers*

14. *ILO Convention (No.122) concerning Employment Policy*
15. *ILO Convention (No. 141) concerning Organisations of Rural Workers and Their Role in Economic and Social Development*
16. *ILO Convention (No.151) concerning Protection of the Right to Organize and Procedures for Determining Conditions of Employment in the Public Service*
17. *Convention on the Political Rights of Women 1953*
18. *Convention on Consent to Marriage, Minimum Age for Marriage and Registration of marriages*
19. *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*
20. *Protocol Additional to the Geneva Convention of 2 August 1949, and relating to the Protection of Victims of Non-international Armed Conflicts (Protocol II)*
21. *International Convention against Apartheid in Sports*
22. *Protocol Instituting a Conciliation and Good Offices Commission to the UNESCO Convention against discrimination in Education 1962*
23. *ILO Convention (No. 111) concerning Discrimination in respect of Employment and Occupation*
24. *Convention for the Prevention and Punishment of Terrorism 1937*

25. *International Convention against Taking of Hostages 1979*

In addition, the Declaration under article 14 of the International Convention on the Elimination of All Forms of Racial Discrimination has not been made

Schedule III

Fundamental Rights Cases decided in 1996

Articles 11 & 13

*Dissanayake Mudiyanse Wasana Susantha Vs K.P.P. Pathirana
SSP and Others*

S.C. Application No: 165/95

*Weerasekare Mudiyanse Anura Dharma Jayantha Weerasekare
Vs Chief Inspector Saliya Silva and Others*

F.R. Application No: 550/95

Vijayan Wimalenthiran Vs The Army Commander and Others

S.C. Application No: 26/94

*Mohamed Thoufeek Ammerul Farook Vs Quintus R. Raymond Chief
Inspector of Police and Others*

S.C. Application No: 156/95

*S.A. Sunil Vs Chaminda alias Chandradasa Police Sergeant 11963
and Others*

S.C. Application No: 105/95

Ms Vinitha Malkanthi Hulangamuwa Vs C.T. Saliya OIC and Others
S.C. Application No: 567/95

David Matthews Vs IGP Police and Others

F.R. Application Nos: 563/95 and 564/95

Shyama Ushandini Mahalingam Vs K.A. Premadasa OIC and Others
S.C. Application No: 179/95

Shelford Anthony Felsiancs Vs Sergeant Bandara and Others

S.C.Application No: 93/95(FR)

*Mahadurage Sunil Kumarasiri Vs S.Jagoda Additional Range
Forest Officer*

S.C.Application No: 559/95

M.D.Sarath Kumara Vs S.Jagoda Additonal Range Forest Officer

S.C.Application No: 560/95

*Gamage Don Anthony Susantha Khandawita Vs The DIG Western
Province*

S.C.Application No: 183/95

Gama Ethige Sarath Kumara Vs Sunil Mahinda SI of Police

S.C.Application No: 124/95

Lakshman Tiranagama Vs OIC Somapala and Others

S.C.Application No: 228/94

Article 14

Mrs N.P. Rahuma Umma Vs Deputy Minister of Industries

S.C.Application No: 120/95

Wimal Fernando Vs The Sri Lanka Broadcasting Corporation

S.C.Application No: 81/95

Article 12

Mahinda Palitha Wijesuriya Vs National Savings Bank

S.C.Application No: 142/95

*Herath Mudiyanseelage Mohan Tissera Perera Vs W.B Rajaguru
IGP and Others*

S.C.(F.R.) Application No: 452/93

*Lucian Batiyatissa Angammana Tennakoon Vs T.P.F. de Silva IGP
and Others*

S.C.Application No: 192/95

*Gamini Atukorale. Srinal de Mel,, M.S.I.H. Mhideen, Gamini
Lokuge Vs T.P.F.de Silva and Others*

S.C.Application No: 137/95(F.R.)

*Pathirannehelage Chandraratne Vs The National Savings Bank and
Others*

S.C.Application No: 642/95(F.R.)

*Kuruppu Don Somapala Gunaratne, Dhammika Ilangakoon, Robin
Clement Kuruppu, Chandima Nalaka Kuruppu, Vs The Ceylon
Petroleum Corporation and Others*

S.C.Application No: 99/96

*Krishna Mining Co., (Ceylon) Ltd Vs Janatha Estate Development
Board and Others*

S.C. Application No: 515/92

*Muditha Nimali Priyangani Vs A.D.C. Nanayakkara, Provincial
Director of Education and Others*

S.C.Application No: 339B/95

*Dinayadura Premachandra de Silva and 62 Others Vs Jeyaraj
Fernadopulle M.P., Deputy Minister of Planning, Ethnic Affairs
and National Integration and Others*

S.C.Application No: 66/95

Kuranage Silvan Joseph Perera and 29 Others Vs Jeyaraj Fernandopulle M.P., Deputy Minister of Planning, Ethnic Affairs and National Integration and Others

S.C.Application No: 67/95

Palitha Bandula Herath Danuwara Vs Hadabima Authority of Sri Lanka and Others

S.C.Application No: 135/95

H.M.Premawathie Vs Ho.A.H.M.Fowzie, Minister of Health, Highways and Social Services and Others

S.C.Application No: 528/96

W.G.Wimalaratne Vs W.M.N.Boteju Director of Irrigation

S.C.Application No: 595/95(F.R.)

B.Romesh Eshantha Mendis Vs Air Lanka Ltd and Others

S.C.Application No: 443/96

Palle Mullegedara Wasantha Himali Gunasinghe Vs Divisional Superintendent of Post Office, Matale and Others

S.C.Application No: 4/96

K.A.D.F.A.D. Ayhukorala Vs R.S.Jayaratne Secretary, Ministry of Public Administration and Others

S.C.Application No: 645/95

T.M.Tennakoon Vs The IGP and Others

S.C.Application No: 574/95(F.R.)

