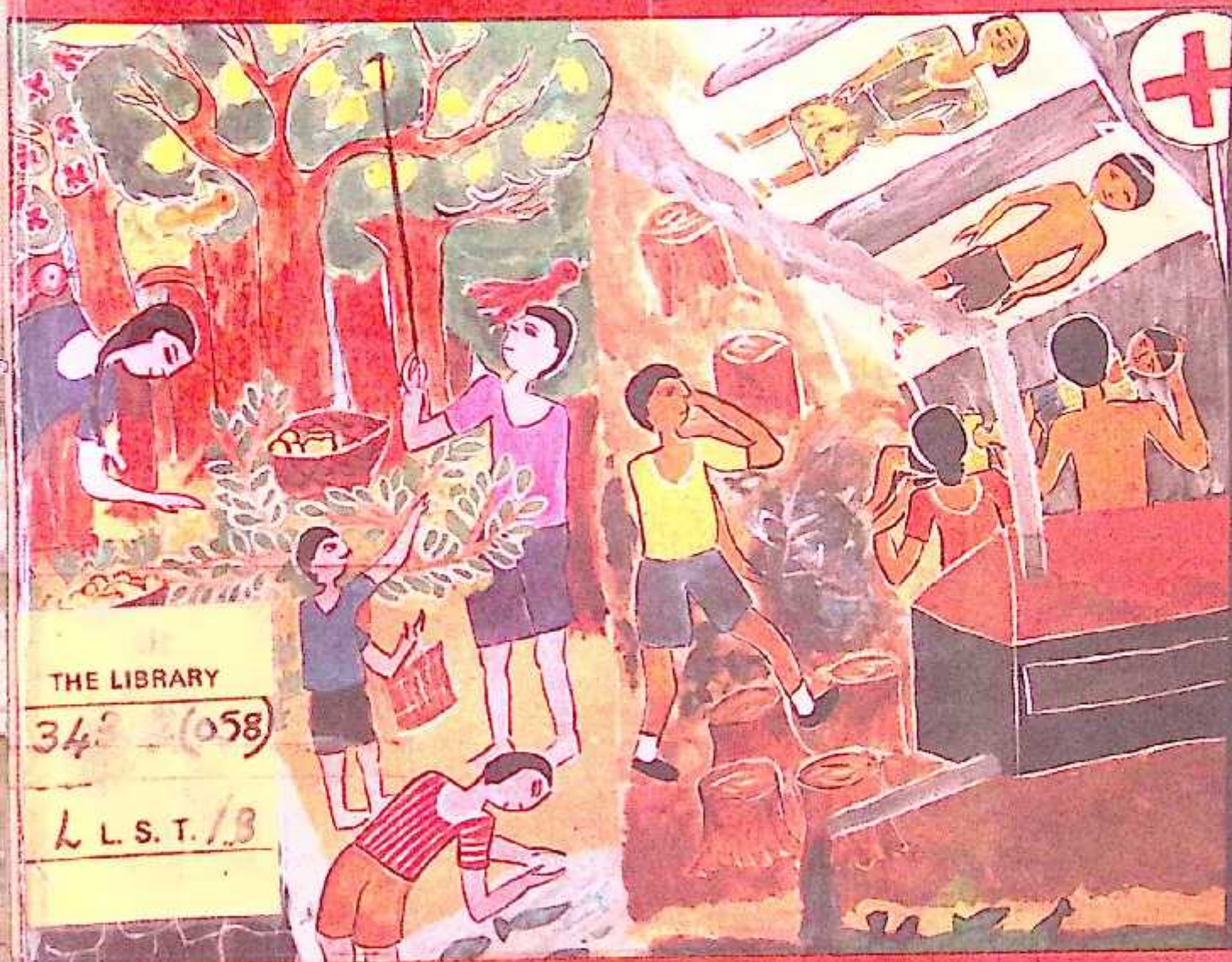
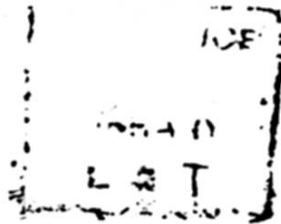


Sri Lanka: State of Human Rights 1998



Law & Society Trust

✓

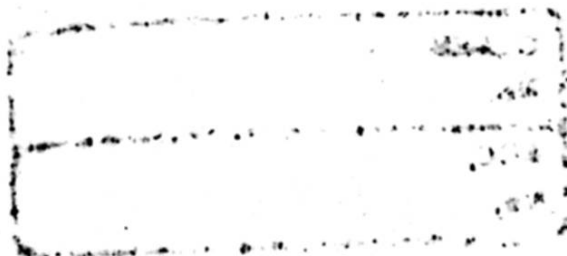


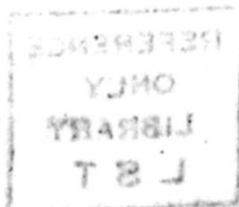
SRI LANKA: STATE OF HUMAN RIGHTS 1998

**This report covers the period
January to December 1997**



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





© Law & Society Trust
September 1998

ISBN - 955-9062-53-0

CLASS	343.4 (058)
No.	347.2
ACC.	000230
No.	5887

✓

Contributors

Overview

Elizabeth Nissan

Integrity of the Person

Sumudu Atapattu

Emergency Rule

Suriya Wickremasinghe

Judicial Protection of Human Rights

Sumudu Atapattu

Freedom of Expression and Media Freedom

Lakshman Gunsekera

Equal Opportunity

Dinusha Panditaratne

✓ A Commentary on the Draft Fundamental Rights Chapter

Sumudu Atapattu

Rights of the Child

Siranthani Gopallawa

Migrant Women Workers

Nimalka Fernando

Internally Displaced Persons and Returnees from India

Consortium for Humanitarian NGOs

Right to Education

Pradeep Ratnam

The Rights of Persons with Disabilities

Dattathreya C. S.

Right to Health

Dharshini Sivanathan and I. K. Zanofer

Workers' Rights

Sumangalie Atulugama

Editor

Elizabeth Nissan

Administrator

Damaris Wickremesekera

Proof Readers

*Sumudu Atapattu; Janaki Dharmasena; Sunila Galappatti;
Damaris Wickremesekera.*

Resource Support

*Sumangalie Atulugama; Christopher Felstead; Tilaka Fernando;
Devampika Karunasekera; Jeffrey Locke; Navin Perera; Pam
Singh; I.K. Zanofer; Charitha Unawatuna*

Papers reviewed by

*Dr. Neelan Tiruchelvam; Prof. Sharya de Soysa; J. C. Weliamuna;
Prof. Ravindra Fernando; Rohan Edrisinha; Franklyn
Amerasinghe; Kishali Pinto Jayewardena; Suriya
Wickremasinghe; Sumudu Atapattu*

Cover

*Drawing by Diluni Nadeesha Hewawasam of R/Ehiliyagoda
Madya Maha Vidyalyaya submitted to the Inter- School Art
Competition 1997 on Human Rights, organised by the Law &
Society Trust.*

Layout

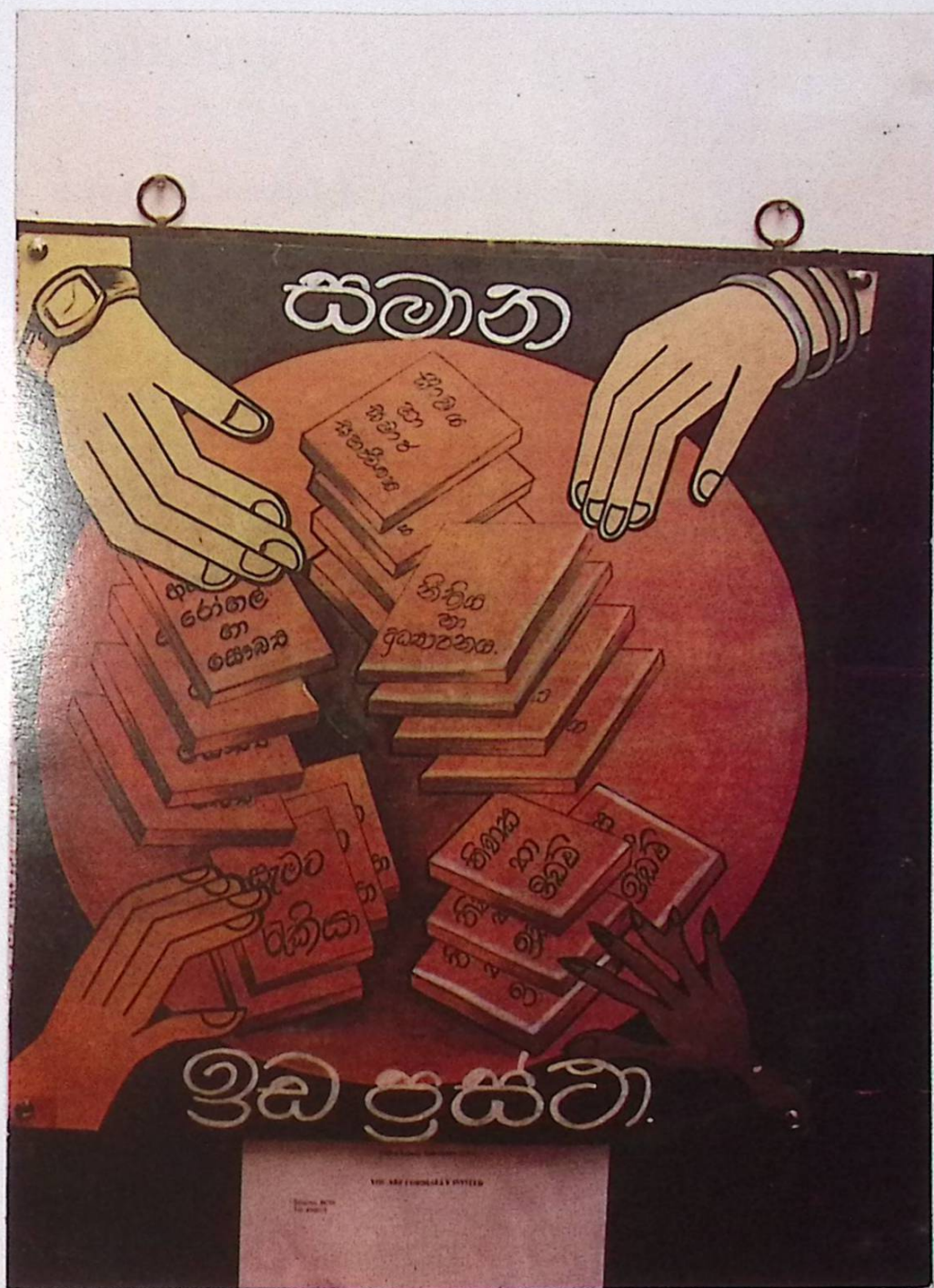
S. Antony Norbert

Printing

Unie Arts (Pvt) Ltd



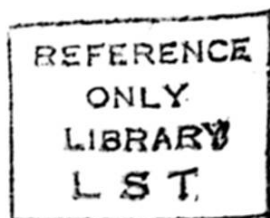
Prize Winning Drawing (First Prize, under 12 years) by D. S. Y. Hirunika Nipuni of G/Sangamittha Balika Maha Vidyalaya, Galle, awarded at the Poster Competition 1998 - on Equal Opportunity organised in the Galle District by the Law & Society Trust.



Prize Winning Drawing (First Prize, over 12 years) by N. Pradeep Kumara de Silva of G/Rajapaksha Maha Vidyalaya, Ahungala, awarded at the Poster Competition 1998 - on Equal Opportunity organised in the Galle District by the Law & Society Trust.



Contents



<i>List of abbreviations and acronyms</i>	xvii
<i>Foreword</i>	xix
I Overview	1
1. Introduction	1
2. The Conflict and Human Rights	2
3. The Government's Constitutional Proposals of October 1997 and Fundamental Rights Protection	8
4. Other Issues	8
5. National Mechanisms for Human Rights Protection	9
6. International Developments	10
II Integrity of the Person	12
1. Introduction	12
2. International Human Rights Instruments Ratified	13
3. Intensification of Military Operations: The Human Cost	14
3.1 Problems faced by civilians	15
4. Extrajudicial Killings	17
4.1 The report of the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions	19
4.2 Arbitrary killings by the LTTE	23
5. Arbitrary Arrest and Detention	23
6. Torture	25
6.1 Sri Lanka's report to the UN Committee against Torture	26

7.	Disappearances	24
8.	Investigation into Alleged Violations and Trials of Perpetrators	30
9.	Election-related Violence	33
10.	New Steps Taken to Protect Human Rights	36
11.	Recommendations and Conclusions	39
III	Emergency Rule	42
1.	Introduction	42
2.	Geographical Limitation	43
3.	Arrest and Detention	44
3.1	Authorised places of detention	44
3.2	Abolition of the HRTF	44
3.3	The Sirisena Cooray case	48
3.4	The Gamini Perera case	58
4.	Restriction of Prison Visits	59
5.	Emergency Regulations Relating to Local Government Elections	60
6.	May Day Ban of 1996: The Aftermath	62
7.	Jackpots and Public Performances	65
8.	The Generation of Electrical Power	66
9.	Other Regulations	68
10.	Territorial Applicability of Emergency Regulations	69
11.	Inaccessibility and Other Long-standing Complaints Remain Unrectified	70
12.	Conclusion	72
IV	Judicial Protection of Human Rights	75
1.	Introduction	75
2.	Case Law	76
2.1	Cases under Articles 11, 13(1) and 13(2)	76
2.2	Cases under Articles 12(1) and 12(2)	84

	2.3 Cases under Article 14	97
3.	Relief	100
4.	Conclusions and Recommendations	101
V	Freedom of Expression and Media Freedom	103
1.	Introduction	103
2.	Legal Framework	105
3.	Major Legal Issues in 1997	106
	3.1 Revision of Parliamentary Powers and Privileges Act	107
	3.2 Sri Lanka Broadcasting Authority Bill	108
	3.3 Criminal defamation action against the media	114
	3.4 Other legal constraints	116
4.	Political Pressures and Violence	118
	4.1 ITN crew assaulted	118
	4.2 TNL crew assaulted	119
	4.3 TNL news manager detained under PTA	119
5.	Mass Media as the Medium of Expression	121
	5.1 Media and the ethnic conflict	123
	5.2 Media and gender representation	125
6.	More Responsive Mass Media	126
VI	Equal Opportunity	127
1.	Introduction	127
2.	Defining "Equal Opportunity"	129
3.	Equal Opportunity Provisions in International Instruments	131
	3.1 Spheres of equal opportunity	132
	3.2 Grounds of impairment	135
4.	The Sri Lankan Context	136
5.	The Adequacy of Present Legal Provisions for Equal Opportunity in Sri Lanka	143
	5.1 Constitutional provisions	143

5.2	Statutory provisions	152
5.3	Executive action and policy	159
5.4	Voluntary measures and policy directives	162
6.	The Role of Local Institutions in Protecting Equal Opportunity	164
7.	Conclusion: The Effectiveness of Legal Provisions and Institutions Relating to Equal Opportunity, and an Agenda for Change	170
VII	A Commentary on the Draft Fundamental Rights Chapter	173
1.	Introduction	173
2.	March 1997 Draft	174
3.	October 1997 Version	175
3.1	Children's rights and socio-economic rights	178
3.2	Widening the scope of <i>locus standi</i> in relation to fundamental rights applications	180
4.	Summary	180
5.	Proposals of the Human Rights Community	182
6.	Provisions in International Instruments	186
6.1	The ICESCR	186
6.2	The CRC	188
7.	Conclusions and Recommendations	190
VIII	Rights of the Child	192
1.	Introduction	192
2.	Sexual Exploitation of Children	193
3.	Child Labour	204
4.	Child Soldiers	209
5.	Children's Rights and the Draft Constitution of October 1997	214
6.	Conclusion	217

IX	Migrant Women Workers	219
1.	Introduction	219
2.	The International Convention on the Protection of the Rights of all Migrant Workers and Members of Their Families	222
3.	The Vulnerability and Plight of Migrant Workers	224
4.	Government Policy on International Labour Migration	229
5.	The Sri Lanka Bureau of Foreign Employment	232
6.	Insurance Services	233
7.	Social Implications of Migration	234
8.	Concluding Remarks and Recommendations	235
 X	 Internally Displaced Persons and Returnees from India	 237
1.	Introduction	237
2.	Internally Displaced Persons	239
3.	Access to Information	240
4.	Freedom of Association of the Displaced	243
5.	Categories of Internally Displaced People in Sri Lanka and the Problems They Face	243
5.1	Internally displaced persons living in government-controlled areas of the North and East	244
5.2	Internally displaced persons living in the North and East in territories held by the LTTE	250
5.3	Internally displaced persons from the North, living in non-conflict areas	252
5.4	Internally displaced persons in border areas, subject to fluctuating control by the government or the LTTE	252
5.5	Internally displaced persons living with friends and relatives	253

6.	Returnees from India and Refugees Going to India	254
7.	International and Domestic Norms Relating to the Internally Displaced	255
8.	Recommendations	258
XI	Right to Education	261
1.	Introduction	261
2.	The International Regime on Educational Rights	266
2.1	The international obligation of states	266
2.2	Discrimination	268
3.	Pre University Education in Sri Lanka	270
3.1	Constitutional provisions and domestic legislation	270
4.	Higher Education	287
4.1	The dilemma of university entrance	287
4.2	Inequities in the policy on university entrance	289
4.3	Rethinking contemporary policy	292
5.	Devolution and Constitutional Reform - The Impact on Education	293
5.1	A history of ineffectiveness	293
5.2	The proposal for dichotomy in educational management	294
5.3	Consequences	295
6.	Proposals for Educational Reform by the National Education Commission	297
6.1	Institutional reforms: increasing access to education	298
6.2	General education	299
6.3	University education	305
6.4	Teacher education	305
7.	Conclusion	306

XII	The Rights of Persons with Disabilities	316
1.	Introduction	316
2.	International Instruments	318
3.	National Legislation	324
4.	Welfare Measures Administered by the Secretariat of the National Council	327
5.	The National Council and Policy Formulation	329
6.	The National Situation and International Standards	330
7.	Conclusion	331
 XIII	 The Right to Health	 333
1.	Introduction	333
2.	Legislation	335
2.1	International instruments	335
2.2	Local legislation	336
3.	Major Health Issues During 1997	337
3.1	Triple vaccine	337
3.2	The Cholera epidemic in Chilaw	339
3.3	Dengue fever	340
3.4	HIV/AIDS	341
4.	Public Health Services in Sri Lanka	343
5.	Health Situation in the North and East	345
5.1	Uncleared Areas: LTTE held areas in the Vanni	345
5.2	Newly cleared areas: Jaffna peninsular, and border areas south of the Vanni	346
5.3	The grey areas: Trincomalee, Batticaloa and Ampara	346
6.	Trade Union Action by the GMOA	347
7.	Conclusion	348

XIV Workers' Rights	350
1. Introduction	350
2. Labour Disputes	351
3. The Protection of Workers' Rights	353
3.1 1978 Constitution of Sri Lanka	353
3.2 Termination of employment	354
3.3 Wages Boards Ordinance	357
3.4 Shop and Office Employees Act	358
3.5 National Workers' Charter	359
3.6 The Protection and Rehabilitation of Persons with Disabilities Act	360
4. Workers in the Free Trade Zones	361
5. Key Events During 1997	363
6. Conclusion	365
<i>Schedule I</i>	367
<i>Schedule II</i>	370
<i>Schedule III</i>	372
<i>Schedule IV</i>	379
<i>Bibliography</i>	397
<i>Index</i>	406

Abbreviations

A/Level	Advanced Level (of the General Certificate of Education Examination)
AG	Attorney-General
AI	Amnesty International
CDB	Crime Detection Bureau
CAT	Convention Against Torture
CCP	Code of Criminal Procedure
CEDAW	Convention on the Elimination of all Forms of Discrimination Against Women
CID	Criminal Investigations Department
CMEV	Centre for Monitoring of Election Violence
CPA	Centre for Policy Alternatives
CRC	Convention on the Rights of the Child
CRM	Civil Rights Movement
EMPPR	Emergency (Miscellaneous Provisions and Powers) Regulations
FMM	Free Media Movement
GMOA	Government Medical Officers Association
HRC	Human Rights Commission
HRTF	Human Rights Task Force
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICRC	International Committee of the Red Cross
IGP	Inspector General of Police
ILO	International Labour Organisation
ITN	Independent Television Network
JVP	Janatha Vimukthi Peramuna
LSSP	Lanka Sama Samaja Party
LTTE	Liberation Tigers of Tamil Eelam
NGOs	Non-Governmental Organisations

NSSP	Nava Sama Samaja Party
PA	People's Alliance
PPC	Public Petitions Committee
PSCCR	Parliamentary Select Committee on Constitutional Reform
PSO	Public Security Ordinance
PTA	Prevention of Terrorism Act
SLBA	Sri Lanka Broadcasting Authority
SLFP	Sri Lanka Freedom Party
STF	Special Task Force
TNL	Telshan Network (Pvt) Ltd
TULF	Tamil United Liberation Front
UDHR	Universal Declaration of Human Rights
UGC	University Grants Commission
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
UNP	United National Party
UTHR(J)	University Teachers for Human Rights (Jaffna)
WHO	World Health Organisation
WTO	World Trade Organisation

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, draft fundamental rights chapter and emergency rule. In addition, separate chapters are devoted to children's rights, the plight of displaced persons, migrant women workers, equal opportunity, rights of persons with disabilities, right to education, workers' rights and the right to health.

The report was co-ordinated by the Law & Society Trust. Specific chapters were assigned to individuals with special competence in the relevant areas. The drafts 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 1997 and the text of the draft fundamental rights chapter released by the government in October 1997. It is encouraging to note that the government finally took the welcome step of acceding to the First Optional Protocol to the ICCPR.

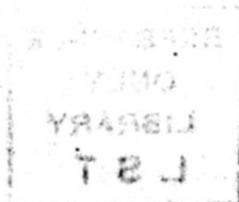
It is hoped that this report would continue to facilitate dialogue between civil society institutions and the government in ensuring more effective protection and promotion of human rights within Sri Lanka.

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 poster competition and exhibition in the Galle district on the theme "Equal Opportunity." The response

to this competition was most heartening and the entries which secured the first two places are included in this report

Law & Society Trust
Colombo
September 1998



I

Overview

*Elizabeth Nissan**

1. Introduction

The relentless armed conflict in northern and eastern Sri Lanka continued to provide the backdrop for any assessment of Sri Lanka's human rights status in 1997. Indeed, as the year ended, the prospect of any end to the "war for peace" looked all the more remote. Although in October 1997 the People's Alliance (PA) government had placed its proposals for constitutional reform before parliament, by the year's end it was evident that there was little chance this draft could actually be enacted; and even if it was, it was still unclear how the proposals for devolution could be implemented effectively without the consent of the Liberation Tigers of Tamil Eelam (LTTE), who remained a potent force on the battle-field.

* Freelance Human Rights Consultant, specialised on Sri Lanka.

After winning power in 1994, the PA government had initiated two consultative processes intended to lay the foundations for peace. Firstly, it had embarked upon talks with the LTTE; secondly, it had established a Parliamentary Select Committee on the Constitution. The talks with the LTTE ended abruptly when, in April 1995, the LTTE suddenly announced its withdrawal from the process and blew up two naval ships, heralding a return to armed hostilities. By the end of 1997, the process intended to lead to constitutional reform appeared to have failed, too. The Parliamentary Select Committee had not reached consensus on a constitutional path that might offer a way out of the war and into new structures of governance. In October, the government presented the results of its own deliberations and consultations to parliament in the form of a proposed draft constitution. The opposition United National Party (UNP) rejected these proposals, however, while failing to propose any clear alternative of its own as yet. The LTTE, too, announced its rejection of the proposed "package." The whole process of constitutional reform-which had been a crucial element of the 1994 PA election manifesto and its conflict-resolution strategy was stalled.

2. The Conflict and Human Rights

The ongoing conflict has had a dramatic impact on the lives of people living in the North and East, and also has serious consequences for people living in other areas of the island. There was no easing of the intensity with which the war was fought in 1997; indeed, fighting intensified from May, when government troops launched a new offensive with the objective of securing a land route through the Vanni to Jaffna (which had not been achieved by the end of the year). There was also no diminution of the impact of the conflict in human rights terms. As described in the chapters on the internally displaced and the

integrity of the person, very large numbers of people remained displaced from their homes as a result of the conflict; indeed, for many people, displacement has now become the "norm." Many people have had to move several times as the arena of fighting has shifted, never able to re-establish a secure life for themselves and their families. Shortages in the supply of essential items - including food and medical supplies - to areas under LTTE control also caused further movement of civilians. Indeed, the food-supply situation in the Vanni caused considerable concern during the year. On the one hand, the government failed to supply the level of food it had agreed was necessary to fulfil minimum nutritional requirements and obstructed the passage of numerous other items; on the other hand, the LTTE appropriated some of the supplies that were sent.¹ The procedures used by the military to permit the transport of supplies to the Vanni were said to be burdensome and secretive. Caught between the two sides, many displaced civilians have become pawns of war, vulnerable to insecurity in the supply of food, clothing, sanitation, health care, housing and education.

It is clear that people living in large parts of northern and eastern Sri Lanka are unable to access a wide range of rights to the extent that they are enjoyed in many other parts of the country. This should mean that people in these areas are given particular priority in assessing their human rights and humanitarian needs. Instead, however, there is a serious lack of accurate, comprehensive data on the conditions under which people in the North and East live. Indeed, two factors in particular raise serious concern that it may be government policy to restrict the flow of information relating to such matters from this area of the country. These are: first, the strict controls on access to the

¹ "Sri Lanka Country Report on Human Rights Practices for 1997," US State Department Report (January 1998).

areas of conflict imposed by the military, which prevent independent reporting on conditions in these areas; and second, the periods of direct censorship on reporting relating to the conflict which the government has imposed at times (although not in 1997 itself). In human rights and humanitarian terms, in contrast, it is precisely the most vulnerable sections of society which need closest monitoring and clearly targeted policies to redress their plight.

The Committee Economic, Social and Cultural Rights, which monitors adherence to the International Covenant on Economic, Social and Cultural Rights (ICESCR), has repeatedly stressed the fundamental importance of the State's obligation to monitor the extent to which the rights guaranteed in the Covenant are realised. According to the Committee, several objectives are served through such monitoring. These include creating the basis for developing clear and targeted policies reflecting the priorities of the Covenant and - equally importantly - facilitating public scrutiny of government policies with respect to these rights, and enabling the involvement of various groups in society in the formulation, implementation and review of these policies.²

Certainly, in a situation where areas of territory are effectively controlled by the LTTE and structures of government administration have broken down, it would be a very difficult task indeed for the government itself to gather this kind of comprehensive data. But if the government is to fulfil its obligations to civilians living within these areas, it must ensure that all available means of gathering and collating appropriate information are utilised. It can only do this if it lifts the restrictions

² See General Comment No. 1 (Third Session, 1989) [UN Doc. E/1989/22], reproduced in Nadesan Centre, *Interdoc No. 1*, Third edition (Colombo, December 1995).

that for the past three years have hampered access to the conflict areas by journalists and non-governmental organisations (NGOs).

International standards state as a basic principle that any restrictions on the free flow of information may not be of such a nature as to thwart the purposes of human rights and humanitarian law.³ "National security" concerns cannot legitimately be used to impose such impediments.

The relative paucity of information on conditions in these key areas of the island necessarily has consequences for a report such as this, which must often rely on official documents and secondary sources and cannot remedy a serious information-gap. It makes the task of scrutinising the government's fulfilment of its obligations to protect the people's rights all the more difficult. Official statistics on many social and economic matters simply fail to include the North and East at all, and this has been the case for several years. The purportedly "national" indices which might be used in assessing Sri Lanka's state of human rights, particularly in relation to social and economic

³ D. Turk and L. Joinet, "Update of the Preliminary Report prepared for the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities," UN Doc. E/Cn.4/Sub.2/1991/9, 16 July 1991, at para. 131. See also "The Johannesburg Principles on National Security, Freedom of Expression and Access to Information," adopted on 1 October 1995 by a group of experts in international law, national security and human rights, convened by ARTICLE 19, the International Centre against Censorship, in collaboration with the Centre for Applied Legal Studies of the University of the Witwatersrand, Johannesburg. These principles are based on international and regional law and standards relating to the protection of human rights, evolving state practice (as reflected, *inter alia*, in judgments of national courts), and the general principles of law recognised by the community of nations.

rights, are generally skewed by this lacuna: "national" data on such issues as literacy levels or access to health care generally exclude some of the most deprived sectors of society. The "Sri Lanka" which is represented by such summary data too often only reflects part of the country; northern and eastern Sri Lanka almost cease to exist in such representations.

The Committee on Economic, Social and Cultural Rights, which scrutinised the Government of Sri Lanka's adherence to the ICESCR in April 1998, also chastised the government for failing to provide statistics relating to the North and East in its initial report to the Committee. It observed that:

*the absence in the report of statistics relating to the north and east of the country can only reinforce the view of the Committee that the question of discrimination in relation to economic, social and cultural rights with respect to ethnic groups, remains the central issue of the armed conflict in Sri Lanka.*⁴

Against the background of conflict, 1997 saw continuing reports of violations of humanitarian law by both parties to the conflict. As described in the chapter on Integrity of the Person, the number of reported disappearances remained high: Amnesty International reported some 80 disappearances during 1997, while the US State Department reported at least 125. Whichever number is correct, that disappearances continue at such a high level makes it clear that the preventive measures taken by the

⁴ Committee on Economic, Social and Cultural Rights, Consideration of reports submitted by States Parties under Articles 16 and 17 of the Covenant: Concluding observations of the Committee on Economic, Social and Cultural Rights: Sri Lanka, UN Doc. E/C.12/1/Add.24, 13 May 1998.

government so far are inadequate and need to be considerably strengthened. Continuing extrajudicial executions and torture also need to be addressed. Most importantly, impunity for involvement in a disappearance, an illegal killing or torture must not be allowed to prevail.

Grave abuses by the LTTE also continued at high levels. The assassinations in July of two members of parliament - Arunasalam Thangathurai of the Tamil United Liberation Front and Mohamed Maharroof of the United National Party - once again emphasised the fragility of democracy in the East and the personal risk taken by those who enter democratic politics. Among other victims of LTTE attacks were 18 civilians who died in a bomb attack in the vicinity of the World Trade Centre and the Galadari Hotel in Colombo in October, while in Jaffna several people were killed who were suspected of providing information to the army. The LTTE also took a number of people hostage in 1997, including 35 Muslim and four Sinhala villagers from Irakkakandy in Trincomalee District, all of whom were released later in the year. Shipping in the North particularly was also threatened by LTTE attacks, and the LTTE took prisoner nine crew members from a passenger ferry in July. Two Indonesian crew members were soon released, but the Sri Lankans remained imprisoned at the end of the year.

As described in the chapter on emergency rule, the state of emergency remained in force throughout the year. It was in force throughout the country from January to July, and thereafter was restricted to certain designated areas, as set out in the Appendix to Chapter III. Of particular concern was the use of emergency provisions on matters with no evident connection to security concerns, and the fact that the text of the regulations remained inaccessible to the public and members of the legal profession. It thus remained hard to know the content of the law in force at any time.

3. The Government's Constitutional Proposals of October 1997 and Fundamental Rights Protection

In October 1997, the government presented the final version of its proposals for constitutional reform to parliament. The developments contained in the proposals in relation to fundamental rights protection are discussed in several chapters in this report, but particularly in Chapter VII on fundamental rights. Of particular note are the provisions to incorporate social and economic rights into the Constitution, and the recognition of children as a group requiring special protection. Such new developments in constitutional thinking in Sri Lanka are reflected in this volume in discussions of the rights of the disabled (which do not receive explicit recognition in the constitutional proposals, but which received statutory recognition in 1996 and are discussed in this volume for the first time), the right to education, the right to health and children's rights. Another crucial issue in the Sri Lankan context - the right to equality of opportunity - is discussed for the first time in Chapter VI, which includes a detailed critique of the contents of the constitutional proposals in relation to this issue.

4. Other Issues

Another group of people who are particularly vulnerable to human rights violations are migrant workers, the majority of whom are women. While the abuses to which they are subjected take place in other countries and need to be addressed within the framework of human rights protection in those jurisdictions, the Sri Lankan government nevertheless still has responsibilities towards its nationals working abroad. In addition, as it is government policy to promote migrant labour as a form of employment, and as labour is now a significant export from Sri Lanka and a major foreign-revenue earner, it is incumbent upon

the government to try to ensure that migrant workers' rights are protected to the fullest extent possible. The situation of these workers, and the steps the government has taken so far for their protection, are discussed for the first time in this report in Chapter IX.

Two further issues discussed here have been the subject of regular discussions in Law & Society Trust *Sri Lanka: State of Human Rights* reports. The government's manifesto pledges on freedom of expression remain unfulfilled; indeed, far from proposing a more liberal environment for the media, the government's Broadcasting Authority Bill was declared unconstitutional by the Supreme Court in April and had to be withdrawn. A Parliamentary Select Committee on media reform was established following this judgment, but instances of media harassment continued to be reported.

Workers' rights are addressed in Chapter XIV, which updates the discussion provided in earlier years, and again draws attention to the poor conditions which workers in the Free Trade Zones continue to experience, and the problems they incur in exercising their trade union rights.

5. National Mechanisms for Human Rights Protection

The members of the new National Human Rights Commission were appointed in March 1997. Legislation to create the Human Rights Commission had been passed in July 1996. The Commission began to function around June 1997 and - among its broad range of other responsibilities - has taken over the role of the former Human Rights Task Force (HRTF), which was disbanded in June. As discussed in the chapter on Emergency Rule, there was considerable concern that the HRTF was dissolved well before the Human Rights Commission was ready

to take on this crucial role. The Human Rights Commission received an average of over 200 complaints a month from early June to the end of November, took over 1,900 cases from the Sri Lanka Foundation's Centre for the Elimination of Discrimination, which had ceased to operate at the end of 1996, and also has fundamental rights cases referred to it by the Supreme Court. By the year's end it was said to have completed preliminary investigations into between 50 and 75 cases.⁵ Some human rights monitors have expressed concern that the Human Rights Commission may not be able to deal effectively with its very broad remit. They add that the Commission needs to set its own clear priorities, reflecting the issues of greatest need within the Sri Lankan human rights situation. They also believe it must become more proactive, and that it should pursue its inquiries through to a proper conclusion, exercising the full range of its powers. Otherwise, they fear it risks being swamped with complaints that could more effectively be dealt with by other mechanisms, such as the Ombudsman, and that it could lose its potential to have a beneficial impact on human rights practice.

6. International Developments

Sri Lanka finally took the welcome step of ratifying the (first) Optional Protocol to the International Covenant on Civil and Political Rights in October 1997, fulfilling a promise the government had made over a year earlier. Human rights organisations had long lobbied for this step to be taken to enhance human rights protection in the country.

In September, the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions visited Sri Lanka. He visited the North and East, among other areas, and made a number of

⁵ *Supra* n 1.

recommendations for the prevention of such killings and to end the climate of impunity that has long prevailed in Sri Lanka. In his conclusion, he lists a range of perpetrators of such killings, highlighting the extent to which resort to lethal and illegal force has permeated Sri Lanka:

the armed forces and police themselves, who kill suspected insurgents and civilians perceived as supporting them; LTTE members who kill members of the security forces, members of opposing factions, those who refuse to continue the armed insurgency or to continue to support the LTTE, including civilians; paramilitary organizations allegedly linked to the security forces (home guards) who are also responsible for extrajudicial executions.⁶

His findings and recommendations are discussed more fully in the chapter on Integrity of the Person.

⁶ E/CN.4/1998/68/Add.2, 12 March 1998

II

Integrity of the Person

*Sumudu Atapattu**

1. Introduction

Nineteen ninety seven was once again dominated by the armed conflict in the North and East, against the backdrop of which many human rights violations took place as military operations intensified. The Liberation Tigers of Tamil Eelam (LTTE), in turn, was responsible for further human rights abuses and attacks on civilian targets.

This chapter provides an update on the situation with regard to the integrity of the person. It also includes a summary of the

* Senior Lecturer, Faculty of Law, University of Colombo; Consultant, Law & Society Trust. The author is grateful to Pam Singh, Intern, Law & Society Trust, for her research assistance.

report of the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, who visited Sri Lanka during 1997, and discusses any positive developments relating to human rights protection. In addition, it discusses the disturbingly high incidence of political violence during the local government elections in 1997.

2. International Human Rights Instruments Ratified

In October 1997, the government finally ratified the first Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR), which it had pledged to do as far back as September 1996. Under the Optional Protocol, individuals who allege that rights protected under the ICCPR have been violated can directly petition the Human Rights Committee in Geneva, once all local remedies have been exhausted. The Human Rights Committee is the body established under the ICCPR to monitor compliance with the Covenant's provisions.

The ratification of the Optional Protocol marked a significant achievement for the human rights community in Sri Lanka, which had consistently lobbied the government to take this step. The Optional Protocol has now been added to the international instruments that delineate Sri Lanka's obligations under international human rights law. Regarding integrity of the person, the most important instruments are the ICCPR, the Optional Protocol and the Convention against Torture.¹

¹ See Elizabeth Nissan, "Integrity of the Person" in *Sri Lanka: State of Human Rights 1997* (Law & Society Trust, Colombo, 1997) pp 12-13 for a discussion of these international obligations.

3. Intensification of Military Operations: The Human Cost

Military operations in the North and East provided the context for the human rights situation in those areas. Several major military operations were launched during 1997, and both government forces and the LTTE suffered heavy casualties; the human cost of the armed conflict reached alarming proportions.

During 1997, the total reported number of fatalities within the government security forces was approximately 1,217² and the number of LTTE cadres who died was reported as being between 1,854 and 2,000.³ In addition, an estimated 61 civilians died as a result of direct attack or being caught in the cross-fire.⁴ These figures, however, have to be treated with caution, as there is no independent reporting of the armed conflict. With journalists unable to enter into the area, the public must rely primarily on press statements put out by the government or the LTTE respectively. Each side is believed likely to exaggerate the numbers of the enemy who have been killed or wounded, while minimising the number of fatalities suffered by their own side.

For civilians, the issue of greatest consequence was probably the considerable rise in internal displacement, as yet more civilians were forced to flee areas which were under heavy fighting.⁵

The University Teachers for Human Rights (Jaffna) [UTHR(J)] noted in relation to these military operations that "Despite a disturbing trend, reprisals [by government forces] remain the

² INFORM Situation Reports January - December 1997.

³ *Ibid.*

⁴ *Ibid.*

⁵ See Chapter X on Internally Displaced Persons.

exception rather than the rule."⁶ UTHR(J) noted that army discipline was good in Vadamarachchi⁷ and that very few persons had gone missing. They attributed this welcome situation, however, "to the initiative of Colonel Larry Wijeratne, the brigade commander, rather than to the army as an institution."⁸ Colonel Wijeratne was known for his sympathetic attitude to victims of army action. He had also arranged for 92 students from the Jaffna peninsula to visit the South to meet southern students of their age and visit places of interest.⁹

3.1 Problems faced by civilians

The innumerable army check points in "cleared areas" of the North and East continued to cause immense hardship to civilians. In early 1997, a pregnant woman in Thenmaratchy reportedly died on her way to Jaffna hospital after being delayed at check points. After the authorities were informed, the situation reportedly improved. By May, the long delays at check points had eased significantly, particularly outside Jaffna town.¹⁰ According to the UTHR(J)'s August 1997 report, it became possible to travel about seven miles from Chavakacheri to Mamapalam Junction near the town with minimum delay.¹¹ The number of check points was reduced, and barbed wire queue controls were also removed.¹² Amnesty International, the UN Special Rapporteur on Summary and Arbitrary Executions¹³ (who

⁶ "Jaffna, A Vision Skewed," Special Report No 09, 7th June 1997, UTHR(J), p 25.

⁷ *Ibid* at p 27.

⁸ *Ibid*.

⁹ *Ibid* at p 28.

¹⁰ INFORM Situation Report, March 1997, p 10.

¹¹ UTHR(J), "Jaffna: Current Situation and Prospects - A Survey," Information Bulletin No. 14 (24 August 1997) at p 9.

¹² INFORM Situation Report, September 1997, p 5.

¹³ For a discussion of the Special Rapporteur's Report, see *infra*.

visited Jaffna in August 1997), and the UNHCR, had all criticised these procedures in Jaffna.

UTHR(J) noted various additional changes of attitude and practice within the army. The army was said to have become more approachable, willing to entertain complaints made by civilians and attempting to distance itself from its more abusive past. In addition, new procedures were adopted as safeguards against military excess. For example, the local headman reportedly accompanied soldiers who searched civilian houses after nightfall, and receipts were issued for arrests under the control of the Commander of Jaffna town.¹⁴ However, such positive developments were not evident in all areas, and there was particular concern elsewhere that the Presidential Directives on issuing receipts for arrest and other humanitarian safeguards were frequently not complied with.

Despite certain improvements on the Jaffna peninsula, other serious problems remained. The military continued to control access to Jaffna on a selective basis, sometimes even blocking the provision of humanitarian aid. For example, permission to *Medicins Sans Frontieres* (MSF) to send medical specialists to Jaffna, who were already stationed at Point Pedro, was delayed by nine months.¹⁵

Some aspects of army behaviour provoked particular concern among civilians. These included the public display of bodies of LTTE cadres in places like Valikamam West,¹⁶ and the army's "hunting expeditions." In these, the army would open fire on an alleged member of the LTTE with no regard for other people in the vicinity, causing civilian casualties.¹⁷ UTHR(J) noted a rise

¹⁴ *Supra* n 6 at pp 8-9.

¹⁵ *Ibid.* at p 9.

¹⁶ *Supra* n 6 at p 11.

¹⁷ *Ibid.*

in 1997 in the number of civilians injured in army action following LTTE attacks, with at least 20 civilians killed by soldiers in the first five months of the year. Indiscriminate attacks on civilians, and acts of reprisal against civilians, are prohibited under international humanitarian law, such as under Article 50(4) of Additional Protocol I of the Geneva Conventions. Chapter IV on precautionary measures is directly relevant to such practices. According to Article 57(2)(a)(ii), those who plan or decide upon an attack shall take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event minimising, incidental loss of civilian life, injury to civilians and damage to civilian objects.

4. Extrajudicial Killings

Both sides to the conflict were reported to have deliberately and illegally killed civilians. In the case of the LTTE, such killings were usually a form of revenge on alleged "informants;" in the case of the military, they were usually in retaliation for LTTE attacks on military targets.

Attacks on unarmed civilians and prisoners by both parties to the conflict continued in 1997. UTHR(J) noted in its June report that the "recent record indicates an increasing tendency towards reprisal action [by the military] against civilians."¹⁸ The report also noted that the LTTE, in turn, provoked such reprisal action by throwing grenades and detonating land mines in total disregard of the implications for civilians. The US State Department recorded 100 extrajudicial killings committed by the security forces in 1997¹⁹ and while noting that the LTTE continued to

¹⁸ *Supra* n 6 at p 8.

¹⁹ "Sri Lanka Country Report on Human Rights Practices for 1997," US State Department Report (January 1998) p 2 (hereinafter the US State Department Report).

commit illegal killings,²⁰ did not give an overall figure. Amnesty International documented several reports of alleged extrajudicial executions, particularly in Vavuniya and the Vanni, where some displaced persons trying to return home had been killed by the army. It also documented several other extrajudicial executions, including that of Reverend Arulpalan who was allegedly killed by the army, although the army disclaimed responsibility.²¹ Amnesty International, however, gave no overall estimate of the number of extrajudicial killings committed by the security forces during the year.

Suspected extrajudicial killings were not only reported from the North and East. In August, the death of S. Ravithan raised the spectre of "death squads" in the South again and highlighted the continuing vulnerability of the Tamil community living there. The case also demonstrated the continuing prevalence of a sense of impunity, despite assurances from the government that it is committed to the protection of human rights and to prosecuting perpetrators of human rights violations. Ravithan was abducted from Wellawatte, a town south of Colombo which has a large Tamil community. Ravithan's body was later discovered in Piliyandala.²² An inquiry was still pending at the end of 1997.

Another body of a youth was found on 18th January in Bolgoda lake, where several bodies of Tamil youth abducted in Colombo had been found in 1995.²³ Twenty two Special Task Force (STF) personnel were arrested in connection with these earlier killings but were later released on bail. They were indicted in the High

²⁰ *Ibid* at p 7.

²¹ Amnesty International Report 1998, p 313.

²² INFORM Situation Report, August 1997, p 7.

²³ See Elizabeth Nissan, "Integrity of the Person," in *Sri Lanka: State of Human Rights 1995* (Law & Society Trust, Colombo, 1996) p 22.

Court of Colombo but the case was postponed as the accused failed to appear in Court.²⁴

4.1 The report of the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions

Mr Bacre Waly Ndiaye, the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions,²⁵ visited Sri Lanka in August 1997 and submitted his report to the UN Commission on Human Rights in March 1998.²⁶ The Special Rapporteur noted the serious nature of extrajudicial and arbitrary executions in Sri Lanka, which he said resulted from the interaction of many factors:

*The principal cause is the prevailing abuses against the right to life which has taken root within the internal armed conflict. The perpetrators are the armed forces and police themselves, who kill suspected insurgents and civilians perceived as supporting them; LTTE members who kill members of the security forces, members of opposing factions, those who refuse to continue the armed insurgency or to continue to support the LTTE, including civilians; paramilitary organizations allegedly linked to the security forces (home guards) who are also responsible for extrajudicial executions.*²⁷

The Special Rapporteur thus identified several categories of people responsible for illegal killings: the armed forces, the police,

²⁴ INFORM Situation Report, January 1997, p 11.

²⁵ Hereinafter, the "Special Rapporteur."

²⁶ E/CN.4/1998/68/Add.2, 12 March 1998.

²⁷ *Ibid* at pp 35-36.

the LTTE and paramilitary organisations such as home guards. All except the LTTE are state bodies, which means that the state would be held accountable for their activities. It also means that the state is obliged to curb such activities and to prosecute and punish those who are found guilty of such grave human rights abuses.

The Special Rapporteur visited both Jaffna and Batticaloa and documented incidents in each area. Quoting military authorities, he stated that between January and August 1997, 32 civilians (of whom 40% were women and children) had been killed in the course of the armed confrontation.²⁸ The Special Rapporteur, however, noted later that in this time period, approximately 37 civilians had been killed as a result of shelling in civilian areas.²⁹ Different sources provided different figures, and it is hard to know what the true picture is. According to the Special Rapporteur, "68 LTTE members and 41 security officers were also reportedly executed."³⁰ The Special Rapporteur did not specify the meaning of "executed" here.

The Special Rapporteur observed an easing of tension in daily life during his visit to Jaffna, despite the night-time curfew.³¹ The Magistrate of Jaffna told the Special Rapporteur that 38 cases of alleged extrajudicial killings had been filed for the period January to September.³² As 31 of these cases had involved murders falling under the emergency regulations, they had been sent to the DIG without an inquiry. The Magistrate had thus been unable to issue a death certificate and the families of the deceased were unable to receive compensation. The Magistrate

²⁸ *Ibid* at p 6.

²⁹ *Ibid* at p 10.

³⁰ *Ibid* at p 6.

³¹ *Ibid* at p 7.

³² *Ibid*.

said that there had been no cases of death in custody and that every two weeks he received a list of persons held in detention. The list received in August contained 31 names. He had added, however, that when a prisoner was moved to another detention centre, he was not informed of the change of place. He had further stated that since March 1996, he was not aware of any reports of mass graves in Jaffna.³³

The Special Rapporteur noted a tense situation in Batticaloa during his visit, with regular security incidents, sometimes resulting in deaths of civilians, in the area. A few days before he arrived there, the LTTE had shelled parts of the city. Every morning, soldiers had to clear the main road of any mines that may have been planted during the night. The judiciary and members of the Bar Association told the Special Rapporteur that people who were arrested under emergency regulations were not informed of the charges against them and that the authorities presented their own version of events. In addition, there were repeated allegations of confessions extracted under torture.³⁴ With regard to victims of execution, families were often reluctant to claim the bodies, as when they did so they were required to declare that the victim was a terrorist. The Special Rapporteur was told that 35 deaths had been investigated by the judiciary during the first eight months of 1997.³⁵ No details of these deaths were given. However, it was made clear that full investigations into these deaths were hampered by the fact that the police often simply claimed that the victim had died during an armed confrontation, that it is the police who have the power to decide whether or not a case of execution falls under the emergency regulations, and that the police are empowered to keep the body.

³³ *Ibid* at p 8.

³⁴ *Ibid* at p 9.

³⁵ *Ibid*.

The Special Rapporteur documented several different contexts in which civilians, including young children, had been killed. These included the indiscriminate bombing of civilian settlements and armed incursions into villages. Some were killed on the spot; others were first abducted to extract information. The army often then presented such victims to the public as terrorists who died in combat and did not hand their bodies over to the families.³⁶ In such circumstances, it is impossible for the causes and circumstances of death to be investigated properly. At Kalmadu camp in April, five people (including a four-year old girl) were reportedly killed and 12 others (including eight children) were injured in cross-fire during a confrontation between the security forces and the LTTE.³⁷ In August, a four-year old was killed and 13 other people seriously injured in shelling by the LTTE at the Kallady Velloor colony, Batticaloa.