T.Sriyani.M.Fernando Vs Agricultural Insurance Board

S.C.Application No: 353/96

Sirimanage Chandrasena Vs K.M.A. Kulathunge, Minister of Education, Provincial Ministry of Education North Western Provincial Council and Others
S.C.Application No: 206/95

Premasiri Vs Mrs S.M.S.Kotakadeniya, Post Master General
S.C.Application No: 439/95

Muthukumarana Hewa Thundilige Chandra de Malini Vs Post Master General
S.C.Application No: 13/96(F.R.)

Chandra Nanayakkara Vs S.B.Bandusena Secretary , Ministry of Fisheries and Aquatic Resources Development
S.C.Application No: 572/95

M.A.W.Sunil Jayalath Vs Hadabima Authority of Sri Lanka
S.C.Application No: 136/95

H.W.Peiris Vs M.B.C.de Silva, Secretary to the Ministry of Education of the Western Province
S.C.Application No: 221/95(F.R.)

P.H.A.Siripala Vs Commissioner of Prisons
S.C.Application No: 430/95(F.R.)

Bibliography

Alfredsson, G, "Human Rights Activities of the United Nations," presented at Danish Centre for Human Rights (unpublished: Copenhagen, January 1997).

Amnesty International "Disappearances" and Political Killings: Human Rights Crisis of the 1990s: A Manual for Action (Amsterdam, 1994)

----- "Sri Lanka: Balancing Human Rights & Security: Abuse of Arrest & Detention Powers in Colombo", AI Index ASA 37/10/94, February 1994.

----- "Sri Lanka: Extrajudicial Executions, "Disappearances" and Torture, 1987 - 1990," AI Index ASA 37/21/90, (London, 1990).

----- "Secret Detention in Colombo: the Case of Arulappu Jude Arulrajah." AI Index ASA 37/13/94, February 1994.

----- "Further Information.... Urgent Action ", AI Index: ASA 37/07/96 (London, April 1996)

----- "Sri Lanka: Highest Number of "disappearances" reported since 1990," AI Index: ASA 37/10/97, (London, April 1997)

----- "Sri Lanka", Amnesty International Report 1997 (AI Publications: UK., 1997)

----- Human Rights Defenders: Breaching the Walls of Silence Issues at stake in the UN Draft Declaration on Human Rights Defenders IOR 40/07/95 (August 1995).

----- Urgent Action, "Disappearance," AI Index: ASA 37/01/97, (London, January 1997).

Atapattu, S "An Introduction to Environmental Law in Sri Lanka", presented at "Sensitisation of Lawyers on Environmental Law and Forming a Countrywide Network", workshop organised by Mihikata Institute (unpublished: Colombo, December 1995)

----- "Environmental Impact of infrastructure Development Projects" Infrastructure Development in Sri Lanka: Regulation, Policy and Finance (Euromoney Publications: Jersey, 1997).

Birnie & Boyle, International Law & The Environment (Oxford University Press: U.K., 1992)

Civil Rights Movement of Sri Lanka. "Emergency Law and Trade Union Rights," CRM ref. E01/10/92 (Colombo October 1992)

Cohen R, and Cuenod, J, Improving Institutional Arrangements for the Internally Displaced, (The Brookings Institution - Refugee Policy Group Project 1995).

Cohen, R, Refugee and Internally Displaced Women, (The Brookings Institution - Refugee Policy Group Project 1995).

Coomaraswamy, R, "Women of the LTTE" in Frontline, (10 January 1997).

----- the UN Special Rapporteur on Violence Against Women, E/CN.4/1995/42, 22 November 1994,

Counterpoint, Vol 4, March 1997 (Ravaya Publications: Colombo, 1997).

Crawford (ed) The Rights of Peoples (Clarendon Press: Oxford, 1988)

Deng, F, Compilation and Analysis of Legal Norms, UN Doc. E/CN.4/1996/52/Add.2, 5 December 1995.

----- Report of the Special Representative of the UN Secretary General on Internally Displaced Persons, E/CN.4/1996/52, 22 February 1996,

Department of Census and Statistics, Ministry of Finance, Planning and Ethnic Affairs and National Integration, Women and Men in Sri Lanka (Colombo, 1995)

Deraniyagala, S, An investigation into the Incidence and Causes of Domestic Violence in Sri Lanka, Women in Need (Colombo, 1992)

Divakara, P, "Police View on Violence Against Women," note prepared for Professor Savitri Goonesekere and made available to the author by Professor Goonesekere.

Gomez, M, "People in Between (US Committee for Refugees: Washington DC., 1996).

Grime, J, " An Investigation into Children's Rights in Sri Lanka," (SIDA, 1994).

ILO, Child Labour in Sri Lanka: Learning from the Past, (Geneva 1993).

INFORM Situation Report February 1996 (Colombo).

----- Situation Report March 1996 (Colombo).

----- Situation Report April 1996 (Colombo).

----- Situation Report June 1996 (Colombo).

----- Situation Report July 1996 (Colombo).

----- Situation Report August 1996 (Colombo).

----- Situation Report September 1996 (Colombo).

----- Situation Report October 1996 (Colombo).

----- Situation Report, November 1996 (Colombo).

----- Situation Report December 1996 (Colombo).

International Centre for Ethnic Studies, Sri Lanka: The Devolution Debate (Colombo, 1996).

Kiss & Shelton, *International Environmental Law* (Transnational Publishers, 1991).

Kiss (ed), *Selected Multilateral Treaties in the Field of Environment*.

Kupchella & Hyland, *Environmental Science: Living Within the System of Nature*, 2nd ed (Allyn & Bacon: U.S.A., 1989).

Lakshman Marasinghe, "Some Thoughts on the Devolution Package" in Sri Lanka: The Devolution Debate.

Law & Society Trust, *Fortnightly Review*, Vol. VI, Issue 94 (Colombo, August 1995).

----- *Fortnightly Review*, Vol VI, Issue No 100 (Colombo, February 1996).

----- *Fortnightly Review*, Vol VI, Issue No 94 (Colombo, August 1995).

----- *Fortnightly Review*, Vol. V, Issue 93 (Colombo, June & July 1995).

----- "Minority Protection and Development Cooperation," presented at the Consultation on Group Rights (unpublished: Cambridge, August 1995).

----- Sri Lanka: State of Human Rights 1993 (Colombo, 1994).

----- Sri Lanka: State of Human Rights 1994 (Colombo, 1995).

----- Sri Lanka: State of Human Rights 1995 (Colombo, 1996).

Mathew, T, "Work Placement: Report on Domestic Violence" paper prepared for MSc Degree in Applied Psychology, University of Colombo, Colombo, p.7.

Ministry of Justice and Constitutional Affairs Draft Provisions of the Constitution Containing Proposals of the Government of Sri Lanka Relating to Devolution of Power, Including a Commentary on the Draft Constitutional Provisions, Colombo, 1996.

Ministry of Rehabilitation and Reconstruction, "Issue of Dry Ration/ Cash & WFP Assistance as at 31/12/1996".

Ministry of Transport, Environment and Women's Affairs National Plan of Action for Women in Sri Lanka: Towards Gender Equality, (1996).

Muni, S, D, Pangs of Proximity: India and Sri Lanka's Ethnic Crisis (1993).

Munro & Lammers (eds) Environmental Protection and Sustainable Development: Legal Principles and Recommendations (Graham & Trotman: London, 1986).

Nissan, E, "Reform at Risk," Article 19,(London, 1997).

———— Sri Lanka- A Bitter Harvest (Minority Rights Group: London, 1996).

Pearl Stephen, "Note to Professor Goonesekere," edited by and made available to the author by Professor Goonesekere.

Report of the World Commission on Environment and Development, Our Common Future (Oxford University Press:UK., 1987).

Rosencranz, Divan & Noble, Environmental Law and Policy in India: Cases, Materials and Statutes (Tripathi, Bombay, 2nd reprint 1995).

Ruiz H, and Hope, K Conflict and Displacement in Sri Lanka (US Committee for Refugees: Washington DC., 1997).

Sands, "International Law in the Field of Sustainable Development," British Yearbook of International Law(1994).

UTHR (J) Jaffna: The Contest between Man & The Beast Within, Special Report No 7, 29 August 1996.

———— The Massacre in Kilivetti, Trincomalee District, 16 February 1996. Information Bulletin No. 10, 2 March 1996.

———— Vanni: A People Crushed Between Cycles of Violence, Information Bulletin No 12, 22 October 1996.

----- The Contest Between man and the Beast Within, Special Report No. 7 29 August 1996, reproduced in Tamil Times (London, 15 September 1996; 18 October 1996; 15 November 1996).

Wijayatilake, D, "Abuse of Women - Problems and Remedies" in Fortnightly Review, Vol. VII, Issue No 107 (Law & Society Trust, Colombo, September 1996).

Wijayatilake, K, "Rape" in Violence Against Women - Voices of Victims and Activists, Centre for Women's Research, Colombo, (1997) p.5.

Ceylon Daily News, 17 August 1996.

Ceylon Daily News, 9 August 1996.

Ceylon Daily News, 16 November 1996.

Mid Week Mirror, 13 November 1996.

Mid week Mirror, 29 May 1996.

Midweek Mirror, 6 March 1996.

Midweek Mirror, 6 November 1996.

Sunday Leader, 27 October 1996.

Sunday Observer, 21 April 1996.

Sunday Times, 2 July 1995.

Sunday Times, 19 October 1997.

Sunday Times, 20 April 1997.

Sunday Times, 27 October 96.

The Island, 1 July 1996.

The Island, 10 December 1996.

The Island, 16 January 1997.

Index

- 13th Amendment to the 1978 Constitution, 140
- abatement of a public nuisance, 173
- abduction, 21, 28, 196, 213
- abuse of power, 105
- access to health care and food, 237
- acquisition of citizenship, 269
- acting under colour of her office, 105
- Additional Protocol to the Inter-American Convention on Human Rights, 156
- Additional Protocols of 1977, 250
- Administrative District of Jaffna, 60
- administrative law, 262
- adoption, 67, 114, 197, 199, 224
- affirmative action, 249
- African Charter on Human and Peoples' Rights, 150
- age
 - of consent, 194
 - of criminal responsibility, 223
 - of Majority Act, 269
- aggravated rape, 193
- air pollution, 158, 159, 169
- Amendment
 - of The Emergency (Harbouring of Offenders) Regulations No.1 of 1995, 59
 - to Emergency (Establishment of a Restricted Zone) Regulations No.1 of 1995, 60
 - to the Emergency (Miscellaneous Provisions and Powers) Regulations No.4 of 1994, 45
 - to the Emergency (Establishment of Prohibited Zone Regulations No.4 of 1995, 60