The Special Rapporteur also documented human rights abuses committed by "home guards" (i.e. paramilitary groups) and militia of political parties. Home guards function mostly under the local police and, in some areas, alongside the army. He said that no serious attempt had been made to restrain these groups or to disarm them. In February, a Muslim home guard attached to the Valaichchenai police station was killed, allegedly by the LTTE. A clash between Tamils and Muslims in Valaichchenai ensued, in which three Tamils were reportedly killed and several injured. In reprisal, three Muslims were later abducted by the LTTE and killed.³⁸

³⁶ *Ibid* at p 10.

³⁷ *Ibid.*

³⁸ *Ibid* at p 12.

4.2 Arbitrary killings by the LTTE

The UTHR(J) recorded several attacks on civilians by the LTTE, including the killings of alleged informants and of a woman in Vadamaratchchi who was engaged to a government soldier.³⁹ In March at Thalayady, an LTTE land mine blasted a passenger bus, killing two people and injuring 11 others.⁴⁰ Others reportedly killed by the LTTE included peasants who had refused to provide them with food and money, prisoners of war and former combatants who had laid down arms.⁴¹

The LTTE also continued its sporadic attacks on civilian targets in the South and East. In October, a bomb exploded in the car park of a five star hotel in Colombo, killing 18 persons including a Buddhist monk, a soldier, a police officer and 6 security guards of the hotel. Over 100 civilians suffered casualties.⁴² In December, two bombs exploded in Batticaloa town killing at least eight civilians.⁴³

5. Arbitrary Arrest and Detention

Following the bomb explosion in the car park of a hotel in Colombo in October,⁴⁴ security was tightened in and around the city and search operations carried out (code named "Operation Tiger-flush"). Nearly 1,000 persons were rounded up, but only 50 were detained for further questioning. Although the President issued a directive to the armed forces and the police in September

³⁹ *Supra* n 6 at p 12.

⁴⁰ *Ibid* at p 25.

⁴¹ *Supra* n 26 at p 11.

⁴² INFORM Situation Report, October 1997, p 3.

⁴³ INFORM Situation Report, December 1997, p 8.

⁴⁴ See *supra* n 42 and accompanying text.

to ensure that the fundamental rights of persons taken into custody were not violated and that all arrests would be reported to the Human Rights Commission (HRC),⁴⁵ it is of grave concern that despite this directive, no arrests had been reported to the HRC by November.⁴⁶

Arrests and detentions have become a routine affair for Tamil civilians in the South, particularly after major attacks by the LTTE in the city. The detainees are kept under poor, unsanitary conditions without being told the reasons for their arrest. In order to facilitate interventions on behalf of Tamil civilians who are detained, in August the government announced the formation of Citizens' Committees,⁴⁷ but no steps had been taken by the end of the year to constitute these committees.

The US State Department recorded more than 1,500 detainees held under emergency regulations at the end of the year.⁴⁸ Between January and July, 300 suspected LTTE members were detained on the Jaffna Peninsula.⁴⁹ Unconfirmed reports indicated that the LTTE was holding in custody more than 2,000 civilians in the Northern part of Sri Lanka, including seven crew members of the Indonesian-flagged passenger ferry hijacked and burned by the LTTE in July.⁵⁰

⁴⁵ The earlier directive related to the HRTF. Since its dissolution, the directive was re-issued replacing the HRTF with the Human Rights Commission.

⁴⁶ INFORM Situation Report, October 1997, p 5.

⁴⁷ INFORM Situation Report, August 1997, p 7.

⁴⁸ US State Department Report, *supra* n 19 at p 11.

⁴⁹ *Ibid* at p 12.

⁵⁰ *Supra* n 19 at p 12. See also Amnesty International Report, *supra* n 21 at p 314.

6. Torture

Torture is reported to be extensively practised by both parties to the conflict. Several people are reported to have died under torture.⁵¹ According to UTHR(J), most incidents of torture were carried out at local camps rather than at the Palaly base itself.⁵² In one instance reported by UTHR(J), the mother of a detainee from Meesalai said that her son had been tortured by former LTTE members who now worked for the army.⁵³

Methods of torture included "electric shock, beatings (especially on the soles of the feet), suspension by the wrists or feet in contorted positions, burnings, and near drownings."⁵⁴ Other reported methods included suffocation with petrol bags and severe assault with thick pieces of wood.⁵⁵ A prisoner at Chavakachcheri camp testified that when he was beaten on the hands, the piece of wood had come down on his handcuffs with such force that they broke.⁵⁶ Victims were also forced to remain in unnatural positions for extended periods and bags laced with insecticide, gasoline or chilli powder were placed over their heads. While the US State Department stated that there were no reports of rape in custody,⁵⁷ Amnesty International noted several allegations of rape by members of the security forces, particularly in the North and the East.⁵⁸

⁵¹ *Supra* n 6 at p 37.

⁵² *Ibid.*

⁵³ *Ibid* at p 32.

⁵⁴ US State Department Report, *supra* n 19 at p 11. See also Amnesty International Report, *supra* n 21 at p 313.

⁵⁵ *Supra* n 6 at p 37.

⁵⁶ *Ibid.*

⁵⁷ US State Department Report, *supra* n 19 at p 10.

⁵⁸ *Supra* n 21 at p 313.

According to the Special Rapporteur on Extrajudicial Executions:

Torture is reportedly used by the armed forces with two principal aims: to obtain information on insurgent groups and to intimidate the population. Torture, inflicted at the place of detention, in remote places in rural areas or on military and police premises, reportedly precedes the taking of a decision as to whether the detainee is released or put at the disposal of the competent judicial authority.⁵⁹

The Special Rapporteur pointed out that lax arrest and detention procedures increase the risk of torture: people are often arrested without a warrant, are not produced before a judge for several days, are forced to sign a statement of good treatment and are held *incommunicado*.⁶⁰ He noted that neither the security forces nor the insurgent groups show respect for the right to life or physical integrity.

6.1 Sri Lanka's report to the UN Committee against Torture

Sri Lanka prepared its initial report pursuant to Article 19 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, to be presented to the UN Committee against Torture in 1998.⁶¹ Having discussed the relevant national and international legal provisions in relation to protection against torture, the report provided a lame excuse

⁵⁹ *Supra* n 26 at pp 10-11.

⁶⁰ *Ibid* at p 11.

⁶¹ CAT/C/28/Add.3, 21 November 1997.

for the absence of any prosecutions under the Convention Against Torture ("CAT") Act:

16. Under the CAT Act, the High Court has been vested with the jurisdiction to hear cases of torture committed within and outside Sri Lanka. The jurisdiction of the High Court has to be invoked by the Attorney-General after he is satisfied that there is sufficient evidence to proceed against the suspect on the basis of the report made consequent to an investigation of the incident of torture by the police.

No cases have yet been filed before the High Court for torture. The primary reason for this is the availability of an alternative remedy by way of a fundamental rights application filed in the Supreme Court. The constitutional remedy is simpler and more expedient than a criminal trial before the High Court, on a higher degree of proof.⁶²

While denying that torture takes place on a systematic basis, the report stated that the government was aware of allegations of torture allegedly committed by members of the security forces in relation to the armed conflict and also of allegations that the police use excessive force in handling criminals. However, it stressed that "[t]hese transgressions are not the outcome of a deliberate policy but isolated acts carried out by some individuals,"⁶³ and that every effort was being taken to eliminate such acts. The report was defensive in tone, attempting both to

⁶² *Ibid* at p 5.

⁶³ *Ibid* at p 8.

deny allegations of a deliberate policy of state approved torture and to acknowledge instances of torture in different parts of the country.

In a scathing criticism of the country report, the Civil Rights Movement (CRM) questioned the need for the CAT Act itself if, as the government contended, there exists an alternative remedy - the fundamental rights jurisdiction of the Supreme Court - which is being extensively used. It further stated that:

Even despite the Supreme Court's requests for further action in a number of instances, the absence of even a single case being filed for a period of over three years, let alone a conviction, raises questions of the Government's seriousness in regard to the effective implementation of its obligations under the Convention Against Torture.⁶⁴

The CRM pointed out some fundamental differences between fundamental rights cases and prosecutions under the CAT Act: fundamental rights cases must be filed by the victim whereas cases under the CAT Act must be filed by the Attorney-General. The victim has no say with regard to indictments under the CAT Act.⁶⁵ Thus, the contention that the fundamental rights procedure is used in preference to criminal prosecutions is untenable, as the victim has no choice.

⁶⁴ Comments of the Civil Rights Movement of Sri Lanka on the Initial Report submitted by Sri Lanka under Article 19 of the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment of Punishment (May 1998) p 4.

⁶⁵ *Ibid.*

The CRM also referred to the Basnayake Commission report of 1970 which stressed the need for an *independent machinery* to investigate complaints against the police.⁶⁶ At present, the police themselves investigate complaints against their members, thereby violating one of the fundamental principles of natural justice, which requires that investigations be conducted by an independent and impartial authority.

7. Disappearances

Amnesty International reported that 80 Tamil prisoners were alleged to have disappeared after arrest by the army during 1997, mostly in Jaffna, Batticaloa, Mannar and Killinochchi.⁶⁷ The US State Department said that at least 125 individuals had disappeared, although the exact number was impossible to ascertain.⁶⁸ The latter report noted that while disappearances at the hands of security forces continued, particularly in the North and East, there were no reports of disappearances in Colombo during 1997.⁶⁹

A Board of Investigation established within the Ministry of Defence in November 1996 to investigate disappearances in Jaffna completed its work towards the end of 1997. It reported that of 2,261 complaints it received, it had set aside numerous duplications and inquired into 768 cases. It located 210 people who had been released after detention, released on bail or remanded and found that 16 people had died in custody. It recommended that further investigations be held into a further

⁶⁶ *Ibid* at pp 2-3.

⁶⁷ Amnesty International Report, *surpa* n 21 at p 313.

⁶⁸ US State Department Report, *surpa* n 19 at p 8.

⁶⁹ *Ibid*.

134 cases, and gave the names of 25 suspected perpetrators of disappearances to the IGP for further action.⁷⁰

A three member team from Amnesty International visited Jaffna and several other areas in August, concentrating primarily on the issue of persons who had disappeared in 1996. In its November report, Amnesty International stated that approximately 540 people had disappeared after being arrested by the army in mid-1996. It believed that "nearly all of them are likely to have died under torture or [been] deliberately killed in detention."⁷¹ Amnesty International cited several factors as aggravating the problem of disappearances: the lingering sense of impunity, the sweeping powers under emergency regulations and the Prevention of Terrorism Act which allow for long periods of detention, and the area of conflict being closed to human rights investigations.⁷²

The Human Rights Commission (HRC) received 199 complaints during July - December 1997 regarding disappearances, of which 100 were traced.⁷³

8. Investigations into Alleged Violations and Trials of Perpetrators

The inquiry into the Krishanthi Kumaraswamy rape and murder case, which had been referred to a trial-at-bar consisting of three High Court judges, commenced in the High Court of Colombo in July 1997. The trial commenced in September.

⁷⁰ INFORM Situation Report, April 1998, p 7.

⁷¹ INFORM Situation Report, November 1997, p 6.

⁷² See Amnesty International, "Sri Lanka: Implementation of the Recommendations of the UN Working Group on Enforced or Involuntary Disappearances Following Their Visits to Sri Lanka in 1991 and 1992," AI Index: ASA 37/04/98 (February 1998).

⁷³ See discussion *infra*.

Last year's report gave details of the rape and murder of this school girl and the murder of her mother, brother and the neighbour who went in search of her.⁷⁴ These killings provoked widespread condemnation, both locally and internationally. In welcome contrast to previous human rights cases, charges were filed against the alleged perpetrators with considerable speed. Eight army personnel and a reserved police constable were indicted and charged with being members of an unlawful assembly and abducting Krishanthi Kumaraswamy with a view to committing rape and murder⁷⁵ and for the murder of three others. The Court refused to grant bail to all nine accused, overruling the plea by Defence Counsel that they had been in remand for nine months. On behalf of the Attorney-General, granting of bail was objected to on the ground that since the accused are members of the security forces, witnesses might be threatened.⁷⁶ In December, a *voir dire* inquiry was held to ascertain whether the five confessions made to the military police by the accused before the trial-at-bar had been voluntary and truthful.⁷⁷ This inquiry had not been completed by the end of the year.

The three Commissions of Inquiry into Disappearances which were appointed in November 1994 submitted their final reports to the President in September. The Commissions had investigated a total of 16,742 disappearances,⁷⁸ but this figure

⁷⁴ See *Sri Lanka: State of Human Rights 1997* (Law & Society Trust, Colombo, 1997) pp 21 and 185.

⁷⁵ *Daily News*, 18th July 1997.

⁷⁶ "All nine accused refused bail," *The Island*, 18th July 1997.

⁷⁷ "Voir Dire Inquiry Begins," *Daily News*, 8th December 1997.

⁷⁸ The US State Department Report says that the Commissions investigated 19,079 cases of disappearances most of which had occurred during the 1988-89 JVP uprising. The Commissions are reported to have found evidence that 16,742 persons had disappeared after having been involuntarily removed, *supra* n 19 at p 8.

represents only a fraction of the number of complaints the Commissions received. Approximately another 12,000 complaints remained to be investigated.⁷⁹ These cases had not been investigated mainly because access to areas where the disappearances allegedly occurred was difficult. The government has stated that it will prosecute alleged perpetrators of disappearance against whom *prima facie* evidence is available. By the end of the year the final reports of the Commissions had not been published.

Several other cases of past disappearances remained before the courts in 1997. Seven army officers facing charges in connection with the abduction and disappearance of school boys at Embilipitiya in 1989 and 1990, and who have been on trial for the past two years, were finally interdicted in August 1997.⁸⁰ The indictment contains 83 charges in relation to the abduction of students. The trial was still continuing at the end of the year.

Proceedings also continued in connection with the Kumarapuram and Mailatenne killings of February 1996 and August 1992 respectively. On the advice of the Attorney-General, proceedings relating to the former case were transferred to Mutur from the Magistrate's Court of Trincomalee. One hundred and one charges were filed against seven army personnel. With regard to the latter case, 21 army personnel were on trial and the case was transferred to the High Court of Colombo. In both instances, the suspects remained in custody.⁸¹

⁷⁹ Source: Manouri Muttetuwegama, member of the new commission appointed to investigate these disappearances.

⁸⁰ INFORM Situation Report, August 1997, p 9.

⁸¹ *Supra* n 26 at p 22.

9. Election-related Violence

During the run-up to the local government elections in March, many incidents of violence took place between supporters of the ruling party and the opposition. The assassination of the SLFP Member of Parliament, Nalanda Ellawala, in February - allegedly by a UNP Member of Parliament for the area - led to retaliatory measures by SLFP supporters, which the police did virtually nothing to prevent.⁸²

Between 5th February and 19th March there were 2,237 reported incidents of election-related violence in 30 police divisions.⁸³ The analysis of data concerning the perpetrators allocated blame to supporters of various political parties as follows:

Party	Number of acts of violence
PA	1,026
UNP	546
JVP	35
Independent groups	29
(Police	18)
MEP	10
CWC	05
UPF	03
NSSP	01
SLPF	01
Assailants not identified according to party affiliation	567
Total	2241

Source: Centre for Monitoring Election Violence (1997).

⁸² INFORM Situation Report, February 1997, p 5.

⁸³ Final Report of Election-Related Violence during the Local Government Election Campaign, Centre for Monitoring Election Violence, 25 April 1997, p 2.

The description of incidents reported between 5th February to 21st March was as follows:

Type of violence	Number
Murder*	6
Attempted murder	2
Hurt	40
Assault	519
Threat and intimidation	242
Robbery	53
Mischief	277
Arson	50
Threat	733
Damage to property	249
Total	2237

* (including a person who died later in hospital)

Source: Centre for Monitoring Election Violence (1997).

According to the Centre for Monitoring Election Violence (CMEV), PA members were responsible for 45% of all assaults, 48% of threats and intimidation, 48% of all threats, 42% of all acts of mischief, 42% of all arson, and 51% of incidents of damage to property.⁸⁴ The UNP's record was as follows: 34% of assaults, around 24% of threats and intimidation, 21% of mischief and 26% of threats.

This means that the PA is allegedly responsible for just under half of the entirety of violence during the run-up to the polls and for almost

⁸⁴ *Ibid.*

twice the number of incidents allegedly committed by the other major contender at the election, the UNP.⁸⁵

In addition, the CMEV also recorded 820 incidents of violence on the day of the election, although it pointed out that the actual number may have been higher.⁸⁶

The Special Rapporteur on Extrajudicial Executions also documented violations of the right to life in the context of political violence. Quoting the CMEV report, the Special Rapporteur pointed out that "impunity with regard to cases of political violence seems to be prevailing throughout Sri Lanka."⁸⁷ By way of an example, he cited a documented incident involving a PA Member of Parliament who had allegedly entered a mosque forcibly in the Puttalam District, accompanied by a gang of armed men, destroyed all green lights in the mosque, as green is the UNP's colour and threatened the UNP candidate with death if he did not withdraw from the election. They then allegedly stormed another village, brutally assaulted the brother of the UNP candidate, and threatened him with death. In another incident, this MP and his gang had allegedly assaulted a former UNP official and his aides bringing the total of injured people to 10, of whom three were seriously injured. According to the Special Rapporteur's source, this party had been accompanied by a police group led by the Inspector of Police, Puttalam.⁸⁸

Although the election brought an overall victory for the PA, the record of election violence reflected poorly on a government which had proclaimed its commitment to respect human rights,

⁸⁵ *Ibid.*

⁸⁶ *Ibid* at p 6.

⁸⁷ *Surpa* n 26 at p 13.

⁸⁸ *Ibid* at p 13.

democracy and the rule of law. The government needs to investigate allegations of violence by its supporters and other parties and take action to ensure that such acts do not recur. The government must ensure that perpetrators of such violence are punished, whatever their political affiliation may be.

10. New Steps Taken to Protect Human Rights

Although legislation was enacted in 1996 to establish a Human Rights Commission, it was not until March 1997 that its members were actually appointed. The members are: Justice O.S.M. Seneviratne, retired judge of the Supreme Court (President); Professor Arjuna Aluvihare, Professor of Surgery at University of Peradeniya and former Chairman, University Grants Commission; Dr A.T. Ariyaratne, the leader of Sarvodaya, one of Sri Lanka's largest development NGOs; Mr T. Suntheralingam, Retired High Court Judge and former Chairman of the Presidential Commission Investigating Disappearances in the Central and Uva Provinces; and Mr Javed Yusuf, former Ambassador to Saudi Arabia and former member of the National Advisory Group of the HRTF and of the Civil Rights Movement. The composition of the Commission, while reflecting the major ethnic groups in Sri Lanka, is not, however, reflective of gender balance.

The Commission got off to a slow start; indeed, it did not commence functioning until June. By the end of the year, it had received 2,642 complaints in addition to the 272 complaints which it took over from the Sri Lanka Foundation's Centre for the Elimination of Discrimination. Of these, the Commission had initiated action with regard to 1,052 cases by the end of the year. The Commission had received complaints of 199 missing persons, of whom 100 were traced. Of the total number, 585 complaints were against the armed forces.⁸⁹

⁸⁹ Information from the Human Rights Commission.

Human Rights Commission of Sri Lanka Report for the period July to December 1997

	No. of Police Station visits	No. of Detention Camp visits	No. of Detainees			No. of missing persons	No. of Traced	Complaints against Armed forces	Other complaints	Total	Action initiated completed
			Sinhala	Tamil	Muslim	Total					
Head Office	382	05	58	1403	11	1472	58	10	203	1829	338
Vavuniya	45	41	02	130	-	132	44	26	123	57	180
Matara	188	16	-	-	-	-	-	-	26	16	40
Trincomalee	36	10	-	274	12	286	05	01	77	04	79
Batticaloa	13	14	-	212	03	215	84	60	11	11	19
Anuradhapura	71	02	-	02	-	02	-	-	10	42	50
Badulla	16	01	-	456	-	456	01	01	18	80	88
Kalmunai	46	83	-	36	-	36	05	02	39	32	62
Kandy	28	06	-	08	-	08	01	-	56	166	156
Ampara	37	08	-	08	-	08	01	-	22	20	40
Total	862	186	60	2529	26	2615	199	100	585	2257	1052

Source: Human Rights Commission of Sri Lanka.

The delay in getting the Commission functioning was particularly disturbing because in June, the government announced the dissolution of the Human Rights Task Force (HRTF). The functions of the HRTF were to be absorbed into the Commission, but the Commission was not yet properly functioning. The human rights community expressed grave concern over this premature action. It was also pointed out that the HRTF had, over the years, acquired considerable expertise with regard to detainees and that if the HRTF were to be dissolved, this experience risked being lost, to the detriment of the welfare of detainees.⁹⁰ In response to such protests, in July the President extended the life of the HRTF by another month.⁹¹

The fundamental rights chapter in the government's October 1997 draft Constitution contains certain improvements with regard to the integrity of the person. Thus, for the first time, the right to life would be protected as a fundamental right if the draft is adopted. The right to privacy would also be protected. In addition, certain procedural rights with regard to those detained are also recognised.⁹² The right to liberty, however, is not included in the draft Bill of Rights. It has also expanded the provisions on *locus standi* allowing for public interest litigation "in respect of aggrieved parties." The draft also includes judicial action as being justiciable in relation to violations of fundamental rights. This provision is particularly relevant in relation to integrity of the person.

⁹⁰ See Suriya Wickremasinghe, "Emergency Rule" in *Sri Lanka: State of Human Rights 1997* (Law & Society Trust, Colombo, 1997) p 59.

⁹¹ INFORM Situation Report, July 1997, p 11.

⁹² For a detailed discussion of the developments in the fundamental rights chapter, see Chapter VII.

11. Recommendations and Conclusions

In the face of continuing violations of rights relating to integrity of the person, we can only repeat the recommendations made in our previous reports in the hope that, at least by next year, the human rights situation will have improved for the numerous people who suffer at the hands of the security forces and the LTTE. We reiterate that both parties to the conflict should adhere to basic human rights and humanitarian standards and in particular, that civilians and civilian places should not be the object of attack, as specified in the Geneva Conventions. The plight of internally displaced persons also needs immediate attention.⁹³

Of particular concern are reports of continuing disappearances and widespread torture. This indicates that "the years of terror" are not yet over. Despite the ratification of the Convention against Torture and the enactment of local legislation,⁹⁴ not a single case has been filed by the Attorney-General under the Act to date. The record of the government with respect to action against perpetrators is also not satisfactory. Speedy action is necessary to ensure that investigations are carried out properly, vital evidence is not lost and witnesses do not forget details of the crime.

The human cost of the war is appalling. In addition to the fatalities, there is also a growing population of disabled people as a result of the conflict, be they from the military, the LTTE or civilians caught in the cross-fire or injured by land-mines. The government needs to develop policies to address the needs - both physical and psychological - of the disabled. Rehabilitation

⁹³ See the Chapter X on Internally Displaced Persons.

⁹⁴ Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment Act No 22 of 1994 ("CAT Act").

will take years and society will have to adapt to cope with the rising numbers of physically and mentally disabled people.

The government should take immediate steps to implement the recommendations made by the Special Rapporteur on Arbitrary Executions which include bringing the national law into full conformity with international human rights standards. It is also pertinent to note here one of his conclusions:

Human rights violations are most frequent in the context of operations carried out by the security forces against the armed insurgency. While considering it inappropriate to affirm the existence of a planned policy of "systematic violations" of human rights, the violations have been so numerous, frequent and serious over the years that they could not be dealt with as if they were just isolated or individual cases of misbehaviour by middle - and lower - rank officers, without attaching any political responsibility to the civilian and military hierarchy. On the contrary, even if no decision had been taken to persecute the unarmed civilian population, the Government and the high military command were still responsible for the actions and omissions of their subordinates.⁹⁵

With regard to disappearances, the recommendations made by the UN Working Group on Enforced or Involuntary Disappearances pursuant to their visits to Sri Lanka in 1991 and 1992 and by Amnesty International must also be implemented without delay. These include: establishing a mechanism to

⁹⁵ *Supra* n 26 at p 36.

investigate the outstanding complaints of disappearances; prosecuting the perpetrators and requiring severe disciplinary punishment for government officials who have failed to take adequate measures to prevent disappearances; repealing indemnity legislation; taking effective steps to protect witnesses and relatives of those disappeared; providing an updated list of detainees periodically; amending present legislation (particularly the Prevention of Terrorism Act and the Emergency Regulations) to conform with Sri Lanka's international obligations; and becoming a party to Protocols I and II Additional to the Geneva Conventions of 1949.

The government must ensure that its pledges are translated into action. The activities of the security forces must be closely monitored; any violations should be promptly investigated and perpetrators brought to justice. Under no circumstances should the government tolerate or condone impunity. The safeguards provided in law with regard to arrest, detention and interrogation must be fully implemented, and any transgressions should be treated as serious offences.

If the government is to make a genuine improvement to Sri Lanka's human rights record, it must become more transparent and accountable, particularly in relation to actions by the security forces. It must demonstrate, through its actions, that its promises were not mere rhetoric.

III

Emergency Rule

*Suriya Wickremasinghe**

1. Introduction

Nineteen ninety seven marked the fiftieth anniversary of the Public Security Ordinance. This law enables the President to make emergency regulations, bypassing the normal legislative process. Its operation was described in *Sri Lanka: State of Human Rights 1993*. Passed in 1947, the Public Security Ordinance was the last piece of legislation to be adopted before independence.¹ An amendment in 1959 strengthened the law by

* Secretary, Civil Rights Movement. The writer is indebted to Mr. Saliya Edirisinghe for his assistance.

¹ Ordinance No. 25 of 1947, Legislative Enactments of Ceylon Cap.40. It was passed by the State Council by 30 votes to 6. Voting against were B.H. Aluvihare, W. Dahanayake, R.E. Jayatilaka, V. Nalliah, G. G. Ponnambalam and S.A. Wickremasinghe.

conferring wide additional powers on the executive. Successive governments have resorted to the Ordinance liberally in the 50 years of its existence, most particularly from 1971 to the present. Indeed, emergency rule has now become the norm rather than the exception.

This paper describes the resort to emergency powers during 1997. The year saw a restriction of emergency rule to certain parts of the country. New regulations gave rise to very serious human rights concerns, in particular those relating to the untimely abolition of the Human Rights Task Force (HRTF), the restriction of prison visits, and the generation of electrical power. Emergency regulations were also made relating to subjects with dubious (if any) relevance to the Public Security Ordinance, such as public performances. An encouraging aspect was the role played by the Supreme Court, notably in the Cooray case, which dealt with preventive detention under the emergency regulations, and the Saranapala case concerning the banning of a May Day procession the previous year.

2. Geographical Limitation

Emergency rule continued either throughout or in parts of Sri Lanka during the whole of 1997. For the first half of the year it was operative throughout the country, but in July 1997 its operation was limited to certain parts: namely, Colombo and adjoining areas and the North and East and border areas. Thereafter, on four occasions new areas were added. The geographical areas where a state of emergency was in force at various times of the year are set out in Appendix 1. Some legal questions that arise from these changes are discussed below in the section on "Territorial applicability of emergency regulations."

3. Arrest and Detention

While the text of the basic regulations relating to arrest and detention remained unchanged, their effect was altered - at times dramatically - both by judicial interpretation, and by other emergency regulations that directly impinged on them.

3.1 Authorised places of detention

Changes of a routine nature were made by adding to the already long list of authorised places of detention. Three hundred and forty seven such places were inherited from previous years, to which 27 more places were added in January 1997, two more places in June and eight more in November,² making a grand total of 384 by the end of the year.

3.2 Abolition of the HRTF

The hasty abolition by emergency regulation of the HRTF at the end of June had drastic practical repercussions on the fate of persons arrested and held under special legislation. The HRTF, itself created under emergency regulations, was charged with monitoring the welfare of detainees, and had been in existence for some eight years (with an inexplicable nine month break during 1994/95).³ Special laws relating to arrest and detention

² Gazette Extraordinary Nos. 957/5 of 6 January 1997, 980/4 of 16 June 1997 and 1001/7 of 10 November 1997.

³ For an assessment of the work of the HRTF in previous years see, *Sri Lanka: State of Human Rights 1994* (Law & Society Trust, Colombo, 1995) p 53, and *Sri Lanka: State of Human Rights 1995* (Law & Society Trust, Colombo, 1996) p 39 - 44. For an example of the role played by the HRTF vis-a-vis the Supreme Court see the discussion of Wimalenthiran's case in *Sri Lanka: State of Human Rights 1997* (Law & Society Trust, Colombo, 1997) at p 43.

such as exist under the Prevention of Terrorism Act (PTA) and the emergency regulations need, as a basic minimum, both certain safeguards against abuse and a specific mechanism by which they can be monitored. Many of the legal safeguards, and the only effective monitoring mechanism at the time of its dismantling, were provided by the emergency regulations creating the HRTF⁴ and the Presidential Directions made thereunder.⁵

It was by virtue of these provisions, for instance, that a person making an arrest was required to identify himself by name and rank to the person arrested or any relative or friend upon inquiry; that the person arrested had to be afforded a reasonable means of communicating with a friend or relative, and that when a child under 12 years of age or a woman was arrested, a person of their choice had to be allowed to accompany them.⁶ It was also by virtue of these provisions that nine regional HRTF offices

⁴ The Emergency (Establishment of the Human Rights Task Force) Regulations No. 1 of 1995.

⁵ Presidential directions dated 18 July 1995 issued under Regulation 8 of the Emergency (Establishment of the Human Rights Task Force) Regulations No 1 of 1995. Failure to comply with any such directions was an offence by virtue of Regulation 35(1) of the Emergency (Miscellaneous Provisions and Powers) Regulations which provides that *"If any person fails to comply with any emergency regulation or any order or rule made under any such regulation or any direction given or requirement imposed under such regulation he shall be guilty of an offence..."* In fact, the President subsequently issued the same directions again. But they no longer purport to have been made under any specific provision of law and may now be considered as merely exhortatory in nature, carrying no specified penalty for non-compliance. There is confusion as to the date these fresh directions were issued, official sources having given it variously as June, July and September 1997.

⁶ Presidential directions paras 3(i), 3(iv) and 4.

had been set up, in addition to the Colombo Head Office, and that the HRTF had employed a staff of over 80 people.

The services the HRTF provided included, by way of example:

- Monitoring arrests and detentions under the PTA and the emergency regulations through regular visits to police stations, army camps and prisons; this was done by the nine regional centres and the Head Office staff, with the latter covering 136 police stations on 13 regular routes every month. In the course of these visits, "missing persons" were sometimes located and their families informed of their whereabouts. This work requires familiarity with police procedures and practices as the registers have to be examined to check on persons detained and the legality of their detention.
- Investigating complaints of disappearances and abductions by the security forces;
- Maintaining a round-the-clock facility at the Head Office and most regional centres for entertaining complaints;
- Taking remedial action when irregular detention or inhuman treatment was observed;
- Inquiring into complaints made against police officers;
- Advising the government in cases of non-compliance with HRTF regulations or Presidential Directions so that human rights violations could be minimised.

The rescinding of the emergency regulations creating the HRTF⁷ dismantled this specialised service practically overnight,

⁷ By Gazette dated 17 June 1997, with effect from 30 June 1997.

threatening loss of the expertise and experience which had been gained over the years. It left a most grievous gap in the mechanisms available for the protection of the life, liberty and security of the people.

Certainly, some of the functions discharged by the HRTF were written into the Act establishing the Human Rights Commission (HRC).⁸ The discharge of these functions, therefore, became the responsibility of the Commission. However, at the time the HRTF was abruptly terminated the Commission had not yet become properly operative and had not established the institutional capacity to undertake this work. The members of the Commission had only been appointed in mid-March. In addition to finding premises and acquiring basic staff, the Human Rights Commission had a host of other substantive responsibilities in the field of human rights to which it needed to turn its energies.

The Commission's responsibilities include: investigating complaints with a view to securing compliance with fundamental rights; promoting respect for and observance of fundamental rights; investigating infringements and imminent infringements of fundamental rights and seeking resolution by conciliation and mediation; advising and assisting the government in formulating legislation and administrative procedures in furtherance of the protection and promotion of fundamental rights; making recommendations to the government necessary to bring national laws and administrative procedures into accordance with international human rights norms and standards; making recommendations to the government on acceding to international human rights treaties and other instruments; and promoting human rights awareness and education. Instead of being able to concentrate on planning how best to fulfil this awesome role,

⁸ Human Rights Commission of Sri Lanka Act No 21 of 1996.

the Commission was compelled by circumstances - the reasons for which remain a mystery - to take on the one complicated and specialist task that was already being reasonably well performed by an experienced existing body. The cause of human rights thus suffered twice over.

Independent human rights bodies, while recognising the deficiencies of the HRTF, described the prospect of its sudden demise as "appalling"⁹ and put concerted pressure on the authorities to rescind or delay its abolition. This included strong pleas by reputed human rights activists who had served on the National Advisory Group of the HRTF and were, therefore, well placed to assess its strengths and weaknesses. The issue of fairness to HRTF staff also had to be considered. Many of them had acquired skills that were not easily transferable, and several had in the course of duty fearlessly called upon influential police officers to observe the law, and consequently now felt themselves at risk.

An eleventh-hour decision to continue the services of the staff on a temporary basis, until formal recruitment and reorganisation could be done, mitigated but by no means rectified the situation. By the end of the year, the extent to which the Human Rights Commission had succeeded in filling the gap caused by the untimely disappearance of the HRTF was still not clear.

3.3 The Sirisena Cooray case

A judgment of the Supreme Court handed down during 1997 had far-reaching implications for several aspects of arrest and

⁹ See for instance "Safeguards Against Torture, "Disappearances" Must Remain; CRM perplexed and appalled at decision to discontinue HRTF," Statement of the Civil Rights Movement of 26 June 1997 (ref. EO2/6/97).

detention under emergency regulations. In this case,¹⁰ Bulathsinghalage Sirisena Cooray, a former Cabinet Minister and General Secretary of the United National Party (which had formed the previous government), successfully challenged a preventive detention order which had been made against him. The Court found that the petitioner's constitutional rights had been violated on a number of grounds, and gave detailed reasons, which are discussed below.

The Court robustly asserted the supremacy of the fundamental rights enshrined in the Constitution, and declared that whilst emergency powers may be used to restrict them in certain specified circumstances, they cannot be used to abrogate them altogether. Although the case arose out of an instance of preventive detention under **regulation 17** of the Emergency (Miscellaneous Provisions and Powers) Regulations (EMPPR), several of its findings also affect the other type of detention permitted under emergency regulations, namely detention under **regulation 19** consequent to arrest on suspicion under **regulation 18**. The major aspects of this significant judgment are as follows:

Access to lawyers, and the Secretary's power to amend the Prison Rules

In the course of considering an application for access to lawyers as a matter of interim relief, the Court held that this is a **norm** that should not be denied irrespective of where the detainee is held. The Court also suggested that

¹⁰ *Sunil Kumara Rodrigo, Attorney-at-law on behalf of B. Sirisena Cooray v R.K. Chandrananda de Silva, Secretary of Defence and two others* SC, (FR) Application No 478/97, SC Minutes 19. 8. 1997.

the power given to the Secretary Defence to alter or amend the Prison Rules may in fact be invalid. Whereas emergency regulations themselves could override, amend or suspend the provisions of any statute, said the Court, "it is doubtful whether [they] can confer on the Secretary any such power." This touches on a matter which has been the subject of the strongest criticism from civil liberties groups over the years. It was not strictly necessary for a ruling to be made on this matter in the Sirisena Cooray case, but this statement has created the expectation that the Court will formally strike down this arbitrary power of the Secretary when an appropriate occasion arises.

Whether arrest was according to procedure established by law as required by Article 13(1)

Period of detention not specified

Examining the original detention order, which had failed to specify the period of detention, the Court held that it was defective for the period until it was rectified, notwithstanding the attempt to make such amendment with retrospective effect. Consequently, the initial period of detention was not in accordance with the "procedure established by law" and was, therefore, unconstitutional.

Was the Secretary "satisfied"?

Still on the question of "procedure established by law," the Court turned its attention to the substantive validity of the detention order. Referring to the opening words of Regulation 17(1), which states that an order may be issued "where the Secretary is satisfied," the Court held this is based on the

requirement of **reasonableness judged objectively**. The Secretary must be able to say that he had reached his decision **independently**, basing it upon the material available. The judgment examined the police reports that were claimed to provide credible information that the petitioner was associating with dangerous criminals and was involved in a conspiracy to assassinate the President. It also adverted to material supplied for confidential perusal by the Court. While acknowledging that in appropriate circumstances the Secretary may rely on the opinions and recommendations of senior police officers, the Court emphasised the "cardinal, invariable principle" that the person making the order must **himself** be "satisfied." The Court concluded that the material on which the Secretary had based his decision could not have provided any grounds to entitle him to be "reasonably satisfied" that detention was warranted; it formed the view that the Secretary had been persuaded by the DIG, CID¹¹ to issue the order of detention.

The question whether the Secretary was "satisfied" was further considered in the context of the **form and content** of the detention order issued. Several features suggested that the Secretary had not given sufficient attention to the particular circumstances of the case before him, and could not, therefore, be regarded as a person who was "satisfied" that detention was necessary. These were:

- the retention of the older term "opinion" appearing in the standard forms used under the earlier regulation instead of the word "satisfied" that should appear under the current regulation;

¹¹ Deputy Inspector General of Police, Criminal Investigation Department.

- the mere repetition of the words "acting in any manner" as stated in regulation 17 of the EMPPR without stating the specific manner in which the petitioner was suspected of being a likely threat; and
- the repetition of the disjunctive term "national security or to the maintenance of public order" as used in regulation 17 of the EMPPR. National security and public order are two different things. Admittedly, in a particular case, the Secretary may feel that both national security and public order are in jeopardy, in which case he should clearly say so, and should use the word "and." The use of the word "or" in the present context suggested either that the Secretary was not certain of the grounds on which to detain, or that he had not given serious attention to the category the alleged activities fell into, and had merely repeated mechanically the words of the regulation empowering detention.

Continued detention held illegal and void

Regulation 17 provides for an Advisory Committee to hear objections by a detainee against his incarceration. In this connection, the Court observed that what the Secretary had done was to inform the Chairman of the Advisory Committee only of the inference he had drawn from certain material contained in the report of the DIG, CID. " had not communicated the grounds and particulars on which that inference was based, to enable the Chairman to convey them to the detainee as required by regulation 17(9) of the EMPPR. In this respect as well, the "procedure established by law" had not been followed. The Court, therefore, found the **continued** detention of Mr Cooray to be unconstitutional.

Informing the reason for arrest as provided by Article 13(1)¹² of the Constitution

The detention order had not stated the reason for arrest but only the purpose of the arrest (i.e. preventing the petitioner from acting in any manner prejudicial to national security or to the maintenance of public order); nor had the officers arresting given any reasons.

The Secretary tried to rely on dicta in some earlier cases which stated that giving reasons for arrest at the time of arrest is not imperative under emergency regulations and that they can be given at a later stage. For example, in one such case it was stated that the provision in regulation 17(9) of the EMPPR,¹³ which requires the Chairman of the Advisory Committee to inform the grounds for detention, implicitly makes the communication of reasons at the time of arrest unnecessary.

The Court rejected this submission, explaining that the whole scheme of the criminal law assumes it to be a basic need that an accused should clearly understand what he is supposed to have done, which is provided in Section 23(1)

¹² "No person shall be arrested except according to procedure established by law. Any person arrested shall be informed of the reason for his arrest."

¹³ "At any meeting of an Advisory Committee held to consider such objections as aforesaid shall be presided over by the Chairman [sic]. It shall be the duty of the Chairman to inform the objector of the grounds on which the order under this regulation has been made against him and to furnish him with such particulars, as are in the opinion of the Chairman sufficient to enable him to present his case."

of the Code of Criminal Procedure Act (CCP)¹⁴ and which has **not** been made inapplicable to those arrested and detained under emergency regulations. This requirement is borne out in other sections of the CCP as well. Further, this principle has also been elevated to the status of a fundamental right. Therefore, the Court pointed out, a person arrested under emergency regulations has both a constitutional right to be informed of the reason for arrest,¹⁵ and a statutory right to be informed of the nature of the charge or allegation upon which he is being arrested at the time of arrest. In the absence of a time stipulation in the constitutional right, the time within which to inform the reason is to be governed by the general law, namely Section 23(1) of the CCP. In the instant case, the Court was of the view that reasons for arrest should have been given at the first reasonable opportunity.

The Court further explained that the right to be informed of the reason for arrest provided by the Constitution, and the right to be informed of the reason for arrest provided by regulation 17(9)¹⁶ of the EMPPR are two separate rights. The constitutional right enables an arrested person to seek freedom immediately by showing good cause for release; the right under the emergency regulations enables a detainee to make a case to the Advisory Committee for his release.

The Court also pointed out that, in any case, the Advisory Committee meeting is convened to hear the detainee's

¹⁴ This section states *inter alia* "In making an arrest the person making the same ... shall inform the person to be arrested of the nature of the charge or allegation upon which he is arrested."

¹⁵ Article 13(1), *ibid.*

¹⁶ *Ibid.*

objections against the order of detention, and that to make meaningful objections, the detainee must be aware of the grounds on which the order was made in the first place.

When examining the question of restrictions on fundamental rights, the Court explained that restrictions can only be imposed by law. Even then they cannot be imposed to the point of denial of the right. They must be confined to the reasons specified in Article 15(7).

Failure to bring before a judge according to procedure established by law, as provided by Article 13(2)¹⁷ of the Constitution

It was not disputed that the detainee had not been brought before a judge after his arrest. The Secretary contended that because Mr Cooray had been detained under an order made under regulation 17(1)(a), there was no obligation to produce him before a judge. He argued that the provisions of regulations 17(1), 17(3) and 17(4)¹⁸ by necessary implication denied that right, and referred to a previous case in support of his submissions.

¹⁷ "Every person held in custody, detained or otherwise deprived of personal liberty shall be brought before the judge of the nearest competent court according to procedure established by law, and shall not be further held in custody, detained or deprived of personal liberty except upon and in terms of the order of such judge made in accordance with procedure established by law."

¹⁸ The essence of these provisions relevant in the present context is that regulation 17(1) empowers the Secretary to order preventive detention under certain circumstances up to a total aggregate of one year; regulation 17(3) authorises police/armed forces personnel to carry out an order made under regulation 17(1); regulation 17(4) provides for the detention at a place authorised by the Secretary in accordance with instructions issued by him.

The Court, while acknowledging that Kulatunga J in the *Wickremabandu* case¹⁹ (and also some other cases) seems to suggest that the constitutional rights provided by Article 13(2) were taken away by implication by regulations 17(1), (3) and (4), disagreed with this view. It reasoned that the provisions in those sub-paragraphs of regulation 17 have no relevance to the rights provided by Article 13(2). Moreover, constitutional guarantees cannot be swept away by implication, they may only be restricted by law, including emergency regulations, with suitable wording having a direct reference to the Article itself. The Court pointed out that this had not been done in respect of those detained under regulation 17 of the EMPPR.

As an example, the Court took regulation 19(1) of the EMPPR, which makes sections 36, 37 and 38²⁰ of the CCP non-applicable to those arrested under regulation 18 of the EMPPR. The Court explained that even in this situation, the constitutional requirement to produce the person before a judge **remains unaffected**. The requirement that an arrested person must be produced before a judge **within 24 hours**, as provided by section 37 of the CCP, is suspended (and, therefore, inapplicable), but he must nevertheless, in view of his constitutional right under Article 13(2), be brought before a judge **within a reasonable time**, although that may be in excess of the 24 hour time limit. In other words, constitutional guarantees survive in a truncated form and should be conformed to in a reasonable way, despite the suspension of the statutory provisions that describe the details.

¹⁹ (1990) 2 Sri LR 348.

²⁰ The essence of these provisions relevant in the present context is the requirement to produce a person arrested without a warrant before a Magistrate within 24 hours.

The Secretary further submitted that the "procedure established by law" in relation to a person arrested and detained under regulation 17 of the EMPPR was the procedure described in regulations 17(1) and (2).²¹ Consequently, such person need not be brought before a Magistrate unless it became necessary to extend detention beyond one year.

The Court rejected this submission. It pointed out that those provisions relate to the question of **extending** a person's detention beyond one year, and **not** to the procedure established by law for producing a person before a judge in accordance with Article 13(2) of the Constitution. The Court explained that the purpose contemplated by Article 13(2) is altogether different. It is to bring the person before a judge without unnecessary delay so that a **"judicial mind" can be applied and an impartial decision made in the light of the applicable law.** The Court further explained that this right is recognised in the scheme of the ordinary criminal law (for example, sections 32, 33, 35, 36, 37 etc. of the CCP) and has been elevated by the Constitution to the status of a fundamental right.

In the course of its judgment the Court also examined the suggestion in an earlier case that the right to be brought before a judge is more associated with a person accused of an offence than with a person in preventive custody. The reasoning there was that the accused person would eventually

²¹ The essence of these regulations relevant in the present context is that the Secretary can order detention upto an aggregate of one year, extensions beyond that to be made by a Magistrate on being satisfied upon the material submitted by the Secretary. The Secretary's report shall be *prima facie* evidence and he is not required to be present or to testify.

be tried by the court before which he was produced, and also that it could grant him bail. This argument was rejected by the judgment in the Cooray case, which held that the questions of later trial and bail were irrelevant. It pointed out that not in every case was an accused person tried by the court before which he is originally produced, nor in every case can such court grant him bail; nevertheless the law requires such an accused to be produced before the nearest competent court.

The Court observed that Mr Cooray had been arrested and detained under regulation 17 of the EMPPR, to which **sections 36 and 37 of the CCP²² are applicable**. He, therefore, should have been produced before a Magistrate in conformity with those sections.

In conclusion, the Court declared that the petitioner's fundamental rights guaranteed by Articles 13(1) and 13(2) of the Constitution had been violated, and directed the Secretary, Ministry of Defence, to forthwith order his release. It ordered the State to pay Mr Cooray Rs.200,000 as compensation and costs.

3.4 The Gamini Perera case

A five judge bench of the Supreme Court was specially constituted in this case²³ to decide whether the Secretary who makes a preventive detention order under regulation 17(1) of the EMPPR must: (a) consider for what period detention is necessary and (b) specify that period in the detention order.

²² *Ibid.*

²³ *Gamini Perera, Attorney-at-law, on behalf of Inspector Saman Srimal Bandara Madakumbura, Officer-in-Charge of the Intelligence Unit of the Special Task Force v. W.B. Rajaguru, Inspector General of Police and six others* (S.C. Application No. 600/95).

The Court, in a majority decision (four to one), answered both these questions in the affirmative. It explained that the Secretary must necessarily consider what length of detention is appropriate and then specify that period in the order.

Fernando J. delivering the judgment of the Court, held that since the order in the instant case was for detention *simpliciter* without specifying the period, it was not in compliance with regulation 17(1) of the EMPPR and was unconstitutional as not being in accordance with procedure established by law.

The same conclusion was reached after briefer consideration in the Cooray case discussed above, judgment in which was delivered a few days earlier.

4. Restriction of Prison Visits

Contact with the outside world, in particular with family and friends, is crucial for the mental and physical well being of persons in detention, and is a basic human right. The Civil Rights Movement (CRM)²⁴ made this point in its criticism of the extraordinary restrictions imposed by an emergency regulation made in late 1997, the Emergency (Prison Visits) Regulation No 1 of 1997.²⁵ As CRM pointed out, among several obnoxious features (which include limiting visits to one visitor once a week), one predominated. A person who intends to visit a detainee held in connection with an offence under the emergency regulations or the PTA, is required first to obtain a letter from the Officer-in-Charge of the police station where he or she resides, to the effect that the police have no objection to such

²⁴ Restrictions on prison visits - "CRM opposes new emergency regulation," CRM ref E 01/1/98.

²⁵ Published in Gazette Extraordinary 1,005/10 of 10 December 1997.

visit. This regulation applies indiscriminately to visits to each and every person held in prisons throughout the country (except in areas where the emergency is not in force)²⁶ in connection with offences under these special laws. It offends against the principles of reasonableness and proportionality that should govern restrictions on human rights permitted in times of emergency, is inconsistent with international standards, and is open to challenge on constitutional grounds.

This new requirement places an intolerable burden on the would-be visitor, with consequent ill effects on the detainee. The detainee may receive visits only after a long delay, or even be denied them altogether. Relatives who live far from where the detainee is held, and who have to travel into unfamiliar areas to visit them, are particularly badly affected. Furthermore, it is not clear how overworked Officers-in-Charge are expected to handle such applications, nor the criteria they should use to make their decisions.

5. Emergency Regulations Relating to Local Government Elections

In 1996, local government elections were postponed by emergency regulation,²⁷ but were subsequently held in March 1997. In January 1997, local authorities were dissolved by order issued under emergency regulations;²⁸ on the same day a new regulation was issued enabling the appointment of Divisional

²⁶ But on this see the section on "Territorial applicability of emergency regulations."