Amnesty International, 14, 15, 16, 17, 24, 25, 34, 37, 43, 44, 45, 93, 235

Amnesty International report, 34, 45

anti-torture legislation, 29

arbitrary

arrest and detention, torture and disappearance, 13

killings by the LTTE, 23

Armed Forces, 51, 136

Army Intelligence Unit, 43, 44, 89

Arrest and Detention, 24, 36, 39

ARTICLE 19, 234

ASEAN Agreement on the Conservation of Nature and Natural Resources, 156

assassination of Rajiv Gandhi, 245

Associated Newspapers Corporations Ltd., 76

asylum, 226, 229, 248

Attorney-General, 25, 64, 67, 74, 108, 112, 136, 162, 166, 183, 203

Auditor-General, 137

Authorised Places of Detention, 36

Bandarawela Centre, 49

Batalanda Housing Scheme, 18

bigamy, 206

Board

of Investment, 271

of Ministers, 143

Bolgoda, 23

British Refugee Council, 242

Bundala National Park, 171

Capital Territory, 143

cautionary rule, 191, 196, 208

CEDAW, 188, 190, 275

CEDAW Committee, 188

censorship, 12, 35, 50, 51, 62, 72, 73, 80, 231, 233, 234

Central Environmental Authority, 163

Centre for Applied Legal Studies of the University of Witwatersrand,
234

Ceylon

Electricity Board, 35, 54, 169

Mercantile, Industrial and General Workers' Union, 52

Workers' Congress, 271

character assassinations, 67

Chavakachcheri, 241

child

labour, 212, 217, 220, 221

prostitution, 213

rape, 178, 212

Children's

Code, 223

Rights, 211, 220

chlorofluorocarbons, 151

CFCs, 151

citizenship, 257, 258, 259, 260, 261, 262, 263, 264, 265, 268, 269,
270, 273, 274, 276, 277

Act, 258, 260, 263, 265, 268, 269, 270, 271, 273, 277

Act of India, 269

by descent, 259, 263

civil

and political rights, 148, 152, 161

Rights Movement, 55

Climate Change Convention, 155

Coast Conservation Act of 1981, 165

Code of Criminal Procedure, 175, 272

collective right, 62, 152, 153

combatants in war, 187

comity, 107

Commissioner

General of Rehabilitation, 48, 49

of Elections, 137

- of Prisons, 45, 212
- Commissions of Inquiry into, 18
- Competent Authority on Censorship, 72, 231
- Concept of the Rule of Law, 97
- conciliation, 128
- concurrent list, 221
- confidentiality of sources, 76
- Confiscation of Property, 56
- conflicts of a non international nature, 251
- conservation of biological diversity, 155
- constitutionality of any Bill, 83
- contractual rights, 97
- Controller of Immigration and Emigration, 267, 270, 271, 272, 274
- Convention
 - against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment Act No 22 of 1994, 112
 - Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 13
 - on Biological Diversity, 155
 - on the Elimination of all Forms of Discrimination Against Women, 188, 275
 - on the Rights of the Child, 156, 212, 222, 275
- corporal punishment, 224
- Criminal
 - defamation, 67
 - Investigations Department, 89
- custodial rape, 193, 195, 208
- customary international law, 154, 250
- democratic polity, 139
- demography, 270
- Department
 - of Census and Statistics, 180, 181, 183, 207
 - of Probation and Child Care Services, 182, 217, 218
 - of the Attorney-General, 136

depletion of the ozone layer, 151

Deportation, 266

 deportation order, 266

Deputy Ombudsmen, 117, 125, 131, 135

derogation clauses, 84

detention

 centre for illegal immigrants, 272

 Centres in Vavuniya, 241

 Order, 39, 40, 41, 42, 93

Devolution package, 138, 139, 140, 141

 Devolution Proposals, 139

Directive Principles of State Policy, 145, 147, 160

disappearances, 11, 12, 14, 15, 16, 18, 30, 31, 32, 39, 92, 199, 243

discrimination in employment, 94

discriminatory and unequal treatment, 99

disenfranchise, 263

displaced

 children, 226

 population, 226, 227, 235, 238, 245, 254, 255

 women, 226, 236, 255

doctrine of acting under colour of office, 106

domestic violence, 182, 183, 184, 191, 198, 200, 206, 208

dowry related violence, 189

dual citizenship, 259, 262, 263

Earth Summit Agenda 21, 155

ECE Charter on Environmental Rights and Obligations, 156

economic, social and cultural rights, 148

educational rights of children, 251

Eelam War, 139

Electronic Media, 70

Emergency

 (Confiscation of Property) Regulations No.1 of 1996, 56

 (Control of Colombo Security Zone) Regulations No.1 of 1996, 59

 (Evidence Special Provisions) Regulations No.1 of 1996, 61

- (Maintenance of Essential Supplies and Services) Regulation No.1 of 1996, 60
- (Miscellaneous Provisions and Powers) Regulations, 36, 43, 45, 54, 55, 60, 61, 89
- (Miscellaneous Provisions and Powers) Regulations No. 1 of 1993, 89
- (Miscellaneous Provisions and Powers) Regulations No. 4 of 1994, 36
- (Miscellaneous Provisions and Powers) Regulations No.1 of 1993, 43
- (Northern Province Re-settlement and Rehabilitation Authority) Regulations No.1 of 1996, 60
- (Prohibition on importation of Outboard Motors) Regulations No.1 of 1996, 59
- (Public Processions) Regulation No.1 of 1996, 53
- (Restriction on Use of Consumption of Electricity) Regulations No.1 of 1996, 60
- (Terms of Office of Local Authorities) Regulations No.1 of 1996, 35
- (Terms of Office of Local Authorities) Regulations No.2 (sic) of 1996, 36
- Regulations, 13, 23, 25, 34, 37, 40, 61, 89, 92, 93
- Employment
 - of Women, 219
 - planning, 221
- Environmental
 - Foundation Ltd., 166, 168, 175
 - Impact Assessment, 165, 171
 - protection, 151, 153, 163, 175, 176
 - Protection Licence, 164, 173
- equal access to opportunities, 249
- equality before the law and non-discrimination, 85
- error on the face of the record, 262
- Essential Services, 54, 60

ethnic

conflict, 148, 225, 226

issue, 140

ethnology, 270

every person shall be presumed innocent until proved guilty, 90

Evidence Ordinance, 199, 208

exhaustion of all domestic remedies, 276

Expert Group on Environmental Law, 154

Explosives Act, 45, 46, 47

expulsion of an alien, 276

extortion, 28, 240

Extrajudicial Killings, 19

Fauna and Flora Protection Ordinance, 163, 168

female genital mutilation, 189

Firearms Ordinance, 45

First Optional Protocol to the International Covenant on Civil and
Political Rights, 12