²⁷ See *Sri Lanka: State of Human Rights 1997* (Law & Society Trust, Colombo, 1997) pp. 35-6.

²⁸ Gazette Extraordinary 960/1 of 27 January 97; Order under regulation 2 of the Emergency (Term of Office of Local Authorities) Regulations No 2 of 1996.

Secretaries to administer the affairs of local authorities in the interim period,²⁹ amended a few days later in a matter of technical detail.³⁰ Then, for the last days of the election campaign, namely 14 to 21 March, regulation 18 of the EMPPR (relating to arrest without warrant) was suspended as regards the areas where elections were being held.³¹ Again under emergency powers, curfew was declared for several hours after the close of the poll and on the following day.³²

The measures described above were all with reference to local government elections outside the North and East. Local authorities in the East remained in existence under the normal law and did not require any special measures to extend their validity. As regards local authorities in the North (the Jaffna, Kilinochchi, Mannar, Vavuniya and Mullaitivu Districts), the commencement of their terms of office was by emergency regulation fixed for July 1997,³³ and thereafter again postponed until February 1998.³⁴

²⁹ The Emergency (Administration of Local Authorities) Regulation No 1 of 1997 published in Gazette Extraordinary No 960/2 of 27 January 97.

³⁰ Amendment of The Emergency (Administration of Local Authorities) Regulations No 1 of 1997 published in Gazette Extraordinary 960/21 of 31 January 1997.

³¹ Amendment to The Emergency (Miscellaneous Provisions and Powers) Regulations No 4 of 1994 published in Gazette Extraordinary No. 965/17 of 7 March 97.

³² Curfew orders published in Gazette Extraordinary 967/9, 10, 11 of 21 and 22 March 1997.

³³ The Emergency (Term of Office of Local Authorities) Regulations No 1 of 1997 published in Gazette Extraordinary 965/16 of 7 March 1997.

³⁴ The Emergency (Term of Office of Local Authorities) Regulations No 2 of 1997 published in Gazette Extraordinary 982/39 of 4 July 1997.

6. May Day Ban of 1996: The Aftermath

In 1996, a last minute ban on processions was imposed just before May Day, when traditionally many political parties and trade unions hold marches and rallies in the city of Colombo. Permission for processions specifying the various routes had already been granted in the normal way under the Police Ordinance, but was then revoked by letter, at least in the case of some processions. In addition, an emergency regulation was made banning processions throughout the country.

In the case of one procession, the revocation was communicated to the trade union concerned just prior to the date of the emergency regulation. As described in last year's report,

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 People's Alliance were not interfered with, while others were broken up.³⁵

The General Secretary of the Government United Federation of Labour, who was also a politbureau member of the Nava Sama Samaja Party (NSSP, a Marxist party outside the governing People's Alliance), challenged the revocation of permission and the ban by emergency regulations in a fundamental rights application. The Supreme Court upheld his complaint in its decision handed down in July 1997.³⁶ Holding that the right to

³⁵ Sri Lanka: State of Human Rights 1997 (Law & Society Trust, Colombo, 1997) p 53.

³⁶ *Palihenage Don Saranapala v. S.A.D.B.R. Solanga Aratchi, Senior Superintendent of Police, and six others*, SC Application 470/96, SC Minutes 17. 9. 1997. See also chapter IV on Judicial Protection of Human Rights

go in processions in the public streets was part of freedom of expression, Amerasinghe J, delivering the judgment of the Court, agreed that this could be restricted by measures aimed at preserving public order, but said that any such measures must be unrelated to the suppression of free speech, and that

... the incidental restriction on the exercise of the free expression must be no greater than is essential to the furtherance of public order. In other words ... the Police Ordinance does not, in my view, empower Police Officers to 'roam at will' in giving directions prohibiting the taking out of any procession or imposing conditions on persons taking part in a procession.

The respondents took up the position that the permission to hold processions had been revoked because the National Intelligence Bureau had information that "Northern terrorists" might strike Colombo in the guise of May Day demonstrators. In rejecting this explanation, the Court said that if that was the case, it was impossible to understand why several public meetings had been allowed. Furthermore, the petitioner had adduced evidence by way of photographs and affidavits that members of other political parties (including the Lanka Sama Samaja Party (LSSP), a constituent party of the governing People's Alliance) had been allowed not only to hold meetings at public places but also to march on the streets. "Why were steps not taken," observed the Court, "to prohibit the processions of other political parties if security considerations prompted the prohibition of the NSSP procession?"

The police were silent about whether letters cancelling permission had been sent to other political parties. They took the position that they had informed the assembled LSSP members that processions had now been prohibited by emergency regulation,

and that they would have to proceed to their meeting place in "scattered groups." This description did not commend itself to the Court when it examined photographs of the procession concerned. Moreover, "if the members of the LSSP were allowed to proceed in "scattered groups" of the sort depicted in the photographs, why were the members of the NSSP treated differently?" The Court concluded that the police had not been concerned with furthering the government interest in national security but with the suppression of free expression by the petitioner and other members of his party.

Counsel for the petitioner pointed out that the emergency regulation imposed a total ban on all processions throughout the country, which would include even funerals and religious processions.³⁷ The Court held, however, that in view of the conclusion it had come to in favour of the petitioner even on the assumption that the emergency regulation was valid, it was not necessary to consider whether the regulation was itself invalid on account of being overbroad.

An emergency regulation has been held invalid only in one previous instance, the *Joseph Perera* case of 1986.³⁸ This case concerned a blanket prohibition on the distribution of leaflets without the prior permission of the Inspector General of Police. The NSSP May Day case had the potential of being an interesting successor to that decision. The readiness with which the Court perceived a clear case of political discrimination, however, compensated for any disappointment in that regard. The Court held that the State had violated the petitioner's rights to equality before the law and equal protection of the law, his right not to

³⁷ In some earlier instances emergency regulations banning processions have specifically exempted such events.

³⁸ (1992) 1 SriLR 199.

be discriminated against on the grounds of political opinion, and his right to freedom of expression and peaceful assembly.

7. Jackpots and Public Performances

In 1995, a renewed tendency to resort to emergency regulations which had a tenuous, if any, relevance to national security was noted.³⁹ The Emergency (Games of Chance) (Jack-pots) Regulations No 1 of 1995, referred to at that time, were amended during 1997. The amendment provided a definition of the term "jack-pots" (which had not been provided earlier) and also enabled a lawful possessor of an instrument or appliance used for such purpose, which had been seized by the police and forfeited to the State under the regulation, to apply to the High Court for compensation.⁴⁰ However, while the regulation also provides for the seizure and forfeiture of any money found on the premises used or suspected to have been used for playing the game, the amendment makes no provision for its return.

The year saw the appearance of yet another regulation apparently distant from public security. The Public Performances Ordinance provides for prior permission to be obtained for any public performance. By emergency regulation, the penalty for contravention of this provision was enhanced from a fine of up to Rs. 1,000 or imprisonment of up to six months, to a fine of up to Rs. 100,000 and/or to imprisonment for between two and ten years. Furthermore, the regulation provides that if the performance is by the exhibition of pictures by cinema or similar apparatus, the apparatus or any other property used in connection with the offence shall **by virtue of the conviction** be forfeited

³⁹ *Sri Lanka: State of Human Rights 1995* (Law & Society Trust, Colombo, 1996) p 48.

⁴⁰ Published in Gazette Extraordinary 966/4 of 10 March 1997.

to the state. No provision is made to protect the rights of a possible innocent third party who may own the apparatus.

Press reports suggested that the motivation behind the regulation was to deal with the exhibition of pornographic material in "video parlours."

8. The Generation of Electrical Power

The most controversial emergency regulation of the year, on a matter with serious implications for the public interest, was the Emergency (Generation of Electrical Power and Energy) Regulation No 1 of 1997.⁴¹ It provided, very simply, that "so far as they relate to the generation of power and energy," four laws shall be of no force or effect. The laws specified were the Urban Development Authority Law, the National Environmental Act, the Nuisances Ordinance, and Chapter IX of the Criminal Procedure Code. This last named law empowers a Magistrate to take action to remove or abate a public nuisance, and to prohibit any person from continuing a public nuisance; it also provides for speedy temporary remedy in urgent cases where, amongst other things, there is danger to life or health.

Admittedly, there was a serious power shortage at the time this regulation was issued, which may reasonably be considered to affect a service essential to the life of the community, the maintenance of which would properly come within the purview of the Public Security Ordinance. Nevertheless, the sweeping and general terms of the regulation clearly lay it open to the charge of being "overbroad" and, therefore, cast doubt on its legality. There is no attempt whatever in the wording of the regulation to balance the other crucial competing public interests

⁴¹ Published in Gazette Extraordinary 966/11 of 12 March 1997.

governed by the four laws, the operation of which was suspended in relation to the generation of electrical power. Nor is there any provision that it should apply only in a case where there is no reasonable alternative. Moreover, the unqualified term "the generation of electrical power and energy" is itself far wider than the circumstances could warrant. It would include, for instance, the use of generators in circumstances where their effect is harmful, with no corresponding benefit whatsoever to the public interest sacrificed. As a legal columnist pointed out,

The latest regulation banning the use of air conditioners taking power off the national grid has also come in for criticism due to paragraph 3 thereof which gives blanket permission for anyone who wishes to operate a generator for the same purpose. When read together with the suspension of the environmental protection and public nuisance laws by the earlier Gazette, this means that there will be no limit to the inconvenience that neighbours or users of the public streets may have to suffer in order for the affluent few to enjoy the comfort of air-conditioning in their own homes or workplaces.⁴²

The background to this regulation is significant. The construction of a diesel power plant in a residential area of Greater Colombo commenced in November 1996, and the plant started operating in February 1997, initially for 24 hours a day. Residents of the area complained to various governmental and local government authorities to no avail. Assistance was then obtained from a non-profit, public interest environmental law firm, the

⁴² Nayana, "Legal Watch: Children of Etul Kotte Challenge CEB," *Sunday Island*, 13 April 1997.

Environmental Foundation Ltd. An application was made to the Magistrate's Court under the Chapter of the CCP referred to above, to abate what they asserted was a public nuisance. While this proceeding was pending, the emergency regulation in question was made. A fundamental rights application⁴³ was then filed in the Supreme Court on behalf of five infants (aged two and a half months to two years) complaining of grave damage and hazard to their health on account of noise, toxic gas emissions and heat, and asserting violation of their fundamental rights to life, to freedom from cruel inhuman or degrading treatment, to freedom from discrimination, freedom to engage in a lawful occupation and freedom of movement including choosing one's residence. The application specifically challenged the validity of the emergency regulation.

The power plant stopped operating in June 1997, and the emergency regulation concerned was rescinded in the same month.⁴⁴ At the end of the year the fundamental rights application, which amongst other reliefs asked for compensation for the damage suffered, was nevertheless still being vigorously pursued.

9. Other Regulations

Other regulations, or orders under them, made during 1997 related to the registration of deaths,⁴⁵ the banning of the use of air

⁴³ *A.V. Deshan Harindra and four others v. the Ceylon Electricity Board and seven others*, SC Application 323/97.

⁴⁴ Gazette Extraordinary 981/20 published in 27 June 1997.

⁴⁵ Published in Gazette Extraordinary 957/3 of 6 January 1997. This regulation extended from two to three years the operation of the Registration of Deaths (Temporary Provisions) Act of 1995, which provides for the issue of death certificates in respect of persons reported missing and presumed dead.

conditioners drawing power from the national grid,⁴⁶ the declaration of work in connection with the maintenance and supply of gas as an essential and specified service,⁴⁷ and the appointment of a competent authority for the administration and control of Yala National Park.⁴⁸

10. Territorial Applicability of Emergency Regulations

Part II of the Public Security Ordinance may be brought into operation in respect of the whole or any part of Sri Lanka. In common parlance, this is referred to as "emergency rule being brought into force." Emergency regulations may then be made which apply with the part or parts of the country in which the emergency is in force. During the course of 1997, as recounted above, the operation of the Ordinance was restricted to certain parts. In some instances, however, the authorities continued to act as if it was in force throughout the country.

A case in point is the regulation restricting prison visits which was published on 10 December 1997. By December, many persons detained under the emergency regulations or the PTA had been moved from the Magazine Prison and other places in Colombo to Kalutara prison. Part II of the Public Security Ordinance was not in force in the Kalutara area at the time,

⁴⁶ The Emergency (Restriction on Use or Consumption of Electricity) Regulations No 1 of 1997 published in Gazette Extraordinary 969/26 of 4 April 1997. This was later rescinded by a regulation the Gazette of which we have not been able to trace.

⁴⁷ Orders published in Gazette Extraordinary 983/6 of 8 July 1997 made under regulation 29A of the Emergency (Miscellaneous Provisions and Powers) Regulations No 4 of 1994.

⁴⁸ The Emergency (Yala National Park) Regulations No 1 of 1997 published in Gazette Extraordinary 995/23 of 3 October 1997.

but it was assumed that this new regulation applied to visitors to the Kalutara prison, and indeed it was being so implemented at the end of 1997.

The question also arises as to whether places designated as authorised places of detention at a time when the whole country was under emergency rule, but which no longer fall within the specified areas of emergency rule, could continue to be considered authorised places of detention for the purposes of the Emergency (Miscellaneous Provisions and Powers) Regulations. Similar questions arise in relation to other emergency regulations. For instance, does the provision extending by one year the time for obtaining death certificates of missing persons fail to apply to the whole country after 4 July 1997? This provision was intended to benefit the relatives of persons missing as a result of the JVP insurgency in the South just as much as victims of the conflict in the North and East. It was not known whether such issues have been considered by those responsible for making emergency regulations, or those to whom it falls to implement them.

11. Inaccessibility and Other Long-standing Complaints Remain Unrectified

The inaccessibility of emergency regulations was more problematic than ever. Subscribers to the Gazette Extraordinary, in which the regulations are published, did not receive all the issues published. Attempts to check the missing numbers to see whether they included emergency regulations were made from normal sources available to the public, including the Government Printer, the Government Publications Bureau, the National Library, and the National Archives. These lengthy efforts remained unsuccessful at the time of writing. There is, therefore, no guarantee that this chapter contains a comprehensive review of

emergency rule during 1997, as it appears almost impossible to be sure exactly what regulations were in force at any time.

The complaints made previously about the inaccessibility of the regulations and other matters regrettably remained valid for 1997. As we said last year:

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, remained 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.⁴⁹

⁴⁹ Sri Lanka: *State of Human Rights 1997*, (Law & Society Trust, Colombo, 1997), p. 61.

12. Conclusion

The judicial decisions related to emergency regulations which came to findings in favour of the fundamental rights of freedom from arbitrary arrest and freedom from discrimination in relation to the rights of assembly and expression, were welcome developments in 1997. These, however, were insufficient to mitigate the disappointment, if not dismay, caused both by the continuation of most of the regulations inherited from earlier years, and the content and effect of the new regulations made during the year.

The year was also distinguished by the unusual scene of human rights experts and activists engaging in a vigorous but losing battle to keep an emergency regulation alive. The abrupt and premature abolition of the Human Rights Task Force, which was a creature of emergency regulations, was described above under "Arrest and Detention." The newly-created Human Rights Commission was invested with a plethora of important tasks. But it was not permitted to set about them in an orderly manner, as it was forced at the outset to plunge itself into the task of monitoring arrests and detentions. This is a complex responsibility needing special expertise, which the eight year old HRTF had already developed. As pointed out earlier, this meant the cause of human rights suffered twice over, and there has been no explanation of why this was done. Some six months earlier, another useful human rights mechanism met a similar fate. The Commission on the Elimination of Discrimination and Monitoring of Fundamental Rights was established in 1986, and its members included persons of competence and dedication who gave a great deal of their time and abilities to their task. Working in low profile and shunning publicity, the Commission patiently inquired into many complaints of wrongs committed by officials, and negotiated to obtain relief from the government authorities complained against. It made several important recommendations

based on its experience over the years. At the end of 1996, in view of the passing of the Human Rights Commission of Sri Lanka Act, the members were informed that their terms of office would not be renewed. The Commission on the Elimination of Discrimination was disbanded in reckless disregard of the fact that numerous pending cases would be left in the air, that there would be a hiatus of at least several months as the Human Rights Commission was not yet operational, and that valuable experience in what was again a specialised field would be lost to the public. At best, the story of the abrupt and cavalier termination of both the Commission on the Elimination of Discrimination and Monitoring of Fundamental Rights and the HRTF reflect an alarming lack of coherence in the government's human rights policy.

Appendix I

Areas where the emergency was in force during 1997

1. **From 1 January to 4 July 1997** the emergency continued to be in force throughout the whole of Sri Lanka.
2. **4 July 1997** Emergency restricted to certain parts of the country, as set out in the schedule below. Gazette Extraordinary No. 982/35 of 4 July 1997.

Schedule

The Municipal Limits of Colombo, Dehiwala-Mount Lavinia, the Divisional Secretaries' Divisions of Nugegoda and Kolonnawa of the Colombo District, all the Divisional Secretaries' Divisions of the Gampaha District, the Divisional Secretary's Division of Hambantota in Hambantota District, the Northern Province, the Eastern Province, the Divisional Secretaries' Divisions of Kalpitiya, Wanathawilluwa, Karuwalagaswewa of the Puttalam

District, the Divisional Secretaries' Divisions of Nochchiyagama, Nuwaragampalatha (Central), Medawachchiya, Kebithigollawa, Padaviya and Horowpathana of the Anuradhapura District, the Divisional Secretaries' Divisions of Dimbulagala and Lankapura of the Polonnaruwa District, the Divisional Secretaries' Divisions of Bibile, Madulla, Medagama, Moneragala, Kataragama and Grama Seva Divisions of Mahakalugolla, Ethimale and Kotiyagala of the Siyambalanduwa Divisional Secretary's Division of the Moneragala District.

3. **4 August 1997.** Divisional Secretaries' Divisions of Kaduwela and Maharagama of the Colombo District added to the list. Divisional Secretary's Division of Dehiattakandiya of the Eastern Province excluded. Gazette Extraordinary No. 987/1 of 4 August 1997.
4. **4 September 1997.** Divisional Secretaries' Divisions of Hanwella and Moratuwa of the Colombo District added to the list. Gazette Extraordinary No. 991/20 of 4 September 1997.
5. **4 October 1997.** Divisional Secretary's Division of Tissamaharama in Hambantota District, Divisional Secretaries' Divisions of Arachchikattuwa, Chilaw and Grama Seva Division of Mundalama of the Puttalam Divisional Secretary's Division of Puttalam District, Divisional Secretaries' Divisions of Buttala, Siyambalanduwa and Grama Seva Division of Sinukkuwa of the Tanamalwila Divisional Secretary's Division of the Moneragala District added to the list. Gazette Extraordinary No. 995/27 of 4 October 1997.
6. **4 November 1997.** The entirety of the Puttalam Divisional Secretary's Division of the Puttalam District included in the list. Gazette Extraordinary No. 1000/6 of 4 November 97.

IV

Judicial Protection of Human Rights

*Sumudu Atapattu**

1. Introduction

The role played by the Supreme Court in providing redress to victims of fundamental rights violations has been reviewed by the Law & Society Trust in each of its annual reports since 1994. This chapter, too, discusses the main fundamental rights petitions decided by the Supreme Court¹ during 1997 and seeks to identify any trends evident in the nature of the petitions received by the Court as well as in the jurisprudence generated by the Court.²

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

¹ Hereinafter referred to as "the Court."

² The provisions of the October 1997 draft Constitution relating to fundamental rights are discussed in Chapter VII.

The fundamental rights chapter of the 1978 Constitution provides the juridical base for the Supreme Court decisions discussed in this chapter. Article 126 confers the *sole and exclusive jurisdiction* on the Supreme Court in relation to violations of fundamental rights by executive or administrative action. Before a petitioner can proceed with a claim, the Supreme Court must first grant leave to proceed. Many applications are rejected at this stage; leave to proceed is granted only to those applications which establish a *prima facie* case. This chapter will not discuss unsuccessful leave to proceed applications.

2. Case Law

An increasing number of petitions under Article 12 of the Constitution was noted last year, as well as the fact that petitions in relation to violations under Article 12 outnumbered the petitions in relation to violations under Articles 11 and 13.³ No specific reasons for this could be identified. This trend continued with regard to the cases disposed of during 1997.

2.1 Cases under Articles 11,⁴ 13(1)⁵ and 13(2)⁶

The Court had occasion, yet again, to discuss the relationship between the fundamental rights enshrined in the Constitution and emergency regulations. The most noteworthy and

³ See *Sri Lanka: State of Human Rights 1997* (Law & Society Trust, Colombo) Chapter V.

⁴ Article 11 deals with freedom from torture, cruel, inhuman or degrading treatment or punishment.

⁵ Article 13(1) deals with freedom from arbitrary arrest and detention.

⁶ Article 13(1) deals with the right of a detained person to be produced before a judge according to procedure established by law and the right to be informed of reasons for arrest.

comprehensive discussion is in *Sunil Kumara Rodrigo, Attorney-at-Law on behalf of B. Sirisena Cooray v. Secretary, Ministry of Defence and two others*.⁷ In view of its importance the case is discussed here in considerable detail.

Mr Sirisena Cooray was the Secretary-General of the United National Party (which was in power from 1977 to 1994). He was arrested and detained allegedly on the ground that he was conspiring to assassinate the President.

Although leave to proceed was granted in respect of the alleged violations of Articles 12(2), 13(1), 13(2), 14(1)(c) and 14(1)(h) of the Constitution, violations of Articles 12(2), 14(1)(c) and 14(1)(h) were not pressed by the counsel for the petitioner. Accordingly, the Court declared that the petitioner had not established a violation of those articles, and so the only violations the Court had to consider were in relation to Articles 13(1) and (2). The Court had to consider two main issues: whether Mr Cooray had been arrested according to the procedure established by law and whether he had been informed of the reason for his arrest.

In order to determine these two issues, the Court had to assess the validity of the detention order issued pursuant to Emergency Regulation 17(1), under which Mr Cooray was held in detention. Regulation 17(1) authorises the Secretary, Ministry of Defence to make a detention order for a particular period. The order relating to Mr Cooray, however, did not contain any reference to a time period. The Court concluded that the arrest and detention of Mr Cooray was unconstitutional as it had not followed the procedure established by law.

⁷ SC (FR) Application No 478/97, SC Minutes 19.8. 1997. See also Chapter III on Emergency Rule.

The Court said that, "the Secretary, in exercising his powers of arrest, should always act cautiously, for the liberty of one citizen is no less important than that of any other, whatever his station in life was, is, or [is] expected to be."⁸

Regulation 17(1) authorises the Secretary to issue a detention order "when he is satisfied" that the detention is warranted. The Court said that these words **do not** confer an absolute discretion on the Secretary: "they serve as a condition limiting the exercise of an otherwise arbitrary power."⁹ The Court said, "*It is open for Mr Cooray to show that the Secretary was not legally entitled to be satisfied. A person is legally entitled to be "satisfied" if he is "reasonably" satisfied.*"¹⁰ The Court also referred to Article 13(5) of the Constitution which lays down the presumption of innocence and stated that this presumption also applies in relation to the police function of arrest.

If a person's decision is reasonable or can be supported with good reasons, that person can be said to be "reasonably satisfied." Discretion must be exercised reasonably. The Court will not usurp the discretion of the Secretary and substitute its own views for those of the Secretary. However, the Court emphasised that the exigencies of dealing with crime cannot justify "switching the notion of reasonableness to the point where the essence of the safeguard secured by Article 13(1) of the Constitution may be abrogated."¹¹ The Court further stated that a decision does not become reasonable solely by virtue of the fact that the information on which it was based was provided by senior police officers.

⁸ *Ibid* at p 10.

⁹ Quoting Lord Radcliffe in *Nakkuda Ali v. M.F.de S. Jayaratne* (1951) AC 66 (1) PC.

¹⁰ Quoting from *Director of Public Prosecutions v. Head* (1959) AC p 83 at p 110.

¹¹ *Supra* n 7 at p 17.

The Court concluded that the Secretary had not acted according to the procedure prescribed by Regulation 17(1) and had, therefore, acted in violation of Article 13(1) of the Constitution. Regulation 17(1) bestows on the Secretary an "exceedingly great power" which must be exercised with a corresponding degree of responsibility. While each case must be judged on its own circumstances, the cardinal principle is always that the person making the detention order must be "satisfied."¹² In this case, the Secretary had abdicated his authority by signing the detention order mechanically. His decision was not supported by good reasons. Therefore, detaining a person in pursuance of such a decision is not in accordance with procedure established by law, and constituted a violation of Article 13(1) of the Constitution:

On the face of it, the order suggests that the Secretary was acting mechanically without due regard to the circumstances of the particular case in respect of which he was issuing the order of detention. As we have seen, orders signed mechanically show that the person making the order was not satisfied that the arrest was warranted. If he is not satisfied, the Secretary is not empowered to issue a Detention Order. If he nevertheless issues such an order, an arrest made in pursuance of such an order is not according to procedure established by law and, therefore contravenes Article 13(1) of the Constitution and is unlawful and invalid.¹³

The Court reiterated that it is a basic principle of criminal law that the accused should clearly understand what he is supposed

¹² *Ibid* at p 24.

¹³ *Ibid* at p 27.

to have done and stated that Article 13(1) of the Constitution has elevated a principle of the ordinary law to the status of a fundamental right. Refuting the contention of the first respondent that under emergency regulations reasons for arrest need not be given, the Court stated that *reasons* must be given *at the first reasonable opportunity*, but not the *purpose* or the *object* of arrest. In addition, the Court pointed out that the Secretary has a duty not merely to state his inference but also to give the grounds on which his inference was based.

With regard to the relationship between Article 13(1) and Regulation 17, the Court said that there are two rights: the constitutional right to be informed of the reason for arrest and the right to be informed of the grounds of arrest. The first was to enable a person arrested to obtain his release immediately, at the time of his arrest, by showing good cause for his release. The second is to enable him subsequently to make a case to the Advisory Committee established under the emergency regulations. The Court stated that these are two quite separate and distinct rights and that the second right does not wipe out or restrict the first.

The Court examined the derogation clause in Article 15(7) of the Constitution and stated that although certain restrictions may be imposed, these rights cannot be denied altogether.¹⁴ The

¹⁴ Justice Amerasinghe referred to Justice Soza's judgment in *Kumaranatunga v. Samarasinghe* [(1983) 2 FRD 347 at p 359] where it was held that the Emergency Regulations "overshadow the fundamental rights guaranteed by Articles 13(1) and 13(2) of the Constitution" but said that if it meant that such regulations towered above the constitutional rights, then he could not agree with that view.

Court also referred to Article 4(d) of the Constitution¹⁵ and to the Supreme Court decision of *Channa Pieris v. AG*:¹⁶

We are obliged to respect, secure and advance fundamental rights. We cannot impose restrictions on any fundamental right guaranteed by the Constitution: such restrictions may only be prescribed by law - by an Act of Parliament or by regulations made under the law relating to public security. No such restriction has been imposed.

With regard to the issue of whether a detenu should be produced before a Magistrate within the specified time period after being arrested under a detention order, the Court stated that this constitutional right has no necessary connection with the court that will eventually try the case. Refuting the contention of the first respondent that when a person is arrested on a detention order made by the Secretary under Emergency Regulations, there is no obligation to produce him before a judge, the Court referred again to its decision in *Channa Pieris v. AG*.¹⁷ It said that it had repeatedly referred to the requirement to produce a detenu before a Magistrate as a salutary provision to ensure the safety and protection of arrested persons. The Court reiterated that although restrictions could be placed on this constitutional right, the right itself could not be denied altogether. The constitutional requirement must be complied with in a reasonable

¹⁵ Article 4(d) provides that "the fundamental rights which are by the Constitution declared and recognised shall be respected, secured and advanced by all organs of government, and shall not be abridged, restricted or denied, save in the manner and to the extent hereinafter provided."

¹⁶ (1994) 1 Sri LR 1 at p 63.

¹⁷ *Ibid* at p 75.

way within a reasonable time, which is a matter for the Court to decide in the circumstances of each case. The Court also stated that the right to be brought before a judge recognised by the Code of Criminal Procedure has been elevated to the status of a fundamental right.

The Court pointed out that fundamental rights can only be restricted by law plainly expressed by Parliament or by a regulation relating to public security: such rights cannot be swept away by implication.

The Court, therefore, concluded that Mr Cooray's fundamental rights under Article 13(1) and (2) had been infringed and that his arrest and detention were unlawful and illegal. It ordered his release.

In *Gamini Perera, Attorney-at-Law on behalf of Inspector S.S.B. Madakumbura v. Inspector-General of Police and six others*¹⁸ the Court again had occasion to discuss Emergency Regulation (ER) 17(1). The Court said that on closer scrutiny, ER 17(1) is clear and unambiguous and provides the answers to four questions: What **order** can the Secretary properly make? What **object** would justify such an order? **When** can the Secretary make such an order? And on what **material** can he do so? Thus, the Court said that ER 17(1) means:

1. The order which the Secretary may make is "an order that such person be (taken into custody and) detained for a period not exceeding three months;"
2. The object justifying such an order would be that of preventing a person from acting in a manner prejudicial to the national security or to the maintenance of public order;

¹⁸ SC Application No 600/95, SC Minutes 29.8. 1997.

3. The Secretary may make such an order only when he is satisfied that it is necessary to do so to achieve the aforesaid object;
4. The material on which the Secretary can be satisfied is the material submitted to him, or such further additional material as he may call for.

In addition, the time for which the detention order is necessary must be specified in the order. The Court said that in interpreting Regulation 17(1) the paramount consideration is that it confers on the executive the power of depriving a citizen of his liberty for up to three months without a conviction, a charge, or a pending trial. Even where a person is convicted, the judge has to pass a sentence for a specified period of time and give reasons for doing so if the maximum sentence is passed. The Court stated that:

In the absence of compelling language, I cannot presume that the law intended to allow executive deprivation of liberty with less respect and concern for the liberty of the citizen, when effected without conviction, charge, or pending trial, and without the safeguards (natural justice, legal representation, confrontation with one's accusers, and the like) of a judicial proceeding. That strongly suggests that the Secretary must consider and specify the necessary period of detention.¹⁹

N.K.K. Kalupahana, Lawyers for Human Rights v. Officer in Charge, Police Station, Hungama and two others²⁰ involved

¹⁹ *Ibid* at p 9.

²⁰ SC Application No 615/95, SC Minutes 24.9. 1997.

the torture of a minor by the first respondent. The Court overruled the preliminary objection that the application was time-barred under Article 126(2) of the Constitution, which requires that fundamental rights petitions be filed within one month of the alleged violation. The Court stated that if the alleged offender was responsible for preventing the aggrieved person from filing the petition within the correct time frame, either by arresting or detaining him or by incapacitating him through injury, then the delay is not fatal.

2.2 Cases under Articles 12(1)²¹ and 12(2)²²

As pointed out earlier, petitions under Article 12 significantly outnumber the petitions filed under Articles 11 and 13. The issues raised under Article 12 relate mainly to discrimination or lack of equality in relation to employment. As was the case in earlier years, none of the decisions under Article 12 in 1997 related to discrimination on the basis of gender or ethnicity.

While many of the cases involved similar issues, several decisions embody important principles which must be noted. *R.P.D.D. Pearly v. Acting Secretary, Educational Service Board and the A.G.*²³ involved an error made by the respondent in relation to the marks the petitioner had obtained at a particular examination. As a result, the petitioner followed a course for which she would not otherwise have been eligible. The respondent, upon discovering the error, refused to appoint the petitioner as an English teacher, although she had successfully completed the course.

²¹ Article 12(1) deals with the right of every person to enjoy equal protection of the law.

²² Article 12(2) deals with non-discrimination on grounds of race, sex, political opinion, religion, language, caste, place of birth or any one of such grounds.

²³ SC Application No 790/96, SC Minutes 30.7.1997.

The Court, pointing out that "to make a mistake, and to correct it, by itself involves no breach of equality or equal protection,"²⁴ nevertheless stated that in this case, the time taken to rectify that mistake seemed *unreasonably wrong* and that this delay had resulted in a denial of equal protection of the law. The Court also stressed that "the wide powers vested in those responsible for recruitment have to be exercised in the public interest and for the public benefit."²⁵

In *A.H. Norman v. Coconut Research Board and nine others*,²⁶ the petitioner challenged the process by which Estate Superintendents were selected. The Court decided that the entire selection process was fatally flawed by the irregular and arbitrary procedure adopted by the first respondent, which resulted in a clear violation of the petitioner's fundamental rights guaranteed by Article 12(1). The Court further stated:

This Court has repeatedly stressed the imperative need for transparency in the matter of public sector appointments and promotions. The only way in which this commendable objective could be achieved is by a full and fair disclosure of the entire selection process. It follows then that every candidate is entitled to adequate notice of the method of recruitment or promotion, thereby ensuring for everyone concerned an equal opportunity to compete.

The Court directed the first respondent to hold fresh selections on the basis of a proper scheme of internal recruitment duly

²⁴ *Ibid* at p 4.

²⁵ *Ibid*.

²⁶ SC Application No 610/95 (FR), SC Minutes 30.6. 1997.

published, which clearly set out the criteria on eligibility and selection.

In *M.A.C.Ayoob v. IGP and three others*,²⁷ the petitioner alleged unfair dismissal as well as racial abuse and physical assault. The case involved Articles 11 and 12(1), but the allegations under Article 11 were withdrawn. With regard to the application of Article 12(1) the Court stated:

The protection of the law, which Article 12(1) guarantees, is not just the protection of the criminal law, but of the law in general; and one aspect of that protection is precision and unambiguity in matters of vital concern to the individual. This Court cannot lightly assume that the norm is otherwise.

The Court stated that even assuming that the Inspector General of Police (IGP) had the power to dismiss the petitioner, Section 26B of the Police Ordinance does not confer absolute, unfettered or unreviewable power. Quoting from *Premachandra v. Jayawickreme*, the Court said:²⁸

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.

²⁷ SC Application No 182/96 (FR), SC Minutes 2.4. 1997.

²⁸ (1994) 2 Sri LR 90 at 105.

The Court pointed out that this principle applied to powers of appointment and dismissal and that reasons for decisions must be given:

Respect for the Rule of Law requires the observance of minimum standards of openness, fairness, and accountability, in administration; and this means - in relation to appointments to, and removal from, offices involving powers, functions and duties which are public in nature - that the process of making a decision should not be shrouded in secrecy, and that there should be no obscurity as to what the decision is and who is responsible for making it.²⁹

The Court stated that the dismissal of the petitioner amounted to arbitrary and unreasonable action by the first respondent as it inflicted a second punishment for the same offence; summary dismissal without charge or inquiry "patently violated the principles of natural justice and of proportionality."³⁰

In *P.B.H. Denuwara v. Hadabima Authority of Sri Lanka and three others*,³¹ it was contended that the termination of the services of the petitioner, who was employed upon an annually renewable contract, did not fall within the ambit of public law and, therefore, relief under Article 126 of the Constitution was not available. It was further contended that the first respondent Authority is an autonomous body³² and cannot be regarded as

²⁹ *Jayawardene v. Wijeyetilleke* SC No 186/95, SC Minutes 27.7. 1995.

³⁰ *Supra* n 19 at p 6.

³¹ SC Application No 135/95, SC Minutes 25.2. 1997.

³² Hadabima Authority is a corporation created under the State Agricultural Corporations Act No 11 of 1972.

an organ of the State. In order to ascertain whether the respondent corporation was a State organ, the Court looked at the provisions in the parent Act, the financial control exercised by the government and the powers vested in the Minister in relation to the respondent Authority. The Court came to the conclusion that the respondent Authority has the statutory status of a public corporation and that this status percolates down to its officers and servants. The Court held -- contrasting the case of *Wijenaike v. Air Lanka Ltd*,³³ cited by the counsel for the respondents -- that the contract of employment clearly falls within the ambit of public law and, therefore, the concept of equality permeates the whole spectrum of the petitioner's employment under the respondent Authority. The Court held that the petitioner's fundamental rights guaranteed under Articles 12(1) and 12(2) had been violated by the second respondent.

In *N.M.B.P. Navaratne and seven others v. President, Nilwala Educational College, Akuressa and two others*,³⁴ the Court had occasion to pronounce on ragging. The petitions were filed by people who had carried out ragging, and who alleged that they had been punished twice for the same offence. The Court held in favour of the petitioners as they had indeed been punished twice for the same offence and, therefore, their fundamental rights under Article 12(1) had been infringed. However, the Court strongly condemned the petitioners' actions and said that it would be wholly inequitable to grant them any relief. It further said that the first punishment meted out on the petitioners was wholly inadequate: the females had been suspended from their internship for one month and the males for two months. In a strong condemnation the Court stated:

³³ (1990) 1 Sri LR 293.

³⁴ This involved identical petitions by eight petitioners and the Court dealt with them together. SC Applications Nos 172-179/97, SC Minutes 16.12.1997.

The Petitioners misconduct is extremely serious. It is not just a matter between one individual and another. All the seniors were involved, and the Petitioners did not claim that they were only passive observers. Ragging is sometimes sought to be justified as being a necessary part of orientation to life in Universities and other institutions of higher learning. Such ragging may be tolerated, if at all, if it is clean fun; but it is totally unacceptable if it causes pain or suffering, or physical, mental or emotional distress, to the victims. No normal person could possibly have considered what happened in this case to be fun: on the contrary, it was cruel, inhuman and degrading to ill-treat or torment persons to the point of pain and exhaustion requiring hospitalization, not to mention the possible long-term adverse mental effects, even on the victims who did not need hospitalization. Should not this Court refrain from granting relief to Petitioners who are plainly guilty of cruel, inhuman and degrading treatment of their junior colleagues?

Yet another relevant matter is that ragging is easily done, but difficult to prove; victims are afraid to complain, because reprisals are likely; those in authority often fear to get involved, whether by intervening, reporting or otherwise. ...In these circumstances, the public interest demands deterrent, rather than lenient, punishment for admitted or proven misconduct.³⁵

³⁵ *Ibid* at p 5.

The Court stated that persons guilty of such misconduct are not fit to be entrusted with the powers and responsibilities of teachers.

*S. Jeevakaran v. The Minister of Public Administration, Home Affairs, Plantation Industries and Parliamentary Affairs and three others*³⁶ involved the alleged violation of Articles 12(1) and 14(1)(e). The petitioner challenged the decision of the first respondent to cancel a public holiday, the Maha Sivarathri, which had been declared a public holiday from 1971 to 1996.

The petitioner alleged that the sudden denial of the holiday was against his legitimate expectations and was totally unilateral, unreasonable, arbitrary, unjustified, *ultra vires* and capricious. He said it denied equality of opportunity and violated the rights guaranteed under Article 12(1) of the Constitution.

The petitioner further contended that the withdrawal of Maha Sivarathri as a public holiday infringed his fundamental right of freedom of worship under Article 14(1)(e). The Court, rejecting this contention, stated that it was necessary to maintain the distinction between not **facilitating** the exercise of a fundamental right, and **infringing** it:

In my view, the obligation created by Article 14(1)(e) is to allow the citizen to practise his religion, but not to give him additional facilities or privileges which would make it easier for him to do so. While the State must not prevent or impede religious observances, it need not go further, and provide a holiday or other facilities for such observances ... The essence of the freedom of worship is that the State (or even a

³⁶ SC Application No 623/96, SC Minutes 24.2. 1997.

private employer) must not prohibit or interfere with the citizen's practice of his religion, but is not bound to extend patronage or provide facilities for such practice.

The Court stated that in any event, the petitioner's contention should fail as the government had already granted Hindus a special holiday on that day.

The Court, however, did recognise that if the State granted patronage to one religion (except as permitted under Article 9), the question of equal treatment could arise under Article 12. The Court also rejected the counsel's argument that the removal of Maha Sivarathri as a holiday affected the petitioner's right to manifest his religion by himself or in association with others ('others' here was interpreted as persons of other religions).

An identical case challenging the decision of the Minister of Public Administration to remove the Hadji festival as a public holiday was dismissed by the Court on similar grounds (See *M.K.M. Shakeeb v. Minister of Public Administration, Home Affairs, Plantation Industries and Parliamentary Affairs and three others*³⁷).

In *R.B. Palitha v. Deputy Minister of Defence and three others*³⁸ the decision to transfer the petitioner as a sub-inspector was challenged. The Court stated that the evidence showed that the transfer effected by the second respondent was not the result of a mistake or an error of judgment, but was a misuse of powers which demoralised and demotivated the victim and, indirectly, the entire public service. The Court further stated

³⁷ SC Application No 624/96, SC Minutes 24.2. 1997.

³⁸ SC Application No 128/96, SC Minutes 26.9. 1997.

that the powers delegated to the respondents by the Public Services Commission are held in trust and should have been exercised with due care for the purpose for which they were delegated.

In *D.G.P.H. Devasinghe and three others v. Secretary, Ministry of Plantation and eleven others*,³⁹ Justice Bandaranayake quoted Justice Sharvananda in *Perera v. The University Grants Commission*:⁴⁰

Equality of Opportunity is only an instance of the application of the general rule of equality laid down in Article 12. Equal protection of the law postulates an equal protection of all alike in the same situation and like circumstances. There should be no discrimination among equals, either in the privileges conferred or in the liabilities imposed.

Justice Bandaranayake also quoted Justice Amerasinghe in *Perera and Nine Others v. Monetary Board of the Central Bank of Sri Lanka and Twenty Two Others*:⁴¹

Selection is not a mere matter of fancy, whim or caprice. Distinctions must not be invidious or biased.... Persons who are selected should not be chosen on account of favouritism or partiality. ... The selected person must be fit and suitable and qualify for appointment...

³⁹ SC Application No 516/95, SC Minutes 19.2. 1997.

⁴⁰ FRD Vol I p 103.

⁴¹ (1994) 1 Sri LR 152 at 164.

*M.P. Wijesuriya v. The National Savings Bank and seven others*⁴² also involved equality of opportunity. The recommendations of an interview board had been rejected, and instead a second interview was held using a new marking scheme without any prior notice of this change being given to the petitioner. The Court, holding that the petitioner had been singled out for discriminatory and unequal treatment, stated yet again that it is imperative for all candidates at interviews to be afforded an equal opportunity to present their cases. One way to achieve this is to make known *in advance* (emphasis added) the criteria to be adopted and the schemes of marking, particularly when a significant change to such criteria is made. The Court also pointed out that while a board of interview generally lacks the authority to make appointments, yet its findings cannot be arbitrarily set aside.⁴³

*V.S. Marapana v. The Bank of Ceylon and eight others*⁴⁴ involved the non-extension of the petitioner's services on reaching the age of 55 years, for which no reasons were given. The usual practice had been for the Board of Directors to follow the recommendations of the Personnel Department with regard to extensions. In the petitioner's case, however, the Board had departed from the established practice without assigning any reasons for doing so.

The Court said that discretionary power must be exercised in a fair and reasonable manner. This means that there is a duty to observe the rudiments of natural justice in the exercise of administrative functions. The Court stated that there is no doubt

⁴² SC Application No 142/95, SC Minutes 31.1. 1997.

⁴³ See also *A.K. Norman v. The Coconut Research Board and Nine Others*, SC Application No 610/95 (FR), SC Minutes 30.6. 1997 for a similar view.

⁴⁴ SC Application No 749/96 (FR), SC Minutes 28.8. 1997.

that the petitioner had a legitimate expectation that her application for an extension of service would be considered fairly and on its merits. The Court concluded that the Board of Directors had acted in an arbitrary, capricious, unreasonable and unfair manner.

*In C. Wickrematunga v. The Minister of Irrigation, Power and Energy and three others,*⁴⁵ the question arose as to whether the alleged violation amounted to "executive or administrative action" as envisaged under Article 126 of the Constitution. In this case, the petitioner alleged that the sudden termination of a dealership agreement, without any warning or notice or any reasons being assigned, constituted discrimination on grounds of political opinion.

Regarding whether action by the Ceylon Petroleum Corporation constituted executive or administrative action within the meaning of Article 126, the Court said that matters concerning the sale and distribution of petroleum are regarded as issues of national importance, and that the deep and pervasive control exercised by the State indicates that the Corporation is a State agency or instrumentality.

The Court concluded that the second respondent had violated the petitioner's fundamental rights guaranteed under Articles 12(2) and 14(1)(g) of the Constitution. It stated that an act which is unconstitutional is invalid and of no legal effect; it is devoid of legal force, amounts to nothing and is of no efficacy.

*In SmithKline Beecham Biologicals S.A. and SmithKline Beecham Mackwoods Ltd. v. State Pharmaceutical Corporation of Sri Lanka and seven others,*⁴⁶ the petitioners

⁴⁵ SC Application No 228/96 (FR), SC Minutes 17.12. 1997.

⁴⁶ SC Application No 89/97 (FR), SC Minutes 20.5. 1997.

argued that they had been denied equality before the law when they failed to win a tender to supply rubella vaccine. In deciding this case, the Court examined the "Guidelines on Government Tender Procedure" which, according to the Preface, was designed to keep the process fully transparent and honest. The Secretary to the Ministry in question did not comply fully with these Guidelines in awarding the contract for rubella vaccine. Justice Amerasinghe stated that Article 12(1) provides for equality before the law and for the equal protection of the law and that "law" includes regulations, rules, directions, instructions, guidelines and schemes that are designed to guide public authorities. This case involved the non-adherence to the "Guidelines on Government Tender Procedure." Part I of the Guidelines contains provisions on the objectives of the tender process. These include providing equal opportunity for interested parties and persons to participate and compete on identical terms and conditions, and ensuring transparency and uniformity of the evaluation process. The Court said that there must be scrupulous adherence to the procedure laid down by the government. Refuting the contention of the respondents that the Tender Board has a clear discretion, the Court stated that although it does have very wide powers, these powers are not uncontrolled and unrestricted. It does not have the power to accept a tender that fails to conform to the specifications and conditions of the tender document.

In this case, the first respondent had invited offers worldwide for the supply of rubella vaccine. The Technical Evaluation Committee considered the petitioner company's bid to be acceptable on the following grounds: the company was registered; it was a previous supplier; and there were no past complaints against it.

The Cabinet Appointed Tender Board decided, after considering the recommendations of the Technical Evaluation Committee, to

award the tender to the petitioner company. Other parties that had put in lower bids were not eligible as they were not registered. Subsequently, however, another company which submitted a considerably lower bid - Biocine -- was registered. The Tender Board then reversed its earlier decision and offered the award to Biocine on the basis that it was the lowest responsive offer.

The petitioners then filed action alleging infringement of their fundamental rights guaranteed under Article 12, and leave to proceed was granted in respect of Article 12(1). Counsel for the respondents contended that the acts in question did not constitute administrative or executive action as they related to contractual rights of parties. In refuting this contention, Justice Amerasinghe stated that where there is a breach of contract and a breach of Article 12(1) brought about by the same circumstances, it cannot be correctly stated that only one remedy could be availed of and the other is thus extinguished.

For a tender bid to be successful, the product had to be registered under the Cosmetic Devices and Drugs Act. However, counsel for the respondents argued that registration was not mandatory. Refuting this claim the Court said:

Considering the broad policy of the condition and the critical and substantial nature of the mischief to which it is directed, namely, assurance of the quality of the product, I am of the view that the requirement of registration was mandatory and could not be treated as a mere formality or technicality, or minor detail that could have been waived or ignored either by the Technical Evaluation Committee or by the Tender Board. The necessary consequence of a failure to comply

with the condition relating to registration is the rejection of the tender.

The Court also stressed that if the Tender Board recommends a deviation of a non-critical nature from the tender conditions, the reasons for such deviation should be recorded clearly.

The Court pointed out that "there must be scrupulous adherence to procedures laid down by the Government"⁴⁷ in relation to procurement. The Guidelines require the process to be transparent and uniform, with all interested parties being given an equal opportunity to participate and compete on identical terms. The Court stated that while the Tender Board has very wide powers under the Financial Regulations, these powers are not uncontrolled and unrestricted.

The Court also stated that while Biocine's was the lowest offer, it could not be considered the lowest responsive offer as Biocine's product had not been registered by the date the tender closed. Thus, Biocine had not been qualified to tender, and the petitioner company was the only body which had made a responsive bid conforming with the tender document at the relevant date.

The Court, therefore, held that the decision to award the tender to Biocine violated Article 12(1) of the Constitution and thus is of no force or avail in law.

2.3 Cases under Article 14

*P.D. Saranapala v. Senior Superintendent of Police and six others*⁴⁸ concerned the refusal to grant permission to the Nava

⁴⁷ *Ibid* at p 17.

⁴⁸ SC Application No 470/96 (FR), SC Minutes 17.7. 1997.

Sama Samaja Party (NSSP) to hold a May Day procession. Leave to proceed was granted in relation to alleged violations of Articles 12(1), 12(2), 14(1)(a)⁴⁹ and 14(1)(b).⁵⁰ The fourth respondent - Deputy Inspector General of Police, Police Headquarters - had informed the Secretary of the NSSP that for security reasons, processions within the city of Colombo had been prohibited and, therefore, permission which had earlier been granted was now revoked.

Counsel for the respondents contended that there is no fundamental right to use a public highway for a demonstration and seemed to assume that section 77(3) of the Police Ordinance gives unlimited powers to prohibit processions. The Court, however, stressed that the Constitution is the Supreme Law of the country and that powers granted under the Police Ordinance are subject to the provisions of the Constitution. With regard to freedom of expression, Justice Amerasinghe stated:

While I do not accept the view that an apparently limitless variety of conduct can be labeled [sic] "speech" whenever the person engaging in the conduct intends thereby to express an idea, I do, however, accept the fact that marching, parading and picketing on the streets and holding meetings in parks and other public places may constitute methods of expression entitled to the protection of the freedoms declared and recognised in Article 14(1)(a) and (b) of the Constitution. Streets and parks and public places are held in trust for the use of the public and have been customarily used for the purposes of assembly,

⁴⁹ Article 14(1)(a) protects freedom of expression and speech.

⁵⁰ Article 14(1)(b) protects the right to peaceful assembly.

communicating thoughts between citizens and discussing public questions. Such use of the streets, parks and public places is part of the privileges, immunities, rights and liberties of citizens.

The Court further stated that May Day rallies and meetings, a customary practice in Sri Lanka, are protected by Articles 14(1)(a) and (b) of the Constitution.

The Court stated that the power of the government to impose restrictions on the operation of the rights recognised in Article 14 is conferred by Article 15(7), which makes it clear that freedom of expression is relative: "The privileges of a citizen to use the streets, parks and public places for communication of views on public questions may be regulated by the government in certain circumstances."

Thus, the Court held that *ex facie*, the prohibition on the NSSP procession was to further an important interest (i.e. interests of national security and public order) but that this interest must be unrelated to the suppression of free expression. The Court stated that Section 77(3) of the Police Ordinance empowers an officer not below the rank of Assistant Superintendent to prohibit processions if he considers it necessary to do so in order to preserve public order. However, such measures -- which may be justified even if they limit the freedoms guaranteed by Articles 14(1)(a) and (b) -- should be unrelated to the suppression of freedom of expression and should be no more than is essential to maintain public order.

The Court rejected the respondent's argument that the prohibition had been imposed for security reasons: a joint meeting of the Lanka Sama Samaja Party (LSSP) and the People's Alliance

(PA) had been allowed in the city of Colombo. It further stated that the burden of proving that the restriction was in the interest of public order lay on the respondents. The Court thus concluded that the prohibition was intended to suppress the freedom of expression of members of the NSSP, of which the petitioner was a politbureau member.

The Court, therefore, held that the petitioner's right of peaceful assembly declared by Article 14(1)(b), his freedom of expression and speech declared by Article 14(1)(a), his fundamental right to equality before the law and equal protection of the law declared by Article 12(1) and his right not be discriminated against on grounds of political opinion declared by Article 12(2) were violated by the respondents.

3. Relief

Various forms of relief are granted by the Court, the most frequently-made award being a declaration of illegality and compensation. Compensation is payable by the State and, sometimes, the individual respondents. The Court has also required the respondents to take such remedial measures as holding fresh interviews where the interview process was not transparent, notifying the selection criteria to the applicants, particularly where such criteria had been changed, and reinstating the petitioner where his transfer or dismissal had been illegal.

*A. Gunawardena and another v. Officer in Charge, Police Station, Elpitiya and four others*⁵¹ involved the arrest of the petitioners on the ground that they possessed anti-government literature. They alleged violations of Articles 12(2), 13(1) and 14(1)(a). The Court, referring to its earlier decisions, laid down

⁵¹ SC Application No 519/95, SC Minutes 13.2 1997.

certain criteria that must be taken into consideration when computing compensation:

- the importance of freedom of speech;
- the right to criticise governments and political parties;
- the importance of dissent;
- the degree of intrusiveness and undue haste which characterised the infringements;
- the directions given by the Court to the IGP - the fourth respondent in this case - to instruct his officers to respect those rights and freedoms;
- the amount of compensation must not be restricted to the proprietary loss or damage caused.

The state was directed to pay Rs 60,000 to each petitioner and the first and second respondents were directed personally to pay Rs 5,000 to each petitioner.

In *N.K.Kalupahana, Lawyers for Human Rights*⁵² the Court stated that as the victim had been tortured over an extended period with severe consequences, and the first respondent had attempted to deter the petitioner from seeking legal redress an award of Rs 200,000 as compensation was not excessive. Of this sum, the first respondent was ordered personally to pay Rs 50,000. The Court also directed the second respondent - the IGP - to ensure that neither the petitioner nor members of her family are subjected to any harassment by the first respondent and the Hungama Police.

4. Conclusions and Recommendations

The Court has generated much important jurisprudence in relation to the interpretation and application of fundamental rights in Sri

⁵² *Supra* n 20.

Lanka, particularly under Article 12. These principles should be made available in an accessible form to all state agencies which are responsible for protecting fundamental rights in order to reduce the number of violations of Article 12.

As aforementioned, the number of petitions filed under Article 12 has increased significantly and outnumbers the petitions filed under Articles 11 and 13. A significant number of these petitions were also dismissed. While on the one hand, this indicates that people do not hesitate to resort to courts in the event of a possible violation of their fundamental rights, it also means that the state agencies are failing to apply the existing jurisprudence to improve their work, on the other. The key principles articulated in the existing jurisprudence generated by the Court need to be extracted and made widely available to all State agencies. These principles should also be incorporated into training programmes and personnel policies wherever appropriate, in order to integrate them into the working practices of all State agencies, for the benefit of all.

V

Freedom of Expression and Media Freedom

*Lakshman Gunesekera**

1. Introduction

The task of assessing the status of the right to free expression in Sri Lanka must include an examination of how the system of mass communication functions in the country as well as the legal framework protecting this right and the performance of the State in upholding it.

In Sri Lanka, the "modernisation" process has included the rapid transformation of systems of social communication from

* Co-ordinator, Equal Opportunity Programme, Law & Society Trust and Journalist. The writer is grateful to I. K. Zanofer, Research Assistant, Law & Society Trust, for his research assistance.

micro-level, community-based systems of communication to the highly centralised and controlled system of "mass" communication. This transformation has been taking place over the past century and today the traditional communication system is now largely a substratum of a dominant mass communication media structure (although the traditional communication culture has, no doubt, influenced modern forms of communication).

The formation of the modern nation-state in Sri Lanka has also contributed to the establishment of a centralised system of social communication. The mass communication media plays a role in creating and sustaining various social groupings and community identities that complement nationhood, including a "national" identity. The country's mass media thus carries the major onus of providing the means of social communication.

In Sri Lanka, this crucial role of the mass media takes on a particular poignancy in the context of a raging civil war. The mass communication discourse has played a role in defining the rival community identities (such as "Sinhala-Buddhist" and "Tamil") and, further, the mass media organisations - the newspapers and broadcasting organisations - contribute their own biases and perspectives in the process of keeping the public informed of opinions, events and trends.

At the same time, individuals and media organisations have to function within both a legal framework enforced by the State and a political environment created by the government, other political parties and actors. In Sri Lanka, these actors include the armed secessionist movement, the LTTE, which currently controls parts of Sri Lankan territory.

This brief survey will, therefore, follow two principal themes : firstly, the legal framework providing for the right to freedom of

expression in the country and the corollary performance of the State in actively upholding (or restricting) this freedom in 1997; and, secondly, the way in which the mass communication media has facilitated the social need for free expression and, has represented aspects of social life and events.

2. Legal Framework

The 1978 Constitution declares in Article 14 (1) (a) that every person is entitled to "the freedom of speech and expression including publication". Article 15(2), however, imposes restrictions on this right "as 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". A further, more repressive, prohibition is found in the Sixth Amendment to the Constitution which imposes a total ban on the advocacy of secession from the Sri Lankan state, even by peaceful means.

There are also several general laws which impose restrictions on, and in other ways define and demarcate, freedom of expression in actual practice. These include:

- ***Section 120 of the Penal Code***, which provides for a broad definition of "sedition" as an offence and could be interpreted in a very loose manner for the purpose of suppressing the expression of views by those with governmental or bureaucratic power;
- ***Section 479 of the Penal Code***, which makes "unfair" character assassination a criminal offence;
- ***Sri Lanka Press Council Law***, which empowers the Press Council (appointed by the government) to regulate publication of Cabinet (government) decision as well as

"profane" or "indecent" material (defined as likely to deprave or corrupt public morality);

- ***Public Performance Ordinance (1912)***, which regulates public performances and carnivals under the supervision of the Ministry of Defence; thus all dramas, films, video productions, songs, etc, must be passed by the Public Performances Board (under that Ministry) prior to public performance or display;
- ***Public Security Ordinance (1947)***, which provides the President with unlimited powers to regulate any activity, including by imposing censorship of the news media and by seizing assets of those deemed undermining public security and order;
- ***Prevention of Terrorism Act (1981)***, which prohibits the printing, publishing and distribution of certain publications without the written approval of the competent authority.

Furthermore, the Business Acquisition Act of 1973, enacted to nationalise private enterprises, was used in the past to nationalise media institutions perceived as hostile (or potentially hostile) to the government. The Public Security Ordinance was also used in the past to ban newspapers and journals. These two laws, in particular, and the manner in which they have been used, create an insecure and intimidating environment in which the media must operate.

3. Major Legal Issues in 1997

The year was noteworthy for contradictory indications of the government's commitment to media freedom. On the one hand, the government moved to liberalise a part of the legal framework

governing the media, while on the other, it also attempted to introduce greater controls over expanding new sectors of the media industry. The liberalisation was effected by repealing a much-criticised statute giving Parliament powers to punish offenders found violating parliamentary privilege. Earlier in the year, however, the Supreme Court had blocked the passage of a new Broadcasting Authority Bill on the grounds that it was "unconstitutional" after a number of media professional groups and television and radio organisations had filed petitions challenging its legality.

Meanwhile, the government continued to slap charges of "criminal defamation" against journals in 1997 with an even greater zeal, despite growing expressions of public disapproval of the use of these provisions.

3.1 Revision of Parliamentary Powers and Privileges Act

One very positive initiative by the government in 1997 was to amend the Parliamentary Special Privileges Act of 1978, thereby abolishing the power of the Parliament to punish persons found guilty of breach of privilege. This Act, passed in 1978 replaced the Parliamentary Privileges Act of 1953, giving Parliament punitive power in cases of alleged breaches of parliamentary privilege and did not provide for appeal. This law had long served to restrain the news media and media commentators in the reporting of and commentary on the work of the country's premier legislature. Its repeal is a welcome step towards greater freedom of expression in Sri Lanka.

While not many media people have actually been punished under these provisions (only two cases so far), there have been numerous attempts or threats by members of parliament to prosecute specific journals or media personnel on issues of

parliamentary privilege. The exclusive punitive powers exercised by Parliament under this Act were a considerable constraint on freedom of speech in relation to the activities of the national legislature and thereby an obstacle to proper democratic practice.

In September 1997, on the initiative of the Minister for Media, Posts and Telecommunications, Mangala Samaraweera, Parliament repealed the 1978 Act to hand back to the Supreme Court certain powers to try persons violating the Act and to fine or imprison those found guilty. The Supreme Court may impose up to two years' rigorous imprisonment and fines of up to Rs.5,000 for breach of privilege.

3.2 Sri Lanka Broadcasting Authority Bill

In April 1997 the government very suddenly tabled in Parliament a Bill to establish a new broadcasting authority which would have extended considerable governmental control over the broadcasting media. Media and human rights groups had already lobbied for a new broadcasting authority to be created, but they had desired a body that would protect media rights and freedoms and that would be independent of government. This, too, had been the recommendation of the committee appointed by the previous Minister of Media to recommend legal reforms necessary for the protection of freedom of expression. The content of the Bill, as well as the manner in which the government introduced it, provoked considerable controversy and therefore merit close scrutiny.

The Sri Lanka Broadcasting Authority (SLBA) Bill was tabled quite unexpectedly, just before the long New Year holiday when most workplaces are closed. The Bill was tabled without any public announcement, and its timing meant that there was every chance that it would remain unnoticed over the holiday period

and that it would pass through Parliament unchallenged. Under the Constitution, the constitutionality of proposed legislation can be challenged before the Supreme Court, but only "within one week of the Bill being placed on the Order Paper of the Parliament".¹ Had it not been for the extra vigilance of human rights activists, this very authoritarian piece of legislation could well have become law.

The Free Media Movement (FMM) led other human rights groups in a strong protest campaign against this "draconian"² Bill. Notwithstanding the apparently secretive procedure used by the Government to table the Bill and, the short time within which they could act to challenge it, the FMM, the Editors' Guild, other media professionals' organisations and several private radio and television companies responded rapidly and filed a total of 15 petitions in the Supreme Court challenging the constitutionality of the Bill. They objected to excessive political interference in the proposed Authority, the severe controls which would be imposed on the freedom of operation of the industry and an unfair institutional bias in favour of the cinema industry as against the electronic media.³

The Bill provided for the proposed Authority to be directly appointed by the Minister responsible for the media and also empowered the Minister to issue guidelines for operation by licensees. The Authority would thus not have been independent of the government. The Bill contained no safeguards to ensure that non-partisan and competent people would be appointed to the Authority. Further, it gave the Minister powers to dictate policy and programme content in a manner that would have

¹ Article 121(1).

² Free Media Movement statement in the Sunday Observer 14 April 1997.

³ See also Civil Rights Movement statement No. E 01/4/97 "Shock and dismay..." of 25 April 1997.

rendered the electronic media industry completely vulnerable to the whims and fancies of politicians and any partisan interests they might represent. Such interference in the operations of media ventures would not have been conducive to the healthy growth of the industry and could have narrowed the parameters of expression through the radio and television media.

The Supreme Court ruling against the entire Bill is a landmark in the history of the modern mass media industry in Sri Lanka and provides a further affirmation by the country's judiciary of its independent stance on fundamental rights. The judgment by Chief Justice G.P.S. de Silva, and Justices A.R.B. Amerasinghe and P. Ramanathan, was also important for its observations on the proper role of the mass media in society and the nature of the regulatory role the State may play in relation to the media.

In its judgment, the Supreme Court observed in relation to the need for regulation that:

(a) Having regard to the limited availability of frequencies, and taking account of the fact that only a limited number of persons can be permitted to use the frequencies, it is essential that there should be a grip on the dynamic aspects of broadcasting to prevent monopolistic domination of the field either by the Government or by a few, if the competing interests of the various sections of the public are to be adequately served. If the fundamental rights of freedom of thought and expression are to be fostered, there must be an adequate coverage of public issues and ample play for the free and fair competition of opposing views.⁴

⁴ See full text of Supreme Court judgment in *Fortnightly Review*, Vol VII, Issue No 115 (Law & Society Trust, Colombo, May 1997).

It further noted that:

(b) While we do not accept the view that licensing must be confined to regulating the technical aspects of broadcasting, and do concede that, in the matter of licensing the State is permitted a margin of appreciation, we are of the view that the principle of pluralism, of which the State is the ultimate guarantor must be safeguarded in order to ensure that freedom of thought and expression may not only survive but thrive and flourish vigorously.⁵

With regard to the role of the mass media in Sri Lankan society, the Court observed:

(c) Without free political discussion, no public education, so essential for the proper functioning of the process of popular government is possible.

(d) It is of paramount importance that programmes should be balanced so that viewers may freely form their own opinions.

(e) ...although the electronic media has a critically important role to play in the formation of political opinion, its role in satisfying other public needs, including intellectual, spiritual and emotional needs, ought not to be ignored or underrated."⁶

⁵ *Ibid.*

⁶ *Ibid.*

In relation to the role of the media, also relevant is a part of the quotation (a) given above, which argues that the media must "adequately" serve "the competing interests of the various sections of the public." In the writer's view, this is the most significant general observation of the Court in relation to the role of the Sri Lankan media. It is, firstly, a recognition (if only implicit) of the representational role of the system of the mass communication system. This is something which is often ignored or de-emphasised by analysts of the media and advocates of communicational rights, most of whom tend largely to focus on the media's ostensible primary role of providing "information" to the "public". Secondly, it is an acknowledgement by the Supreme Court that in Sri Lanka there are many different sections within the "public" (i.e. communities, social and political groups) which may have "competing interests" and that these interests must be represented by and through the media. In a situation in which at least two kinds of competing interest have reached the level of violent political conflict - i.e. the ethnic conflict and the class conflict reflected in the JVP insurgencies - can anyone doubt the importance of the media's role in this regard? This is emphasised by the Court in another part of quotation (a) which declares that "there must be an adequate coverage of public issues and ample play for the free and fair competition of opposing views."

The Supreme Court's unequivocal ruling on the Bill reassured many human rights observers who had been concerned about the capacity of the judiciary to remain relatively independent of the government and direct political influences.

The manner in which the SLBA Bill was introduced in Parliament also calls for comment. In March 1997, when the government had hinted that it was considering the setting up of a new broadcasting authority, members of the FMM had obtained a

public commitment from the Media Minister at a weekly Cabinet news briefing that any proposals for such an institution would be published as a White Paper to enable public discussion prior to any legislation being tabled. In violation of such a commitment and despite the awareness of a keen interest among concerned groups, the government tabled the SLBA Bill in Parliament without any warning at all. Indeed, the timing - just before the lengthy New Year holidays in April - made it all the more difficult for those who wanted to critically examine the bill or contest the bill in the Supreme Court to do so within the constitutionally stipulated seven-day period.

The authoritarian provisions contained in the Bill were not what had been expected of a government that had been elected to power on the promise of democratisation. Worse still, the way in which the Bill had been introduced gave the impression that the government was covertly attempting to smuggle through legislation which it knew would be totally unacceptable to the concerned groups and that it was trying to ensure insufficient time for such groups to react and file challenges in the Supreme Court. Such impressions of governmental intent, if correct, did little to preserve the democratic credentials of the People's Alliance.

However, the subsequent promise of a Parliamentary Select Committee to address various legal aspects of mass media regulation, including a regulatory body for the electronic media, went some way to reassure the public and human rights observers.⁷ The Free Media Movement, in collaboration with

⁷ A Select Committee was appointed in early 1998 and began receiving submissions from the public.

the Centre for Policy Alternatives (CPA), later placed before the government and the public its own alternative model for an independent broadcasting authority.

3.3 Criminal defamation action against the media

Nineteen ninety seven was also notable for the large number of criminal defamation cases brought against media organisations. Some cases filed in earlier years were still pending, while others were completed or closed; yet others were filed during the course of the year. The number of criminal defamation cases heard against the print media in 1997 marked a significant increase over recent years.

Five major "national" newspapers⁸ (of a total of less than twenty) - all of them known critics of the incumbent government - were subjected to legal action against them in 1997 on charges of criminal defamation. One mass circulation weekly, the *Ravaya*, which is reputed for usually accurate investigative journalism and exposures of corruption and irregularities, faced no less than four criminal defamation cases against it in the year under review. The *Ravaya*, the sole major newspaper not owned by big business, is famous for its brave critical journalism during the period of violent state repression during the previous government (especially in the years 1989-92), when the big business-owned media remained virtually silent on the massive violations of human rights. But while the *Ravaya*, much poorer in resources, battled several criminal defamation law suits simultaneously, it was the *Sunday Times* (part of the giant Wijaya

⁸ The newspapers were the Sinhala language *Ravaya* and *Lakbima* and the English language *Sunday Times*, *The Island* and *Sunday Leader*.

Publications group) which drew much greater public attention over the case it faced for the alleged criminal defamation of the President of the Republic.

In this case, the State filed action in the Colombo High Court against the *Sunday Times* Editor, Sinha T.M. Ratnatunge, charging him with criminally defaming the President in a gossip column. Mr. Ratnatunge, a highly respected journalist, was charged on two counts under Section 479 of the Penal Code and the Press Council Law. High Court Judge Upali de Z. Gunawardene delivered the judgment in July 1997 after a trial lasting 15 months and including 75 days of hearings. In the 328-page judgment, the accused was convicted on both counts and sentenced to relatively light fines and suspended prison terms. He appealed against the conviction.

Interestingly, while the general public seemed concerned about whether or not the published article actually was defamatory, the human rights and professional media communities concentrated more on the desirability of using criminal defamation law to deal with such matters. However, the ethical questions concerning media gossip and the private lives of public officials took a back seat after it was acknowledged in court that the references to the President in the article concerned were not factual. The primary judicial issue then became whether or not the editor should be held directly culpable.

The continuing expansion of the country's media industry makes competition for "hot", marketable news more intense. In this light, it is unfortunate that the moral, ethical and human rights issues involved in media coverage of the private lives of public

officials were not more widely discussed by the public and the news media in the aftermath of the judgment.

The main issue debated in the media was the application of the criminal defamation law itself. Human rights groups have long criticised the existence of the criminal defamation laws in its present form (i.e. Section 479 of the Penal Code), as it provides an easy means for the State to target newspapers and other media critical of the government. Some groups have, in the past few years, called for the complete abolition of the existing criminal defamation laws. It is argued that defamation need not be dealt with as a criminal offence since there is, anyway, adequate legal provision for civil action. This view anticipates that the State is liable to use the criminal defamation law to punish and intimidate media organs regarded as hostile. Whatever the intentions of the government may be, there is no doubt that the frequent use of the criminal defamation law against media organs that approach matters of governance critically will only serve to intimidate and constrain the media in its vital watchdog role.

3.4 Other legal constraints

When the government moved to repeal provisions of the Parliamentary Privileges Act in September 1997, it did not heed the advice of human rights and media rights groups, nor the recommendations of one of its own special committees, to take legislative action to revise several other statutes - including the law on criminal defamation - which also constrain freedom of information and expression. As the R.K.W. Goonesekere Committee on Laws on Media Freedom and Freedom of Expression pointed out in its report, three other amendments to the Parliamentary Privileges Act should also be repealed to

remove further undue impediments to free expression.⁹ The Goonesekere Committee recommended that:

- the 1987 amendment, which provided for enhanced punishments to be imposed by Parliament, should be repealed by necessary consequence of the repeal of the 1978 amendment;
- the 1980 amendment, which created the new offence of wilfully publishing words or statements made in Parliament after the Speaker has ordered them to be expunged from the Hansard, should be repealed since this provision denies the public the knowledge of how their representatives conduct themselves in Parliament; and,
- the 1984 amendment, which permits the publication of allegations against judges made in Parliament that would be otherwise in contempt of court, should be repealed in order to protect the independence of the judiciary.

Despite the Committee's recommendations, and despite the promises made by the government to liberalise the media environment, these provisions remained in force throughout 1997. Indeed, during 1997 the government appeared to ignore the Report and recommendations of the R.K.W. Goonesekere Committee which it had appointed to further the purpose of democratic reform.

Meanwhile, the Sixth Amendment to the Constitution, which bans the advocacy of secession from the Sri Lankan state, continues to be a major impediment to the freedom of expression that is enshrined at the level of the State's basic law.

⁹ R.K.W. Goonesekere Committee Report on Laws on Media Freedom and Freedom of Expression, Page 58. This Report has not yet been published nor made available to the public.

The failure of the People's Alliance Government to review these and other laws and regulations is contrary to its election pledge to strengthen democracy, and unduly constrains the dynamism of the Sri Lankan mass communication media and free expression in general.

4. Political Pressures and Violence

In the first quarter of 1997 there were two incidents in which television crews were physically attacked and intimidated while working in the field. Meanwhile, one television station, Telshan Network Limited (TNL), was first subjected to action under the Prevention of Terrorism Act (PTA) against its editorial staff, including the arbitrary detention of a senior executive, and subsequently investigated by a committee of inquiry under the Media Ministry for ostensibly contravening the terms of its operating licence. These developments were punctuated by intense protest campaigns by media personnel and human rights groups demanding a halt to what was seen as deliberate harassment and intimidation of media people by government-linked politicians and by the State itself. Fortunately, there was no recurrence of such incidents during the rest of the year.

4.1 ITN crew assaulted

On 1 January 1997, a television crew of the State-owned Independent Television Network (ITN) was severely beaten by thugs believed to be linked to a government politician. An expensive TV camera operated by the crew was also damaged in the incident. The attack occurred near Gampaha while the crew were video recording an outbreak of mob violence in which a lorry involved in a fatal road accident was set on fire. The TV personnel escaped with minor injuries. Their assailants were identified as civilian supporters and a security officer of

a government politician of the area. The police did not appear to pursue investigations with the vigour appropriate to such an incident and, although various governmental authorities gave public assurances of "action" being taken, there is no record of any formal arrests or charges being filed against any suspects.

4.2 TNL crew assaulted

On 25 January 1997, a TV crew of the privately-owned Telshan Network Limited¹⁰ was assaulted, allegedly by supporters and security officers in the bodyguard of a government minister. The crew had arrived to video record the national convention of the Sri Lanka Freedom Party, the main element of the governing People's Alliance coalition, which was being held at the Premadasa Stadium, in Colombo. While no injuries were reported, the crew were manhandled and forcibly sent out of the stadium and prevented from carrying out their TV news coverage. Again, professional groups protested and there was criticism in the media, but despite official assurances of an investigation, there is no record of any persons being held responsible.

4.3 TNL News Manager detained under the PTA

The two incidents of physical violence were somewhat overshadowed in the media by the detention and charging under the PTA of a senior TV executive with powerful political connections. The fact that Ishini Wickremesinghe Perera, news manager of TNL, was a young woman and, more importantly for a society which places great significance on kinship, the daughter of the TNL chairman and the niece of former Prime Minister and current Opposition Leader, Ranil Wickremesinghe,

¹⁰ TNL is principally owned by Shan Wickremesinghe, brother of the Leader of the Opposition and United National Party.

prompted enormous media attention for her case as well as major political attention.

The case began in December 1996 when police and Criminal Investigation Department (CID) officers raided the offices of TNL, questioned (without any prior warning) a number of its editorial staff and took Ms. Perera into custody. The charge was that TNL had incorrectly reported a military incident in the eastern war zone. Ms. Perera was taken to the CID headquarters in Colombo and questioned for several hours. After considerable efforts by her lawyers, she was released on bail. While Ms. Perera's court case was proceeding, however, the Media Ministry initiated its own parallel inquiry into the matter by appointing a one-man committee of inquiry comprising a retired judge (G.L.M. de Silva). The committee was mandated to examine whether TNL was functioning in accordance with the terms and conditions of its licence to operate. This inquiry was strongly contested by the lawyers of TNL who questioned the legality of such an inquiry when the general conditions of the licence did not provide for such a procedure. The inquiry was ended following a writ application filed in the Court of Appeal by TNL challenging the validity of the inquiry committee.

In subsequent judicial hearings, the CID finally unilaterally withdrew the case against Ms. Perera. However, after the defence insisted that valid reasons for withdrawing the case should have been given, the Colombo Fort Magistrate strongly criticised the police for having failed to do so. In addition, in his order discharging Ms. Perera in June 1997, the Magistrate remarked that it was "highly irregular"¹¹ for an administrative inquiry to be conducted while the case was still before the

¹¹ Quoted in Daily News of 12 Jun 1997 in report headlined "CID failed to act....."

court. The Magistrate concluded that "...this action has been instituted purely with malice".¹²

Ms. Perera's case, although not involving any actual violence and thuggery, was nevertheless a serious abuse. It involved the arbitrary use of a draconian counter-terrorism law against a media organisation. The arbitrary nature of the case was evident from the facts that (a) her organisation had given no cause for suspicion of a link with "terrorism" of any kind; (b) the State had taken immediate legal action without first asking for a corrective statement to be broadcast and, (c) other media organisations (including State-owned ones) which had carried similar news reports on the same incident were not treated in the same manner.

This incident also raised more questions about the way the State managed the release of information regarding the war. Many media commentators felt that the State, and in particular the Ministry of Defence was being too secretive about information on the war, and that this enhanced the risk of incorrect reporting of the facts. Indeed, considerable constraints are placed on access to information about the conflict, and on access to the conflict areas themselves for independent reporting. Another aspect of this issue, however, relates to the dynamic of news selection by the media, which is examined in the next section.

5. Mass Media as the Medium of Expression

As pointed out in the introduction to this chapter, the country's mass media functions as the dominant mode of social communication in our society today. Indeed, even as it functions as an industry (with its products and markets, competition and

¹² *Ibid.*

profit-making), the Sri Lankan media actively presents itself as being the main provider of "news" and the principal medium of "expression". In so far as the mass media are recognised as the dominant means of social communication, there is some validity to this claim.

As pointed out earlier in this chapter, less acknowledged is the representational role played by the media. As analysis has shown in other parts of the world, it is in this representational dynamic that the most intimate link is formed between the media and its audience; that is, between the various media organisations (i.e. newspapers, magazines, radio or TV stations) and their specific audiences which are also their markets. It is this interaction between audience and media that enables the media to be influenced with regard to the informational as well as representational needs of the audiences.

At any given moment, it is the existing media structure which is the principal facility for such information and representation. That is because not all groups and individuals in society have the skills, the resources or the time to set up their own media organs. As highlighted in section 3.2 of this chapter, the Supreme Court has recognised the vital responsibility of the media to "adequately" serve the "interests of various sections of the public." The only way of "adequately" serving such interests is for the existing media to be continually sensitised as to the communicational needs of the various sections of society.

Just as the state and other political actors may be influenced by an analysis of the status of human rights, so can the media. This chapter on the "Freedom of Expression and Media Freedom" cannot be simply an assessment of the rights of media organisations in relation to the State and Constitution. It must also assess the ability of individuals and collectivities to express

themselves both individually and through the existing media structure. Hence, it needs to examine the extent to which the media actually enables expression. However, as there has been little in-depth and consistent study of the mass media in Sri Lanka, there is little information for definitive conclusions on this issue.

Such an analysis would have to assess the role of the media in adequately representing the needs, aspirations, claims, postures, ideas and demands of individuals as well as numerous social groups - such as youth, men, women, ethnic groups, sub-cultures, castes and socio-economic classes. It would have to judge whether society (both individuals and social groups) are happy with the way they are represented by the media.

5.1 Media and the ethnic conflict

The TNL case highlights the contest over war information between the State and the mass media. What is less readily acknowledged by the mass media is the way they systematically **select** information as being newsworthy and how this is conditioned by the fact that the Sri Lankan mass media has not just one but three major and exclusive mass audiences based on language. Within each language group, secondary divisions are based on social class and gender. For the mass media industry, information is only the raw material from which is selected and packaged a marketable product called "news" and this selection and packaging is done according to each media organisation's marketing strategy as well as its ideological perspectives.

At least two studies of the Sri Lankan media¹³ have found that the media coverage of the ethnic conflict has various biases

¹³ Studies done by the Council for Communal Harmony through the Media (CCHM) in association with the Marga Institute, Colombo, and published in its Media Monitor and Maadhya Nireekshaka newsletters during 1980-84. Unfortunately this material is no longer traceable.

which could contribute to the continuation of conflicting perceptions among the various ethnic groups already locked in rivalry and war. To quote from the findings of the continuing media monitoring project of the CPA: "Sri Lankan newspapers of the three language media cater to sets of individuals who inhabit different worlds and espouse different worldviews."¹⁴ The CPA study's first "findings summary" concludes that:

*An analysis of reportage on the North-East war demonstrates that these differences are not accidental or innocent but, rather, a reflection of deep ideological divergences that need to be brought to the surface and addressed directly for any lasting solution to the ethnic crisis to be meaningful and just. Broadly speaking, the effect of the Sinhala-English coverage of the North and the East is to create and nurture a war mentality, despite occasional protestations to the contrary, and to instill the view that victory against the LTTE is imminent.*¹⁵

The CPA findings also indicate that Tamil newspapers tend to downplay the "success stories" of the Sri Lankan armed forces in the war.¹⁶

The CPA's study focuses on the newspapers. However, the same kind of biases could also be observed in the electronic media. For example, both the private and State-owned TV stations depict the conditions of refugees in Afghanistan, Rwanda

¹⁴ Media Monitor, Vol.1, Issue 1 (Centre for Policy Alternatives) (June 1997) p.6.

¹⁵ *Ibid*, p.6.

¹⁶ *Ibid*, p.10.

and other countries more regularly than they depict the more than one million refugees in Sri Lanka. The war is projected by the audio-visual media as a war prosecuted by the Sri Lankan armed forces alone, with the LTTE "enemy" remaining invisible except as the occasional pile of dead bodies.

5.2 Media and gender representation

Women's organisations have regularly criticised the manner in which women are represented or portrayed in the Sri Lankan media. On the one hand, there is the complaint that the life and concerns of women are largely excluded from the "news" provided by the media. On the other hand, where women are included they are presented in narrowly defined ways, and not necessarily in the manner they themselves would wish to be portrayed.

The media monitoring project of the CPA finds, for example, that the English language newspapers tend to compartmentalise women's concerns into the "Women's Page" or section. But even these specialised pages "notably lack an awareness about current issues that are affecting women's lives in Sri Lanka, other than the sporadic articles on sexual harassment of women ..."¹⁷

Many women's organisations are also very concerned that their efforts are given overtly hostile treatment by most sections of the media (of all three language streams), especially those organisations which strive to raise women's concerns as a basic issue of human rights. Newspapers appear to give more space to articles which portray women's organisations negatively than to coverage of the actual activities of such organisations.

¹⁷ *Ibid*, p.20.

"Exposures" of the ostensible "misdeeds" of women's groups are usually given greater prominence than media statements by women's groups or reports of their programmes.

6. More Responsive Mass Media

These very brief observations are intended to point to the accountability that is due from the mass media as a functioning industry in society which plays a vital social role. This chapter has only concentrated on two aspects - namely, gender and ethnic representation - but it is a pointer to the need for greater active responses by media audiences. Audiences are also markets and they have the ability to respond as consumers of media products. At the same time, the State will be required to tailor its regulatory mechanisms pertaining to the mass media to take into account the Supreme Court's call to ensure "the principle of pluralism".

The mass media industry is challenged by the Court to ensure that "there must be an adequate coverage of public issues and ample play for the free and fair competition of opposing views". This may entail a review of the current policies of media organisations, and the proper orientation of media personnel to fulfil this declared, as well as expected, role of mass media in Sri Lankan society.

VI

Equal Opportunity

*Dinusha Panditaratne**

1. Introduction

In Sri Lanka, as in other countries, the ability of individuals to enjoy their rights and pursue their aspirations may be impaired on the basis of their sex, ethnicity, disability, socio-economic position or other such status which may pertain to them. A person's right to education or career aims, for example, may be limited or even prevented because of sex, language, or any disability. The impairment of individual rights and aspirations on such grounds is commonly due to discrimination but it may also be due to the inherent disadvantages of a particular status.

The principle and practice of "equal opportunity" seeks to rectify or at least minimise these impairments. It aims to afford all

* Senior Researcher, Law & Society Trust.

individuals an equal chance to participate in public spheres, particularly those of education and employment, by eliminating the discrepancies which persons may experience in their treatment by public and private actors on the grounds of their race, sex or other status. The notion of equal opportunity is premised on the belief that an individual's opportunities should not be determined by status ascriptions that are irrelevant to his or her rights, capabilities, needs and ambitions.

Equal opportunity is primarily implemented by the three means listed below:

- The **prohibition and elimination of discrimination**, either direct or indirect, on grounds such as sex, ethnicity, disability or socio-economic position, and as prescribed in international instruments. Discrimination can result from actions, structures and stereotypical attitudes which inhibit or disadvantage persons on such grounds.
- The use of "**affirmative action**" measures, which seek to counter the effects of past discrimination against particular groups. Such measures might include the reservation of quotas for members of disadvantaged groups by employers or educational establishments, policies designed to encourage applications from members of such groups for educational or employment opportunities, or - at a more fundamental level - socio-economic programmes intended to empower members of these groups.
- The operation of "**enabling measures**" which address the inherent conditions or disadvantages of a particular status. Examples of enabling measures are the provision of wheelchair facilities in schools, universities, public buildings and workplaces, or the provision of public information in different languages.

Each of these three means of achieving equal opportunity can be implemented through constitutional or statutory legal provisions enforceable in courts of law. Alternatively, they can operate as policy directives which, for example, institutions, employers and retailers, could implement voluntarily.

The parameters of equal opportunity are still evolving in both international and local rights discourse and there is often confusion as to the meaning and scope of the term. Hence, this chapter will firstly identify common misconceptions in defining "equal opportunity". It will then outline the provisions for equal opportunity in international instruments before examining whether and how these precepts have been translated into Sri Lankan laws and conditions, including in developments during 1997. As this analysis will show, despite several relevant legal provisions and institutions which exist in Sri Lanka, equality of opportunity has yet to be effectively promoted.

This chapter can only provide an overview of the provisions, institutions and issues relating to this broad and complex subject, which has not been covered in any previous *Sri Lanka: State of Human Rights Report*. It focuses on the legal aspects, although socio-economic dimensions such as cultural awareness and government welfare policies also play a vital role in securing equality of opportunity. Discussion of equal opportunity for disabled persons is limited here, as the rights of the disabled are discussed in a separate chapter of this report.

2. Defining "Equal Opportunity"

Certain misconceptions about equal opportunity must be clarified at the outset. First, "equal opportunity" is not synonymous with "equality", in the sense akin to a socialist ideal of equalising individuals in all respects (such as in their educational levels,

wages and quality of life). By way of analogy, equal opportunity aims to provide a level playing field, to which all players have fair access and can compete on fair terms. It does not seek to endow all players with equal attributes. However, this liberal-minded framework does not preclude a recognition that some degree of economic and social parity is necessary for individuals to realise their rights and aspirations.¹

Nor is equal opportunity synonymous with equal rights for all persons before the law. On the contrary, it may be necessary for the State or other actors to provide "special measures"² and "affirmative action" for certain categories of individuals so that they can have the same opportunities as others. To the extent that equal opportunity is concerned with rights, it is primarily concerned with so-called "affirmative" human rights; that is, rights to some facility, such as education or health services³ - just as an "opportunity" is to some facility, good or service. Moreover, equal opportunity is not concerned only with rights but also with human aspirations and needs beyond those basic standards; including, for example, promotion in employment or access to public buildings.

¹ See Sandra Fredman, "Reversing Discrimination" (1997) 113 LQR 575, especially at pp. 579-580 and 585-587, for a discussion of arguments that equal opportunity is in fact contingent on some degree of economic and social parity, in qualification of a formal, liberal approach to non-discrimination.

² This term may be used to encompass both affirmative action and enabling measures.

³ See Giovanni Sartori, *Comparative Constitutional Engineering* (2nd ed.), (Macmillan, 1997) at p. 196 including n. 1 at p. 201. "Affirmative rights" are analogous to "social and economic rights," as distinct to "civil and political rights" - for an analysis of the distinction and its difficulties, see Rosalyn Higgins, *Problems and Process: International Law and How We Use It*, (Oxford University Press, 1995) at pp. 99-102.

Similarly, while equal opportunity is closely related to the principle of non-discrimination, it should not be equated with it. As indicated above, anti-discrimination laws and policies constitute only one, albeit important, arm of the strategic implementation of equal opportunity. Further, the principle of non-discrimination is a general maxim of procedural equality of all individuals. It calls for the equal treatment of all persons by the law or by a public or private actor in potentially any sphere of life. In contrast, non-discrimination as an arm of equal opportunity law and practice targets the elimination of discrimination specifically where it inhibits *opportunities* and particularly those of employment and education.

Rather than requiring procedural or "formal" equality in the way in which persons are treated, equal opportunity calls for a more substantive equality, which frequently requires the active intervention of the State or private actors through enabling measures and affirmative action. Procedurally equal (i.e. non-discriminatory) treatment by an employer of men and women applicants, for example, cannot of itself ensure equality of opportunity when females are - or have been - systematically disadvantaged in the provision of education and training.

3. Equal Opportunity Provisions in International Instruments

International instruments provide a starting point for defining both the spheres of equal opportunity and the proscribed grounds of impairment to equal opportunity in those spheres. Several international conventions and declarations include non-discrimination clauses, but the specific terminology of "equal opportunity" has only been used in international instruments relating to employment and education.

3.1 Spheres of equal opportunity

(a) Employment

The ILO Convention (No. 111) Concerning Discrimination in Respect of Employment and Occupation⁴ requires State parties "to declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof."⁵ Sri Lanka is yet to ratify this treaty, whose provisions only represent minimum standards that are commonly exceeded by the national provisions of other countries.

Article 1 of the Convention describes "discrimination" for the purpose of the Convention as:

[a]ny distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation. [Emphasis added.]

However, according to Article 1(2), any distinction, exclusion or preference in respect of a particular job based on the "inherent requirements" of that job shall not constitute discrimination. Further, the Convention specifically excludes "special measures" of protection or from the ambit of prohibited discrimination in employment and occupation.⁶ These include "special measures

⁴ Adopted on 25 June 1958 by the General Conference of the International Labour Organisation at its 42nd session (hereinafter the "Employment Convention").

⁵ *Ibid*, Article 2.

⁶ *Ibid*, See Article 5.

designed to meet the particular requirements of persons, who for reasons such as sex, age, disablement, family responsibilities or social and cultural status, are generally recognised to require special protection or assistance."⁷

The Convention thereby permits enabling measures to be implemented in the spheres of employment and occupation, although it does not **require** them. Given the wording of "particular requirements of persons," it is unclear whether the Convention provides for affirmative action as an instrument of equal opportunity. Do such "particular requirements" encompass a person's status as belonging to a group which has endured historic and ongoing discrimination? If so, "special measures" has been rightly interpreted in some jurisdictions and discourse as incorporating both affirmative action and enabling measures.⁸

Specific regard is paid to equal opportunity in matters of **promotion** in the International Covenant on Economic, Social and Cultural Rights (ICESCR),⁹ which was ratified by Sri Lanka on 11th June 1980. Article 7(c) stipulates that:

[t]he States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:... Equal opportunity for everyone to be promoted in employment to an

⁷ *Ibid*, Article 5(2).

⁸ See, for instance, section 7D of the Australian Sex Discrimination Act (Cth) 1984 and the decision of the (Australian) Human Rights and Equal Opportunity Commission in *Eleven Fellow Members of the McLeod Country Golf Club v. McLeod Country Golf Club* (1995) No. H95/28, especially at paras. 3, 41-44 and 61-63.

⁹ Adopted by General Assembly resolution 2200A (XXI) of 16 December 1966.

appropriate higher level, subject to no considerations other than those of seniority and competence.

(b) Education

In contrast to the Employment Convention, the Education Convention does not mention "equality of opportunity" in its definition of discrimination. Instead, it contains the term in Article 4 which stipulates that States Parties undertake to formulate, develop and apply a national policy which, by methods appropriate to the circumstances and to national usage, "will tend to promote equality of opportunity and of treatment in the matter of education," *inter alia*, by the provision of free and compulsory primary education, secondary education generally available and accessible to all and higher education which is equally accessible to all on the basis of individual capacity.

It appears that equality of opportunity is included here to qualify the prescription of equality of treatment. As stated earlier, equality of treatment *per se* (as formal, procedural non-discrimination) may be inadequate to achieve, and may indeed limit, equal opportunity among individuals. Article 4 of the Education Convention would permit, for instance, special programmes to further the participation and achievement of girls in areas such as science and technology, in which they may be under-represented and under-achieving.¹⁰

(c) Other spheres of equal opportunity

Although international legislation specifically prescribes equality of opportunity only in respect of employment and education,

¹⁰ For example, although 42.5% of all university graduates in Sri Lanka were female in 1994, only 13.7% of engineering graduates were female; *Statistical Profile of Sri Lanka* (Department of Census and Statistics, Ministry of Finance and Planning, 1998), Table 18 at p. 20.

provision for equal opportunity in additional spheres of public life is implicit in several other international instruments. Non-discrimination with respect to access to public buildings or to goods, services, accommodation and activities, for example, is directed *inter alia* at women,¹¹ at different races¹² and at disabled persons.¹³ These spheres of equal opportunity are less prone to systemic discrimination and therefore generally do not call for programmes of affirmative action by government or private bodies. Non-discrimination policies and - where necessary - enabling measures, arguably suffice to ensure equality of opportunity in these areas.

3.2 Grounds of impairment

International provisions target socially, politically, economically and culturally **institutionalised** grounds of impairment to equal opportunity, such as sex, race, social origin, political opinion and economic condition or birth. The dearth of Sri Lankan case-law challenging these grounds of impairment (exemplified by the lack of a single case of sex discrimination decided by the Supreme Court) may be responsible for the common local conception that equal opportunity involves the absence of undue discrimination on the grounds of any status, trait or characteristic. Thus, *Perera v. University Grants Commission*,¹⁴ which concerned discrimination on the ground of having qualified under one school-

¹¹ Convention on the Elimination of All Forms of Discrimination Against Women, General Assembly resolution 2263 (XXII) of 7th November 1967, Articles 12 and 13.

¹² International Convention on the Elimination of All Forms of Racial Discrimination, General Assembly resolution 2106 A (XX) of 21 December 1965, Articles 5(e)(iii)-(iv) and (vi) and 5(f).

¹³ Declaration on the Rights of Disabled Persons, General Assembly resolution 3447 (XXX) of 9th December 1975, Article 9.

¹⁴ (1978-79-80) 1 SLR 128, FRD (Vol. I) 103.

leaving examination rather than another, is often interpreted as a case concerning equality of opportunity.¹⁵ It is certainly arguable that all arbitrary distinctions, even if of an isolated nature, can be regarded as within the realm of equal opportunity concerns, on the basis that they may threaten the primacy of the principle of "merit" in the spheres of education and employment as much as distinctions on such grounds as social origin, sex, ethnicity, or religious belief.

Nevertheless, the focus on institutionalised grounds of impairment to equal opportunity in international instruments should be maintained. Importantly, it calls for identification of **entrenched** patterns of discrimination which may, in turn, require systematic affirmative action to redress historical and continuing imbalances or barriers.

4. The Sri Lankan Context

The terminology of "equal opportunity" has yet to infuse local human rights discourse,¹⁶ but relevant concerns and issues have long dominated human rights and political agendas in Sri Lanka.

The ongoing civil conflict may be viewed in part as a manifestation of the perception that equal opportunity has been denied to segments of the Sri Lankan population on the grounds of language and ethnicity. The introduction of the *Official Language Act*¹⁷ in 1956 and the

¹⁵ See, for example, J.A.L. Cooray, *Constitutional and Administrative Law of Sri Lanka* (Colombo, 1995) at p. 635.

¹⁶ Perhaps because it has never featured in as a fundamental right in Sri Lankan constitutional provisions, in contrast to, for example, Article 16(1) of the Indian Constitution which provides for "equality of opportunity" for all citizens in matters of employment as a fundamental right. The present Constitution of the Democratic Socialist Republic of Sri Lanka (1978) (hereinafter the "1978 Constitution"), refers to equality of opportunity in Chapter VI on Directive Principles of State Policy and Fundamental Duties - see Article 27(6). However, pursuant to Article 29, these "Principles" and "Duties" are not enforceable as legal rights and obligations.

¹⁷ No. 33 of 1956.

policy of "standardisation" until 1978 (under which admission to universities places was determined according to the proportions of school leavers educated in each language medium) were notable policies which fuelled such perceptions. Issues of equal opportunity in Sri Lanka are complicated by competing perceptions on the part of **both** majority and minority communities of historical discrimination¹⁸ - with correspondingly conflicting attitudes on how to redress such practices through affirmative measures. Inter-related with these grounds of impairment in Sri Lanka's intricately multi-cultural society is that of impairment to equal opportunity on the basis of religious affiliation or belief.

Table 1: Employment of Ethnic Groups in the State, Provincial and Semi-Government Sectors

Ethnic Group	State Sector		Provincial Public Sector		Semi-Government Sector	
	No.	%	No.	%	No.	%
Total	221,229	100.0	291,265	100.0	227,023	100.0
Sinhalese	201,750	91.2	243,007	83.4	200,532	88.3
Sri Lankan Tamils	11,568	5.2	30,258	10.4	17,46	17.7
Indian Tamils	372	0.2	2,449	0.8	2,477	1.1
Moors	6,010	2.7	14,415	4.9	4,516	2.0
Others	1,151	0.5	915	0.3	1,669	0.7
Unspecified	378	0.2	221	0.1	368	0.2

Source: Census of Public and Semi-Government Sector Employment 1994, Department of Census and Statistics, Ministry of Finance and Planning, 1997.

¹⁸ See Elizabeth Nissán, *Sri Lanka: A Bitter Harvest* (Minority Rights Group, 1996) at p. 24 in reference to discriminatory practices both under colonial rule and since independence. She notes, for example, that "Tamil recruitment to the General Clerical Service stood at c. 40.7% in 1949" - soon after Sri Lanka's independence from colonial rule - and "[f]rom 1978 to 1981 it fell to 5.4%". See Table 1 for present proportions of minority employees in public employment.

Despite the governance of a woman President and the relatively high social indicators for Sri Lankan women compared to women in neighbouring countries,¹⁹ Sri Lankan women face several problematic aspects in respect to equality of opportunity. These include the harassment of women in employment, education and public space; and continued social disapproval and imposition of gender-stereotyped limitations²⁰ on women accessing and advancing in certain fields. Direct and indirect barriers to women entering employment are evident in the high unemployment rates of women, which for over 20 years have at least doubled the rate of men.²¹ Sexual harassment of women has been conspicuously absent from local discourse on equal opportunity, yet this is a prime example of the institutionally disadvantageous conditions women experience, which are often sanctioned by the management and administration, and which discourage or impede women's advancement in and contribution to public spheres. Related concerns include the use of marital status and maternity to impair women's equality of opportunity; employers frequently ask female applicants and employees about these statuses when considering appointments and promotions.