Forced displacement, 254

forcibly resettled or expelled, 248

Forest Ordinance, 163, 174

Forestry Master Plan, 174

forfeiture of property, 56

Formal Censorship, 72, 231, 233

Fortnightly Review, 83, 84, 104, 138, 139, 140, 193, 228

Francis Deng, 235, 236, 247, 250, 254

free

expression, 233, 234, 235

Media Movement, 76, 81

freedom

from Arbitrary Arrest and Detention, 13, 85

from Torture, Cruel, Inhuman or Degrading Treatment or
Punishment, 85

of Association of the Displaced, 246

of Expression, 12, 51, 80, 234

- of Expression and Peaceful Assembly, 86
- of Information, 63, 80, 99, 101
- of Movement, 26, 89, 167, 225, 243, 247, 248, 252, 254, 274, 275
- of Movement and of Choosing the Residence within Sri Lanka, 89
- of Speech and Expression, including Publication, 99
- of the Press, 71
- of Thought, Conscience and Religion, 63
- to Choose One's Residence, 247
- to Communicate, 233
- to Engage in a Lawful Occupation or Profession, 89
- to Form Public Opinion, 102
- to Have or to Adopt a Religion or Belief of his or her Choice, 63
- fundamental
 - duties, 160
 - right, 13, 37, 63, 64, 82, 83, 84, 85, 86, 87, 88, 89, 91, 93, 95, 99, 100, 103, 104, 105, 106, 110, 111, 112, 113, 114, 115, 116, 117, 118, 122, 123, 125, 126, 127, 132, 134, 135, 136, 140, 144, 145, 146, 147, 154, 160, 161, 166, 167, 168, 169, 175, 258, 268, 271, 272
- gang rape, 185, 193, 204
- Gangodawila Centre, 49
- gender
 - based discrimination, 235
 - discrimination, 262
 - equality, 268
 - or racial discrimination, 110
 - specific violence and exploitation, 236
- General Assembly
 - Declaration on the Right to Development, 149
 - Resolution 45/94, 156
- General
 - law, 222, 223
 - Recommendation 19, 188, 190
- genetic diversity, 156

Geneva Conventions of August 1949, 250

Government's Media Policy, 100

Grant of Citizenship to Stateless Persons

(Special Provision) Act No. 39 of 1988, 264

Act No. 5 of 1986, 264

greenhouse effect, 151, 158, 159, 169

grievous hurt, 181, 191

gross indecency between male persons, 215

Hague Convention on the Conflict of Nationality Laws, 258

Home for Human Rights, 177, 186

homosexual exploitation of children, 211

hostages for ransom, 28

HRTF, 14, 15, 25, 26, 42, 43, 44, 58, 59, 92

Human Rights

Commission, 12, 30, 59, 84, 85, 129, 134, 157

Commission of Sri Lanka, Act No 21 of 1996, 129

Committee in Geneva, 31

Law, 12, 247

humane treatment of civilians, 250

humanitarian

law, 11, 19, 234, 235, 250, 254

standards, 20, 33, 234

ICCPR, 12, 13, 31, 32, 64, 65, 66, 79, 80, 148, 225, 235, 237, 247, 248,
257, 275, 276

ICESCR, 237, 248

ICRC, 27, 254

ill treatment in custody, 39

ILO Convention No 169, 225, 247

Immigrants and Emigrants Act, 258, 265, 271, 272, 277

Immigrants and Emigrants Act No. 20 of 1948, 258

imminent infringement, 64, 82, 85, 96

impunity, 16, 17, 30, 31, 74

incest, 179, 190, 191, 197, 198, 213

- incidence of rape, 236
- indecent assault, 251
- independent judiciary, 86
- Indian
 - Constitution, 160, 195
 - government, 245
 - Peace Keeping Force, 15
 - Supreme Court, 150, 160, 168
- individual right, 152, 153
- Indo-Ceylon Agreement (Implementation) Act, 264
- Indo-Sri Lanka Accord, 140
- industrialisation, 158
- INFORM, 15, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 72, 73, 74, 75, 76, 77, 78, 79
- Infrastructure Development, 165
- Initial Environmental Examination (IEE) report, 165
- Inspectors of Orphanages, 216
- International Centre
 - Against Censorship, 234
 - for Ethnic Studies, 138, 177
- International
 - human rights law, 237, 247
 - humanitarian organisations, 232, 256
 - Standards on Internal Displacement, 246
- investigative detention, 46
- Jaffna, 13, 15, 19, 20, 21, 23, 25, 26, 49, 58, 60, 185, 186, 226, 227, 228, 230, 232, 233, 236, 238, 239, 241, 242, 243, 244, 254, 255
- Jaffna Teaching Hospital, 230, 243
- Janatha Vimukthi Peramuna, 16
- Johannesburg Principles on National Security, Freedom of Expression and Access to Information, 80, 234
- Jude Arulrajah, 37, 43, 44
- Judicial
 - Medical Officer, 218
 - Services Commission, 88