¹⁹ For example, the illiteracy rates for women exceed 70% in India, Bangladesh, Pakistan and Nepal (in ascending order of illiteracy). By contrast, in Sri Lanka, 83.2% of women were literate according to the 1981 Census of Population and Housing and 87.9% according to the 1994 Demographic Survey (excluding Northern and Eastern Provinces), *Statistical Profile of Sri Lanka*, *supra* n. 11, Table 11 at p. 14.

²⁰ *Supra* n. 11.

²¹ See Table 45, *Statistical Profile of Sri Lanka*, *supra* n. 11, at p. 48. This is despite the higher percentage of women than men in the labour force who have obtained Ordinary and Advanced Level qualifications at secondary school level, *Quarterly Report of the Sri Lanka Labour Force Survey: First Quarter 1997* (Department of Census and Statistics, Ministry of Finance and Planning, 1997) at p. 5.

In respect to Sri Lanka's plantation sector Tamils, barriers to equality of opportunity on the ground of national extraction or citizenship have been addressed to some extent but their access to education and employment remains a matter of concern.²² Further, the disparities between male and female employment and educational indicators among estate Tamils are particularly pronounced.²³

A highly partisan culture of political favouritism and partiality suggests that impairments to equal opportunity on the ground of political opinion (including trade union association), particularly in the sphere of employment, are frequent. Although numbers of formal complaints cannot be taken as indicative of the most pervasive forms of discrimination, the number of petitions to the Supreme Court alleging discrimination on the ground of political opinion constitute by far the largest proportion of fundamental rights petitions which relate to equal opportunity.

Perhaps the most systemic impediments to Equal Opportunity in Sri Lanka occur on the ground of socio-economic status, whereupon any one or more of the factors of poverty, rural habitation or non-English speaking status serve to restrict opportunities in the spheres of education and employment.

²² See, for example, G.H. Peiris, *Development and Change in Sri Lanka: Geographical Perspectives* (International Centre for Ethnic Studies, Kandy, 1996) at p. 306, which cites studies showing that 86% of Plantation Tamils over 19 years of age have had less than five years of schooling.

²³ For example, in the estate sector, 79% of males are literate but only 52.8% of females - Household Income and Expenditure Survey 1990/1, Table 11, *Statistical Profile of Sri Lanka*, *supra* n. 11, at p. 14. Among the Sri Lankan population as a whole, 90.5% of males are literate, compared to 82.8% of females - 1981 Census, Department of Census and Statistics.

Discrimination on the basis of caste (including in the sphere of religious education and activity) is also a form of impairment to equality of opportunity on the ground of socio-economic status. Discrimination on the ground of caste appears most pervasive as a form of social discrimination.²⁴ However, it also remains ingrained in certain spheres of occupation and employment; most notably, with regard to ordination to religious priesthoods.²⁵

Finally, while the opportunities of disabled persons ought anyway to be equalised with their able-bodied counterparts, the context of a protracted civil war has rendered this even more imperative.²⁶ As with other segments of the population, equal opportunity in training and employment, commensurate with individual ability, must be provided to Sri Lanka's ever-increasing number of

²⁴ Especially in respect to marriage and other rituals. See Leach LR (Ed.) *Aspects of Caste in South India, Ceylon and North-West Pakistan* (Cambridge University Press, 1960), especially at pp. 90-101, and Bryan Pfaffenberger, *Caste in Tamil Culture* (Maxwell School of Citizenship and Public Affairs, Syracuse University, Syracuse, New York, USA, 1982), especially from p. 147.

²⁵ For example, the traditionally powerful order of Buddhist monks, the *Siyam Nikaya*, recruits exclusively from the *Goyigama* caste, the highest and most predominant caste among the Sinhalese. However, even in jurisdictions that impose liability for discrimination on non-State actors, there is frequently a stated exception in respect to the policies and actions of religious bodies.

²⁶ In 1981, 61 824 (or 0.4%) of the population were classified as disabled (comprising those who are totally blind, deaf-mute and dumb or do not have the use of one or more limbs), *Census of Population and Housing - 1981: Statistics on Physically Disabled Persons* (Department of Census and Statistics, Ministry of Plan Implementation) at p. vi. No official study has been conducted thereafter, to determine the presumably far greater numbers of persons (including soldiers, militants and civilians) who have been disabled since the escalation of the civil conflict. See also chapter XII on the Rights of Persons with Disabilities.

disabled persons in order to ensure their ongoing contribution to the social, economic and public life of the country. Further, the provision of equal access to public buildings and spaces, which inevitably requires special facilities as enabling measures, is vital to their continued participation and sense of belonging in public and community activities.²⁷

Two further grounds of impairment to equal opportunity in Sri Lanka require mention. The first is impairment to equality of opportunity on the ground of age. A cultural reverence for age and seniority in Sri Lanka appears to have checked the increase in discrimination on the ground of (older) age which is noticeable in many western countries.²⁸ Nevertheless, even a cursory glance at employment advertisements in local papers reveals that it is common to specify an upper age limit for a particular job, frequently as low as forty-five years of age for a managerial position. Of course, the same cultural reverence may be indicative of discrimination on the ground of youth, particularly in respect to promotions, where merit and seniority within an organisation may be over-ridden by preference to an older candidate.

The final impairment to equal opportunity covered here is the ground of sexual orientation. The criminalisation of homosexual

²⁷ However, the very right of the disabled to equal public participation and belonging is anomalous in prevalent, local attitudes towards disability, which frequently view its causes and ostensible confines as manifestations of one's 'fate' or *karma*.

²⁸ In the United States, individuals of 40 years of age or above cannot be discriminated against on the ground of age in recruitment or other aspects of employment - see *The Age Discrimination in Employment Act of 1967* (ADEA). In the United Kingdom, the Labour government entered office on a "firm commitment" made in 1995 to introduce anti-discrimination legislation on the ground of age in the sphere of employment.

activity under colonial rule²⁹ and the corresponding change in attitudes towards sexual behaviour means that those who practise homosexual and bisexual behaviour may suffer intolerance or harassment in their educational institutions and workplaces.

Of course, the grounds of impairment rarely operate in isolation from each other. The nature and degrees of impairment to equal opportunity suffered by a male member of an ethnic minority who is in a position of socio-economic influence, for example, will be distinct from a female member of the ethnicity in a situation of socio-economic deprivation. The multi-layered, heterogeneous nature of Sri Lankan society means that impairments to equality of opportunity are not simply classifiable under one ground or another but rather, often emerge from a complex interaction between several statuses and conditions which can be attributed to a person.

The varying social indicators applicable to different groups in Sri Lanka create a strong inference of entrenched barriers to equal opportunity on several grounds. However, it is difficult to ascertain the precise nature of this discrimination. It may not always constitute overtly discriminatory decisions by persons and organisations. Rather, it is often rooted in socially-dominant, stereotypical assumptions and attitudes which pervasively constrain an individual's expectations and potential. This latter, "indirect" discrimination is particularly insidious; its causal connection to individual impairment is more complex and less apparent than "direct" discrimination and, accordingly, it is generally less receptive to legal forms of redress.

²⁹ Until 1995, section 365A of the Penal Code rendered illegal acts of "gross indecency" between male persons in public or in private. The Penal Code (Amendment) Act No. 22 of 1995, replaced this section with the criminalisation of acts of gross indecency in public or private between persons.

5. The Adequacy of Present Legal Provisions for Equal Opportunity in Sri Lanka

5.1 Constitutional provisions

Unlike the Indian Constitution,³⁰ the 1978 Constitution does not explicitly protect "equality of opportunity" in any sphere as a fundamental right. However, Article 12 in Chapter III, which provides for the "right to equality," contains four distinct aspects. The first, which provides for equality before the law and equal protection of the law,³¹ enshrines the **general** principle of equal justice, stipulating equal subjugation of all persons to the law and guaranteeing equal application of laws of the State and the rights contained therein to all persons similarly situated³² and further, equal rights of access and action before the Courts. Article 12(1) thereby implicitly incorporates the underlying basis of equal opportunity³³ but does not specifically provide for it by any reference to its spheres and grounds of operation.

Articles 12(2)-(4) are of more direct relevance to the practice and parameters of equal opportunity. Article 12(2) specifies the **institutionalised** grounds on which discrimination against any **citizen** is prohibited, including race, religion, language, caste, sex, political opinion, place of birth "or any one of such grounds."

³⁰ *Supra* n. 17.

³¹ 1978 Constitution, Article 12(1).

³² See *Eheliyagoda v. Janatha Estates Development Board* (1982), FRD (Vol. I) 243.

³³ See the opinions of Sharvananda J in *Perera v. University Grants Commission* (*supra* n. 15) and G.P.S. de Silva J in *Ramupillai v. Festus Perera, Minister of Public Administration, Provincial Councils and Home Affairs and others* (1991) 1 SLR 11 at 44; both of which state that equality of opportunity is an instance of the application of the general rule of equality in Article 12.

However, Article 12(2) does not include all the grounds protected under international instruments (such as national extraction and economic condition) and is particularly narrow when compared with the national provisions of other jurisdictions.³⁴ It also exempts discrimination against a non-Sri Lankan citizen or stateless person - an exclusion which does not feature in the other provisions of Article 12 and which is unjustified, not only *vis-à-vis* the international provisions but on the fundamental principles of non-discrimination and equal opportunity themselves. This exclusion would deny those of Sri Lanka's plantation sector Tamils who remain stateless any remedy for discrimination on the basis of race, language or any other ground.³⁵ The right to non-discrimination is similarly denied to any non-citizen who is permanently or temporarily resident in Sri Lanka, despite the fact that Article 12(1) makes the law equally applicable to all persons and, therefore, demands equal compliance with the State on their part.

³⁴ See, for example, Article 9(3) of the South African Constitution (1996). Also in Australia, the Federal Human Rights and Equal Opportunity Commission Act 1986 proscribes discrimination in employment and occupation on the grounds including age, nationality and sexual preference; the Sex Discrimination Act 1984 provides for equal opportunity in the spheres of employment, education and other areas on the grounds of marital status and pregnancy; and the Disability Discrimination Act 1992 prohibits discrimination and ensures access in those spheres on the grounds of physical or mental disability. The Racial Discrimination Act 1976 proscribes race discrimination in several forms, including verbal or written incitement of racial hatred.

³⁵ While most "Indian" Tamils in Sri Lanka have now acquired citizenship, some of whom applied for Indian citizenship under the 1986 Accord on Tamils of Indian Origin between India and Sri Lanka have still not been granted that citizenship and are ineligible to apply for Sri Lankan citizenship under section 2(c) of the Grant of Citizenship (Special Provisions) Act No. 39 of 1988.

Several cases were brought under Article 12(2) in 1997,³⁶ often simultaneously under the general equality provision of Article 12(1). However, all alleged discrimination on the ground of political opinion; not one related to any other institutionalised ground of discrimination proscribed by Article 12(2). The only judgment in which "equality of opportunity" was specifically discussed was that of Shirani Bandaranayake J in *Devasinghe and others v. Jayaratne and others*,³⁷ a case which did not even concern an instance of institutionalised discrimination. In that case, the petitioners alleged a violation of the guarantee of equal treatment. They had not applied for certain advertised vacancies because their qualifications did not match the stated criteria, but the respondents had recruited applicants whose qualifications also did not fulfil the advertised criteria. Bandaranayake J (with whom G.P.S. De Silva CJ and Ramanathan J concurred) cited the opinion of Sharvananda J in *Perera v. University Grants Commission*³⁸ in supporting her decision that equality of opportunity required only those in equal circumstances to be treated without discrimination; as the petitioners had not applied for the said posts, they had not suffered discrimination as against those who had applied and were subsequently recruited.³⁹

Article 12(2), which prohibits discrimination on the ground of language, contains two exceptions. Firstly, where knowledge of any language is "reasonably necessary" to discharge the duties of a public employment or office, it is lawful to require a person to acquire "within a reasonable time sufficient knowledge" of

³⁶ For a detailed examination of these cases, see Chapter IV on the "Judicial Protection of Human Rights."

³⁷ SC Application No. 516/95.

³⁸ *Supra* n. 15.

³⁹ *Supra* n. 15 at p. 8.

that language as a qualification for the employment or office. Secondly, however, where "no function of that employment or office can be discharged otherwise than with a knowledge of that language," it is lawful to require a person to have a sufficient knowledge of the language as a qualification for the employment or office.⁴⁰

Proponents of these two exceptions may argue that they are justified by reference to international standards which exclude the "inherent requirements" of a job⁴¹ from the ambit of prohibited discrimination in employment and occupation. However, the exceptions contained in Article 12(2) ought to be viewed in the context of other norms and conditions of the State in which they operate. Namely, when selecting public employees, decision-makers should not assume that the discharge of public functions and duties depends only on an ability to communicate in the language of the majority but rather, also on the ability to communicate in the languages of minorities.

A study of the language proficiency of public service employees conducted by the Department of Official Languages⁴² revealed that out of the 3,500 employees in government ministries, 3,368 were proficient in Sinhala, 1,015 in English but only 119 in Tamil (including bilingual and trilingual employees). A basic standard of communication with linguistic minorities is important to fulfil

⁴⁰ Note that these exceptions are mirrored in Article 22(5) of Chapter IV on Language in the 1978 Constitution, qualifying the entitlement to be examined in either of Sinhala and Tamil for admission to employment in the Public Service, Judicial Service, Local Government Service, a public corporation or statutory institution.

⁴¹ Article 1(2) of the Employment Convention, *supra* n. 4.

⁴² A report of this study, the *All Island Survey on Language Capacity of Public Servants* (unpublished), was presented to President Chandrika Bandaranaike Kumaratunga in 1995.

public functions and duties across the country but is even more imperative in regions where there are considerable proportions of these minorities; in the majority Tamil-speaking areas in the North and East as well as the Sinhala-speaking majority areas elsewhere in Sri Lanka. The Department of Official Languages study revealed that in Trincomalee,⁴³ out of 418 public employees, 190 were proficient in Sinhala and 269 in Tamil. By contrast, among 947 public employees in Badulla, 941 were proficient in Sinhala and only a mere 37 in Tamil.⁴⁴ It must be recognised that effective public administration depends on the ability to communicate with linguistic minorities, and is essential to effecting the constitutional provision that both Sinhala and Tamil be the national languages of Sri Lanka⁴⁵ and the languages of administration,⁴⁶ regardless of demographic variation in the predominance of these languages:

The third aspect of the Constitutional right to equality is both a sub-set and a qualification of the second. Article 12(3) prohibits discrimination in the form of "any disability, liability, restriction or condition" with regard to "access to shops, public restaurants, hotels, places of public entertainment and places of public worship" of a person's own religion. The proscribed grounds include all those mentioned in Article 12(2) **except** those of political opinion and place of birth. Hence the grounds of discrimination are even more restricted than in Article 12(2).

⁴³ Where 33.6% of the population is Sinhala according to the last census taken in Sri Lanka; 1981 Census, Department of Census and Statistics.

⁴⁴ *Ibid.* Where approximately 31% of the population is Tamil-speaking (either of Tamil or Muslim ethnicity), the majority of these being "Indian" Tamils.

⁴⁵ 1978 Constitution, Article 19.

⁴⁶ *Ibid.*, Article 22(1), as inserted by the 16th Amendment to the Constitution, certified on 17 December, 1988.

Finally, Article 12(4), in accordance with the principles of equal opportunity, qualifies the preceding interdictions on discrimination by including limited provision for affirmative action and enabling measures by the State. It permits (but does not require) "special provision being made, by law, subordinate legislation or executive action, for the advancement of women, children or disabled persons." Significantly, it does not allow for special measures to be taken in respect of any other group which may have suffered disadvantage either presently or historically, on grounds including race or ethnicity and socio-economic status.

Perhaps the most serious limitation of Article 12 (and indeed of the Chapter on Fundamental Rights as a whole) is that, with the exception of Article 12(3), it is only enforceable against **State** respondents.⁴⁷ This is a severe restriction on the protection of equal opportunity, given the ever-expanding influence of the private sector in employment and, lately, in education. In 1997, of all employed Sri Lankans, 44.7% worked in the private sector, compared to 15% in the public sector.⁴⁸ For a culture of non-discrimination and equality of opportunity to truly permeate Sri Lankan society, infringements on the part the private sector cannot be ignored.

⁴⁷ *Ibid.* Under Article 126(1), the Supreme Court only has jurisdiction to hear and determine upon infringements and imminent infringements of fundamental rights by **executive or administrative action**.

⁴⁸ *Sri Lanka Labour Force Survey: First Quarter 1997*, Department of Census and Statistics, Ministry of Finance and Planning, (17 October 1997) at p. 16. Employers, the self employed and unpaid family workers comprise the other "employed" persons registered by the Survey. Note, however, that the Survey excludes the Northeastern Province.

5.1.1 The Draft Constitution of October 1997

The manifold normative deficiencies of Article 12 are redressed to some extent in the corresponding provisions relating to equality of opportunity in the fourth and most recent draft of the government's proposals for constitutional reform, presented to parliament in October 1997. First, the scope of the grounds of discrimination under the proposed Article 11(2) is considerably wider⁴⁹ than the existing Article 12(2) and mirrors developments in this respect in other national jurisdictions. Thus, political and other opinion, national and social origin, mode of acquisition of citizenship, marital status, maternity and parental status have been added to the current list of prohibited grounds of discrimination. In recognition of the role of culture and identity in defining grounds of discrimination, "ethnicity" has replaced "race" in the proposals, and "gender" has been incorporated alongside the ground of sex.

While Article 11(2) retains the limitation of protection to "citizens," this is relieved to some extent by the inclusion of Article 31 in the October 1997 draft. The proposed Article 31 provides that any person who has been and continues to be "permanently and legally resident" in Sri Lanka at the commencement of the new Constitution, is entitled to all the rights granted to Sri Lankan citizens in the Fundamental Rights Chapter. This provision addresses the position of "Indian" Tamils, although it still leaves other stateless persons and non-citizens unprotected by the non-discrimination clause.

⁴⁹ See Article 11 in *The Government's Proposals on Constitutional Reform*, October 1997, Ministry of Justice Constitutional Affairs, Ethnic Affairs and National Integration (hereinafter the "draft Constitution").

One glaring omission in Article 12(2) and (3) of the 1978 Constitution which has not been rectified in their corresponding provisions in the draft Constitution is the prohibition of discrimination on the ground of disability. That the Constitution recognises the disabled only with regard to their "advancement" but not with regard to their legal rights indicates continuing paternalistic attitudes towards disabled persons in Sri Lanka. It should also be noted that the draft Article 11(2) retains the same two exceptions in respect to discrimination on the ground of language as the present Constitution,⁵⁰ without any changes that would accommodate the observations on these above.

For no apparent reason, several of the grounds of discrimination specified under the proposed Article 11(2) have been omitted from Article 11(3) in the draft Constitution, which is intended to replace the present Article 12(3). Thus, discrimination on the grounds of mode of acquisition of citizenship, marital status, maternity and parental status are apparently sanctioned with regard to access to shops, public restaurants, hotels, places of public entertainment and places of public worship of a person's own religion. One cause for concern at this deficiency is that discrimination on the bases of marital status, maternity and parental status are typically sub-sets of discrimination on the ground of sex, especially with regard to women. Hence, the apparent protection on the ground of sex in the proposed Article 11(3) is, in fact, significantly qualified by the omission of these related grounds. This potentially represents a step backward from Article 12(3) in the 1978 Constitution, if conservative judicial construction interprets the differences in specified grounds of

⁵⁰ Correspondingly, the proposed Article 38 in the draft Constitution's Chapter IV on Language retains these exceptions to the entitlement to be examined in either Sinhala or Tamil for admission to employment in any national or regional (public) service or any public institution.

discrimination between Articles 11(2) and 11(3) as indicative of an intention to circumscribe the ambit of sex-based discrimination in the latter provision.

Other than the broadened ambit of the proposed Article 11(2), another improvement in the draft Constitution should be recognised. The first is that the proposed Article 11(4) allows (but again, does not require) "special measures" to be taken by law, subordinate legislation or executive action:

where necessary for the sole purpose of the protection or advancement of disadvantaged or underprivileged individuals or groups including those that are disadvantaged or underprivileged because of ethnicity, gender, sex, age or mental or physical disability. (Emphasis added.)

It appears an unwarranted limitation that the protection or advancement of the disadvantaged or underprivileged must be the **only** purpose of the special measures if they are to be constitutional. If affirmative action or enabling measures serve concurrent or ancillary purposes which do not contradict any other provision of the Constitution, there is no reason why they should not be permitted. Nevertheless, the proposed Article 11(4) reflects a welcome recognition that special measures are based on the fact of entrenched disadvantage regardless of its basis, rather than on any particular ground(s) for an underprivileged status. Hence, while the proposed Article identifies the most common or institutionalised grounds of disadvantage and discrimination in Sri Lanka, it permits the State to take special measures to help those who are disadvantaged or impoverished on any grounds.

Finally, the draft Constitution aims at furthering equal opportunity in respect to political participation, a very specific but influential

sub-set of the spheres of employment and public activity. Item 42 of The Regional List ⁵¹ requires election laws to ensure that at least 25% of those elected to local authorities are women and that 25% are persons under 35 years of age. This targets the present institutionalised barriers to political participation on the grounds of sex and age.⁵²

5.2 Statutory provisions

Statutory provisions are generally enforceable against non-State respondents and thereby offer remedies to a considerably wider segment of the population whose rights and opportunities have been impaired. Statutory provisions relevant to securing equal opportunity relate primarily to sexual harassment, disability and women.

(a) *Sexual harassment under the Penal Code*

While sexual harassment can be considered a form of sex-based discrimination under the Fundamental Rights Chapter of the Constitution, it is specifically covered in the 1995 Act amending the Penal Code.⁵³ Section 345 of the Penal Code (which in archaic terminology, made it illegal to "outrage the modesty" of a woman) was repealed and replaced with the criminal prohibition of sexual harassment of **another person**⁵⁴

⁵¹ List II, Second Schedule.

⁵² In 1991, only 1.7% of those elected to Local Authorities were women. In Provincial Councils, women constitute 3.1% of elected members in 1993, while in 1994, 5% of Members of Parliament were women: *Changing Role of Women in Sri Lanka* (Department of Census and Statistics, 1997), Table 5.5 at p. 139.

⁵³ Penal Code (Amendment) Act, No. 22 of 1995.

⁵⁴ Since the victim is not presumed to be female, this would allow for a man to complain of sexual harassment or annoyance including, for example, harassment which occurs on the ground of sexual orientation.

by assault or use of criminal force, and sexual annoyance or harassment by the use of words or actions. Sexual harassment is defined as "[u]nwelcome sexual advances by words or action used by a person in authority, in a working place or any other place..." There is, therefore, no prohibition on sexual harassment or annoyance by a person who is deemed not to be in a position of authority. This appears to sanction the widespread sexual harassment which occurs by "ordinary" people in public places, educational institutions⁵⁵ and workplaces, including by colleagues at work who are not the victim's superior. The limitation of punity to "persons in authority" fails to recognise the habitual circumstances of sexual harassment, in which victims are frequently alone or outnumbered by physically stronger (and, therefore, more threatening) male perpetrators, who inflict psychological and physical harm regardless of their supposed "designation."

(b) Statutory provisions on disabled persons

Although Articles 12(2)-(3) of the Constitution fail to include disability as a ground of discrimination, the *Protection of the Rights of Persons with Disabilities Act*⁵⁶ (1996) makes some provision for the equal opportunity of disabled persons. The Act provides for the establishment of a "National Council for Persons with Disabilities,"⁵⁷ whose several intended functions are enumerated in section 13 of the Act. They include, *inter alia*, to "provide educational and vocational training" for disabled persons;⁵⁸ to "assist wherever possible, persons with disabilities

⁵⁵ Which may take place in the context of the common practices of "ragging" or "initiation" by other students.

⁵⁶ Act No. 28 of 1996. See Chapter XII on the Rights of Persons with Disabilities.

⁵⁷ *Ibid.*, Part I of the Act.

⁵⁸ *Ibid.*, section 13(l).

to be gainfully employed;"⁵⁹ to "encourage and provide facilities for full participation by persons with disabilities in all activities;"⁶⁰ to "introduce programmes to make the physical environment accessible to persons with disabilities and to implement schemes to provide access to information and communication by persons with disabilities."⁶¹

Nineteen ninety-seven witnessed the first functional year of the National Council, during which several relevant recommendations were made.⁶² However, the Council directs its recommendations at the Department of Social Services rather than implementing them itself, a process which unnecessarily delays implementation of its proposals.

Section 23(1) of the Act prohibits discrimination against persons on the ground of disability "in recruitment for any employment or office or admission to any educational institution." Further, s. 23(2) aims at affording similar protection for disabled persons as Article 12(3) of the Constitution provides for other specified statuses. It proscribes "any liability, restriction or condition" imposed on disabled persons "with regard to access to, or use of, any building or place which any other member of the public has access to or is entitled to use, whether on the payment of any fee or not." For infringements of the provisions of section 23, the Provincial High Courts have the "power to grant relief or make such directions as it may deem just and equitable in the

⁵⁹ *Ibid.*, section 13(t).

⁶⁰ *Ibid.*, section 13(o).

⁶¹ *Ibid.*, section 13(p).

⁶² Agendas and Council Papers of the meetings of the National Council for Persons with Disabilities, Ministry of Social Services. Eleven meetings were convened during 1997, excluding the meetings of its sub-committees.

circumstances..."⁶³ This grants a wide discretion to judges of the Provincial High Court, allowing for lenient treatment of liable respondents in the widely-held belief that incorporating the needs of disabled persons imposes too heavy a burden on employers and educational or other institutions.⁶⁴ In any event, as of the end of 1997, no cases had been filed pursuant to section 23.⁶⁵

(c) *Effect of labour laws on women in employment*

Several enabling measures for employed women, such as maternity benefits and other special conditions, exist in a variety of legislation and sub-legislation in Sri Lanka.⁶⁶ However, four substantial defects are apparent in the statutory provisions for equality of opportunity for women in employment. First and foremost, differential minimum wages for men and women remain in force in certain trades. The Wages Board Ordinance specifies the minimum daily wages for workers in the Cinnamon Trade, for example, as Rs 10.23 for males and Rs 9.92 for females,⁶⁷ despite the fact that women invariably do at least as much work

⁶³ *Supra* n. 57, s. 24(3).

⁶⁴ The Australian Disability Discrimination Act 1992 requires workplaces and other environments to provide facilities of access and use to the extent that these are economically and practically feasible.

⁶⁵ See Chapter XII on the Rights of Persons with Disabilities.

⁶⁶ See, for example, the Shop & Office Employees (Regulation of Employment and Remuneration) Act, No. 19 of 1954 (as amended) and the Maternity Benefits Ordinance (1939). The author wishes to acknowledge the valuable assistance of Mr T. Jeyarajasingham in providing information on the numerous relevant statutes and ordinances, all errors being my own.

⁶⁷ *Sri Lanka Labour Gazette*, Vol. 48, No. 3, July-September 1997, Ministry of Labour and Vocational Training at p. 82.

as men. The Women's Charter contains a provision on equal remuneration for men and women,⁶⁸ but until the Charter is enacted as legislation to allow a legal challenge or -preferably -until the offending wages provisions are expressly repealed, these discriminatory practices will continue. One positive feature is that the average female-male wage ratio in Sri Lanka is amongst the highest in the world, surpassing those of most industrialised countries.⁶⁹ However, the comparatively low female rate of participation in the Sri Lankan labour force⁷⁰ could mean that this is a result of a educated or affluent women entering well paid jobs while their predominantly less educated counterparts are omitted from labour and employment indicators altogether.

The second notable deficiency is that many statutory provisions reflect a paternalism which in fact restricts equality of opportunity for women, by legitimising stereotypical assumptions of women's roles. Thus, under the *Employment of Women, Young Persons and Children Act*, No. 47 of 1956⁷¹ and section 10 of the *Shop and Office Employees (Regulation of Employment and Remuneration) Act*⁷² women are prevented from working at certain times (and thereby indirectly, from

⁶⁸ Section 10(i)(f) of the Women's Charter (Sri Lanka) (1993), Office of the Minister of State for Women's Affairs, Ministry of Health and Women's Affairs, Colombo.

⁶⁹ See Richard Anker, *Gender & Jobs, Sex Segregation of Occupations in the World*, (International Labour Office, Geneva, 1998) at p. 31 for female-male wage ratios in several countries around the year 1990.

⁷⁰ At the end of 1997, this stood at 32.3 percent. See the Bulletin of Labour Force Statistics of Sri Lanka, Department of Census and Statistics, Ministry of Finance and Planning, Issue No. 5, Fourth Quarter 1997, Table 1 at p. 1.

⁷¹ As amended.

⁷² *Supra* n. 67.

employment in certain positions).⁷³ Administrative laxity in enforcing these provisions has prevailed alongside a growing acceptance of the participation of women in areas of employment which were previously the exclusive domains of men. However, the statutory norms themselves should be repealed, to guard against the potential injustices resulting from administrative discretion in enforcement.

Thirdly, even those measures which rightly recognise the special circumstances of women (based on biological considerations rather than stereotypical assumptions) are provided for in an *ad hoc* statutory framework which unfairly distinguishes between women. Under the *Shop and Office Employees (Regulation of Employment and Remuneration) Act*, 'white-collar' women are entitled to 84 days of maternity leave with full pay for their first two children (and 42 days for subsequent children)⁷⁴ exclusive of other leave or holidays.⁷⁵ In contrast, the *Maternity Benefits Ordinance* entitles women in labour-intensive (such as factory) employment to 84 days of maternity leave⁷⁶ with full pay inclusive of holidays.⁷⁷ This distinction is tantamount to discrimination on the ground of socio-economic status. There is a need for a single enactment which sets common standards for women employees in respect to pregnancy and maternity, and which only distinguishes between the conditions afforded to women on rational bases, such as medical difficulties that they or their children may experience.

⁷³ It should be reiterated that the statutory prohibitions operate alongside, as well as compound, the social barriers to employment in areas which are simply assumed to be the domain of men, taxi-drivers being a prime example.

⁷⁴ *Supra* n. 67, section 18B(1) - 18(C).

⁷⁵ *Ibid.*, section 18H.

⁷⁶ *Supra* n. 67, section 3, as amended by Act No. 43 of 1985.

⁷⁷ A difference which is not inconsiderable in the country with the highest number of public holidays a year.

Finally, it is lamentable that there are no statutory provisions prohibiting discrimination against women in employment, which leaves women employed in the private sector (who cannot lodge a fundamental rights petition) without any remedy in the event of infringement of their right to non-discrimination and equality of opportunity. Under the *Industrial Disputes Act*,⁷⁸ the Labour Department can only attempt conciliation and mediation of disputes relating to the contractual terms and conditions of employment. It is unlikely that an employer would voluntarily contractually bind him or herself to equal treatment or opportunity. Even if a contract did contain broadly relevant clauses (such as to promotions on merit) it is even more improbable that the Labour Department, or the arbitrators to whom they can refer cases, would adopt a progressive construction of such a clause so as to accept evidence of discrimination on the ground of sex. The Labour Department has no power to inquire into cases of unlawful terminations, which are instead heard by Labour Tribunals which inquire into the termination or "constructive termination" (i.e. forced resignation) and make an order that is "just and equitable." Here again, the standard is broadly relevant to equal opportunity, but it has never been far-sightedly used to uphold a case of sex (or race) discrimination. Much depends on judges, potential complainants, lawyers and female employees as a whole becoming convinced that the fair treatment of women in employment is properly within the range of what is "just and equitable" in labour-related norms.

⁷⁸ Chapter 152, Legislative Enactments of Sri Lanka Vol. VII (1980), as amended by Act No 32 of 1990.

(d) Statutory prohibition of caste-based discrimination

The *Prevention of Social Disabilities Act*⁷⁹ makes it illegal to impose "social disabilities" on a person by reason of his or her caste, punishable by imprisonment up to three years with or without a fine up to Rs 3,000. The Act does not seek to prevent caste-based discrimination in the private or social spheres (despite its terminology). Rather, social disabilities as defined under the Act directly impact on spheres of equal opportunity and constitute prevention or obstruction of a person from, *inter alia*, admittance to any educational institution; engagement in any lawful employment or activity; entering or being present in any place to which the public have access, other than a place of religious worship; entering or service at a shop, market, fair, hotel, resthouse, eating house or restaurant; and, being carried as a passenger in any public vehicle or vessel. The exclusion of places of religious worship is significant because religious activity is the prime public domain in which caste-based discrimination prevails. It exemplifies the frequent conflict between the right to equal opportunity and non-discrimination and other human rights, such as to freedom of religion, expression and cultural self-determination.

5.3 Executive action and policy

(a) Education

Although standardisation of marks by language of instruction was abolished in 1978, a modified version of the district quota system continues to operate. In 1997, admissions to the faculties of arts and humanities were based on "raw" marks alone, while

⁷⁹ NO. 21 of 1957, as amended by No. 18 of 1971.

admissions to the science-related faculties were based 40% on raw marks, 55% on district quotas proportionate to the population of the district and 5% from thirteen "educationally underprivileged" districts also proportionate to the population of those districts.⁸⁰

The issues of equality of opportunity which arise in respect to the district quota system are multi-faceted. To date, the focus has been on its discriminatory impact on Jaffna Tamils, yet its role in redressing institutionalised discrimination and disadvantage on **other** grounds - namely economic condition, social origin and birth - also needs close attention. While admission to university on a district-based system alone would arguably not find support in the principles of equal opportunity, affirmative action (or "positive discrimination") for the socially and economically underprivileged could be thereby justified.⁸¹ The system needs to be restructured to compensate for the socio-economic disadvantages borne by large segments of the student population (whether Sinhala, Tamil or Muslim), without adversely affecting any ethnic group to a greater extent than any other such group. The addition of Jaffna District to the list of "educationally underprivileged" districts in 1997 is a welcome step in this direction.

⁸⁰ Chandra R. De Silva, "Education in Sri Lanka: A Development Oriented Analysis," Paper read at a Conference on *The Political, Economic, and Social Reconstruction of Sri Lanka*, Harvard University, Boston, Mass., November 20-22, 1997. See also the *Sri Lanka Universities Year Book*, 1997 and Chapter XI on the Right to Education.

⁸¹ As per the decision in *Seneviratne and another v. University Grants Commission and another* (1978-79-80), 1 SLR 182.

(b) *Employment: appointment and promotion*

The Public Administration Circulars No. 15/90 and 15/90(i) of 1990 stipulate that recruitment of ethnic groups to public employment must correspond to the proportions of those groups in the total Sri Lankan population. Previously, ethnic quotas applied also to promotions within the Public Service and Public Corporations. However, this was challenged in the case of *Ramupillai v. Festus Perera*,⁸² which held that although appointments to public employment could be made in accordance with ethnic quotas, the application of a quota system to **promotions** constituted an unwarranted interference with the principle of merit. The basis on which the Court distinguished appointments and promotions was unclear, especially given that international provisions in regard to both aspects regard the principle of merit as paramount. Essentially, the Court's decision appeared to be based on the undesirability of quotas when they **adversely** impact on equal opportunity for minorities; but there was no attempt to reconcile this with instances where ethnic quotas would assist in the promotion of a minority employee or equally, would hinder members of minority groups who apply for appointment to public service. The Court could have also considered whether equal opportunity is only justifiable on the primacy of merit (as international provisions suggest) or whether there are alternate, competing justifications which call for limits to and reconciliation with this principle, such as whether national amity would be promoted by the proportionate public participation

⁸² *Supra* n. 34

of ethnic groups.⁸³ Such a justification may hold greater weight in a society where more than one group may have suffered discrimination, and 'reverse discrimination' in favour of only one of those could thereby aggravate inter-group tensions.

In addition to ethnic-based quotas, 3% of all vacancies in the Public Service and Public Corporations are supposed to be filled by disabled persons "possessing the requisite qualifications and whose disability would not be a hindrance to the performance of their duties."⁸⁴ Whether this quota is fulfilled in practice is unclear. Considerably more attention needs to be paid to the actual number of disabled persons in employment and, further, to whether conditions of employment accord with their needs.

5.4 Voluntary measures and policy directives

Provision for voluntary measures implemented by the State under Article 12(4) of the Constitution has already been discussed above. Indeed, Article 12(4) appears to provide the constitutional

⁸³ As exemplified in the Fair Employment (Northern Ireland) Act 1989, which aims to promote "fair participation" in employment. See sections 31(1), 32(5) and 36(1)(c) of that Act. Fredman, *supra* n. 1, at p. 588, describes the Act as "openly results-oriented." She comments, that the aims of affirmative action "range from providing a specific remedy for invidious discrimination to the more general purpose of increasing the participation of groups which are visibly under-represented in important public spheres..." (at p 575)

Note that this contradicts the conservative, liberal view of affirmative action as a **temporary** measure to counter past discrimination, as it calls for a continuing relegation of the 'merit' principle. In the same liberal paradigm, enabling measures (such as maternity benefits) are justified as permanent structures, but this is for the purpose of fulfilling individual merit.

⁸⁴ Public Administration Circular No. 27/88.

basis for the 1995 Women's Charter, the 1996 *Protection of the Rights of Persons with Disabilities Act*⁸⁵ and the National Council for Persons with Disabilities.

The draft Constitution of October 1997 has no provision corresponding to Article 27(6) in Chapter VI (Directive Principles of State Policy and Fundamental Duties) of the 1978 Constitution. This entreats the State to "ensure equality of opportunity to citizens so that no citizen shall suffer any disability on the ground of race, religion, language, caste, sex, political opinion or occupation." However, this omission in the draft does not appear to warrant an outcry. In both the present and draft Constitutions, these "Principles" and "Duties" are not enforceable as legal rights or obligations.⁸⁶ Judges of the Supreme Court of Sri Lanka, unlike their Indian counterparts, seem reluctant to remind the State of the constitutional principles and duties enunciated in Chapter VI, although they could use them progressively in interpreting the ambit of fundamental rights. In this light, equal opportunity is more likely to be secured through measures of operative and enforceable effect, rather than declarations which need not be implemented and can be conveniently forgotten.

Voluntary measures which have been effective in other jurisdictions are those undertaken by non-State actors, whose role should not be underestimated in gradually altering cultural attitudes towards, and expectations of, equal opportunity. The "human resources" departments of large private sector institutions in Sri Lanka,⁸⁷ for example, could draw up and institute their

⁸⁵ *Supra* n. 57.

⁸⁶ See article 29 of the 1978 Constitution and Article 55(1) of the Draft Constitution.

⁸⁷ Particularly banks and companies which can draw on their overseas exposure and experiences in respect to the implementation of equal opportunity in their workforce.

own "Codes of Conduct" to set standards by which both management and employees treat fellow workers, implement informal mechanisms to impart these standards in the workforce and resolve concerns relating to their adherence. A survey of five major banks in Sri Lanka⁸⁸ revealed that none had written policies committing them to equal opportunity practice. Similarly, larger retailers and other businesspersons could take the lead in improving facilities for the access of the disabled, parents with accompanying children and linguistic minorities, for example. Aside from potentially increasing custom, such measures could have a domino effect of conformity with the principles of equal opportunity.

6. The Role of Local Institutions in Protecting Equal Opportunity

The National Council for Persons with Disabilities and the National Committee on Women have been discussed above in their statutory context and framework. Three other institutions also have mandates relevant to ensuring equality of opportunity. However, the effectiveness of all these institutions depends much on public awareness of their existence and functions, their

⁸⁸ The Personnel or Human Resources Managers at Bank of Ceylon, Hatton National Bank, Hongkong Bank, ANZ Grindlays Bank and Citibank were asked to describe ways in which equal opportunity was implemented in their respective institutions. All except one stated that there was no formal recognition of equal opportunity practice in their bank but that there was 'implicit' or 'informal' adherence. The local branch of ANZ Grindlays Bank is considering incorporation of the global ANZ Group's written policy on equal opportunity; it does, however, discuss equal opportunity practice during its orientation programme for new employees. The survey was conducted by telephone on 22nd May 1998 by the Law & Society Trust.

accessibility and the willingness of complainants to approach them, and the dynamic commitment of those responsible for their direction and everyday operations.

(a) *Human Rights Commission*

The Human Rights Commission (HRC),⁸⁹ which became gradually operational during 1997, has jurisdiction to investigate complaints regarding fundamental rights issues arising out of procedures and, further, infringements or imminent infringements of fundamental rights. Its complaint functions, are therefore, bound by the normative limitations of Article 12 and the Fundamental Rights Chapter of the 1978 Constitution as a whole,⁹⁰ although the HRC has a mandate to undertake resolution by conciliation or mediation where its investigation discloses an infringement or imminent infringement.⁹¹

⁸⁹ Established by the Human Rights Commission of Sri Lanka Act, No. 21 of 1996. The Human Rights Commission absorbed the functions of the former Human Rights Task Force, whose jurisdiction did not include discrimination or equal opportunity matters.

⁹⁰ Section 33 of the Act, *ibid*, declares that "fundamental right" means a fundamental right declared and recognised by the Constitution "unless the context otherwise requires." It is yet to be seen whether the HRC will boldly interpret the "context" of complaints so as to overcome the limitations of the 1978 Constitution. Also, under section 10 of the Act, the HRC has functions relating to "human rights," a category of norms broader than the locally recognised "fundamental rights." However, these are of a non-investigative and non-binding nature, including, for example, the functions of education, raising awareness and providing recommendations to government.

⁹¹ *Ibid.*, section 10(b).

If conciliation or mediation is not appropriate, objected to by the parties, or unsuccessful, then the HRC can recommend to appropriate authorities that prosecution or other proceedings be instituted against the respondent, refer the matter to an appropriate court, or make its own recommendations to an authority or to the party concerned with a view to preventing or remedying the infringement or its imminence.⁹² However, the recommendations of the Commission are not binding and in the event that they are disregarded, "the Commission shall make a full report of the facts to the President who shall cause a copy of such report to be placed before Parliament."⁹³ There is no stipulation as to whether or how the contents of the report are to be regarded after this stage, and no time-limits for their consideration and implementation. It appears that the HRC can only punish for contempt where a party defaults on a direction issued upon successful conciliation or mediation.⁹⁴

Resolution of disputes by conciliation or mediation is often regarded as particularly suitable for employment disputes, where relatively close relationships pre-exist between the parties. If successfully conducted, it can relieve existing tensions between parties and imbue respondents with a genuine understanding of any wrongdoing, which will allow for continued and healthier employment relations. However, the potential role of the HRC in resolving discrimination and equal opportunity matters in employment (and in other spheres) will rest largely on its success in being a "user-friendly" organisation reflective of the Australian

⁹² *Ibid.*, section 15(3).

⁹³ *Ibid.*, section 15(8).

⁹⁴ *Ibid.*, section 21(3)(c).

model on which it is based⁹⁵ and, closer to home, on positive developments in the practice of Sri Lanka's Ombudsman. Otherwise, the HRC risks becoming superfluous to the fundamental rights jurisdiction of the Supreme Court, especially when that jurisdiction offers the advantage of a timely disposal of cases.

(b) Official Languages Commission

While the Department of Official Languages operates at a governmental and policy level, the Commission of Official Languages was established in March 1991 for the specific purpose of protecting language rights and handling complaints relating to language rights. Its mandate relates to Chapter IV of the Constitution on Language Rights, but it also has a role in dealing with complaints of impairment to equal opportunity on the ground of language, including under Articles 12(2) and (3). However, only 30 complaints in total have been brought to the Commission since it was established, most of which do not directly relate to equal opportunity.

Two deficiencies have been identified with respect to the Commission's efficacy,⁹⁶ which are equally applicable to other,

⁹⁵ The Human Rights and Equal Opportunity Commission in Australia benefits from free telephone complaint facilities, simply-worded complaint forms, a central location in Sydney with several regional offices around the country, accessibility of premises to the disabled, interpreters and other multi-lingual facilities, the absence of lengthy delays in inquiring into complaints, frequent resolution of disputes by conciliation, mediation or public hearing **without** the use of lawyers, wide media coverage of decisions of the Commission and a proactive approach to raising awareness of human rights issues.

⁹⁶ In an internal report on the Commission of Official Languages, prepared for the Law & Society Trust by Ms Claudine Poirier.

similar institutions in Sri Lanka. Firstly, many people are unaware of the Commission's existence. Even if they are, they fear confronting bureaucratic mechanisms and procedures if they approach the Commission. Secondly, most complainants have been from economically advantaged backgrounds, despite the fact that monolingual Sri Lankans are overwhelmingly in lower socio-economic social groups.

(c) *The Ombudsman*⁹⁷

The Parliamentary Commissioner for Administration, otherwise known as the Ombudsman, can inquire into alleged infringements of fundamental rights **and other injustices**, by public officers, officers of public corporations local authorities and like institutions⁹⁸ (emphasis added). Thus, the Ombudsman is seemingly not bound by the normative limitations of Article 11 or the Fundamental Rights Chapter. However, a significant limitation to the Ombudsman's potential to protect equal opportunity is an inability to investigate or report an injustice which relates to the "appointment, transfer, dismissal or disciplinary control of public officers"⁹⁹ **unless** it amounts to an infringement of a fundamental right. The ostensibly broad power to inquire into any "injustice" is, therefore, significantly circumscribed in a key sphere of equal opportunity. Hence, in respect to impairments to equal opportunity in matters of public

⁹⁷ For a detailed study of this institution, see Deepika Udagama, "A Case Study of the Office of the Ombudsman" in *Sri Lanka: State of Human Rights Report 1997* (Law & Society Trust, Colombo, 1997) at p. 113.

⁹⁸ Section 10(6) of the Parliamentary Commissioner for Administration Act, No. 17 of 1981, as amended by Parliamentary Commissioner for Administration (Amendment) Act, No. 26 of 1994.

⁹⁹ *Supra* n. 98. See Section 11 of Act No. 17 of 1981.

employment, the Ombudsman's jurisdiction merely replicates that of the Supreme Court - except that the Ombudsman does not have the power to enforce its determinations upon finding an infringement or injustice.¹⁰⁰

However, the Ombudsman's office benefits from user-friendly practices which, subsequent to the 1994 amendments, allow for direct petitions from the public. Previously, a complaint could only reach the Ombudsman through a convoluted, bureaucratic route involving a Member of Parliament, the Public Petitions Committee (PPC) of Parliament, the Speaker and, finally, the Ombudsman. After the procedure was changed to allow direct access as well as through the PPC, there was a dramatic upsurge in the number of complaints submitted to the Ombudsman. In 1995, 5,262 petitions were received by the Ombudsman, over 99% by direct petition, whereas during the entire 13 years of operation prior to the 1994 amendment (1982-1994 inclusive) the Ombudsman had received a total of 1,075 complaints from the PPC.¹⁰¹ The figures indicate the positive impact that accessible procedures can have on the utilisation of human rights and equal opportunity mechanisms. The increase in complaints in turn helps create a rights-based awareness among potential complainants and an internalised, voluntary compliance on the part of potential respondents.

¹⁰⁰ *Supra* n. 98. Section 17(3)(c), as amended by Act No. 26 of 1994 merely provides that, in the event of non-compliance, the Ombudsman forward a report to the President and the Parliament.

¹⁰¹ *Supra* n. 98, at p. 124.

7. Conclusion: The Effectiveness of Legal Provisions and Institutions Relating to Equal Opportunity, and an Agenda for Change

It is tempting to assume that the various legal provisions and the profusion of relevant local institutions protect the right to equality of opportunity and non-discrimination in Sri Lanka. However, in practice they have played no significant role in rectifying the widespread impairments which exist to equality of opportunity on the grounds of gender, ethnicity, disability and socio-economic status. The only exception is with respect to impairments on the ground of political opinion in the sphere of public employment, where the sheer number of fundamental rights cases brought before the Supreme Court under Article 12(2) has at least created an awareness of the extent of such discrimination and a corresponding readiness to vindicate the right of redress. This situation needs to be replicated in respect to any form of impairment in all spheres of equal opportunity.

The task of developing such awareness and readiness rests largely in the hands of civil society.¹⁰² In 1984, the trade union movement demonstrated the potential role of non-State institutions in furthering equal opportunity when it advocated and secured equal wages for men and women in the plantation sector. Similarly, non-governmental organisations (NGOs) and social action institutions must take a proactive role to ensuring equality of opportunity in Sri Lankan society, particularly for women, ethnic minorities, the disabled and the socially and economically disadvantaged. Of the tripartite role of public education, advocacy

¹⁰² Neelan Tiruchelvam, "Equal Opportunity and the Role of Civil Society," *Fortnightly Review* (Law & Society Trust, Colombo, August 1997) Vol. VIII, Issue No. 118 at p. 16.

¹⁰³ *Ibid.*

and research which has been identified for civil society institutions in respect to equal opportunity,¹⁰³ the conduct of research is dominating the agendas of many such institutions to the evident neglect of the imperatives of public education and advocacy.