juvenile justice, 223

Kaithady Army Camp, 14

Kandyan

law, 222

Marriage and Divorce Act, 211

Killinochchi, 20, 238, 240, 241

Krishanthi Kumaraswamy, 21

Kumarapuram, 20

Labour

Department, 221

laws, 218

language right, 82, 116, 127

Lanka Electricity Company Ltd., 54

Law Commission, 268, 278

lawful age of marriage, 211, 222

laws delays, 204, 205

leave to proceed, 86, 89, 106, 109, 271

liberal and purposive approach, 105

Liberation Tigers of Tamil Eelam, 11

LTTE controlled territory, 241

LTTE suicide bomb attack, 26, 243

local remedies have been exhausted, 31

locus standi, 168, 175

Long-range Transboundary Pollution, 164

malaria, 240

Manager of the Orphanage, 216

Mannar, 61, 177, 227, 238

marital rape, 189, 194, 208

Marriages (General) Ordinance, 197, 211

marriages of convenience, 270

mass transfers of people, 254

May Day Processions, 51

Medecins Sans Frontieres, 230

mediation, 128

Mihikatha Institute, 173

Ministry of

Defence, 15, 27, 37, 42, 43, 48, 230, 231, 240, 244, 269, 270, 278

Fisheries, 172

Health, 230, 244

Justice, 142, 269

Public Administration, 130

Rehabilitation and Reconstruction, 228, 229, 256

Shipping, Ports, Rehabilitation and Reconstruction, 186

Minority Rights Group, 263

Monitoring of Fundamental Rights of Detainees Regulations 1991, 43

movement of the displaced to India, 226

Mullaitivu, 20, 238, 243

Mullaitivu camp, 243

Municipal Councils Ordinance, 163

National

Commission on Women, 270

Committee of Women, 206

Environmental Act, 157, 163, 174

Forest Policy, 174

Plan of Action for Women in Sri Lanka, 198

security, 50, 63, 64, 66, 72, 231, 233, 248, 276

Water Supply and Drainage Board, 54

nationality, 257, 258, 275

natural

resource management, 270

resources, 159

Newspapers Ordinance No 5 of 1839, 69

North and North Central regions of Sri Lanka, 238

obscene publications, 68

Ordinance No 4 of 1927, 68

offence of torture, 112

Office of the

Ombudsman, 113, 114, 117, 119, 123, 129, 132, 133, 134

Parliamentary Commissioner for Administration, 113

Official

Publications (Immunity) Ordinance No 47 of 1946, 69

Secrets Act No 32 of 1955, 68

Omanthai, 241

Optional Protocol, 12, 31, 257, 276, 277

Orphanages Ordinance, 216

paedophilia, 191, 215

Panagoda Army camp, 37

Parliamentary

(Powers and Privileges) Act No 21 of 1953, 66

Commissioner for Administration Act No. 17 of 1981, 114

Select Committee on the Constitution, 138 PEACE, 215

Penal Code, 40, 66, 179, 191, 192, 197, 198, 203, 205, 211, 213, 214,
218, 223, 263

(Amendment) Act No. 22 of 1995, 191, 192

(Amendment) Act of 1995, 214

Peoples' Alliance, 53, 133

PLOTE, 239

Police

Force, 51, 136

Headquarters, 51, 181

Training Institute, 203, 209

political victimisation, 94

Pollution, 157, 158, 163, 164, 171, 172

population growth, 159

pornography, 211

port of Trincomalee, 245

preferential right of the father, 223

Press Council, 69, 72

Prevention of Terrorism Act, 13, 45, 68

preventive detention, 46

principle of

- non-discrimination, 222
- equality, 97
- natural justice, 116
- non refoulement, 252
- respect for the views of the child, 222
- the best interests of the child, 222

Probation Officers, 221

Profane Publications Act No 41 of 1958, 69

Prohibited Zone, 59, 60

project approving agency, 165

prostitution, 179, 189, 213, 266

Protecting the Environment and Children Everywhere, 215

Protective Accommodation and Rehabilitation Centres, 47

Protocol II, 251

Provincial Councils Act of 1988, 140

Public

Access, 118

health or morals, 66, 248

hearings and injunctions, 153

interest, 52, 70, 100, 130, 168, 199, 262, 266, 267

interest litigation, 168

law, 108, 262

nuisance, 173

order, 42, 63, 64, 66, 67, 136, 248, 276

participation, 153, 174, 176

Performance Ordinance No 7 of 1912, 68

Petitions Committee of the Parliament, 118

policy, 261

Security Ordinance, 34, 61, 67, 89, 136

trust duty, 174

Ramsar

Convention, 171, 173

site, 173

rape, 21, 22, 28, 178, 179, 180, 182, 183, 185, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 200, 204, 205, 206, 208, 211, 212, 213, 236