However, just as NGOs and social service organisations play a potentially crucial role in creating awareness and helping people utilise existing legal avenues of redress (whatever their limitations), so too is it important that governmental authorities respond to proposals by these bodies for the development of **more effective** legal mechanisms. The normative deficiencies which have been highlighted in this chapter and in other analyses of legal provisions for equal opportunity call for significant legal and policy reform. If adopted, the October 1997 draft Constitution would rectify several shortcomings in the constitutional protection of equal opportunity, but even then several recommendations for the furtherance of equal opportunity would remain. These include:

1. the application of constitutional provisions to all persons, including stateless persons and nationals of other countries;
2. the inclusion of disability as a prohibited institutionalised ground of discrimination under Articles 12(2)-(3) and the equivalent proposals in the draft Constitution;
3. comprehensive protection, either constitutional or statutory, against impairments to equal opportunity by **non-State** actors;
4. the prohibition of sexual harassment in the spheres of equal opportunity regardless of the deemed designation of the alleged harasser;

5. repeal of all laws which contravene the fundamental principle of equal wages for men and women, as embodied in the Women's Charter and stipulated by international instruments;
6. provision of enabling measures for women in employment, such as maternity benefits, regardless of occupational and socio-economic status;
7. repeal of labour laws which prevent women working in the same positions and under the same conditions as men;
8. continuous review of the district quota system for access to university education, so as to compensate for social and economic deprivation **without** discrimination against any ethnic group;
9. the rationalisation of existing equal opportunity institutions under one umbrella institution, with the aim of strengthening their impact, increasing public awareness and utility, and improving resource-efficiency.

VII

A Commentary on the Draft Fundamental Rights Chapter*

*Sumudu Atapattu***

1. Introduction

The Government released two drafts of its proposals for a new Constitution during 1997, the first in March and the second in October. This chapter discusses the salient features of the fundamental rights chapter of these two drafts and compares the two versions where necessary. It also discusses whether the fundamental rights embodied in the draft Constitution are

* A concise version of this paper was published in *LST Review*, Vol 8, Issue 124 (February 1998) (Law & Society Trust, Colombo), p 20.

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

commensurate with the obligations undertaken by Sri Lanka under international human rights treaties. Attention will be paid mainly to the October draft as it is the later version.

2. March 1997 Draft

For the first time, the right to life is included as a fundamental right. Certain new procedural rights are included and some of the existing ones expanded, including:

- the right of a person arrested to be informed at the time of arrest in a language he appears to understand, of the reason for his arrest and of his rights under the Constitution;
- that the reasons for the arrest shall be given in writing within a reasonable time, if the person so requests;
- the right of such person to communicate with any relative or friend of his choice and affording him means of communicating with such friend or relative if he so requests;
- the right of a person arrested to consult and retain an Attorney-at-Law of his choice;
- that the amount of bail shall be fixed with due regard to the circumstances of the case and shall not be excessive;
- that any person suspected of committing an offence shall be charged or indicted or released without unreasonable delay; and
- that any person charged with an offence is entitled to be tried without undue delay; at a fair trial; by a competent court; and at a public hearing.

In addition, every person's right to respect for his private and family life, his home and his correspondence and communication is guaranteed as well as the right not to be subjected to unlawful attacks on his honour and reputation. Further new additions to the March 1997 proposals were: the right to receive and impart information, the right of every citizen to enjoy and promote his own culture and to use his own language, and the right of every citizen to own property alone or in association with others.

The draft provides that an infringement of a fundamental right is justiciable if it is the result of "state action, "including" executive or administrative action". This is a welcome development as it would broaden the scope of fundamental rights jurisdiction, the current formulation being only "executive or administrative action". The draft also provided an extension of the time limit within which an application should be filed in the Supreme Court with regard to a violation or an imminent violation of a fundamental right. The present time limit is one month; the draft proposed three months. This would significantly benefit many people as petitions are frequently rejected as being time-barred.

3. October 1997 Version¹

The most recent version of the government's proposals for constitutional reform was released October 1997. The October draft contains many developments in the fundamental rights chapter when compared with the March draft. These developments are summarised below. One notable development is the use of gender-neutral language in the text.

¹ For the text of the fundamental rights chapter in the October 1997 draft, see Schedule IV.

- Article 10(13)(a) refers to principles of public international law instead of principles of law recognised by the community of nations.
- Article 10(14) contains the following addition to the principle that a person shall not be punished twice for the same offence: "save on the order of a court exercising appellate or revisionary jurisdiction."
- Article 11(2) contains an expanded non-discrimination clause to include ethnicity, gender, national or social origin, mode of acquisition of citizenship, marital status, maternity and parental status.
- Article 12(3) contains the following additional derogation clause to the freedom of movement recognised in Article 12(1): "for the extradition of persons from the Republic."
- Article 14(2) contains the following additional derogation clause to the right to private and family life: "for the enforcement of a judgement or order of a competent court."
- Article 21 substantially qualifies the right to own property by subjecting it to "the preservation of the environment and the rights of the community."
- Article 22 embodies special rights of children and is a major achievement.
- Articles 23 and 24 embody freedom from forced labour and the right to safe conditions of work.
- Article 25 includes, for the first time, social rights in the fundamental rights chapter. The social rights that would

be guaranteed under Article 25 are the right to have access to health care services, including emergency medical treatment; sufficient food and water; appropriate social assistance; and the right not to be evicted from one's home except as permitted by law.

- The derogation clause in Article 27 includes grounds of ethnicity and gender.
- A notable addition is Article 28(2), which requires a commission to be established within three months of the commencement of the Constitution to examine all existing written or unwritten law and to report to the President, within three years of its establishment, whether any such law is inconsistent with the provisions of the fundamental rights chapter. However, apart from requiring that such report be tabled in Parliament as soon as practicable, the Constitution does not mandate further action to repeal the statutes which are found to be inconsistent with the fundamental rights chapter.²
- Article 30, which provides for the remedy in the event of a violation or imminent violation of a fundamental right, specifies that "state action" includes judicial action to the extent provided in the Articles (i.e. if there is a violation of a fundamental right guaranteed under draft Article 10 on procedural rights by judicial action, such action is also justiciable) but *does not* include legislative action. It also adds the words "acting bona fide" in the section dealing with public interest litigation.

² See also the discussion, *infra*.

3.1 Children's rights and socio-economic rights

The inclusion of children's rights³ in the October draft is a major, and welcome, development. However, the rights protected in draft Article 22 do not include all the rights embodied in the Convention on the Rights of the Child (CRC), which Sri Lanka ratified in 1991.⁴ Nonetheless, the draft constitution does recognise the special status of children as requiring special protection.

The rights protected are: to a name from birth; to be protected from maltreatment, neglect, abuse or degradation; to have an attorney-at-law assigned by the State at State expense in criminal proceedings affecting the child; to family or parental care; to basic nutrition, shelter, basic health care services and social services; to have access to free education provided by the State for children aged between five and 14; to grow up in an environment protected from the negative effects of addictive substances harmful to the health of the child; and the right not to be employed in any hazardous activity.

The rights relating to family/parental care and to basic nutrition, shelter, basic health care services and social services are, however, "resource-based." That is, they are to be realised progressively, based on the available resources.

The October draft provides that every child between five and 14 years of age shall have access to free education provided by the State. However, since the State any way provides free education even at the tertiary level, it would have been

³ According to draft Article 22(9), a child means a person under the age of 18 years.

⁴ See discussion *infra* on the rights embodied in the CRC.

appropriate to formalise this by elevating universal education to the status of a fundamental right. The draft also provides that best interest of the child should be of paramount importance.

In addition, freedom from forced labour and the right to safe conditions of work are included in the October draft, with application to all persons (not just children). While the social rights are confined to citizens, freedom from forced labour and safe conditions of work are to be enjoyed by every person.

The social rights which would be guaranteed if the October draft is adopted are: the right to have access to health-care services, including emergency medical treatment; sufficient food and water; and appropriate social assistance. The meaning of "appropriate" in this context remains uncertain.

The provisions in relation to social rights are also "resource-based." This limitation, which is also found in the International Covenant on Social, Economic and Cultural Rights (ICSECR), does not apply to the realisation of civil and political rights. Some, however, argue that not all socio-economic rights need to be resource-based: certain core socio-economic rights such as the right to emergency health care do not need resources for their realisation.⁵

The draft omits the right to housing and the right to a clean environment, which had been proposed by the human rights community. Although the right to housing is included in the ICSECR, the right to a clean environment is not mentioned there. The latter was proposed in keeping with international developments, particularly in India and South Africa.

⁵ See Mario Gomez, "A Right to Emergency Health Care," *LST Review*, Vol 8, Issue 124 (February 1998)(Law & Society Trust, Colombo) p 25.

3.2 Widening the scope of *locus standi* in relation to fundamental rights applications

Another significant development is the widened scope of *locus standi* with regard to fundamental rights applications that the October draft provides. At present, fundamental rights applications can only be made by the aggrieved party or his Attorney-at-Law. According to draft Article 30, where an aggrieved person is unable to make an application for physical, social or economic disability or other reasonable cause, a relative or friend would be able to make such an application, if the aggrieved party raised no objection.⁶

Draft Article 30 further provides that an application may be made in respect of an aggrieved party, *in the public interest*, by any incorporated or unincorporated body of persons acting *bona fide*. While this recognition of public interest litigation is a significant development, the requirement that the incorporated or unincorporated body of persons can only act in respect of an aggrieved party somewhat limits its scope.⁷

4. Summary

The main developments of significance in the October draft fundamental rights chapter can be summarised as follows:

- The inclusion of the right to life is a welcome development; it was a notable omission in the 1978 Constitution. It has,

⁶ This is in line with the jurisprudence generated by the Indian Supreme Court.

⁷ See the recommendations made by the Law & Society Trust in the lobby document prepared by the Working Group convened by the Trust. *Fortnightly Review*, Vol VII, Issue No 113 (March 1997) (Law & Society Trust, Colombo) p 12.

however, been argued that such a right is an inherent right and all the other fundamental rights would be meaningless if the right to life was not guaranteed.⁸ Its specific inclusion, however, is important. In line with the approach adopted by the Supreme Court of India, it would enable the Sri Lankan judiciary to interpret it as including other rights, such as the right to a clean environment and the right to a livelihood, which are not specifically mentioned in the Constitution.

- The draft, if adopted, would significantly widen the scope of the non-discrimination clause in Article 11(2). The additions proposed to this article are: gender (in addition to "sex" in the present Constitution), ethnicity (as opposed to "race" in the present Constitution), mode of acquisition of citizenship, marital status, maternity and parental status.
- The inclusion of social rights and children's rights is another important development.
- The recognition that certain existing laws are contrary to the fundamental rights chapter of the Constitution and the provision for the appointment of a commission to identify these laws and forward a report to the President within three years is another important development. The draft Constitution, however, does not mandate any further action to remove such laws from the statute book or to render them inoperative. Follow-up action of this kind should be made a mandatory requirement.

⁸ See the fundamental rights application made on behalf of five infants by Environmental Foundation Ltd., in April 1997 against, *inter alia*, the Ceylon Electricity Board, Central Environmental Authority and the Urban Development Authority.

- The use of gender-neutral language in the text is another notable feature of the October draft.

5. Proposals of the Human Rights Community⁹

In response to the March 1997 draft, the Law & Society Trust convened a group of experts on constitutional and human rights law and NGO representatives to study the draft and prepare a set of recommendations to be presented to the Parliamentary Select Committee on the Constitution. The group studied the provisions in the draft in great detail, comparing them with the provisions in the relevant international instruments ratified by Sri Lanka. It is heartening to note that some of the recommendations in the lobby document are reflected in the October version of the Constitution.¹⁰ Several recommendations, however, remain unaddressed. These include:

- The phrase "if the person so requests" in relation to the right of a person arrested to communicate with a friend, relative or lawyer should be deleted, since such right should be ensured regardless of any specific request by the person arrested.
- The reference to "by death or imprisonment" in draft Article 10(15) should be deleted. This provides that no person shall be punished with death or imprisonment except by order of a competent court made in accordance with procedure established by law.

⁹ See *supra* n 7.

¹⁰ For example, the group recommended that the provision on the right to life should be drafted in the light of Article 6 of the ICCPR, and that the right to property should be qualified in order to protect the environment.

- The right not to be discriminated on the grounds specified in the article should be afforded to all persons, not to citizens alone, similar to the equality provision.
- Although the non-discrimination clause was significantly widened in the October draft, it does not include disability (mental and physical) as a ground of discrimination and nor does it follow the open-ended formulation.
- An enforceable right to compensation for people who have been unlawfully arrested or detained should be included.
- The provision that an alien lawfully in the territory may be expelled only in pursuance of a decision reached in accordance with law should be included.
- The provision on the right to promote one's culture and to use one's language should be subject to other rights recognised in the Constitution in order to prevent the promotion of culture being used to impose on the fundamental rights of other persons.
- The freedom to form and join a trade union should be afforded to every person as opposed to only citizens.
- The right to a clean and healthy environment should be included as a fundamental right.
- Fundamental rights petitions should first be referred to the proposed Regional High Court and an appeal should lie to the Supreme Court in order to make the system more accessible to the public and also to ease the present burden on the Supreme Court.

- An interpretation clause should be included emphasising the supremacy of the Constitution, the *sui generis* nature of the Constitution and to ensure uniformity.
- The derogation clauses should be brought in line with the international standards.

In addition, the validation clause in draft Article 24 (which is also in the present Constitution)¹¹ has caused grave concern to the human rights community and should be removed. While new legislation can be challenged for inconsistency with the fundamental rights chapter (subject to the provisions in the Constitution), existing laws remain sacrosanct and cannot be touched. The Constitution thus discriminates between existing law and future law. It also undermines the supremacy of the Constitution by providing that existing law will continue to be valid and operative despite any inconsistency with the fundamental rights chapter of the Constitution.¹²

The government appears to have responded to the human rights community's request to remove the validation clause by proposing the establishment of a commission to study the consistency of existing law with the fundamental rights chapter of the Constitution. However, since no follow-up action to the commission's report is mandated (as discussed above), this would remain a hollow exercise of no efficacy.

The Law & Society Trust also organised, in collaboration with the Commonwealth Human Rights Initiative, a

¹¹ This provision exempts judicial review of *existing legislation* for inconsistency with the Constitution.

¹² See also the comments made by the participants at the Consultation on the Draft Constitution, *infra*.

Consultation on the Draft Constitution¹³ in August 1997, which included a session on the March draft of the fundamental rights chapter. Participants included local and international experts on constitutional law, international law and human rights law and several members of the Parliamentary Select Committee on the Constitution. Several recommendations were made with regard to the fundamental rights chapter:

- The wording in the fundamental rights chapter should conform with the international human rights instruments that Sri Lanka has ratified.
- Derogation clauses should be simplified and brought in line with the provisions in the ICCPR, as draft Article 23 does not completely conform with Article 4 of the ICCPR.]
- The rights of women and Sri Lanka's obligations under the CEDAW should receive greater recognition in the Constitution.
- The term "general principles of law recognised by the community of nations" should be replaced with "public international law."¹⁴
- Provision should be made requiring the courts to interpret the fundamental rights chapter in a manner consistent with Sri Lanka's international human rights obligations.
- The validation clause in Article 24 should be deleted. The participants stressed that the government's proposal to

¹³ For the report, see Patricia Hyndman, "Consultation on the Draft Constitution of Sri Lanka" (1997) (Unpublished).

¹⁴ This recommendation is reflected in the October 1997 draft.

establish a commission to examine all laws for consistency with the Constitution was not a solution. It was proposed that provision be made for all laws, with the exception of the different personal laws, to be challengeable for inconsistency with the Constitution.

- The right to vote and the right to stand for election should be included in the fundamental rights chapter.
- State action should be defined to include judicial action specifically, without confining it to the violation of rights enumerated in draft Article 10.
- A clear statement on the supremacy of the Constitution should be included.
- The right to property should not be extended to corporations.
- A prohibition on children below 14 (or 16) years of age being allowed to work in any factory, mine or engage in other hazardous activity should be included.

6. Provisions in International Instruments

6.1 The ICESCR

While the inclusion of a few socio-economic rights is a major advancement, those rights which are enshrined in the draft Constitution are not on par with those embodied in the ICESCR, which Sri Lanka ratified in 1980. As a State Party to the ICESCR, Sri Lanka is required to give effect to these obligations at the national level.

It has often been argued that socio-economic rights should not be included in the Constitution because they are vague and lack clarity and precision. The same argument was made in relation to civil and political rights when they were first included in the Bill of Rights. Yet, civil and political rights now have precision and a clear definition as, over the years, the courts have had the opportunity to define them, identify their parameters, and discuss their relationship with other laws and regulations, including particularly emergency regulations. A similar opportunity must be given to the Court in relation to socio-economic rights: they will otherwise remain vague, imprecise and unenforceable.

The rights embodied in the ICESCR include:

- The right to work which ensures fair wages and equal remuneration for work of equal value without distinctions of any kind, particularly women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work; safe and healthy working conditions; equal opportunity for everyone to be promoted in his employment in accordance with seniority and competence; rest, leisure and reasonable limitation of working hours and periodic holidays with pay as well as remuneration for public holidays;
- the right to social security, including social insurance;
- the widest possible protection to be accorded to the family;
- special protection to be accorded to mothers during a reasonable period before and after childbirth;
- the right of everyone to an adequate standard of living, including adequate food, clothing and housing;

- the fundamental right of everyone to be free from hunger;
- the right of everyone to the enjoyment of the highest attainable standard of mental and physical health;
- the right of everyone to take part in cultural life; to enjoy the benefits of scientific progress and its applications;
- the right of everyone to education.

Even if the government does not embody all these rights in the fundamental rights chapter, it must consider the inclusion of at least some core rights. These would include the provision of free education and free health care services, which are provided by the government to the people at present, and it should be left to the Court to define the scope of these rights.

6.2 The CRC

Sri Lanka ratified the CRC in 1991, and, therefore, the obligations it undertook under the Convention must be incorporated into the domestic law. While the inclusion of children's rights in the fundamental rights chapter is an important development, not all the obligations in the CRC are included in the October draft fundamental rights chapter. It may be that the government intended to identify core rights for constitutional protection and leave the rest to be included in a special statute on children. Either way, the obligations stipulated in the CRC must be given effect at the national level.

The rights contained in the CRC which are not included in the draft fundamental rights chapter are:

- The rights in the Convention to be accorded to every child without discrimination of any kind, irrespective of the child's or the child's parents or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status;
- every child's inherent right to life;
- the right to acquire a nationality;
- the right of the child to preserve his or her identity, including nationality, name and family relations as recognised by law without unlawful interference;
- the child shall not be separated from his or her parents against their will, unless judicial authorities determine that such separation is necessary for the best interests of the child;
- the views of the child be taken into consideration;
- the right of the child to the enjoyment of the highest attainable standard of health;
- the right of mentally and physically disabled children to enjoy a full and decent life;
- the right of children to benefit from social security, including social insurance;
- the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development;

- the right of the child to rest and leisure, and to participate in cultural life and arts;
- the right of the child to be protected from economic exploitation and from performing any work likely to be hazardous, to interfere with the child's education or to be harmful to the child's health;¹⁵
- the right of the child to protection from all forms of sexual exploitation and sexual abuse;¹⁶
- the right to protection against abduction or the sale of or traffic in children;

7. Conclusions and Recommendations

The government must be commended for the inclusion of several new civil and political rights, including the right to life and some social rights and children's rights in the October draft of the fundamental rights chapter of the proposed Constitution. Only few constitutions in the world embody social rights so far; thus if the constitutional proposals are adopted, Sri Lanka's Constitution would be among a select few which embody such rights.¹⁷

However, several rights and derogation clauses contained in the October draft still fall short of the relevant international standards and must, therefore, be amended along the recommendations

¹⁵ See "Children's Rights" in *Sri Lanka: State of Human Rights 1997* (Law & Society Trust, Colombo, 1977) Chapter X.

¹⁶ See the 1995 Amendments to the Penal Code and also *ibid.*

¹⁷ See Mario Gomez, *supra* n 5.

made by the human rights community to make them compatible with these standards. In addition, the government must ensure that Sri Lanka's obligations under the relevant international conventions are implemented nationally.

In addition, there is concern that some of the rights proposed in the October draft are ambiguous and drafted too broadly. For example, the provision that children should be protected from the adverse effects of narcotic substances, while being important, would be a difficult provision to implement, particularly where parents use such substances.

Some experts argue that the rights need not be drafted precisely as the judiciary should be allowed to define and interpret them. Others, however, feel that this could be dangerous as different interpretations could be adopted if the wording is not precise enough, thereby giving rise to inconsistency. There is merit in both these arguments, and a middle way can be found between them: the rights should be drafted as precisely as possible in order to avoid inconsistent interpretations, but the courts should be given leeway to interpret them in the light of the international commitments and developments.

VIII

Rights of the Child

*Siranthani Gopallawa**

1. Introduction

Last year's volume¹ discussed sexual exploitation of children, child labour and the recommendations of the Committee on the Rights of the Child. This year, while continuing to appraise the sexual exploitation of children and child labour, the chapter also examines child soldiers and the inclusion of children's rights in the draft constitution of October 1997.

Nineteen ninety seven showed a slight improvement in the situation for Sri Lankan children. It saw the establishment of two administrative bodies concerned with children's rights: the

* Legal Division, Ministry of Foreign Affairs.

¹ *Sri Lanka: State of Human Rights 1997* (Law & Society Trust, Colombo, 1997), Chapter X, pp. 211-224.

National Child Protection Authority (NCPA) and the National Steering Committee on Eliminating Child Labour. The incorporation of children's rights as fundamental rights into the draft constitution was welcome. However, no legislative reform with respect to children was made, thus calling into question the priority given to children's rights in Sri Lanka.

2. Sexual Exploitation of Children

Having deposited the instrument of accession with the UN Secretary General, Sri Lanka became a State Party to the Convention on the Rights of the Child (CRC) in July 1991. Article 19 of the CRC clearly states that the States Party shall protect the child from all forms of physical or mental abuse, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or other care-giver(s). Article 34 of the Convention deals extensively with the issue of sexual exploitation and sexual abuse of children.

The Penal Code reforms of 1995 relating to sexual offences against children helped to bring about a more stringent approach to sentencing in 1996.² However, it is unclear whether the new, tougher laws are actually deterring the sexual exploitation of children as envisaged. Although an increasing rate of child abuse and rape is reported throughout the island,³ it is not clear whether the actual number of cases has increased or whether more cases are being reported due to greater public awareness of the issue.

Newspapers report that over 600 new entries a day appear on the Internet, advertising Sri Lanka as the world's child sex centre,

² *Ibid.*

³ "Helping the abused," *Sunday Leader*, 25 May 1997.

where children as young as five years old are for sale for a nominal fee.⁴ Furthermore, Sri Lanka is considered a primary source of child pornography for markets in both Europe and the United States of America. Organised groups of foreign paedophiles visit Sri Lanka regularly, but it is also reported that some children are taken abroad to be shared within paedophile rings overseas.

In 1997, a number of foreign nationals were charged with committing sexual offences against children. On 6 February 1997, Armin Heinrich Pfaffhauser, a Swiss national aged 58, was sentenced to two years' rigorous imprisonment for committing an unnatural offence and gross indecency against two boys aged 12 and 13 years, on 7 February 1995.⁵ This was the maximum punishment available for these offences,⁶ and Pfaffhauser became the first foreign national to be convicted under Sri Lankan law for child abuse.⁷ However, had the offence been committed after September 1996, the offender would have received a minimum sentence of at least ten years under the Penal Code reforms of 1995.⁸ Pfaffhauser's application for bail was refused by the Magistrate.⁹ On the request of the Crimes

⁴ "Sri Lankan children for sale on Internet," *Weekend Express*, 20-21 December 1997, "Foreign paedophiles invited to Sri Lanka through internet," *The Island*, 20 October 1997.

⁵ "Swiss paedophile gets two years jail," *Daily News*, 7 February 1997; "Police seek CBK's nod to deport Armin," *Sunday Times*, 16 February 1997; "That long road to justice," *Sunday Times*, 23 February 1997; "A paedophile's pad," *Sunday Leader*, 9 March 1997.

⁶ Penal Code section 365A.

⁷ "Police seek CBK's nod to deport Armin," *Sunday Times*, 16 February 1997.

⁸ Penal Code section 365A as amended in 1995.

⁹ "Bail refused to Swiss paedophile," *Daily News*, 17 February 1997.

and Criminal Intelligence Bureau, the Controller of Immigration and Emigration declared the Swiss national *persona non grata* and deported him under Section 31 of the Immigrants and Emigrants Act of 1948, on the grounds that he was "not a fit or proper person to remain in the country."¹⁰ The deportation was vehemently protested by local NGOs. The legal consultant to Protecting the Environment and Children Everywhere (PEACE) stated that, "to send [him abroad] would be a mockery of justice."¹¹ Nevertheless, Armin Pfaffhauser was arrested upon arrival in Zurich and was reported to be in preventive custody awaiting trial in Switzerland. The Government of Sri Lanka granted international judicial assistance to the Swiss Government by allowing a special investigative team to visit the country to gather necessary evidence against the child abuser in respect of legal proceedings instituted in Switzerland.

Meanwhile, Thomas Casperwivz, also a Swiss national and an accomplice of Pfaffhauser, was arrested at the same location in February 1995. He left the country while on bail.¹² In February 1997, the Magistrate's court sentenced him to two years of rigorous imprisonment after he was tried in absentia for unnatural offences. According to police sources, Casperwivz was arrested by Interpol on arrival in Geneva.

Another interesting case was against Victor Baumann. A Swiss businessman aged 54 years, Baumann was resident in Negombo. He was deported while a case was pending against him on charges of sexual exploitation of children. With the assistance of child welfare groups and NGOs, the police apprehended

¹⁰ "Swiss paedophile to be deported," *Daily News*, 8 February 1997.

¹¹ "Don't deport paedophile," *Sunday Times*, 30 February 1997.

¹² "Swiss probe team meets child victims," *Sunday Times*, 2 March, 1997.

Baumann in October 1996 on suspicion that he had sexually abused around 1,500 Sri Lankan children.¹³ The Magistrate remanded him for two weeks pending completion of investigations and later released him on bail. He was charged under section 365A of the Penal Code as amended for committing acts of gross indecency between persons and grave sexual abuse of children.¹⁴ He was due to be indicted on 26 February 1997, when he was deported under Part IV of the Immigrants and Emigrants Act of 1948, as an undesirable person to remain in the country because similar charges were pending against him in other countries.¹⁵ According to the District Attorney, upon his arrival in Zurich, Baumann was taken into custody by the relevant authorities.¹⁶ A Swiss investigative team was granted judicial assistance by the Government of Sri Lanka to obtain necessary evidence against Baumann in respect of legal proceedings instituted in Switzerland. Sri Lankan human rights lawyers expressed shock over his "hurried and secret deportation."¹⁷ The Lawyers for Human Rights and Development (LHRD) pointed out that Baumann could come back to Sri Lanka any time as a free man, as he had not been convicted under Sri Lankan law.¹⁸ The government's decision to deport

¹³ "Swiss alleged to have abused 1,500 Lankan children," *The Island*, 17 February 1997; "Paedophile jailed pending inquiry," *Daily News*, 13 February 1997.

¹⁴ "Swiss charged with child abuse deported," *The Island*, 12 February 1997.

¹⁵ *Ibid.*

¹⁶ "Swiss held in Zurich in Sri Lanka child abuse case," *Ceylon Daily News*, 12 February 1997.

¹⁷ "Lawyers smell a rat in Baumann case," *Sunday Times*, 16 February 1997.

¹⁸ *Ibid.*

Baumann without prosecution clearly demonstrates that the penal amendments introduced in 1995 to help eliminate sexual abuse of children are of no avail.

While several other child abuse cases were pending against German, Dutch and Belgian nationals before Sri Lankan courts, numerous cases against respectable members of the local community were also reported. One was against an 82 year-old Buddhist monk, the chief incumbent of the Kataragama Wedihitikande temple, who was accused of having sexually molested two girls aged 11 and 13 years who were under his care at the temple premises.¹⁹ In October 1997, following complaints by their parents, the children were removed from the temple premises by the police and entrusted to the care of the child specialist attached to the Karapitiya hospital for a medical examination. According to C.A.Gunawardena, the Officer in Charge of the investigation at the Kataragama police, "there are eleven cases against the monk but he has fled the area."²⁰ However, the monk -- Sri Siddhartha Thera -- appeared in court in November 1997. He was charged with molesting two young girls; the case was still pending at the end of the year.

In another case, a 33 year-old graduate teacher, who was the sectional head for years 3, 4 and 5 of a village school in Horana, was taken into custody on 18 June, 1997 and remanded pending trial for molesting eight children.²¹ On the order of the Additional District Judge, the victims were first examined by the DMO of

¹⁹ "Aged monk held for molestation," *Sunday Leader*, 11 November 1997.

²⁰ "Monk wanted for molesting teenagers in the south," *Sunday Leader*, 2 November 1997.

²¹ "A school master stands trial for sexual abuse in the classroom," *Sunday Times*, 29 June 1997.

the area and then by a professor of Ruhunu University. It was confirmed that the children had been molested, and two of the boys had signs of severe rape. The children were then referred to a child psychologist at the Lady Ridgeway Hospital. Subsequent to his arrest, the teacher confessed to the police that he had molested the children. The case was due to be heard on 30 June 1997 at the Horana Magistrate Court, but the outcome is not known.

According to a research study conducted by Professor Harendra de Silva of Ruhunu University, in collaboration with UNICEF, 18 % of 1,000 male university students had been sexually abused while at school.²² Indeed, according to Dr. Hiranthi Wijemanne, Senior Programme Officer for UNICEF, sexual exploitation of children is increasing in schools, which is a deeply worrying trend.²³

In another incident, the Papiliyana police in February 1997 arrested a Buddhist monk, a trustee of the Japanese-aided Noguchi children's home, for allegedly molesting four girls of the orphanage.²⁴ The children complained to teachers, who in turn reported to the police. The victims, all under the age of 10 years, were admitted to the hospital for medical examinations. There is no further information on the action taken.

In another noteworthy case, at least 11 girls under 15 years old were reported to have been sexually abused at a children's home, the *Vijitha Lama Nivasaya* in Beruwela, which was run

²² "18% of male varsity students sexually abused in school," *The Island*, 15 September 1997.

²³ *Ibid.*

²⁴ "We were abused, then told to shut up," *Sunday Times*, 9 February 1997.

by the All Ceylon Buddhist Congress (ACBC).²⁵ The children had reportedly been taken to hotels, where they were subjected to sexual abuse by foreigners and Sri Lankans on 21 October 1995. The Magistrate ordered that the children be medically examined, and that they be transferred to another home. A number of the ACBC officials, the management of the home, and members of the social services organisation of the area were suspected of involvement. On 25 June 1997, the matron and assistant matron of the home and two others were charged for involvement in the case by the Kalutara Magistrate. The Criminal Investigation Department took over the investigations into this case in January 1997. The suspects were charged with rape and aiding and abetting rape under the Penal Code.²⁶ Non-summary proceedings were under way at Kalutara Magistrate's Court at the end of 1997. Meanwhile, the children's home has been closed down and the all the children have either been transferred to a children's home in Borella (also run by the ACBC) or returned to relatives.

As a result of these cases, the Department of Probation and Child Care announced that "all unregistered children's homes [will be shut down] without warning."²⁷ According to the Commissioner, Probation and Child Care, around 50 unregistered children's homes would be forced to closed down under this

²⁵ "CID takes over probe," *The Island*, 25 January 1997; "Abused children to be examined by Prof.," *Daily News*, 25 January 1997; "Several quizzed in child abuse case," *Daily News*, 11 February 1997; "Home without children," *Sunday Leader*, 25 May 1997; "Are the abused children receiving the right care?" *Sunday Leader*, 6 July 1997.

²⁶ Sections 364 and 102.

²⁷ "Child-sex homes to be shut," *Sunday Times*, 19 January 1997.

directive. Regrettably, it is only after a major scandal that the government takes any action, by which time considerable damage has already occurred.

In December 1996, the President directed the Presidential Committee on Prevention of Child Abuse to draw up an immediate action plan to deal strictly with offences against children, including sexual exploitation and child labour.²⁸ The Committee examined legal procedures, enactment of legislation, counselling and therapy for victims, and raising public awareness. The need to strengthen child care activities at the district level was also addressed. The Presidential Committee's Child Abuse Action Plan highlighted the following areas:

- Establishment of the NCPA under the purview of the President in terms of Article 44(2) of the Constitution, empowered to formulate policy, monitor implementation and network all activities, in relation to this subject;
- Amend relevant existing laws and establish new legal procedures to ensure effective prosecution of offenders;
- Make child abuse a non-bailable offence;
- Create a special desk, with trained women officers, at every police station to deal with offences against children;
- Create a facility for the public to report offences against children, such as a "help line";

²⁸ "Presidential action panel to report by February 7 on child abuse," *Daily News*, 5 January 1997; "President to set up Child Protection Authority," *Daily News*, 11 February 1997; "Child protection authority to be set up," *Daily News*, 20 March 1997.

- Institute comprehensive training programmes for probation and child care officers; and
- Introduce children's rights, awareness of sexually transmitted diseases and relevant life skills into the education curriculum.

The 24-hour "help line" was soon set up at the Police Headquarters' Crimes Division's National Desk for Child Abuse and Violence against Women.²⁹ The public is also able to write to the National Desk. All such information is to be kept strictly confidential. According to the police, the public's response to the "help line" has been extremely positive and the police are actively following up reports of abuse. The "help line" received a total of 268 complaints in the first ten-and-a-half months of its operation.³⁰ Of these complaints, 25 related to sexual exploitation of children, nine to child rape, one to prostitution, and nine to cruelty to children.³¹

Pending legislation being drawn up to establish the NCPA as a statutory body, a Presidential Task Force on Child Abuse was appointed by the President in July 1997, to exercise the powers and functions of the proposed NCPA. The Presidential Task Force on Child Abuse comprises both governmental and non-governmental officials specialised in child abuse, and is based at the Presidential Secretariat.³² The terms of reference of the Task Force are:

²⁹ "Child abuse 'hot line' set up," *Sunday Observer*, 23 February 1997; "Special unit to deal with child abuse," *Daily News*, 24 February 1997.

³⁰ 19 February 1997 to December 1997.

³¹ Crimes Division, Department of Police.

³² "Presidential Secretariat to set up Child Protection Authority," *Daily News*, 3 September 1997.

- To advise the government on the formulation of national policy to prevent child abuse and to protect and treat children who are victims of such abuse;
- To promote the welfare and protection of victims of such abuse;
- To create awareness of the rights of the child in relation to the prevention of child abuse;
- To consult and/or liaise with all relevant ministries, government departments and agencies, provincial councils, local authorities, district and divisional secretariats, and public and private sector organisations in relation to the above;
- To monitor the implementation of laws relating to child abuse;
- To recommend legal, administrative or other reforms required for the effective implementation of the national policy on the prevention of child abuse;
- To monitor the progress of criminal investigation and criminal proceedings relating to incidents of child abuse;
- To prepare and maintain a national database on child abuse;
- To co-ordinate the supervision and monitoring of all religious and charitable institutions which provide child care facilities; and
- To organise and facilitate workshops, seminars and discussions relating to child abuse.

While the NCPA will have a very specialised mandate in comparison to the functions of the National Monitoring Committee on the Children's Charter, there is a risk that it will duplicate some functions of the Monitoring Committee. However, it is to be hoped that the specialised mandate of the NCPA will enable it to bring about positive changes to prevent the sexual exploitation of children.

Positive steps have been taken to ensure that child victims are afforded immediate therapeutic care facilities.³³ Probation and child care officers at the provincial level are to ensure adequate care facilities for child victims. Action has already been taken to provide protection and immediate care for children by transferring child victims to the nearest paediatric unit at provincial or district hospitals. Consultants and medical practitioners are to ensure that children are examined and given professional help. The victims are to be afforded protective custody in the ward and a case report will be prepared. Furthermore, the Ministry of Health, the Sri Lanka College of Paediatricians and the Sri Lanka Medical Association are to mobilise the support of health professionals to ensure their co-operation.

As pointed out by Professor Harendra de Silva, the rehabilitation and protection of child victims will be particularly difficult.³⁴ The rehabilitation process is particularly important to prevent the abused becoming abusers themselves. More systematic therapeutic and psychological care must be provided for abused children, although this need is already being provided to some extent, as seen in the reported cases.

³³ "Committee proposes Protection Authority, 'Help line' to arrest child abuse," *The Island*, 20 March 1997.

³⁴ "Local abuse more than foreigners," *Sunday Leader*, 27 July 1997

A special unit to help investigate child abuse cases was set up in the Attorney General's Department in August 1997.³⁵ In instances where children have been sexually exploited, a team of state counsel will assist the police in the investigations from the very outset, thereby helping to identify the legal implications involved.

In order to boost South Asia's fight against child abuse, a team of detectives from Scotland Yard conducted a training course in November 1997, on the methods of investigating child abuse cases and protecting children.³⁶ The primary objective of the training was to ensure the welfare of the victim at all times. It was also seen as equally important to secure convictions of abusers, and to send a clear message that harming children is not acceptable. The course was held at the Police Training College, Kalutara, and was attended by delegates from Sri Lanka, India and Nepal.

3. Child Labour

The prevailing legislation in Sri Lanka on Child Labour conforms to Article 32 of the CRC. Although legislation³⁷ exists to protect children from being employed and exploited for their labour, children below the minimum age of employment (14 years)³⁸ are nevertheless employed. In Sri Lanka a significant proportion of children employed outside the family are reported

³⁵ "AG's dept. special unit to tackle child-abuse cases," *Sunday Times*, 29 June 1997.

³⁶ "Britain in new initiative to combat child abuse," *The Island*, 13 November 1997.

³⁷ See *supra* n.1 for a discussion on laws relating to child labour, p. 217-221.

³⁸ There is a discrepancy with regard to minimum age. See *Sri Lanka: State of Human Rights 1997* (Law & Society Trust, Colombo 1997) chapter X, p 219. This anomaly was recognised in 1997 but no action was taken during the year to rectify it.

to work in domestic service and in the informal economic sector, such as in cottage industries. Child labour is less prevalent in the organised sectors.³⁹

Young children are forced into labour mainly for economic reasons. Another contributing factor is the non-availability of adult domestics due to women leaving the country as migrant workers. There are no official statistics as to the number of children employed in Sri Lanka. "Unofficial figures vary from 100,000 to 500,000 children who are illegally employed,"⁴⁰ but the exact figure is not known. Furthermore, according to a 1996 report by the International Labour Organisation, the number of child workers in Sri Lanka numbered between 100,000 and 500,000.⁴¹ A survey of middle-income households in Colombo showed that one in three such households employed a child under 14 years of age as a domestic worker.⁴² Nobody knows the actual number of child domestics in Sri Lanka, however. The complex social processes which sustain child labour, both paid and unpaid, are not easily amenable to straightforward law enforcement.

According to the police, of the 268 complaints received on child abuse via the "help line" at the Police Headquarters Crimes Division, 213 complaints related to child labour, constituting approximately 80% of the total number of complaints received.⁴³

³⁹ Padma Ranasinghe, "An Overview of the global child labour situation, history, magnitude, causes and consequences," *Child Labour in Sri Lanka, Report of the Workshop Action Plan*, (September 1996), p.2.

⁴⁰ "Child labour: crushing them young," *Sunday Times*, 9 November 1997.

⁴¹ *Child Labour in Sri Lanka, Report of the Workshop Action Plan* (September 1996), p.142.

⁴² UNICEF, *The State of the World's Children 1997*, (Colombo, 1997), p.32.

⁴³ See *supra* n.30. Discussion with DIG Crimes

Police sources also stated that 60% of the complaints relating to child labour were unsubstantiated.

The case of two teenage domestics, aged 13 and 15 years respectively, who had escaped from a High Court Judge's house, was given wide coverage in the print media.⁴⁴ The girls were held in police custody and produced before the Kalutara Magistrate. The Magistrate ordered that they be medically examined. The 15 year-old was found to have been sexually abused on several occasions, while the 13 year-old had not been sexually harassed, but had been subject to inhuman treatment, including being hit by a blunt weapon. Police are conducting further investigations. In another incident, a housewife was taken into custody for employing an 11-year old girl as a domestic.⁴⁵ A medical examination revealed that the child's arm was fractured following an assault by her employer. The Magistrate ordered that the girl be produced in court the next day, but the outcome of the case is not known.

A man who inflicted 23 external injuries and internal wounds on a 12-year old domestic and caused her death by assaulting her with a blunt weapon was convicted and sentenced to death by the High Court Judge of Chilaw.⁴⁶ The child was examined by the JMO of Colombo, who said that, "the cause of death of the girl was shock following multiple musculo-cutaneous injuries."⁴⁷

In March 1996, under the Women, Young Persons and Children's Act No 47 of 1956, the Ministry of Labour & Vocational Training,

⁴⁴ "One girl scarred, other subjected to sex," *Sunday Observer*, 9 March, 1997; "Teenage domestics subjected to sexual, cruel harassment," *Evening Observer*, 12 March 1997.

⁴⁵ "Housewife remanded for employing underaged as domestic," *Evening Observer*, 12 March 1997.

⁴⁶ "Death sentence for killing domestic," *Daily News*, 1997.

⁴⁷ *Ibid.*

together with the Ministry of Health and Social Services, granted authority to the Department of Probation and Child Care to investigate into cases of child labour by inspecting households.⁴⁸ In order to take child labourers into protective custody, the probation officers have to be accompanied by police officers. Prior to this agreement, only labour officers together with the police had the authority to remove a child worker from his or her employer and take them into protective custody. Thus, by expanding the law to incorporate probation officers, a greater number of workplaces are being monitored.

The Department of Labour is preparing amendments pertaining to employment of children under the Women, Young Persons and Children's Act, based on the recommendations made by the National Monitoring Committee on the Children's Charter.⁴⁹ It is expected that the Department of Labour will seek to enhance the penalties and fines for retaining child labour, and introduce the payment of compensation to the victim. If implemented, amendments of this nature would be a most welcome move to help eliminate child labour.

A national workshop on child labour in Sri Lanka, organised jointly by the ILO office in Colombo and the Ministry of Labour and Vocational Training, was held in September 1996. The workshop drew participants from various ministries, government departments, employers, workers, national and international NGOs. It examined the nature and extent of child labour in Sri Lanka, assessed the measures taken by the government and society in dealing with the problem and suggested certain

⁴⁸ Under section 34(1)(c)(ii) of Women, Young Persons & Childrens' Act No. 47 of 1956.

⁴⁹ Informal discussion with Ms. Pearl Weerasinghe, Department of Labour.

interventions needed to eradicate the problem, particularly in its more abusive and hazardous forms.⁵⁰ The Ministry of Labour and Vocational Training and the ILO signed a memorandum of understanding in November 1996, extending the ILO's International Programme on the Elimination of Child Labour (IPEC) to Sri Lanka. The IPEC programme in March 1997, set up a National Steering Committee on the Elimination of Child Labour. The Steering Committee has representatives from the relevant Ministries and government departments, workers and employers organisations, and local and international NGOs active in the field of child labour. The mandate of the National Steering Committee is to advise on the nature and scope of IPEC activities within the framework of the national policy, to propose action programmes, and review their outcome. In the light of the deliberations at the workshop, the National Steering Committee decided to implement the following action programmes to eliminate child labour in Sri Lanka:

- Situation analysis and survey incidence of child labour;
- Strengthening the capacity of non-governmental organisations to provide legal assistance to victims of child labour; and
- Enhancing the capacity for enforcement of child labour legislation.

The introduction of the IPEC programme to Sri Lanka and the establishment of the National Steering Committee are positive efforts by the government to combat child labour. However, it is still too early to assess the effectiveness of the Committee's work.

⁵⁰ Press release, ILO Colombo Office, 26 March 1997.

4. Child Soldiers

Sri Lanka is committed to Article 38 of the CRC which stresses that:

States Parties shall take all feasible measures to ensure that persons who have not attained the age of 15 years do not take a direct part in hostilities and shall refrain from recruiting any person who has not attained the age of 15 years into their armed forces.

Article 38 further reiterates that "in accordance with their obligations under international humanitarian law to protect the civilian population in armed conflicts, States Parties shall take all feasible measures to ensure protection and care of children who are affected by the armed conflict."

The government strictly adheres to the first part of this Article. The minimum age for recruitment into the armed forces in Sri Lanka is 18 years. Furthermore, under the Children's Charter of Sri Lanka, the government in principle recognises that the minimum age for participation in state military activities is 18 years.

However, one of the biggest problems faced in this area of child protection is the recruitment of children into the armed cadres of the Liberation Tigers of Tamil Eelam (LTTE). There is clear evidence of forced conscription of thousands of young children, both boys and girls. Many are as young as 10 years. They are used by the LTTE for combat and related armed actions. Involving children as soldiers has been made easier by the proliferation of inexpensive light arms such as the AK 47 and the M16. Children from marginalised and impoverished

backgrounds and those separated from their families are most likely to be recruited. Following a military operation in 1997, of the 180 LTTE cadres killed, "more than half were still in their teens, and 128 were girls."⁵¹ The number of child soldiers within the LTTE and the number of child soldiers that have died in combat are unknown.

As pointed out by Guy Goodwin-Gill and Ilene Cohn, in their study on Child Soldiers,

*It was only with the intervention of the Indian Peace Keeping Forces (IPKF) in 1987 that the Liberation Tigers of Tamil Eelam (LTTE) faced a manpower shortage, leading to the recruitment of boys as young as 9 to 12 years old.*⁵²

The study goes on to state that "the recruitment of young boys increased again in 1990 when conflict erupted for the second time."⁵³

The problem of child soldiers within the LTTE received extensive international and local media coverage during 1997. Interpress Services (IPS) noted that "as adults are killed, up to half the fighters [of the LTTE] are children, many among them girls."⁵⁴ *The Emirates News* of 15 June 1997, quoted soldiers saying, "Sri Lanka's Tamil Tiger rebels have thrown hundreds of girls into the frontline in recent attacks on government troops . . .

⁵¹ "Children at both ends of the gun," *Weekend Express*, 7 - 8 June, 1997.

⁵² *Child Soldiers - The role of Children in Armed Conflict*, A study for the Henry Dunant Institute, Geneva, (1994), (Clarendon Press, Oxford), p. 29.

⁵³ *Ibid.*

⁵⁴ "Asia's child warriors," *The Observer*, 9 May 1997.

teenage girls took part in this week's attack on the military's forward position near the northern town of Vavuniya."⁵⁵

According to another report, the LTTE forcibly recruited school children despite the pleadings of their parents. Ashok, the LTTE Ram Base leader in Batticaloa, reportedly said that, "The children forcibly recruited are brainwashed by showing them video cassettes favourable to the movement, after which they then undergo military training."⁵⁶ In their study, Guy Goodwin-Gill and Ilene Cohn also state that the LTTE's recruitment drives are conducted in schools and are not voluntary, as families are pressurised to permit their children to enlist.⁵⁷

A number of case studies report that during exchange of fire, the child soldiers forget to take cover, and thus run greater risk of injury or death. Like other LTTE cadres, these boys and girls are made to wear cyanide capsules round their necks. It is also reported that the LTTE cadres deliberately exploit such fearlessness in children. Moreover, the progressive involvement of children in acts of extreme violence desensitises them to suffering.

Graca Machel, the Expert of the UN Secretary General on Impact of Armed Conflict on Children, singled out Sri Lanka as a country where children are lured into a "cult of martyrdom" by the "ideological indoctrination" of the LTTE.⁵⁸ The report

⁵⁵ "LTTE throws girls into frontline, says paper," *Emirates News*, 15 June 1997.

⁵⁶ "LTTE forcibly recruits school children," *Daily News*, October 1997.

⁵⁷ See *supra* n. 49.

⁵⁸ Graca Machel, *Impact of armed conflict on Children*, (UN report, November 1996).

condemns the use of children as militants by the LTTE and reports that in Sri Lanka, adult cadres of the LTTE "have used young children's immaturity to their own advantage, recruiting and training adolescents for suicide bombing." As the study points out, the inexperience and lack of training leaves these young children particularly exposed and they rarely appreciate the perils they face.

The Graca Machel report makes several general recommendations in relation to child soldiers. Governments must take all necessary measures to prevent the recruitment and participation of children under the age of 18 years in armed forces, and to ensure their demobilisation and reintegration into society in a manner that fosters self respect and dignity. These measures should include the adoption of the proposed Optional Protocol to the Convention on the Rights of the Child on involvement of children in armed conflicts. The demobilisation and social reintegration of child soldiers must be incorporated into the peacekeeping mandate and peace agreements.

The Graca Machel report makes further recommendations on preventing the recruitment of children to armed forces, some of which may be useful in the Sri Lankan context. As many children are forced to enlist for economic, social and political reasons, access to education and employment can be preventive factors. Active tracing and family reunification programmes can help prevent unaccompanied minors from being recruited. Governments and international agencies must also ensure the safety and security of refugee and welfare centres for displaced persons. Furthermore, recruitment of children can be minimised if local communities are aware of national and international laws relating to children.