Reconstruction and Rehabilitation Authority of the North, 256

refuge in India, 245

refugee

and internally displaced women, 237

camps in Southern India, 227

law, 252

women, 210

Regional

Council, 143

Councils, 143

High Courts, 146

Registrar of Orphanages, 216

Registration of Electors Act No. 44 of 1980, 259

Rehabilitation

of Persons, Properties and Industries Act No 29 of 1987, 60

order, 46, 49

repatriation, 226

REPPIA, 60

Re-settlement and Rehabilitation Authority of the North, 60

respect for the views of the child, 222, 223

respiratory tract infections, 240

restricted zones, 60

Revocation/Annulment of Citizenship, 263

Right

of entry, 265

of access to information, 152

of future generations to a clean and healthy environment, 151

of the displaced to free expression, 235

to a balanced and healthful ecology, 161

to a clean environment, 149, 150, 152, 153, 154, 160, 163, 166, 168, 175

to administrative and judicial remedies, 152

- to an adequate standard of living, 248
- to be protected from discrimination, 248
- to development, 150
- to education, 244
- to health, 243
- to health, livelihood and property, 152
- to information, 65, 83, 101, 102, 103, 231, 233, 234, 235
- to information simpliciter, 101
- to leave one's place of origin, 248
- to life, 13, 17, 83, 149, 152, 159, 168, 248
- to live in a clean environment adequate for his well-being, 150
- to live with human dignity, 248
- to livelihood, 244
- to participate in the decision-making processes, 152
- to privacy, 83, 237, 275
- to privacy and family life, 83
- to property, 125
- to receive an education, 251
- to receive information, 63, 64, 101, 102, 103, 104
- to recognition everywhere as a person before the law, 248
- to residency, 257, 267
- and freedoms of others, 63, 248
- of a detained person to be produced before a judge according
to procedure established by law, 85
- Rio Declaration on Environment and Development, 155
- safety zone, 254
- Secretary to the Ministry of Defence, 37, 42, 43, 48
- sedition, 67
- seek asylum abroad, 248
- self-determination, 147
- sexual
 - abuse, 189, 195, 216, 217, 224
 - annoyance or harassment, 197
 - exploitation of children, 197, 211, 212

312 *Sri Lanka: State of Human Rights 1997*

- harassment, 179, 189, 197, 198
- harassment in the workplace, 197
- offences, 214
- socio-economic right, 150
- sociology, 270
- Soil Conservation Act, 163
- Solicitor-General, 136
- South African Constitution, 150
- Sovereignty, 142, 144
- special
 - employment programmes, 221
 - Presidential Commission of Inquiry, 18
 - Representative of the U.N. Secretary-General on Internally Displaced Persons, 247
- specified services, 54
- Sri Lanka, 50
 - State of Human Rights 1993, 34
 - Broadcasting Corporation Act No 37 of 1966, 70
 - Monitor, 242
 - Press Council Law No 5 of 1973, 69
 - Rupavahini Corporation, 70, 78
 - Constitution, 13, 161
- state
 - and non-state actors, 250
 - Lands Ordinance, 163
- Stockholm Declaration on the Human Environment, 154
- Supreme Court, 22, 34, 37, 43, 44, 64, 66, 82, 83, 84, 85, 86, 88, 95, 106, 107, 108, 111, 112, 113, 117, 119, 125, 150, 151, 160, 161, 168, 235, 271
- sustainable
 - development, 150, 155, 156, 164, 165
 - use, 155, 159
- Tamil Eelam Liberation Organization, 17
- Tamil Nadu state government, 245

- Tamil Rehabilitation Organisation, 246
- Technical Committee on Child Labour, 220
- telecommunication service, 54
- Teleshan Network (Pvt.) Ltd., 78
- TELO, 17, 240
- Thandikulam, 241
 - checkpoint, 241
- the
 - National Plan of Action, 179, 202, 207
 - Sri Lanka Rupavahini Corporation Act No 6 of 1982, 70
 - Sri Lanka Telecommunications Act No 25 of 1991, 71
- third generation rights, 149
- threshold stage, 97
- through descent, 259
- time barred, 96
- torture, 11, 12, 13, 16, 17, 18, 22, 28, 29, 31, 32, 33, 85, 86, 112, 167,
181, 199, 240, 251
 - house, 18
- trafficking, 179, 189, 197
- UDHR, 237, 247, 248
- UN
 - Convention on the Rights of the Child, 275
 - Declaration on the Protection of All Persons from Enforced
unfettered discretion, 108, 262
 - UNHCR, 227, 232, 242, 245, 250
- United Nations
 - Committee on the Convention of the Rights of the Child in 1995,
211
 - Conference on the Human Environment in 1972, 154
 - Declaration on the Elimination of Violence Against Women, 189
- University Teachers for Human Rights, Jaffna, 233
- unlawful intercourse, 213
- Unofficial Censorship, 73
- Up Country Tamils, 263, 264, 271, 273