In an effort to address the problem of child soldiers, the Sri Lankan government in October 1997 urged the UN Special

Representative on the Impact of Armed Conflict on Children, Mr. Olara Otunnu, to focus international attention on the plight of Tamil children who have been recruited by the LTTE, to take active measures to rescue them and to help rehabilitate and reintegrate them into normal society. The UN Special Representative declared his willingness to render all possible assistance to compel the LTTE to abandon their practice of forcibly conscripting children. On the invitation of the government, Mr. Otunnu is expected to visit Sri Lanka in May 1998 to make a first hand assessment of the situation.

In returning captured child soldiers to safety, it was earlier reported that the security forces do act according to international humanitarian law.⁵⁹ In one such incident in 1997, LTTE cadres who surrendered to the army stated that they were treated well by the military.⁶⁰ Child prisoners of war are returned to their parents by the government forces. Under the Emergency Regulations (ERs) of November 1994,⁶¹ people who had surrendered ("surrendeers") were treated as detenus. However, in August 1996, Regulation 22 relating to surrendeers was replaced with a new regulation⁶² which specifies that surrendeers are no longer to be held in detention camps but must be sent directly to Protective Accommodation and Rehabilitation Centres.

There are two such Centres, one in Gangodawila for girls and one in Bindunuweva for boys. They are run by the Department

⁵⁹ See *Sri Lanka: State of Human Rights 1995* (Law & Society Trust Colombo, 1996), Chapter VIII, pp. 160-169 for discussion on principles of international humanitarian law.

⁶⁰ "Captured LTTE youth recounts story," *Daily News*, 20 November 1997.

⁶¹ Emergency Regulation No. 843/12 of 4 November 1994.

⁶² Emergency Regulation No. 938/13 of 29 August 1996.

of Rehabilitation, and child soldiers who or who are captured by the forces, and deserters from the LTTE are rehabilitated there. However, a military source noted that this rehabilitation programme is not very effective; LTTE cadres rehabilitated at these centres are often recaptured after they return to armed action.⁶³ The rehabilitation programmes in these centres are reported to focus on vocational training, but do not adequately address therapeutic and psychological care. The government needs to ensure that children in these centres receive care from personnel who have been specifically trained to work in this area of child protection.

The government could also help promote the idea that 18 years should be the minimum age of recruitment into any armed group or unit within the country. Local communities should be made aware of the national and international laws relating to children through legal advocacy programmes. In order to prevent children being recruited off the streets, schools and children's homes, the government together with international agencies should engage in active tracing and family reunification programmes in the conflict-ridden and border areas of the country. Once reunited, such children should be provided with access to education and employment to facilitate reintegration into society. The government should also develop mechanisms and specialised training for staff in such places as internally displaced centres, welfare centres, refugee camps, and transit camps to assist children traumatised from participation in armed conflict.

5. Children's Rights and the Draft Constitution of October 1997

Children's rights (Article 22) are incorporated in the fundamental rights and freedoms chapter of the draft constitution, which the

⁶³ Sources requested anonymity.

government presented to parliament in October 1997. Today, when numerous violations of children's rights are reported, granting constitutional recognition to children's rights is a most welcome and a progressive change from earlier constitutions.

The clarification that a child will be entitled to any other fundamental rights of a citizen in addition to the special rights of children recognised in the Constitution is welcome to prevent confusion and argument.⁶⁴

The constitutional recognition of the concept of the "best interest" of the child⁶⁵ as a paramount consideration in all matters concerning children, is another significant feature. The introduction of children's rights together with this concept into the draft Constitution confirms Sri Lanka's commitment to conform to the standards of the CRC. However, Article 3 of the CRC refers to the "best interest" of the child as "primary" rather than a "paramount" consideration. As pointed out by the National Monitoring Committee on Children, "this reflects the idea of giving importance and priority to children's needs in the course of considering other factors. 'Primary' seems a preferable standard, particularly in a context where children's rights may come into conflict with women's rights."⁶⁶

Although the right to a name from birth⁶⁷ is recognised in the draft Constitution, a child's right to citizenship through either parent who is a Sri Lankan citizen is not recognised. Thus, in

⁶⁴ Article 22(8) of the draft Constitution.

⁶⁵ Article 22(4) of the draft Constitution.

⁶⁶ Changes proposed by the National Monitoring Committee on Children to the Parliamentary Select Committee on the Constitution on the proposed children's rights article.

⁶⁷ Article 22(1)(a) of the draft Constitution.

a situation where a Sri Lankan woman is married to a foreign husband, their children are not entitled to Sri Lankan citizenship. Provision should be made to allow a child to obtain Sri Lankan citizenship through either parent.

Under Article 22(1)(a) of the draft Constitution, a person below the age of 18 years is considered to be a child.⁶⁸ If adopted, this would give legal effect to the Children's Charter and would bring Sri Lankan law in line with the CRC. Although there are numerous definitions of a child in Sri Lankan law, the constitutional recognition of anyone under 18 years to be child would help create uniformity in the law.

Article 22(6) states that "every child between the ages of 5 to 14 years shall have access to free education provided by the State." While the draft constitution does not make primary education compulsory as it only requires the provision of access to free education, an amendment proposed to the Education Ordinance seeks to make education compulsory for children between ages 5 and 14. However, it should specifically be stated that children cannot be engaged in employment during school hours. Furthermore, there should be uniformity in the cut-off age for compulsory education in the draft Constitution and in the proposed amendment to the Education Ordinance. The latter refers to the cut-off age being 15 years and not 14 years.

By stating that a child shall not be employed in any hazardous activity, it can be argued that draft Article 22(7) leaves room for children to be employed in non-hazardous activities. Thus, this article takes away from the accepted concept of eliminating all child labour under the minimum age of 14 years.

⁶⁸ Article 22(9) of the draft Constitution.

Once children's rights are enshrined in the Constitution, the enforcement of these rights will be of paramount importance. The mere legal institutionalisation of children's rights in the Constitution will be insufficient to ensure their realisation. Hence, the co-operation of all concerned ministries, governmental departments, local and international NGOs should be sought to implement these provisions effectively.

6. Conclusion

Sri Lanka being a State Party to the CRC has taken several steps to endorse these rights in a meaningful manner. In comparison to last year, in 1997, with the establishment of two administrative bodies to address issues on child abuse and child labour, and the introduction of children's rights into the draft constitution, we see a slight improvement in the realisation of children's rights. Nevertheless, while these efforts to protect children's rights are welcome, they still fall short of international standards. In order to ensure that Sri Lankan children are guaranteed the protection envisaged by the CRC, the government still has considerable work to do, and will need to consider expanding the resources devoted to children's rights.

Numerous issues relating to children living in conflict areas, displaced children, and children in conflict with the law⁶⁹ still need to be addressed. The government should look into the possibility of establishing a specialised authority or department to address issues relating to children living in conflict areas and

⁶⁹ See *Sri Lanka: State of Human Rights 1993* (Law & Society Trust, Colombo, 1994).

displaced children. In addressing issues concerning children in conflict with the law, the government should consider the recommendations proposed by Dr. Vijaya Samaraweera in his study⁷⁰ of the juvenile justice system of Sri Lanka.

⁷⁰ Report on the abused child and the legal process of Sri Lanka, Colombo, 1997 (*being published*).

IX

Migrant Women Workers

*Nimalka Fernando**

1. Introduction

International migration has become a priority issue on the global development agenda.¹ According to official sources, the flow of migrant workers from low-income to high-income countries and regions accelerated in the 1980s and early 1990s. In 1991, the International Labour Organisation (ILO) estimated that the total number of legal migrant workers globally was around 25

* Women's Rights Activist, formerly Regional Co-ordinator, Asia Pacific Forum on Women, Law and Development.

¹ Thanh-Dam Truong, "Gender, International Migration and Social Reproduction" Paper presented at the International Seminar on Female Migration, December 1995, ISS Hague Conference.

million, and that if the number of illegal migrants was also included, the total would be about 70 million. By 1994, the combined total of migrant workers was estimated at 80 million, of whom about 30 million were legal migrants.² Data from selected Organization for Economic Co-operation and Development (OECD) countries show that women constitute between 30%- 48% of the total migrant labour force.³

From 1972 to 1992, there was a marked increase in labour migration from Sri Lanka. Economic development in the Middle East, and high oil revenues, had a tremendous impact on the labour market. In the 1970s and 1980s, the Ministry of Planning and Implementation gathered statistical information on Sri Lankan migrants by using their embarkation cards. In March 1990, however, the Sri Lanka Bureau of Foreign Employment (SLBFE) introduced an Airport Survey Unit to obtain data in a more organised manner. Their surveys revealed that the majority of migrants use unofficial channels. In 1992, of a total of 124,494 migrants, 45% migrated through officially registered agencies. In 1993, of a total of 129,076 migrants, only 38% used official channels. In 1994, of 130,000 migrants, about 46% used official channels.⁴

The scale and geographical spread of Sri Lankan migrant labour are summarised in Table 1. The figures given here, however, only represent those workers registered by the SLBFE; the true figure is likely to be higher.

² International Conference of Free Trade Unions, *Free Labour World* September 1995, p 2.

³ *Supra* n 1

⁴ *Economic Review*, January 1996

Table 1: Estimated No. of Sri Lankan overseas contract workers

Country	No. of workers
1 Saudi Arabia	225,000
2 Kuwait	110,000
3 U.A.E	125,000
4 Lebanon	35,000
5 Oman	35,000
6 Bahrain	20,000
7 Jordan	50,000
8 Qatar	30,000
9 Italy	15,000
10 Other M/E Countries	15,000
11 Far Eastern Countries	5,000
12 African countries	15,000
13 Asian Countries	10,000
Total	690,000

Source: Performance Report -Ministry of Labour (1997)

Migrant labour has become an important sector within the Sri Lankan economy, and is actively promoted by the government both as an avenue for employment and a major earner of foreign exchange. Labour is now one of Sri Lanka's major exports. Migrant workers' remittances are now Sri Lanka's highest net foreign exchange earning source. From January to July 1997 alone, Rs 29,342 million was brought into the country through remittances, which was an 11% increase over the previous year.⁵ According to SLBFE officials, as reported in the press, overseas

⁵ Performance Report - Ministry of Labour and Vocational Training (hereinafter "Ministry of Labour") (1997).

migrant workers earned an estimated Rs 50 billion in 1997 as a whole, an increase of Rs3.5 billion over the previous year. It is estimated that remittances from women migrant workers, particularly domestic workers, make up the bulk of this figure.⁶

This chapter does not attempt to address the full range of violations of human rights which arise within the many different national contexts where Sri Lankan migrants are employed. It does discuss and illustrate the general vulnerability of women migrant workers, however, and outlines the various steps which the Government of Sri Lanka has taken to try to improve conditions for Sri Lankan migrants working overseas. Finally, it outlines some of the social implications of migration within Sri Lanka, including its impact on gender relations and families left at home.

2. The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families

The UN General Assembly adopted the International Convention on the Protection of the Rights of All Migrant Workers and their Families in December 1990. It will not enter into force, however, until 20 UN member states ratify it. By mid-April 1998, only nine states had done so: Bosnia-Herzegovina, Cape Verde, Colombia, Egypt, Morocco, the Philippines, Seychelles, Sri Lanka and Uganda.⁷

⁶ "Women's Rights Watch," Women & Media Collective Publication (First Quarter 1998)

⁷ International Migrant Rights Watch Committee, Press Release 18.4.98.

The great majority of obligations contained in the Convention apply to the State in which the migrant worker is employed, to ensure that a range of rights of migrant workers within the State of employment is respected. Very few of the provisions in the Convention apply to the migrant worker's country of origin.

The importance of the Convention may be summarised as follows:

1. The Convention recognises that migrant workers are more than just labourers or economic entities; it views them as fully social beings with families, religions and cultures and as having rights accordingly, including that of family reunification.
2. It recognises the need to protect migrant workers and members of their families, as non-nationals residing in states of employment, or in transit between states. As the rights of migrant workers are often not addressed in the national legislation of receiving states or their own states of origin, it places responsibilities on the international community, through the UN, to provide measures of protection.
3. It provides, for the first time, internationally accepted definitions of "migrant workers" and various categories thereof, and members of their families. It also establishes international standards of treatment through the elaboration of the particular human rights of migrant workers and members of their families.

4. It extends fundamental human rights to all migrant workers, whether in a "regular situation" (i.e. authorised by law) or whether "non-documented or in an irregular situation" (i.e. illegal migrant workers).
5. The Convention seeks to play a significant role in preventing the exploitation of all migrant workers.
6. It attempts to establish minimum standards of protection for migrant workers and members of their families that are universally acknowledged. It can serve as a tool to encourage those States which lack appropriate national standards to bring their legislation in harmony with internationally recognised norms of protection.

3. The Vulnerability and Plight of Migrant Workers

The fundamental human rights of migrant workers are too easily violated or ignored. Non-nationals falling within such categories as "refugee", "registered foreign worker" or "student" are normally protected by law, but migrant workers too often have no legal protection.

The Human Rights Watch (HRW) investigated the forms of abuse suffered by women migrant workers employed as domestics. HRW found a pervasive pattern of rape and other forms of physical assault such as kicking, beating with sticks and pipes, slapping, punching and hair-pulling.⁸ Many Sri Lankan women

⁸ Violence Against Women Migrant Workers, UN Document E/1996/71.

are also known to suffer from such treatment. For example, three women who escaped from their places of work in Saudi Arabia described their situation as follows:

We were beaten regularly to get us to do work. Yesterday (19 August 1997) Madam requested me to feed the child. But the child refused to eat and continued to cry. Madam got very angry and started beating me with a plastic rod. After that she hurled me on to the ground and trampled on me.⁹

Of migrant workers, it is women who suffer the greatest abuse and exploitation. Often employed in the domestic sector, their existence is frequently not recognised, and they are generally abandoned to their fate. They are often placed in a hostile, alien social context in the country of employment, and if they have no legal status as workers, they may find themselves in conditions analogous to slavery, with no protection under the law at all. To earn money for the improvement of their family's lives back home, these women workers may be risking their own lives in highly exploitative and humiliating jobs.

The following incident was reported by a returnee from the Middle East:

My husband has no permanent income. I have a son 15 years of age. We need a home, even a small hut of our own, for our only child. I borrowed

⁹ Translated from *Lakbima*, 13 August 1997

Rs.12,500 and left on 16 October 1996 for Saudi Arabia. My employee loaded me with work from the very beginning. I had to get up by 3 am and could only go to sleep after midnight. I had to cook, wash clothes and clean the house. I did all the work they gave me. At the end of the first month I asked for my salary. The lady beat me up. Then I bled. She pushed me into the washroom and locked me up. She took me out at 6 am the next day. I continued to remain with them. I was given only one roti to eat. This harassment continued for 3 months.

I wrote a letter to Sri Lanka requesting them to bring me back home. My brother, with the assistance of the SLBFE, made a complaint to the police in Riyadh. Suddenly on 23 January 1998, my employer sent me back to Colombo. They did not give me any wages. As my legs were broken, other people who were on the flight collected money and hired a vehicle at the airport and sent me home. Today I have become so disabled. I have made a complaint to the Veyangoda Police."¹⁰

Not only domestic workers in the Middle East face problems collecting their wages. Sri Lankan workers in the Maldives, for example, commenced strike action in December 1997. They were employed by Five Star Garments and had reportedly not been paid since September.¹¹

¹⁰ Translated from *Lankadeepa* 10 May 1998.

¹¹ *Supra* n 6, p 26.

The Ministry of Foreign Affairs has received numerous complaints of harassment and abuse of women migrant workers overseas. In 1995 alone, it received 106 reports of women who had died and 2,268 complaints of harassment. The extent of the problem was summarised by the Chairman of the SLBFE as follows: "The real problem is that 80% of the women in Kuwait must sleep with their masters. They are merely regarded as sex slaves."¹²

The SLBFE has received considerably more complaints (see Table 2). In 1997, it received 7,431 complaints on different issues,¹³ including the deaths of 102 Sri Lankan migrant workers in Middle Eastern countries. Most of these deaths were recorded as being due to suicide or accident. Others were the result of murders and natural causes.¹⁴

Table 2: Complaints Received by SLBFE during 1997

Nature of complaint	Number
Harassment	1554
Non-payment of the wages	1514
Breach of Contract	923
Lack of communication	1830
Stranded	82
Death	102
Other	1426
Total	7431

Source: SLBFE

¹² *Sunday Times*, 4 August, 1996.

¹³ Performance Report, Ministry of Labour, 1997.

¹⁴ Women's Rights Watch, *supra* n 6 at p 30.

Numerous questions surround the deaths of women migrant workers overseas; the precise circumstances and reasons for these deaths are often not known. Families who request further investigations into these deaths through the SLBFE often face a negative response from the host countries.

Migrant workers who return home may also find themselves in situations of despair if they have been conned by unscrupulous, false agents:

Forty year-old Gunawathi left for the Middle East six months ago. But she came back within one-and-a-half months as she had been duped by a bogus agency. Her family was in debt, as they had to repay the money they had borrowed to pay the agency. She decided to approach another agency and began to quarrel with her husband to find the money. One night, her husband threatened to burn down the house if the quarrelling continued and brought out a kerosene lamp. Gunawathi grabbed it and set herself alight. She subsequently died."¹⁵

Returned migrant workers are commonly reported to suffer from mental depression, but Sri Lanka has not developed counselling or rehabilitation services to address their needs.

In 1995, the Airport Medical Centre, Katunayake, which refers all indisposed returned migrant workers to hospitals and family

¹⁵ Translated from *Lankadeepa*, 10 May 1998.

care, recorded 71 cases of insanity among returnees. Of these, 45 were married women and 26 unmarried women. A further 106 cases of women who had been harassed were also recorded. Women who have experienced violence and harassment may fear being socially stigmatised and the break-up of their families if the experiences they suffered abroad become known. Many thus fear speaking out. The SLBFE can only "facilitate inquires" into these cases.

4. Government Policy on International Labour Migration

In spite of the negative picture, more and more women seek work abroad, and it is government policy to increase employment opportunities for Sri Lankans overseas. According to the Ministry of Labour, over a million Sri Lankan migrant workers are employed overseas; it hopes to increase that figure to 1.2 million by the year 2000.¹⁶

During 1997, the Ministry of Labour pursued an aggressive drive to secure more job opportunities overseas for women. The demand is primarily for unskilled labour, and particularly for housemaids, who account for 86% of the total Sri Lankan female work force abroad.¹⁷ In addition, the government introduced several new schemes and regulations for the welfare and protection of migrant workers.

The press reported a number of job placements in South Korea, Brunei, Singapore, Malaysia and other parts of South East Asia,

¹⁶ Central Bank of Sri Lanka, Annual Report 1997.

¹⁷ *Ibid.*

mostly in garment factories or as domestic workers. The economic crisis in Asia, however, has had far reaching effects on those workers who were already employed in South Korea and Malaysia. The government of South Korea ordered the workers to return home, while nurses working in Malaysia reported that their salaries had been reduced from US\$ 100 to US\$ 50.¹⁸

The SLBFE has also acted on behalf of 96,000 returnees affected by the Iraq - Kuwait conflict in 1990/1991. In March 1997, 6,385 persons received US\$ 2,500 as compensation from the UN Compensation Committee. In addition, a further batch of 19,333 applicants was also awarded compensation in October 1997.¹⁹

During 1997, President Chandrika Bandaranaike Kumaratunga appointed two Task Forces to examine matters related to all aspects of migrant workers and to frame a national policy on overseas employment. One Task Force is designated to frame development policies related to the international situation; the other will develop an action plan to raise the socio-economic conditions of migrant workers. After receiving the reports and recommendations from these Task Forces in September 1997, the President appointed a special commission to look into the socio-economic problems and sexual harassment faced by migrant workers.

In September 1997, the Ministries of Foreign Affairs, Labour, Immigration, Civil Aviation and the SLBFE decided to take all necessary steps to register agencies for migrant workers within two months. A conference was also convened at the Presidential

¹⁸ *Supra* n 6.

¹⁹ *Supra* n 5

Secretariat that month to discuss the problems faced by migrant workers in the Middle East. It was attended by Ambassadors of Middle Eastern countries, deputy ministers and other government officers

According to the 1997 Performance Report of the Ministry of Labour, several policy decisions to increase protection for migrant workers were implemented after 1st November 1997, of which the following should be noted:

- The introduction of a new service contract for migrant women workers;
- Registration of service contract at Sri Lankan embassies abroad;
- Credibility assessment and authentication of foreign agents by Sri Lankan embassies, prior to the commencement of business with Sri Lanka manpower suppliers; and
- Introduction of compulsory requirement for migrant workers to register with the SLBFE in order to curb activities of illegal agencies and to expand welfare assistance to all migrant workers; airlines were instructed not to issue tickets to people who do not possess certification of such registration from the Bureau.

The government also took action to prosecute illegal employment agencies. All recruitment agencies have to be registered with the SLBFE. During 1997, the number of registered agencies increased from 452 to 493, of which 70% were in the capital,

Colombo. The Ministry of Labour reported that it had taken 62 illegal agencies to court, and cancelled the licences of eight other agencies because they had acted illegally. However, it did not give any details of the illegal activities involved.²⁰

5. The Sri Lanka Bureau of Foreign Employment

The main governmental body which promotes overseas employment is the Sri Lanka Bureau of Foreign Employment, which was established by Act of Parliament in 1985. It also has responsibilities to regulate contracts and conditions of employment overseas. The SLBFE has the following objectives:

- to promote and develop employment opportunities outside Sri Lanka, for Sri Lankans;
- to assist and support foreign employment agencies in their growth and development;
- to undertake measures to develop overseas markets for skills available in Sri Lanka;
- to assist licencees to negotiate terms and conditions of employment with agencies abroad;
- to regulate the business of foreign employment agencies and recruit Sri Lankans for employment outside Sri Lanka;
- to issue licences to foreign employment agencies for conducting the business of recruitment;

²⁰ *Ibid.*

- to set standards for and to negotiate contracts of employment;
- to formalise recruitment agreements; and
- to formulate and implement a model contract which ensures fair wages and standards of employment.

In addition, the SLBFE runs an Information Data Bank to monitor the outflow and return of migrant workers, to undertake welfare and protection of those employed overseas and initiate programmes for rehabilitation, guidance, counselling and training. The SLBFE directly operates 15 training centres in Sri Lanka to prepare potential migrants for working abroad. Those seeking job opportunities abroad are trained on how to operate modern home appliances and receive an orientation course on cultural issues they need to know prior to their departure. A further 22 training centres are operated by private agencies with the assistance of SLBFE.

During 1997, The SLBFE opened a special counter at the Bandaranaike International Airport to monitor the airlines' compliance with the new regulations which had been introduced on the basis of the recommendations made by the Presidential Task Forces. It also initiated, a project to extract data on migrant workers directly from the embarkation card.²¹

6. Insurance Services

The 'Suraksha' (protection) insurance scheme was initiated in October 1994 to provide relief for migrant workers in distress.

Workers who registered with the SLBFE prior to departure are eligible for this insurance scheme, which provides compensation for death, disability and repatriation. Between January and September 1997, 2,707 persons were awarded compensation totalling Rs. 35 million.²² Migrant workers are required to pay Rs. 3,200 as a deposit under this scheme.

7. Social Implications of Migration

The majority of migrant workers are women (see Table 3), and the majority of women migrants are married. The collapse of the agricultural sector has given rise to rural unemployment and deprivation. Overseas job opportunities have "relieved" this situation to some extent, but because of the nature of the jobs available, it has been primarily women who have taken up employment abroad. As a result men often remain at home and look after the children, while the wife's remittance becomes the main source of family income. Female employment overseas has transformed gender relations, but the negotiation of new identities for these women remains problematic.

It is frequently said that the migration of mothers has caused an increase in problems related to children. There are frequent press reports, for example, of young children being raped or sexually abused when the mother is working abroad. The impact of migration on families needs to be properly researched, and the findings addressed in policies developed for the welfare of migrant workers and their families. While poverty drives many women

²¹ *Supra* n 5.

²² *Ibid.*

outside the country to earn resources for the well-being of their children, the same process has created an impression that these women are not good mothers.

Table 3: Departure For Foreign Employment In 1997
(Through all Sources by District & Sex)

District	Male	%	Female	%	Total
Colombo	8735	36.57	15152	63.43	23887
Gampaha	4629	30.39	10605	69.91	15234
Kalutara	2354	25.67	6818	74.33	9172
Kandy	2740	23.38	8980	76.62	11720
Galle	2111	23.20	6987	76.80	9098

Source: Information Data Bank - SLBFE

8. Concluding Remarks and Recommendations

The scale of labour migration from Sri Lanka reflects clearly on the inability of the economy to absorb its labour force, providing employment with adequate wages. "Globalisation" has contributed to the displacement of labour within the country while it is absorbed for the profit gains of the developed capital centres of the world.

The problems related to overseas migration call for an imaginative, multi-pronged strategy. Policies and programmes need to address both long and short term issues, including those related to the families of migrant workers. Policies related to migration need to address at least the following points:

- The root causes of the outflow of migration need to be examined and resolved. This would include reviewing agricultural policy, liberalisation policies and the ethnic and civil conflicts.
- Development of a comprehensive National Employment Policy.
- Formulation of a standard form of contract for all grades.
- Appointment of labour welfare officers who are trained on the social and psychological aspects of migration to Sri Lankan diplomatic missions abroad.
- Provision of "telephone hot-lines" at Sri Lankan diplomatic missions.
- Campaign for the ratification of the UN Migrant Workers Convention so that the necessary number of ratifications can be obtained for the Convention to enter into force.

X

Internally Displaced Persons and Returnees from India

*Consortium for Humanitarian NGOs**

1. Introduction

This chapter discusses the situation of internally displaced persons in Sri Lanka and returnees from India during 1997. During this period, there was intensive fighting for control of the Vanni, as the army sought to open a land route to Jaffna. The military continued to hold Jaffna, while control of the East remained less clear. The LTTE continued to control much of the Vanni and parts of the East.

The rights of the displaced in a situation of conflict are denied in many respects. There are severe restrictions on their freedom of

* The Trust would like to thank I.K. Zanofer & Sumudu Atapattu for their contribution to this chapter.

movement, and their access to shelter, health-care, food, water and education is often very limited indeed. In addition, they need protection against arbitrary arrest and detention, torture and disappearance.

The majority of people living in LTTE-controlled areas of the Vanni are displaced persons. In January 1997, government sources reported 177,000 non-displaced residents and 575,000 internally displaced persons living in these areas. Approximately 785,000 persons displaced or affected by the conflict were receiving government dry rations, cash or assistance from the World Food Programme. Towards the end of the year approximately 762,736 people received such assistance.

The extent of access to shelter, health, food, water and sanitation varied according to the location in which people were living. Following the government's decision to reduce food supplies to the Vanni in May 1997, there was particular concern about a decline in nutritional levels there. The government reduced food supplies by 55%, from 425,000 to 185,000 recipients, causing considerable hardship among those displaced families who relied on this supply for a substantial percentage of their caloric needs.¹

Issues such as access to medicine and infrastructure also provoked debate. Further, the transport to the North of a wide range of essential and non-essential items - including food, medicine, items of commercial and non-commercial value, and building material - was subject to strict review and delay by the military, compounded by vagaries in availability of transport. Controls on the flow of goods to the East were less strict, but were tighter if the items

¹ *Save the Children, Situation Report: Children Affected by Armed Conflict in North and East, February 1998, p.5.*

were destined for an "uncleared" area (i.e. an area controlled by the LTTE).

2. Internally Displaced Persons²

The problems facing internally displaced people in Sri Lanka are complex and numerous. They are compounded by military operations by both the Sri Lankan security forces and the LTTE, which continue to put civilians at risk. The chronic displacement of large numbers of people in Sri Lanka will continue until the conflict itself comes to an end.

Successive military offensives since April 1996 have displaced several hundred thousand persons. The true number of people displaced by the conflict is not known, as many are not included in the government's figures. These figures include only those people who receive official food rations. Some people have been displaced several times, having to move repeatedly as the location of the hostilities changes.

The Sri Lanka Government has repeatedly acknowledged its commitment to provide basic humanitarian assistance to the internally displaced and accordingly maintains a comprehensive assistance scheme. At the same time, it accepts international assistance in insecure areas and sectors where either its own administrative machinery has been disrupted, or where expertise or funds are lacking.

² This section is based on a paper presented at the Asia-Pacific Partnership in Action Workshop, Country paper (Sri Lanka) for the 2nd Asia-Pacific Pacific Conference, Tokyo, Japan, 2-5 March 1998.

Much of the displaced population resides in "uncleared" areas under the control of the LTTE, where government presence is minimal. International agencies' attempts to support delivery of essential services to the civilian population in these areas have been subject to logistic and security-related constraints. As a result, the supplies of food, clean water, materials for shelter and medical services is often inadequate. This, combined with a very difficult security situation, makes the lives of the civilian populations in these areas - including displaced people - very precarious.

3. Access to Information³

Both the Sri Lankan Government and the LTTE exercise a very high level of control over information on the conflict and its impact to suit their respective military ends. This has direct implications for the flow of information on issues relating to displaced people, particularly those living in the conflict areas.

Although the Constitution provides for freedom of speech and expression, restrictions are permitted on national security grounds. During 1997, the government strictly limited the access of domestic and foreign media to the conflict areas. The government occasionally organised groups of journalists to visit Jaffna and the front lines.⁴

Some parts of the country with a high concentration of displaced persons, such as Vavuniya town and parts of the East, are accessible to the media and to human rights activists. However, public

³ This section is based on a paper by Mario Gomez, "The Internally Displaced: Some International & Domestic Norms"(unpublished).

⁴ "Sri Lanka Country Report on Human Rights Practices for 1997," U.S. State Department Report (January 1998).

perceptions in Sri Lanka and abroad have been shaped largely by information issued by the military or the LTTE as there are so few independent sources.

One exception to this tightly controlled information policy was the visit by a two member team from the US Committee for Refugees (a Washington DC based NGO) to the conflict areas, including those areas controlled by the LTTE, in November 1996. The US Committee Report was released in March 1997.⁵ In 1997, the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions visited Sri Lanka from 24 August to 5 September. During this period, he visited Jaffna and Batticaloa. His findings are discussed in Chapter 11 on Integrity of the Person.

Information on the conflict areas and displaced people living there trickles in through NGOs and humanitarian officials who work there, but this information tends to remain within limited circles. The University Teachers for Human Rights (Jaffna) - which operates from Colombo but has sources in the North and East - is one of the few groups that regularly reports on the conflict.

The restrictions imposed on access to the conflict zones contravene international human rights standards. According to Principle 19 of the Johannesburg Principles on National Security, Freedom of Expression and Access to Information:

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

⁵ Hiram Ruiz and Katie Hope - Conflict and Displacement in Sri Lanka; (Washington DC: US Committee for Refugees, 1997).

*particular, governments may not prevent journalists or representatives of inter - governmental 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.*⁶

The Sri Lanka Government, the armed forces and the LTTE have all flouted this principle, with the result that information on the condition of the displaced living in these areas is not readily available.⁷

The lack of accurate information has severe consequences for displaced people themselves. Without access to independent and accurate information, they have no sound basis for such decisions as where they should go, or whether they can safely return to their original place of habitation. Their right to know about the security,

⁶ The Johannesburg 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.

⁷ 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.

welfare and infrastructure conditions of areas they may wish to move to is a precondition for them to be able to exercise their right to free movement effectively.

4. Freedom of Association of the Displaced⁸

The right to freedom of association of the displaced is denied absolutely in areas controlled by the LTTE. Displaced people living under LTTE control have very little opportunity to organise and lobby on issues of concern. The LTTE controls the expression of views and ideas that run counter to its own.

In government-controlled areas, camp committees exist which give the displaced some voice, but they have very limited opportunity to make any real impact on relief and displacement policy.

5. Categories of Internally Displaced People in Sri Lanka and the Problems They Face

Even though the majority of internally displaced people are from the Tamil community, substantial numbers of Sinhala and Muslim people, expelled from parts of the North and East by the LTTE, have also been displaced and live in areas controlled by the government. Internally displaced persons at present fall into the following categories:

1. displaced Tamil, Sinhala and Muslim people, living in government-controlled areas of the North and East;
2. displaced Tamil people living in areas of the North and East held by the LTTE;

⁸ This section is based on a paper by Mario Gomez, *The Internally Displaced: Some International & Domestic Norms*(unpublished).

3. displaced Muslim, Tamil and Sinhala people from the North, living in non-conflict areas;
4. displaced Sinhala, Tamil and Muslim people living in border areas where neither the government nor the LTTE are clearly in control;
5. displaced Sinhala, Tamil and Muslim people living with friends and relatives all over the island;

These categories are discussed in turn to provide a clearer picture of the specific problems they face.

5.1 Internally displaced persons living in government-controlled areas of the North and East

Displaced people living in the Jaffna peninsula, Vavuniya and the East are discussed in separate sections below, as the circumstances of each group are different.

5.1.1 Jaffna Peninsula

In 1995, the intensified military operation against the LTTE witnessed government forces capturing Jaffna town - considered the heartland of the LTTE - in December. The largest displacement of persons from Jaffna town and its surroundings took place at that time, representing a severe crisis for northern Tamils. Most other areas of the Jaffna peninsula were brought under the control of government security forces by April 1996.

The government then began to encourage people to return to Jaffna. The town had been home to more than 850,000 persons immediately before the government took control in 1995, and by the end of 1997

had a population of 331,065 persons from 80,414 families.⁹ Four hundred and seven of these families lived in four government welfare centres.

While the Jaffna peninsula remained heavily fortified, with extensive military and police checkpoints, the relationship between security forces personnel and civilians reportedly improved during 1997.

There were considerable constraints on freedom of movement in the peninsula, which can be divided into three areas from a military standpoint: security zones, cleared areas and uncleared areas. Civilian movement into the security zones was prohibited. Travel between cleared and uncleared areas was permitted during the day, but was subject to intensive security screening at checkpoints that are in some places located only 100 metres apart. A night-time curfew was imposed from 9 pm to 6 am,¹⁰ and people returned home early to arrive before dark, having to pass through many checkpoints on the way.

In addition, travel into and out of Jaffna was restricted. First, people had to get security clearance before travelling, and then - in the absence of a land-route to the south - further constraints resulted from a severe shortage of air and sea transport facilities. Both government forces and the LTTE used the requirement of security clearance to regulate the movement of people.

Other matters of serious concern, not only for the displaced but also to the civilian population more widely, included: personal security;

⁹ CGES Statistics, Issue of Dry Ration, Cash and WFP Assistance as at 31.12. 1997.

¹⁰ Joe William, *Internally Displaced Persons (IDP's) in Sri Lanka*. October, 1997 (unpublished), p. 2.

physical and psychological isolation from the rest of the country; lack of essential supplies and, at times, their high prices; lack of regular electric power; and inadequacies of infrastructure.

Over time, as the conflict has escalated, the peninsula has experienced considerable demographic change. The upper and middle classes and a significant section of the productive work force aged between 18 and 40 years have left Jaffna.

The Jaffna peninsula remained vulnerable to periodic attacks by the LTTE in 1997, and the subsequent security measures implemented by government forces deepened civilian resentment towards all parties involved in the conflict. Additional concerns included violence against women by both the military and unidentified groups, and certain extra-legal activities of the security forces, including continuing "disappearances," which were reported to number 600 people or more, during 1996 and 1997 in Jaffna.¹¹

5.1.2 Vavuniya - The gateway to the North

After government forces captured Jaffna and Kilinochchi, and linked up the route to Mannar from Vavuniya, Vavuniya town became the hub for many activities. Civilians leaving the LTTE-controlled areas of Mullaitivu and Kilinochchi, wishing to travel to Jaffna or to other parts of the island, had to transit through Vavuniya. An increasing number of people left LTTE-controlled areas in 1997 to move into "secured" areas.

Civilian life in Vavuniya District continued to be hampered by the conflict. Vavuniya has had a permanent displaced population (local and from other districts) of approximately 55,000 persons since

¹¹ *Supra* n 1, p.16. See also Chapter 11 on Integrity of the Person.

1990.¹² In addition, between 13 May 1996 and 31 December 1997, 79,326 civilians crossed from LTTE-held areas to Vavuniya as a result of military operations.¹³ Of these, 42,427 persons were reported to have returned to Jaffna, 380 to Mannar, 490 to Batticaloa, 1,032 to Trincomalee, 4,958 to Colombo, 9,039 to other areas, 3,046 to uncleared areas in Kilinochchi, 1,486 to uncleared areas in Mullaitivu, and 4,887 to cleared areas in Vavuniya. A further 11,581 persons remained in overcrowded welfare centres, surviving on a daily hand-out of dry rations.

Restrictions on freedom of movement constituted a major problem for internally displaced persons travelling through Vavuniya, and wanting to travel out of Vavuniya. No restrictions were placed on those who wanted to travel to Jaffna. They were transported overland, free of charge, to Trincomalee or Mannar and from there by boat to Jaffna. Other categories of persons usually permitted to leave the transit camps and welfare centres were:

- persons over 60 years of age;
- persons below 60 years of age who had relatives living as permanent residents in Vavuniya;
- patients seeking medical treatment;
- students proceeding for higher studies;
- persons seeking employment;
- public servants;
- persons appearing for visa interviews;
- people proceeding for their weddings;
- permanent residents of the South; and

¹² *Ibid* p. 4.

¹³ *Consortium of Humanitarian Agencies Yearbook 1997* (Consortium of Humanitarian Agencies, Colombo, 1998) p. 77

- persons seeking accommodation in welfare centres in Vavuniya.¹⁴

However, restrictions were imposed on the movement of people who did not fall into the above categories, who, in effect, were subject to a form of informal detention. Their requests to leave the transit camps had to be backed-up by the recommendation and guarantee of a responsible surety, and were considered on a case-by-case basis by a committee consisting of representatives from the Sri Lanka Army, police and civil administration in Vavuniya.

Residents of Vavuniya (who are not displaced) do not face restrictions in travelling out of Vavuniya, provided they have the necessary and valid documents. The people in transit camps in Vavuniya are not all destitute; some are people with means. However, regardless of the relative degree of deprivation, all endure the same strict controls and often the same indignities. Many wish to move in with relatives¹⁵ in Vavuniya, or to proceed to alternative destinations such as Colombo. The lack of freedom to move constitutes a violation of one of their basic freedoms.

5.1.3 The East

At the end of 1997, approximately 11,000 internally displaced persons (of which approximately 4,000 were children) were in welfare centres in the East and a further 48,000 people (of which 18,000 were children) living with friends and relatives.¹⁵ All received dry rations, cash and World Food Programme assistance from the Commissioner General of Essential Services.

¹⁴ Kachcheri, Vavuniya, Situation Report as of 31.10.1997; (12.11.1997) p. 8.

¹⁵ *Supra* n 1 at p.12

The strategic and political importance of the East has resulted in large-scale militarisation of areas under government control. The East has remained unstable, with a shifting patchwork of "cleared" and "uncleared" areas, since the LTTE was dislodged from major towns and trunk roads in 1990. Since 1990, the military has generally been encamped along the main roads to the East and in the towns. The military controls the roads by day, while the LTTE accesses the countryside.

The ethnic mix in the east contributes to greater volatility and insecurity for all. Civilians, including displaced people, continued to suffer from the impact of shelling, and were sometimes caught in the crossfire. They were subjected to frequent round-ups and security checks.

5.1.4 Health and education

Government officials were increasingly fearful and unwilling to move outside urban areas unless escorted by international organisations, or else did not have the resources to do so. The *de facto* situation is that those in rural areas are denied access to urban facilities such as health and education, which anyway are poorly resourced. Many teachers are urban based, either because they fear working outside the town or because of the lack of services available in the rural zones. Their attendance at work is often erratic due to transport delays, blockades, military activity, or due to poor morale.¹⁶ Again it is the poor and the vulnerable, particularly children, who suffer most as a result.

¹⁶ *Ibid* at pp. 13-14.

5.2 Internally displaced persons living in the North and East in territories held by the LTTE

In the Vanni and other contested areas of the North and East described by the Sri Lankan military as "uncleared areas," the government maintained a much-reduced administration that strived to provide basic services.

Since 1995, displacement into and within the Vanni has followed major military offensives, and this continued in 1997. Estimates of both the general population of the Vanni and the number of internally displaced people living there have varied significantly, depending upon the source. Central government figures are lower than those identified by local government structures.

According to a census taken in October 1997, there was a total population of 495,678 people living within the uncleared areas.¹⁷ This census used Ministry of Relief and Rehabilitation statistics and was prepared with the assistance of UNICEF. The population of the uncleared areas is not static, however; there was a continuous flow of returnees to Jaffna throughout the year. Of the initial estimates of about 500,000 people who were displaced from Jaffna in late 1995, it is believed that over 250,000 have returned.¹⁸

The civilian population in LTTE-controlled areas has been deprived of free access to goods since 1990, due to restrictions on the transport of specific items to the area. Although these restrictions were briefly lifted while talks were in progress between the

¹⁷ *Ibid*, p.3.

¹⁸ *Ibid*, p.4.

government and the LTTE in late 1994 and early 1995, the restrictions were re-imposed in April after the talks had broken down.¹⁹

There was considerable concern that an inadequate quantity of relief supplies was sent into the Vanni in 1997. The internally displaced, whether in camps or with relatives, faced serious problems from lack of electricity and efficient transport facilities in these areas, together with restrictions on the supply of fuel, medicines, building materials and other necessary amenities of life. Educational facilities were very few and there were few employment opportunities for skilled labourers like masons, carpenters, welders and painters, as there was a lack of both raw materials and demand for their labour.

5.2.1 Education

Despite the large numbers of displaced children, there was no increase in school resources, resulting in fewer teachers teaching more and more children. For example, in Kilinochchi there are 72 permanent schools and an additional 26 displaced schools shared these facilities, while in Mannar the schools catering for a resident student population of 5,922 received no extra resources to assist with the additional 4,692 displaced students who arrived there.

A number of schools initially benefited from the services of teachers who had been displaced from Jaffna and elsewhere, who assisted with teaching. However, no budget was made available to pay these volunteers, and nor was transfer of

¹⁹ Joe William, *Internally Displaced Persons (IDP's) in Sri Lanka*. October, 1997 (unpublished).

payment possible. As a result, most either stopped teaching, or have left the Vanni and returned to Jaffna.

5.3 Internally displaced persons from the North, living in non-conflict areas

In October 1990, the LTTE forced the Muslims living in the North to leave the area within 48 hours. Out of the estimated 120,000 people who were forcibly evicted, 65,000 continued to live in welfare centres in Puttalam District in 1997 while others lived in Anuradhapura and Kurunegala.²⁰ The rest lived with friends and relatives elsewhere.

There is a mistaken belief that displaced people in cleared areas are provided with all facilities. In fact, they face considerable hardship. Low employment opportunities and, therefore, low buying power, lack of access to clean water, lack of proper health and nutrition facilities are only some of the problems faced by these people. The resources the government has at its disposal are inadequate to service all their requirements. Here too, the poorest of the poor are left to their own devices, as are their brethren in the North.

5.4 Internally displaced persons in border areas, subject to fluctuating control by the government or the LTTE

This category includes villagers resident in the border areas, who may have fled elsewhere to escape violence and those who remain as displaced persons in the border areas.

²⁰ *Consortium of Humanitarian Agencies, Yearbook 1997, (Consortium of Humanitarian Agencies, Colombo, Sri Lanka, 1998), p.79.*

The Sinhala, Tamil and Muslim populations in the border villages of the East and of North Central Province have all been affected by the conflict, and have been subject to attack. In common with other victims of violence, those who have been displaced due to violence carry considerable psychological wounds, which affect their lives in many ways.

5.5 Internally displaced persons living with friends and relatives

Local and international attention often concentrates on displaced persons living in welfare centres. Less attention is paid to displaced people who rely on the hospitality of relatives and friends, and who form 60% of the total number of internally displaced people in the country. The facilities provided by friends and relatives constitute a major relief operation provided by the communities themselves.

The traditional hospitality that displaced civilians received in the past has been eroded by various means. These include the restrictions imposed on "providing accommodation for Tamils from the North and East in Colombo and other urban areas, security checks and other acts of intimidation under the cloak of Emergency Regulations or the Prevention of Terrorism Act" which are prevalent in urban areas of the south, and which continued in 1997.²¹

Many displaced Tamils who came to Colombo faced precarious conditions. "They remain at risk of arbitrary arrest and detention by the security forces."²² Those who originated from Jaffna and, to a

²¹ *Ibid.*, p. 8.

²² *Consortium of Humanitarian Agencies, Yearbook 1997*, (Consortium of Humanitarian Agencies, Colombo, Sri Lanka, 1998), p. 79

lesser extent, Batticaloa, were at particular risk as they were most likely to be suspected of having had contact with the LTTE.

6. Returnees from India and Refugees Going to India

In Sri Lanka, there is no clear distinction between refugees who have returned to the country from India and the internally displaced. The only difference is that the returnees once managed to make their way to Tamil Nadu, whereas the internally displaced remained within the country. Returnees and internally displaced people often return to the same village and face similar problems in re-starting their lives. This has led the United Nations High Commissioner for Refugees (UNHCR) to extend its mandate to enable it to assist some of the internally displaced under their micro-project programme. This programme targets the communities where returnees are resettling, rather than specific individuals, and internally displaced people comprise the majority of the beneficiaries.²³

A trickle of people continued to make the hazardous night crossing to India as refugees in 1997. These included some that had been repatriated from India to Sri Lanka by UNHCR on two previous occasions.²⁴ Some 4,272 people reached camps in Tamil Nadu in 1997. A further 66,498 who had arrived in earlier years, also remained in camps in Tamil Nadu.²⁵ According to UNHCR, Colombo, there were no returnees from India during 1997.

²³ Joe William, *Internally Displaced Persons (IDP's) in Sri Lanka*. October, 1997 (unpublished), p.7.

²⁴ *Ibid.*

²⁵ Consortium of Humanitarian Agencies Newsletter, January/February 1998, Volume II - Issue 6., Dept. of Rehabilitation, Chennai, South India.

Refugees who recently fled to India cite scarcity of food, non-availability of medical supplies, violation of human rights and harassment as their main reasons for having left Sri Lanka.²⁶

7. International & Domestic Norms Relating to the Internally Displaced²⁷

There is no single codification of the international standards which are relevant to the internally displaced. Applicable norms are scattered among various humanitarian, human rights and refugee instruments. These have been detailed in previous *Sri Lanka: State of Human Rights* reports,²⁸ and are not repeated in full here. Of particular importance is the compilation and analysis of relevant legal norms by Francis Deng, the Special Representative of the UN Secretary General on Internally Displaced Persons, which was released as an Appendix to his 1996 report.²⁹

The internally displaced are entitled to the same rights as all other people, and as a group which has been "rendered

²⁶ Joe William, *Internally Displaced Persons (IDP's) in Sri Lanka*. October, 1997 (unpublished).

²⁷ This section is based on a paper by Mario Gomez, *The Internally Displaced: Some International & Domestic Norms*(unpublished).

²⁸ See *Sri Lanka: State of Human Rights 1997* (Law & Society Trust, Colombo, 1997) pp 246-254; *Sri Lanka: State of Human Rights 1994* (Law & Society Trust, Colombo, 1995) Chapter XIII pp. 228-259.

²⁹ Francis Deng - *Compilation and Analysis of Legal Norms*; UN Doc. E/CN. 4/1996/52/Add.2, 5 December 1995.

vulnerable,"³⁰ and are entitled to particular attention by the State 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 [their] rights ¼ and to ensure the participation of those among them who are interested in finding a solution to their own problems.*³¹

The specific rights which are of most importance to the particular situation of the displaced include: the right to the freedom of movement and the freedom to choose one's residence; the right to life; the right to an adequate standard of living, including adequate food, clothing and housing and to the continuous improvement of living conditions; the right to recognition everywhere as a person before the law; and the right to protection against discrimination.

International humanitarian law also contains provisions of relevance to the displaced. These 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 non-combatants from abuses of power by the combatants. Some provisions of international humanitarian law - particularly Common Article 3 and Protocol II of the Geneva Conventions - are binding on both parties to a conflict. Sri Lanka has ratified the Geneva Conventions, but not the Protocols.

³⁰ Vienna Declaration and Programme of Action, para 24, adopted 24 June 1993. UN Doc. A/Conf. 157/24, 13 October 1993.

³¹ *Ibid*

Protocol II of the Geneva Conventions contains express protections against the displacement of civilians, and prohibits attacks on civilians or on objects necessary for their survival. Common Article 3 and Protocol II expressly prohibit 23 different acts ranging from murder and torture to indecent assault. Protocol II also provides that where essential supplies are lacking, the State must agree to the mounting of humanitarian relief operations, and provides special protection for children.

Within Sri Lanka, the displaced are entitled to the fundamental rights guaranteed under Chapter III of the 1978 Constitution and to other basic services available to other citizens. Apart from the rights they enjoy as individuals, the displaced as a group are not granted any special protection by the Constitution or by legislation.