Upper Kotmale hydro power plant, 169

urbanisation, 159

US

Committee for Refugees, 228, 232

State Department Report on Sri Lanka for 1996, 14

UTHR(J), 19, 20, 21, 23, 186, 233, 240, 243

Vanni, 226, 229, 232, 233, 238, 239, 240, 246

Vavuniya, 22, 26, 61, 177, 186, 226, 232, 233, 236, 237, 238, 239, 241, 242

Vienna Declaration, 198, 249

on Human Rights, 198

Vijayam Wimalenthiran, 37

Violence against

women, 177

migrant workers, 179

visas, 262, 266, 267, 272, 274, 277

water pollution, 158, 159, 172

Weerawila Centre, 49

wetland, 169, 171

Conservation Project, 172

wife battery, 179

Women

and Children's Bureau, 221

and Children's Unit, 180

and children's units of the Police, 207

and Displacement, 235

for Peace, 186

In Need, 183

Women's

Charter, 190, 207

Development Centre, 207

World Commission on Environment and Development, 150, 154

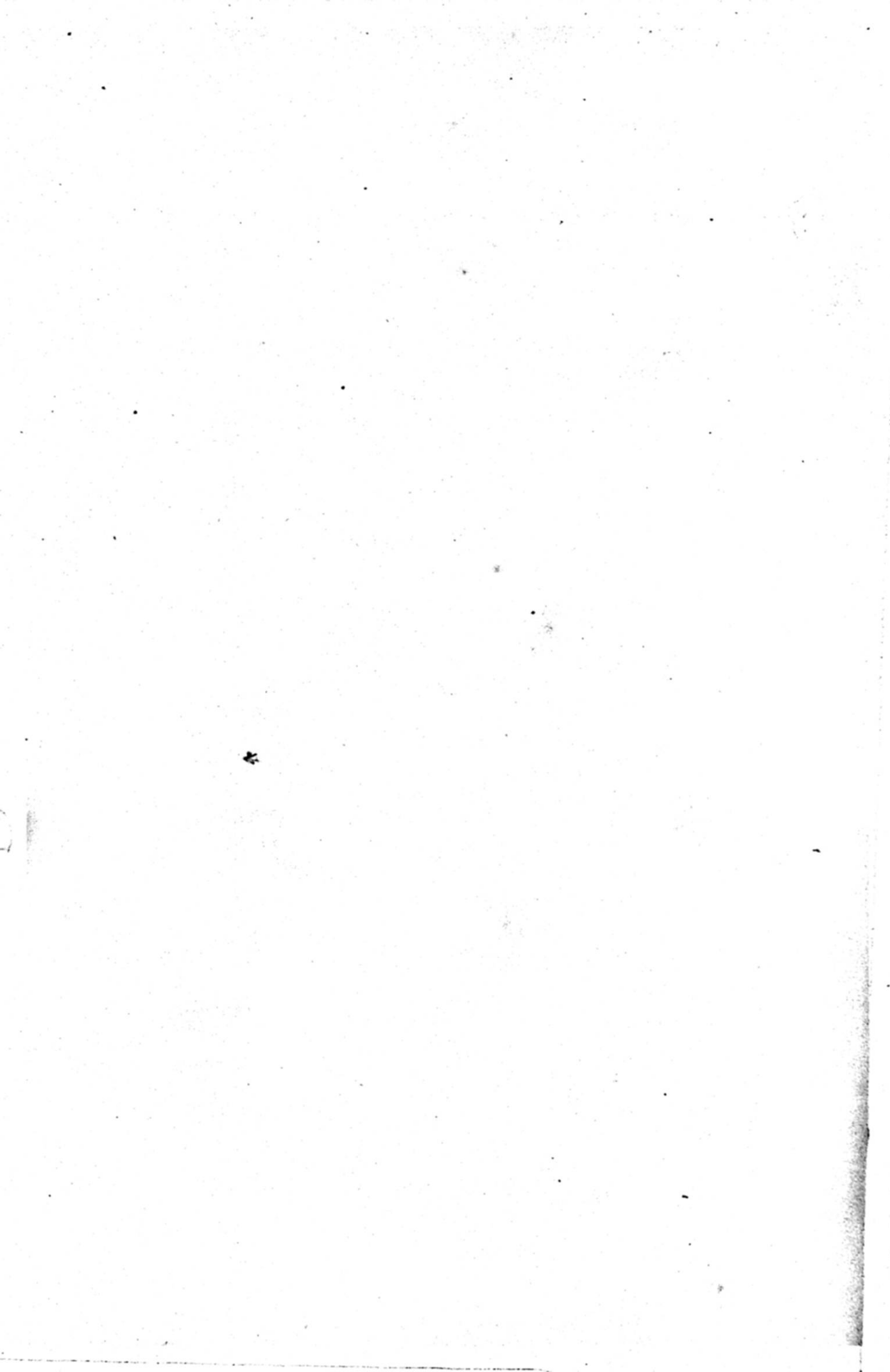
writ of

certiorari, 168

of mandamus, 162, 168

Young Persons and Children's Ordinance, 219

Youth Development and Training Centres, 47



THE LAW & SOCIETY TRUST

The Law & Society Trust is a non-profit making body committed to improving public awareness on civil and political rights and social, economic and cultural rights, and equal access to justice. The Trust has taken a leading role in promoting co-operation between government and society within South Asia on questions relating to human rights, democracy and minority protection, and has participated in initiatives to develop a global intellectual and policy agenda for the nineties.

The Law & Society Trust was established in June 1982 to initiate studies and activities on law, its processes and institutions. In 1990 the Trust was incorporated as a non-profit making body under the provisions of the Companies Act of 1982.

The Trust has designed activities and programmes, and commissioned studies and publications, which have attempted to make the law play a more meaningful role within society. The Trust has attempted to use law as a resource in the battle against underdevelopment and poverty and has also conducted a series of programmes aimed at members of the legal community, including publications, workshops, seminars and symposia; it is developing its documentation centre with the objective of establishing in the future, a regional centre for advanced legal studies and socio-legal research. The Trust has been responsible for the production of four consecutive annual reports which are independent reviews of the state of human rights in Sri Lanka. The first was Sri Lanka: State of Human Rights 1993.

The Trust has an ongoing programme designed to disseminate information and upgrade local legal skills on matters relating to commercial law. With the Sri Lankan Government's increased emphasis on economic restructuring, privatisation of state enterprises and liberalisation of the economy, there is a growing need within Sri Lanka for legal skills and expertise in drafting appropriate legislation and negotiating contracts. The Trust has also arranged discussions between the public and private sectors and labour on critical issues relating to economic law and policy.

Sri Lanka: State of Human Rights 1997

This report is a detailed account of the state of human rights in Sri Lanka focusing on events which occurred in the country in 1996.

The report considers civil and political rights in relation to the integrity of the person; emergency rule; freedom of expression and media freedom and judicial protection of human rights. Separate chapters are devoted to environmental rights; internally displaced person and the freedom of movement; nationality and citizenship laws; violence against women; and children's rights. The report also discusses the human rights implications of the devolution proposals. Hence, the report represents an important watershed with regard to human rights in Sri Lanka.



Law & Society Trust

3 Kynsey Terrace, Colombo 8

Sri Lanka

Tel: 691228, 684845 Telefax: 686843, 696618

e-mail: lst@slt.lk

ISBN: 955-9062-45-X