The rights entrenched in the Sri Lankan Constitution include the rights to freedom of thought, conscience and religion;³² freedom from torture, cruel, inhuman or degrading treatment or punishment;³³ equality before the law, equal protection of law and the right not to be discriminated against on the grounds of race, religion, language, caste, sex, political opinion or place of birth;³⁴ freedom from arbitrary arrest, detention and punishment; free speech, assembly and movement; freedom to engage in any lawful occupation, profession, trade, business or enterprise. However, these rights may be restricted for a variety of broadly defined reasons.³⁵

³² *Ibid*, Article 10

³³ *Ibid*, Article 11

³⁴ *Ibid*, Article 12

³⁵ *Ibid*, Article 15

8. Recommendations

The plight of internally displaced persons during the year remained bleak. Their standard of living, and their access to basic amenities, health care facilities and education remained poor.

Last year's *Sri Lanka: State of Human Rights* report contained a series of recommendations relating to the internally displaced which remain relevant, and which we reiterate here in the hope that at least some of these measures may yet be implemented. These recommendations included that:

- The Sri Lanka 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 on human rights.
- The government should invite the UN Special Rapporteur on Internally Displaced Persons to make a follow-up visit to the country.
- The government and the LTTE should permit humanitarian organisations and human rights groups full and free access to the displaced population and the conflict areas.
- The government and the LTTE should permit journalists and other media personnel full and free access to the displaced populations and the conflict areas.
- The government should re-establish all damaged hospitals and ensure that they become operational.

- The government should ensure that schools are not used to house displaced persons.
- The supply of all relief to the displaced, including food, medicine, fertilizer and non-nutritional items, should be co-ordinated by a representative body consisting of representatives of the Ministry of Rehabilitation and Reconstruction, the Reconstruction and Rehabilitation Authority of the North, local and international humanitarian organisations and the military.
- The government should ensure that relief to the displaced is not determined by military and security concerns.
- The Ministry of Rehabilitation and Reconstruction should begin a process to draft legislation to recognise and provide for the enforcement of the rights of the displaced, in consultation with local NGOs and other humanitarian organisations working with the displaced.

The plight of internally displaced people - and indeed the category of the "internally displaced" itself - is intrinsically intertwined with the civil war in the North and East. Unless and until a permanent political solution is found to the armed conflict, this vulnerable segment of society, who have suffered much hardship at the hands of both the security forces and the LTTE, will continue to be deprived of their fundamental rights. The fundamental rights that are violated include the rights to life, to food, health care, education, freedoms of movement, expression and association, to livelihood, to privacy and family life, and the right to enjoy one's culture.

Although the Sri Lankan government continued to send relief supplies to internally displaced people living in the LTTE-controlled areas, it cut the amount it sent by almost half in 1997, causing much hardship to displaced people. The government should immediately revise this decision and provide the full amount of relief recommended by the World Food Programme.

Displaced children are particularly at risk, and levels of malnutrition are rising. Some children have known only displacement and their education is severely disrupted. The government needs to pay urgent attention to the educational needs of these children.

XI

Right to Education

*Pradeep Ratnam**

1. Introduction

"At the heart of the learning complex is the individual, the learner, in his and her unique individuality.....Whether the learner is at the centre or the periphery is the defining characteristic that distinguishes one education system from another."

The rights discourse in education can primarily be divided into two principal issues. First, the **accessibility** of education under a welfare state model founded on normative universality of access to education as a basic right. Thus state policy on free

* Senior Researcher, International Centre for Ethnic Studies.

¹ Raja Roy Singh, "Education for the twenty first century" cited in Nihal Cooray, *Leaving learning with learners: the crux of all education*, *Daily News*, 11 October 1997.

education has to be examined in the light of deficiencies in the educational system, the *actual* distribution of educational resources and socio economic realities. Second, the *content* of education and the extent to which it conforms to individual aspirations and the objects of the community at large.

The need for a comprehensive re-evaluation of the system has come at a time when statistical indicators present a mixed picture. Traditional parameters of state expenditure on education and literacy levels in Sri Lanka reflect commendable achievements by modest South Asian standards. Public expenditure accounts for 2.7% of the GDP and 9.5% of the total government expenditure during 1996, recording a substantial increase from the figures for 1991 which were 2.5% and 7.6% respectively.² The corresponding figures for India are 4.5% of the GDP and 1.5% respectively.³ The literacy rate of those above 10 years of age has risen to almost 90% today. Additional statistics⁴ support the phenomenal increase in the number of students in school as a proportion of the 5-19 age group and a sharp decline in drop out and repetition rates and gender differences. There have also been positive initiatives to ensure access to university education to the poorest sections of society.⁵

² *Sri Lanka Socio-Economic Data 1997* (Statistical Department Central Bank of Sri Lanka, June 1997), p. 42.

³ Statistics as per the Eighth Five Year plan. See Jandhyala B.G. Tilak, Five decades of under investment in Education, Economic and Political Weekly, Vol. XXXII No. 36, 6-12 September 1997, p.22-39

⁴ *Educational Statistics of Sri Lanka, 1992* (Ministry of Education) Colombo, 1993), p.11.

⁵ The Mahapola scholarships for instance which started in 1981 today subsidise the living costs of 95% of university students, *Sri Lankan Universities Year Book* (1996), pp.7-8.

These, however, are not reasons enough for complacency. Beneath the veneer of a system premised on considerations of equity, equality and maximising universal access, is one which is proving to be increasingly unsuited to meet contemporary demands of a developing society. The hierarchy between schools and inter regional disparities in education facilities, a high drop out and repetition rates in formal education, the minuscule intake into university from the percentage of candidates taking the General Certificate of Education, Advanced level examination,⁶ (GCE A/L) and the yawning gap between the output of graduates and employment figures are indicators of a fundamentally flawed educational system. Further, the content of education and the manner of teaching, assessment, and evaluation leave much to be desired.

These defects have necessitated revisiting the basic approaches and objectives of education at the primary, secondary and tertiary levels and entrenched concepts like free education, district quotas, the language of instruction and pervasive state control in the designing, implementation and management of the education system. From the perspective of human rights one has to focus on the discrepancies between the avowed objectives of state policy and their actual implementation in the educational system.

Education at the school level is fraught with inequities which only deepen existing ethnic, economic and regional disparities. There are, for instance, different categories of schools which differ qualitatively in equipment and infrastructure, teaching,

⁶ See "Reform Proposals for an education system suitable for the 21st century" *The Sunday Observer*, 17 August 1997. At present, of the 170,000 students who sit for the G C E A/L examination, only 12,500 enter university.

availability of resources, fee patterns and related educational facilities. The curriculum ignores the development of fundamental skills like language, writing skills, critical appreciation and promotion of dramatic skills and the arts⁷ and has an overwhelming academic content. Even though technical studies and skills have been integrated into the curriculum at the junior and senior secondary levels,⁸ figures in unemployment render the efficacy of such initiatives suspect. Further, vernacular instruction in government and state aided schools has been at the cost of English, running contrary to the developmental challenges in a multilingual internationalised world order. There is free education on the one hand, countered by burgeoning expenses on private tuition on the other, sometimes due to inadequate teaching facilities and resource input from the State.⁹

These problems reflect the multiple dilemmas of the developmental state, with no simplistic solutions. While egalitarianism and universal access have remained the strongest guidelines defining the State's policies on educational rights and entitlement, the policies have also contributed to creating an

⁷ *Educational Proposals for Reform: General, University and Tertiary (Vocational, Technical and Professional)*, Ministry of Education in collaboration with the Ministry of Higher Education and the Ministry of Youth Affairs and Employment, 1981, hereinafter, White Paper Reforms. See Paras 14, 25-27

⁸ Free Education v. Reform, *Pravada*, Vol. 5 No. 3, p. 1.

⁹ The distribution of resources between districts, the flourishing hierarchy of schools and policies on admission to state schools and universities are some of the issues discussed more fully below.

✓
 iniquitous educational system.¹⁰ The paper, therefore, evaluates education through three stages:

- (a) **The point of entry into the system:** This questions the efficacy of policies on admission to schools and university. Domicile and the proximity of locality as the basis of admission to schools presupposes that the district of location is the basis to assess the standard of the school. The district quota system and 'cut off marks' for university admission also, have their limitations.¹¹
- (b) **Once within the system:** This aspect examines the distribution of resources (teachers, quality of education, the language barrier and the availability of facilities like counselling) to enable students overcome of past deprivation either in the form of inferior education

¹⁰ For instance, the district quota system does not take into account urban migration though the immigrants retain their original districts to avail of admission benefits. There is also criticism of the fact that sometimes under-privileged schools in the so called 'privileged districts' may be worse off than some schools in the under-privileged districts. This means questioning the 'district' as the sole basis for assessing the student's deprivation rather than individual schools. On cutoffs, with a single mark determining the basis for entrance into a particular course, it is argued that no examination evaluation procedure can be so perfect as to obviate errors by a mark. See K.D. Arulpragasam, "Admission Policies," in National Workshop on Higher Education Policy: Papers presented at the Workshop and Summary of Recommendations, Colombo, National Education Commission, 1995.

¹¹ Article 26, Universal Declaration of Human Rights, in *Human Rights: A Compilation of International Instruments*, Vol I, United Nations, New York (1994).

(particularly in relation to tertiary education) or due to social and economic factors

- (c) **On leaving the system:** This stage evaluates the competency of the product of the education system and his or her role in society and the contribution to it. It is essentially a critical appraisal of the approaches and content of education and whether they satisfy the goals they are intended for.

Each of these stages has to be evaluated in the light of the hierarchy of schools with districts, the urban-rural divide based on differences in the distribution of resources and benefits between regions *inter se*. Policies like the domiciliary basis for admission to schools and certain aspects to the district quota system militate against the interests of rural students and in some cases urban students as well. Even assuming that these measures do create a level playing field for students from different backgrounds, what remains to be seen is whether the objectives of education are realised, especially *after* the students entering the system leave it.

2. The International Regime on Educational Rights

2.1 The international obligations of states

The jurisprudence of educational rights is well entrenched in the international regime. The Universal Declaration of Human Rights states that every one has the right to education.¹² Additionally, there are some other aspects of education which are regarded

¹² *Ibid.*, Article 26(1).

as equally important. Elementary education is to be free and compulsory.¹³ The Declaration also incorporates technical and professional components to education as a basic human right and reiterates the principle of uniform accessibility to higher education based on merit.¹⁴

Article 26(2) prescribes the standards for the content of education. Firstly, education should reflect the development of the human personality and strengthen the respect for human rights and fundamental freedoms. The rights of the child outlined in the international instruments serve as important normative indicators for the content of education, which is to conform with his general culture and enable him to develop his abilities, individual judgment and moral and social responsibility.¹⁵ Secondly, it should facilitate access to scientific and technical knowledge and modern teaching methods.¹⁶ Thirdly, it should foster coexistence through tolerance and understanding between nations, racial and religious groups.

The onus of the state in striving to secure these rights is clearly enunciated in the International Covenant¹⁷ on Economic, Social and Cultural Rights (ICESCR). In addition to the obligations

¹³ *Ibid.*

¹⁴ See Article 7 of the United Nations Declaration on the Rights of the Child, proclaimed by the General Assembly Resolution 1386 (XIV) of 20 November 1959. See Article 7.

¹⁵ Article 28(3) of the United Nations Convention on the Rights of the Child, Adopted and opened for signature, ratification and accession by General Assembly Resolution 44/25 of 20 November 1989.

¹⁶ Article 13 of the ICESCR.

¹⁷ *Ibid.*, Article 13(1) and 13(2). See also Article 14.

towards betterment of the system and content of education¹⁸ and adopting measures to secure the elimination of discrimination in the fields of teaching and education,¹⁹ there is also a provision supporting the establishment of private educational institutions which can operate within minimum standards established by the State.²⁰ With concurrent private sector and minority institutions, parents are given the option of choosing the system of instruction for children.²¹

2.2 Discrimination

Discrimination in education could be *systemic*, i.e. resulting from an inequitable distribution of educational resources in the community which privileges certain segments of the populace over the others. In practice this could mean that a system (either at the school or university level) is designed to inherently suit people from a particular background over others. The second category is discrimination based on differential *access*, where one segment of the population is the beneficiary to educational policies to the exclusion of others. This includes discrimination based on community which could be based on *inter alia*, ethnic, racial or religious grounds. The Convention against Discrimination in Education²² caters more directly to the latter category, though

¹⁸ Article 8 of the United Nations Declaration on the Elimination of all forms of Racial Discrimination, *General Assembly Resolution 1904 (XVIII) of 20 November 1963*.

¹⁹ See *supra* n 17, Article 13(4).

²⁰ *Ibid.*, Article 13(3).

²¹ Convention against Discrimination in Education, *Adopted on 14 December 1960 by the General Conference of the United Nations Educational, Scientific and Cultural Organization*.

²² *Ibid.*, Article 1.

it also addresses issues of equality in facilities accorded to similarly situated institutions. Discrimination has been defined to cover race, religion, language, colour and sex in addition to social origin and economic status.²³ The Convention obliges the State to ensure that no person or group is deprived of access to education at any level or limited to education of an inferior standard.²⁴

Four important State obligations are recognised:

- (a) To abrogate statutory provisions and administrative instructions and practices which involve discrimination in education;²⁵
- (b) To ensure that standards in and quality of education are equivalent in all public education institutions of the same level;²⁶
- (c) To provide training for the teaching profession without discrimination;²⁷
- (d) To recognise the right of national minorities to carry out their own educational activities. This is however, subject to the educational policy of the State and the precondition that the standard is not lower than the general standard laid down and approved by competent authorities.²⁸

²³ *Ibid.*, Articles 1(a) and (b).

²⁴ *Ibid.*, Article 3(a).

²⁵ *Ibid.*, Article 4(b).

²⁶ *Ibid.*, Article 4(d).

²⁷ *Ibid.*, Article 5(1)(c).

²⁸ The Constitution of the Democratic Socialist Republic of Sri Lanka, 1978.

3. Pre University Education in Sri Lanka

3.1 Constitutional provisions and domestic legislation

The 1978 Constitution is lacking in comprehensive provisions on education. Article 27(1)(h) of the Constitution²⁹ mentions eradication of illiteracy and universalising the access to education at all levels as a Directive Principle of State Policy. This means that certain essential principles on access to education are not seen as a fundamental right and are not justiciable in a court of law. At most they act as normative parameters for the direction of state policy in its endeavours in this field. The 13th Amendment to the Constitution devolved the subject of education to Provincial Councils. The Draft Constitution (October 1997 version) has remedied this anomaly by duly recognising the right to education as a fundamental right, in addition to recognising it as a devolved subject.

Much of the domestic policies on education in Sri Lanka have been shaped by the Education Ordinance No. 31 of 1939. It stipulates an elaborate administrative hierarchy within the government's Department of Education, comprising individual office bearers, which include centrally appointed regional Directors of Education,³⁰ and advisory committees assisting policy formulation on different aspects of education including matters connected with education in different parts of the country.³¹ The extent of ministerial involvement, his power to make regulations³² and the manner of appointment of the office bearers

²⁹ For a detailed discussion see the section on Devolution and Constitutional Reform in this chapter.

³⁰ Education Act No. 35 of 1973. See Section 2A.

³¹ *Ibid.*, Sections 5-9.

³² *Ibid.*, Section 37.

reveal two important facets to the role of the State in education: firstly, the conspicuous political presence in the working of the system, with all appointments and regulations made by the Minister for Education and secondly, there seems to be no discernible involvement of regional actors in what is predominantly a centralised initiative. This suggests the urgent requirement to re-examine the statutory framework in the light of the initiatives for the regionalisation of education discussed later in the chapter.

Some important principles are laid down under the legislation. Local schemes are to ensure equitable access through free education,³³ the supply of meals and books for needy children, medical check ups for children, special mechanisms to train disabled children and securing educational facilities and industrial training for students.³⁴ There is an explicit repudiation of discrimination in aided schools on grounds of religion, language, race, caste and social status.³⁵ Religious instruction is a matter of choice and a student can be exempt if the parent so desires. The Minister has the power to make regulations on a host of matters such as the establishment and classification of schools, the training of teachers, guidelines for admission, the language of instruction and the conduct of business of the several councils responsible for advice and implementation of educational programmes.³⁶

³³ *Ibid.*, Sections 47, with the exception of fees charged to defray expenses for facilities.

³⁴ *Ibid.*, Section 27.

³⁵ *Ibid.*, Section 34.

³⁶ *Ibid.*, Section 37.

Universities are governed by the Universities Act³⁷ which establishes the University Grants Commission (UGC) responsible for the planning and co-ordination of the university education policy and establishing new universities and faculties within such universities.³⁸ An Amendment introduced in 1985 facilitates the establishment of Institutes and Centres for Higher Learning and the recognition of Degree Awarding Institutes. The Amendment also affiliates them to specified universities³⁹ and stipulates their powers and academic jurisdiction. The activities are alongside the responsibility of the Minister for the general direction of university education and the administration of the Act.⁴⁰ In addition, there is a National Institute of Education established as a statutory body rendering advice on policy, plans and programmes for the development of education.⁴¹ In 1991 the National Education Commission was established to redevelop educational policies to conform to requirements of a global world order.

The gamut of parliamentary legislation on education fails to stipulate vital guidelines on several aspects - notably the quality of education, the recruitment and deployment of teachers to schools, controlling admissions and ensuring independent institutions to monitor their selection, etc. Several issues are left to ministerial discretion to be formulated through circulars and

³⁷ Act No. 16 of 1978.

³⁸ *Ibid.*, Section 3. See also Section 15.

³⁹ Universities (Amendment) Act No. 7 of 1985. See Sections 24A, 25A and Sections 70A-E. See also section 24B of Universities (Amendment) Act No. 1 of 1995.

⁴⁰ *Ibid.*, Section 19.

⁴¹ National Institute of Education Act No. 28 of 1985. See Section 3.

notifications. In the absence of clear guidelines, recruitment and deployment has been ad hoc and made as and when vacancies arise. Trained and graduate teachers tend to concentrate in urban centres while rural and remote areas are left with untrained ones. There have been allegations of basic qualifications not having been complied with, with some of the recruits merely having passed the GCE O/L. The National Authority on Teacher Education Act of 1997⁴² has been a concrete initiative to upgrade the quality of teachers who are recruited by the government which recognises the importance of teacher education and integrated policies on teacher training.

3.1.1 The distribution of educational resources

Classification of schools on the basis of infrastructure, equipment and quality of education, location and source of funding has resulted in the creation of a hierarchy of institutions. The products of these systems who receive widely disparate educational inputs are often placed in a level playing field in terms of access to higher educational facilities and opportunities for employment. The first divide is between government schools and private institutions. Over 94.5% of the schools in Sri Lanka are government schools, run on financial support from the state and in turn are subjected to greater state regulation. However, discrepancies exist from school to school, from one region to another, as also the resource allocation per student between large and small schools within the provinces. The disparities can be classified as follows:

⁴² Act No. 32 of 1997.

3.1.2 Differences in resources and teaching**Number of government schools by status, 1992-1994**

Status	1992	1993	1994	1997
1AB	530	540	566	594
1C	1,617	1,693	1,696	1843
Status2	3,561	3,647	3,752	3682
Status3	4,334	4,279	4,177	4191
Total	10,042	10,159	10,191	10,310

Source: Statistical abstract (1996), p.247 and Ministry of Education and Higher Education, *School Census* (1997).

Schools are classified based on the number of grades taught. The best (accounting for 5% of state schools) are type 1AB (Grade 1-13) offering all subjects including science up to the GCE A/L. Of these a meagre 0.5% have sophisticated resources like computers and laboratory facilities. The other categories are type 1C which lack a science stream for the GCE A/L, status 2 Schools having classes up to year 11, Status 3 schools having years 1-5 schools and years 1-8 (and similarly), years 6-11 and 6-13. In Colombo for instance in 1991, of the 115 schools in the district teaching till year 8 (type 3 schools) only 2 had science laboratories and only 16 had playgrounds.⁴³

⁴³ J.I Lofsedt, S. Jayaweera and A. Little, *Human Resource Development in Sri Lanka: An analysis of Education and Training*, Stockholm (1985). See C.R. de Silva, "Education in Sri Lanka: A Development Oriented Analysis," paper presented at a conference on *The Political, Economic and Social Reconstruction of Sri Lanka*, Harvard University, Boston, Mass., November 20-22 (1997) pp. 6-7.

Schools with facilities for science are outnumbered by those without.⁴⁴ The internal differentiation has led to several imbalances. Firstly, it creates a hierarchy of institutions with an implicit prestige component; as schools for facilities all the way up to Year 13 offering science subjects are at the top of the ladder. Secondly, students who have to move out after a particular year for want of facilities in their school for further education are at a disadvantage when compared to those who can continue in the same school. Thirdly, students from localities without facilities for further education stand to lose under a system of school admission based on geographic proximity of residence to the school. Lastly, the policy for admission to university assumes that the district is the sole and decisive basis for assessing the extent of deprivation and excludes those disadvantaged by attending sub-standard schools, even though they may be located in 'privileged' districts.⁴⁵

⁴⁴ As of 1994 there were 1696 1C schools and only 566 1AB schools in the island. Statistical Abstract of the Democratic Socialist Republic of Sri Lanka, Department of Census and Statistics, Ministry of Finance and Planning (1996), p. 247. See also Action Oriented strategy, P-5. At present 23% of urban schools and only 3.5% of rural schools are type 1AB schools. Around 50 Assistant. Government Agent's Divisions do not even have such schools.

⁴⁵ This means, for instance, that a student from an educationally 'privileged' district like Colombo, but from a locality where the school is inferior, is assumed to be similarly situated as a student from the same district but from a good school.

3.1.3 District-wise differences

Number of government schools by grade for some districts, 1997

District	1 A B	1 C	Type2	Type3	Total
Colombo	61	96	190	98	445
Kandy	47	144	244	254	689
Jaffna (1996)	40	43	127	188	398
Hambantota	17	72	139	103	331
Matara	26	91	159	119	395
NuwaraEliya	15	61	29	316	421
Batticaloa	14	39	57	206	316
Trincomalee	12	49	76	116	253
Badulla	33	114	202	227	576
Kurunegala	50	217	393	305	965

Source: Ministry of Education and Higher Education, *School Census*, 1997.

Another closely related divide is that stemming from an unequal distribution of educational resources between districts in the availability of facilities and also factors like the student teacher ratio. In Trincomalee and Nuwara Eliya, the ratio as per 1996 statistics of pupils to graduate teachers is as low as 1:119.34 and 1: 169.36 respectively.⁴⁶ In the war torn districts of the North, there is a shortage of trained teachers. 86% of the

⁴⁶ Ministry of Education and Higher Education, *School Census* (1996), p. 20.

Plantation Tamils over the age of 19 in Nuwara Eliya have had less than five years of schooling and this district still has the highest number of small schools (Type 3) with just one or two teachers.⁴⁷ Small schools in under-privileged districts like Badulla and Kurunegala have no access to electricity or running water or basic infrastructure like buildings and furniture. Urban centres like Colombo and Kandy have infinitely better resources both in terms of density of schools and their equipment for teaching all the way up to pre-university level (1AB and IC) when compared to the rural areas.⁴⁸ Thus, students from urban areas have the advantages of large schools, the most sought after government schools and in addition, the option of schooling in private or international schools as well.

3.1.4. Distinction with respect to private institutions

A major challenge to concerns of parity in output, is the increasing number of private schools where the role of the State is either non-existent or negligible. At the top of the ladder are privately funded international schools numbering around 60 with a student population of approximately 20,000, attracting the

⁴⁷ See C.R. de Silva, *Education in Sri Lanka: A Development Oriented Analysis*, *Supra* n 43, p. 16.

⁴⁸ See Ministry of Education and Higher Education, *School Census* (1996), p. 3. Urban Colombo has 46 1AB schools while there are only 14 on rural Colombo. For Kandy, what is conspicuous is the ratio of IC schools in urban and rural districts, which stands at 18:128. Rural Kandy also has a large number of Type 2 and Type 3 schools, when compared to the urban or, for that matter, most other districts.

best of teaching talent and providing sophisticated facilities.⁴⁹ The tuition fees are commensurately high, estimated at two to three times the average per capita income of Sri Lanka. At the next level is a group of 38 independent fee levying schools catering to some 32,000 students, which are approved and registered by the state but receive no financial assistance from the government. The third category has 25 non fee levying private denominational schools (predominantly Christian) accounting for another 52,000 students. The salaries for the teachers here are paid by the State and they are, as a result, more bound by State policies and regulations. Both these categories enjoy relatively superior resources in terms of equipment and teaching. They are sought after for their valued educational opportunities and entry is highly competitive. There are also the *piriven* and the government schools where the contribution of the State towards salaries and equipment is substantial. These schools cater to the bulk of the students mostly from the economically disadvantaged segments of society.

Several inequities operate under the hierarchy. The obvious disadvantages students face are due to differences in the availability of facilities, laboratories and equipment, and teaching calibre. This manifests itself in the differences in output between different regions, as also between urban districts and rural areas. In international schools, the medium of instruction is usually English from the very beginning which opens up lucrative avenues for career in the private sector.

⁴⁹ See Wijemanne, E.L. *Study on Educational Financing in Sri Lanka-Summary Report*, Colombo, Marga Institute (1995), p. 10.

The student population in private schools collectively accounts for only 2% of the entire student population of the country.⁵⁰ To the extent that a majority of the student population attends government schools with disparate infrastructure, trapped in a mutually reinforcing cycle of sub-standard teaching in school and private tuition, unabsorbed into universities and unsuited for employment, the responsible state policies only heighten existing discrimination.

3.1.5 The content of education

Relevance, efficiency and quality are the parameters for evaluating the content of a system of education. These broadly determine whether (1) the education imparted helps develop work oriented and employment skills which benefit the individual and the community as a whole, and (2) it is diversified enough to cater to the educational needs of students of different cognitive abilities (ranging from slow learners to the bright and average) and those possessing special aptitudes and skills.

The question of **relevance** has become a point for introspection for two reasons:

- (a) The growing inability of the existing formal education system to meet the demands of a global economy. It is a constant complaint of employers that applicants for various job opportunities, are often unable to fit into an environment which requires knowledge and skills

⁵⁰ See *supra* n 2: There are 83 private schools in Sri Lanka as compared to 9964 government schools.

necessary to cope with the demands of globalisation. This has been highlighted time and again in informal discussions with employers.

- (b) the extent to which the curricular and co-curricular content of education addresses the deeper aspects of values, culture and spirit, the goals of democratisation, informed decision making, create awareness, rational thinking and fostering coexistence in a plural society.⁵¹ The curriculum content helps assess this. Even though school texts have been rewritten a number of times, their basic composition, themes and illustrations have remained constant. As the contents of books were never seriously analysed to assess their impact in the long run, they have only fostered ethnic chauvinism and stereotyping within the classrooms. A study by Dr. Sasanka Perera reveals for instance, that history texts which were used in schools until recently present the most serious and consistent problems in terms of the content.⁵² Narratives on Sri Lankan history have many negative statements regarding inter-ethnic relations, such as

⁵¹ S.B. Ekanayake, "Development needs and future educational challenges", 22 *Daily News* July 1997.

⁵² History has been discontinued as a school subject. But it has been incorporated within the new subject of "Social Studies" formulated after 1970.

portraying Tamils as traditional enemies of the Sinhalese. Similarly, readers published in Tamil were usually not directed towards creating understanding and respect for the culture and way of life of ethnic or religious groups other than Tamils and Hindus (Indrapala 1980:35). They were characteristically mono-cultural in their presentations and attempted to create in Tamil youth a special, superior and exclusivist feeling for his or her ethnic (or linguistic/religious) group.⁵³

The question of **quality** in education is determined both by curriculum content and the resource infrastructure (laboratories, classrooms, buildings and furniture, etc.) which enable the system to conform with its objectives. A report by the Asian Development Bank⁵⁴ indicated several shortcomings in pre-university education in Sri Lanka:

- (a) *Aesthetics and creativity*:⁵⁵ Although policy on primary education places emphasis on creativity at the secondary

⁵³ More significantly, these books fostered in children a sense of patriotism and nationalism directed not towards Sri Lanka, but towards Tamil Nadu. Poems of Subramaniya Bharathi, the well known Tamil nationalist poet from Tamil Nadu, were frequent inclusions. Most children would have learnt Bharathi's famous poem "Pappa-Pattu" (children's song) in which he advises: "Thou shalt worship the sacred Tamil land as your own mother---" (translation: Indrapala 1980: 35).

⁵⁴ *Education and Training in Sri Lanka: An Asian Development Bank Project*, Vol. I-IV, Educational Consultants of India, New Delhi (1989).

⁵⁵ *Ibid.*, Vol I, p. 72. Between Year I and III only 25% of school period time was allotted to play, activity and sensor motor experiences, with 65% on classroom instruction.

and higher secondary levels, the importance given to aesthetic, physical education and life skills, progressively diminishes to account for 17.5% and 18% of the class hours respectively.⁵⁶

- (b) **Science education:** Science education needs to be upgraded periodically, to keep abreast with developments in electronics and information technology. Obsolete theories should be dropped and greater emphasis should be placed on laboratory work and experimentation. A recently conducted study reveals that science education lacks an integrated approach with no emphasis on developing skills like predicting, hypothesising, generalising, inferring and data processing. Students are not learning science but are only passive recipients to a large number of seemingly unrelated information from teachers.⁵⁷
- (c) **Excessively exam oriented:** There is a severe 'academic' bias to the educational system through excessive emphasis on examination. This has lead to the diminution of the practical content-co-curricular activities and vocational skills⁵⁸ and the impoverishment of intellectual enterprise by stifling research and innovation. The examination system involves a mechanical reproduction of data, shifting the focus of education from developing general and basic competencies such as manipulative skills, familiarity with the use of common

⁵⁶ *Ibid.*

⁵⁷ *Secondary Educational Developmental Project-Curriculum Development Final Report Vol I & II, CANEDCOM Intl. Ltd., Toronto (April 1996).*

⁵⁸ *Ibid.*, p. 84.

devices and equipment and specific practical skills in areas like agriculture and engineering at the secondary level.⁵⁹

- (d) *Vocational education*: The White Paper Reforms of 1981 visualised the creation of alternative institutions imparting vocational education which would relieve the pressure on the formal education system. The objective was to progressively siphon off students at different stages of schooling to alternative self employment courses as well as create channels for re-entry into the formal education system.⁶⁰ The impact of these reforms is questionable, as what emerges with certitude is the statistics of unemployed graduates and progressive drop outs from formal education.⁶¹

The third parameter of assessing education is **efficiency**. This has been defined as the allocation of resources in a manner and proportion so as to maximise the end yield. As a precise identification

⁵⁹ *An Action Oriented Strategy towards a National Education Policy*, National Education Commission, September pp. 9-12 and 22.

⁶⁰ White Paper Reforms, Para 14. This introduced life skills at the junior secondary cycle (Years VI-VII), providing exposure to a range of optional technical subjects. These were to be continued at the senior secondary level with some specialisation (Para 27) and intensified at the tertiary level under established Technical Education Authorities (para 118) providing vocational training affording different levels of specialisation (Paras 121-128).

⁶¹ This is substantiated by Chandra Gunawardena's study on unemployment where a substantial number of vocationally trained students including those trained in computer systems and information technology remain unabsorbed into the work force. Chandra Gunawardena "Education in Sri Lanka" cited from C.R.de Silva, *Education in Sri Lanka: A Development Oriented Analysis*, *supra* n 47.

of output is not possible, there has to be a broad correlation of planning strategy to the expected outcomes and objectives, such as the productive assimilation of the emerging student populace into the work force. Statistically, drop out and repetition rates from primary schooling up to university⁶² and the capacity of the education system to attract and sustain the interest of students indicate the level of efficiency in the system. In economic parlance, resource input into the education system which does not produce the desired results, leading instead to unemployment, drop outs and failures is the biggest indicator of inefficiency within the system.

Efficiency is hampered both by minimal investment on developing educational resources like libraries, reading materials and teaching aids⁶³ and inequitous distribution of available resources, creating neglected districts like the plantation sector. These have

⁶² Of the half a million students who sat for the GCE O/L examination in 1996, only 21.7% qualified to enter the A/Level classes. See Pravada, Vol 5 No. 3 at p. 2. See also Reforms in General Education, National Education Commission, 1997, p.i: At the GCE O/L of 1995, 9.9% of the candidates failed in all eight subjects, and in the GCE A/L examination for the same year, 9.1% failed in all four subjects. In a study conducted of Year V children, only 21% had attained mastery level in writing, 13% in Math and 20% in health skills. The repetition rate (all island) up to Year V is 9.25%, the drop out rate is 4.37%. See "What children learn after five years of schooling," Evaluation Department, National Institute of Education, Colombo (1995), p. 2.

⁶³ Educational expenditure is 3% of the GNP and of this 85% is spent on teachers' salary. ADB, p. 29.

contributed to escalating drop out and repetition rates in the formal education system.⁶⁴

Seen from another perspective, university facilities do not seem enough when compared to the small percentage of GCE A/L students who are actually absorbed into university.⁶⁵ Thus, assuming that a graduate degree is one of the primary objectives of the formal education system this remains unrealised for a vast majority of the students. Additionally, unemployment figures reflect that both the formal and the vocational education sectors are not achieving what they have been intended for.

The drawbacks of improper curriculum design and evaluation, acute shortage of qualified teachers and the quality of in service training programmes and limited infrastructure, laboratories, buildings, furniture and funds, are felt more acutely in the poorer districts. The lack of a clear cut policy on recruitment, training and transfer of teachers compounds this, coupled with the hesitancy of new recruits in opting for areas troubled by war or economically under-privileged districts. Career incentives with more definitive policies on transfer and periodic rotation of services could address one aspect of this problem.

Another criticism of the education system is the policy on English. Students are educated in either of the vernacular languages up to the GCE O/L, with English as an additional 'taught' language

⁶⁴ Recent statistics on drop out and repetition. In 1987, 67.25% of candidates failed in the GCE O/L Mathematics and 63.37% failed English. Only 12% of those entering Year I enter Year XII. ADB, p. 321.

⁶⁵ Dr. K.D. Arulpragasam, "Reforms in the Education System," *Daily News*, 10 January, 1998.

(rather than as a medium of instruction). Some schools offer an option at the GCE A/L stage to switch over to English as the medium of instruction. Many students, however, prefer to retain their vernacular streams as they are too familiar with Sinhala or Tamil to switch to English.

The White Paper recommendations⁶⁶ on upgrading teaching of English do not address more serious consequences of being educated in the vernacular right through.

- (1) *Inequities within the system:* Most of the standard publications at the tertiary level, particularly in science, are in English and there is a paucity of material in local languages. There is also a lack of teachers competent to teach in English. Lack of exposure to English impedes reference work from texts and makes the student hopelessly reliant on class notes by lecturers. This places students without a background knowledge in English at a natural disadvantage when compared with those from urban, English speaking backgrounds.
- (2) *Discrimination on leaving the system:* It also places students from government schools unfamiliar with English on an unequal footing vis-a-vis those from fee levying private schools in opportunities for employment. It is believed that technological changes and global interdependence has necessitated developed communication skills in English for the exchange of ideas and technology. Given these requirements the isolated teaching of English as a second language unrelated to other subjects is questionable.

⁶⁶ Para 32.

- (3) ***Bridging the ethnic divide:*** Lastly, the absence of English as a conversational link language militates against efforts at finding common ground for the meeting of students of different communities. The swabasha policy has, to an extent, created a divide between the segregated Sinhala and Tamil streams.

4. Higher Education

4.1 The dilemma of university entrance

University admission has been a subject of controversy since the mid 60s when the unprecedented expansion of student numbers necessitated fresh policy measures to cope with the pressure of admission.⁶⁷ Starting 1970 a policy of differential minimum marks for admission of students from each of the three language media replaced the earlier criteria based solely on the aggregate of marks based on the GCE A/L examination. There was a lower qualifying mark for students who took the examination in Sinhalese in order to address the concern that Tamil students were over represented at the university level (especially in science, engineering and medical faculties) in relation to the proportion of Tamils in the population as a whole.⁶⁸

⁶⁷ Between 1963 and 1965 the student population of the university of Ceylon doubled. The rapid growth lay primarily in the arts faculty, with a near four fold increase in the intake as compared to 1960, *Report of the Committee Appointed to Review University Admission Policy*, University Grants Commission (1987), p. 5.

⁶⁸ In 1970 Tamils had over 35% of the admissions in the science faculty and 45% in engineering and medicine. See K.M. de Silva, "Affirmative Action Policies: The Sri Lankan Experience" *Ethnic Studies Report*, Vol. XV, No 2 (July, 1997) ,pp. 245-286 at p. 249.

The system of standardisation based on the language media introduced subsequently⁶⁹ was justified as affirmative action to check imbalances resulting from differences in facilities and teaching available to students from the Tamil stream which had adversely affected the intake of Sinhalese students into university.

The standardisation formula did not, however, address the differences in facilities and training within a particular medium. Based on the recommendations of a Cabinet sub committee in October 1973,⁷⁰ standardisation was abolished to be replaced with district quotas to address inter regional imbalances in intake. By 1976, the formula for university entrance was as follows: 70% of students were admitted on 'raw' marks, and 30% on a district quota basis. Of the 30%, 15% of places were reserved for students from 10 'educationally underprivileged' districts. In 1979 the admission policy was amended on the following pattern- 30% based on an all island merit basis, 55% allocated to 24 administrative districts in proportion to their respective populations and the balance 15% to be allocated to 12 districts classified as educationally backward in proportion to their respective populations.

The present admission policy which came into operation in 1986-87 prescribes entrance into the faculty of Arts and Humanities based on raw marks, while for Science based faculties the criteria is 40% on a competitive merit basis, 55% on district quotas

⁶⁹ This was a device which reduced all marks to a uniform scale is that in the end the number qualifying from each language medium would be proportionate to the number taking the examination in that medium.

⁷⁰ The Sectoral Committee on Social Overheads, Mass Media and Transport of the National Planning Council, 1973.

(with different cut off marks based on "backwardness" of the district) and 5% for the 13 educationally under-privileged districts. The controversial list of under-privileged districts remains untouched, but for the inclusion of Jaffna as of 1996-97 into the list of educationally under-privileged districts.

4.2 The inequities in the policy on university entrance

The three tiered admission system built on the premise of inequitable distribution of resources between districts has come under scathing attack from several quarters. The principle of having a lower cut off mark for qualifying for university entrance for 'under- privileged' (rural) districts as compared to urban ones like Colombo and Kandy operates on the presumption that resource distribution remains static. More fundamentally, it is also unjust that a student from a 'privileged' district with a higher mark in a the GCE A/L exam is denied admission solely based on the population and policy perceptions on educational access in other districts and the consequent distribution of seats on a pro rata basis. The minimum marks for admission applicable to some of the under-privileged districts is much lower than that prescribed for say Colombo and Kandy, and till very recently Jaffna as well. In a system of keen competition with every mark being decisive in determining university entrance, the assumptions behind the policy are questionable. The classification of districts for quotas is contentious for the following reasons:

- (a) The district is not the sole determinant of disability as a lot depends on the school attended rather than the bureaucratic classification of the district as privileged and under-privileged. Some schools in the so called 'developed' districts are worse off than some of those in areas designated as under-privileged.

- (b) District quotas based on resident population' has created situations where students migrate to urban schools after the GCE O/L but continue to be classified as from their original district for the purposes of university entrance. Also, the district quota scheme is applied in favour of academically poor of students as the better students secure admission to urban schools under the Year 5 scholarship scheme. Sometimes there are not even students to fill the minimum mark of 180 from rural areas due to this migration, while there is a simultaneous swelling of ranks of students in Colombo and Kandy.⁷¹
- (c) As there is no proper monitoring system or documentation to check the migration, some students manage to retain their rural domicile on paper for reservation benefits while having availed of superior schooling facilities in the cities, which technically should place them to compete in the merit category.
- (d) Lastly, the discriminatory ethnic undertones cannot be entirely overlooked. There is a belief among the Tamil minority that even with the abolition of standardisation and the gradual modification of the district quota systems, the admissions policy continues to place them at a

⁷¹ J.N. Oleap Fernando, "University Admission Reforms", *The Island*, 4 January, 1998.

disadvantage vis-a-vis the majority community.⁷² To support this contention is the fact that Jaffna district, (until recently), had the highest cutoff marks for securing admission to the engineering faculty and the fact that beneficiary districts under the district quota system and the reservation for underprivileged districts are from Sinhalese majority areas. Thus, rural Sinhalese students are the biggest beneficiaries of affirmative action, while Tamils in the south (who are usually resident in forward districts like Colombo) are ghettoized into competing within the merit category. Thus, one criticism of the policy is that even though it is designed to benefit rural students, it actually has an implicit ethnic bias.

The latest development (1996-97) in the otherwise static policy was the addition of Jaffna to the list of twelve educationally under-privileged districts, which might help change perceptions on ethnic bias. It is ironic, as noted by Professor K.M. de Silva, that the most vigorous advocate of the merit system has been absorbed into the list of the beneficiaries of affirmative action.⁷³ Seen differently, however, it vindicates the policy from allegations of ethnic bias. Instead, the system gives preference to certain regions and districts and acknowledges of the debilitating effect of war on the once excellent education system in the North.

⁷² See C.R. de Silva, "The politics of University Admissions: A Review of Some Aspects of the Admission Policy of Sri Lanka 1971-78", in *Sri Lanka Journal of Social Sciences*, I(2), 1978, pp. 85-123. See also K.M. de Silva, "University Admissions and Ethnic tensions in Sri Lanka, 1977-1982," in Robert A. Goldman and A. Jeyaratnam Wilson (eds.) *From Independence to State hood: Managing Ethnic Conflict in Five Asian and African Countries*, London, Frances Pinter (1984), pp 97-110.

⁷³ See *supra* n 66 at p. 266.

4.3 Rethinking contemporary policy

Preferential policies in university admissions are premised on the inequitable distribution of resources under a centralised education system which places rural students at a disadvantage over urban candidates. The Committee appointed to review the university admission policy in 1987 drew attention to the pervasive and severe decline in academic quality and excellence "under the overwhelming concern for equity and equality of opportunity in formulating schemes for university admission."⁷⁴ The Committee maintained that the policies have contributed to both a lowering of academic standards and the exacerbation of the ethnic conflict.

Several changes have occurred in the course of the decade which have necessitated re-examining the need for preferential policies in university entrance. There has been a considerable expansion of higher education resources in the country especially in the sciences, professional and technical education. With the creation of newer universities and the expansion of the capacity of high demand faculties like engineering and medicine, the base of the university system is much broader than it was in the early 70s, with considerably greater access.⁷⁵ Therefore, one has to rethink the tiered quota system where merit accounts for only 40% of the intake. However, government policy in expanding the list of educationally backward districts from 5 to 12, in its

⁷⁴ See *supra* n 65 at p. 9.

⁷⁵ "Reform Proposals for an Education System suitable to the 21st Century, National Education Commission," *The Sunday Observer*, 17 August 1997: The number of 8700 students admitted to universities in 1994 has now been increased to 12,500. The capacity should swell to 20,000 by the year 2000.

reluctance to review suggestions calling for a reduction of quotas for arts courses and increasing the admission cut off marks to allow better quality of student intake, reveals the political constraints to reform in this area.

5. Devolution and Constitutional Reform - The impact on Education

5.1 A history of ineffectiveness

According to the 13th Amendment⁷⁶ and the Provincial Council's Act, preparation of educational development plans and annual implementation will be the responsibility of the Provincial Council. What has happened up to 1997 is the partial devolution of administrative authority with the replication of strongly hierarchical organisations in the provinces.⁷⁷ However, the legal framework in substance, does not support provincial autonomy in educational matters.⁷⁸ The pervasive role by the Centre is evident in its control over funds, allocated on the recommendation of the Finance Commission which has no regional representation.⁷⁹

As for the institutional hierarchy there is insufficient coordination between school clusters and the divisional planning on the one

⁷⁶ Appendix III to the 13th Amendment to the 1978 Constitution.

⁷⁷ See *supra* n 60 at p. 14.

⁷⁸ Education is on the Concurrent List and there is no real clarity between the respective obligations of the central and the provincial authorities, imprecise demarcation of control and diluted powers of supervision over and appointments to 1AB and 1C schools with provincial authorities. See clauses 7 and 14 of Appendix III.

⁷⁹ *Ibid.*, Article 154R.

hand and provincial and central planning on the other. The reasons cited included the absence of long term perspectives in development and training, improper mechanisms for appraisal and review of policy and the lack of participation of the community and functionaries at the grass root level.⁸⁰

Control by the Centre has been justified on certain 'national concerns' of education-employment patterns, overall educational development of the island and social responsibility of distributive justice across provinces. But this has resulted in stifling genuine devolution, resource development and experience at the regional level. Consequences include, for example, the failure to develop appropriate training and management development programmes to produce competent faculty at the regional, sub-regional and school levels. Another example, is vesting the Provincial Authority with the power of "Implementation of the Annual Education Development Plan"⁸¹ while the funds for this are the prerogative and discretion of the Centre. Dependence on the Centre is thus made indispensable.

5.2 The proposals for dichotomy in educational management

The principal improvements made under the devolution proposals was to vest the Regions with the responsibility to train teachers

⁸⁰ *Education and Training in Sri Lanka: An Asian Development Bank Project*, Vol.I, Educational Consultants of India, New Delhi (1989), p. 55. It is also suggested to have a standing committee of the Human Resource Development Council, where broad policy issues on education development could be discussed between the Centre and provincial authorities. See also pp. 179-182, Vol II.

⁸¹ See *supra* n 74.

for regional institutions, greater powers of curriculum development and a National Education Commission with regional representation from both the Centre and Regions.⁸² In keeping with the earlier proposals of the government on devolution, the Draft Constitution provides for the devolution of educational services and higher education to the Regional List, including regional policy and research on education and publication provided by the Regional Administration.⁸³ National schools and universities which are financed and managed by the Centre are excluded from regional control and the responsibility of admission to and regulations of these institutions will lie with the Central Government.⁸⁴ The recruitment, transfer and disciplinary control of teachers other than those in national schools will be the responsibility of the Regional Councils.

5.3 Consequences

Devolution of education under the Draft Constitution is bound to impact favourably the administrative side to educational management. Empowerment of regional authorities may augment the process of upgrading rural schools and regularising their

⁸² Text of Government's Devolution Proposals of August 3, 1995, cited from *Sri Lanka: The Devolution Debate*, (ICES, Colombo, 1997) 3rd edn., Contrast these with position under the 13th Amendment where teacher training and curriculum development was the responsibility of the National Institute of Education. Provincial Authorities had to indicate their need for staff requirement and secure approval of the Institute for local variation in the primary curriculum and selected subjects in the secondary curriculum. The Institute does not have regional representation.

⁸³ Entry 20 List II, Draft Constitution.

⁸⁴ There are 252 National Schools and 9964 provincial schools. See *Central Bank of Sri Lanka, Annual Report* (1997) p. 69.

network to two per Pradeshiya Sabha to offset inter-regional imbalances. Introducing participatory management in schools with the Principal, parents and the local community can be achieved through the effective involvement of provincial policy makers who are accessible, unlike parliamentarians based in Colombo. The caveat, of course, is the extent of devolution of power to the Regional Councils and the question of fiscal federalism to support regional policy.

There are, however, two possible drawbacks to the system. First, the system creating 'national schools' with their superior resources under federal patronage next to regional ones may create internal differentiation adding yet another genre to the existing hierarchy and further entrench the existing inequities in facilities and resource distribution. Secondly, it is feared that this may result in 'parochialisation of education' in a scenario of competing cultural identities based on conflicting interpretations of history, rights and nationhood.⁸⁵

The proposals on teacher training unfettered by adequate guidelines, and autonomy in designing syllabi are two of the more problematic aspects of devolving authority. Strict formats and rules on training formulated with the concurrence of both the Centre and the regions is one solution. On syllabi, certain contentious courses involving the interpretation of historical facts, venerating persons, religion and ethnicity and issues on sovereignty and nationality (which are sensitive areas) should

⁸⁵ Sasanka Perera, "The Structure and Content of Education: Policy Choices and Problems of Implementation in the Context of Devolution Proposals," *Sri Lanka: The Devolution Debate*, *Supra* n 82, pp. 87-108.

be formulated by the National Education Commission with representations from the Regions, rather than vesting the Regions with exclusivity in the matter.⁸⁶

6. Proposals for Educational Reform by the National Education Commission

The National Education Commission was established as a statutory body on 15 July 1991⁸⁷ with the function of making recommendations to the President on a comprehensive education policy suitable to the needs of a changing society. The Commission was entrusted with the task of designing long term educational policies and monitoring the implementation of the existing ones. In 1995 a document on reform in general education was prepared which contained a fresh set of policy proposals on primary and secondary education.⁸⁸ Subsequently, proposals for reform in university education were formulated by the Commission based on ideas obtained from discussions with university professors, lecturers, educational administrators and the business sector.⁸⁹ Currently a National Policy on Technological and Vocational Education is being considered by specialists in the field.⁹⁰ In August 1997, some of the proposals submitted by the Commission and accepted by the government

⁸⁶ *Ibid.*, pp. 106-107.

⁸⁷ Act No. 19 of 1991.

⁸⁸ See *An action Oriented Strategy Towards the National Education policy*, Colombo, National Education Commission, September, 1995.

⁸⁹ See *supra* n 11.

⁹⁰ *The Sunday Observer*, 17 August 1997, p. 33.

were articulated as an official statement of the Ministry of Education and Higher Education, addressing different aspects of reform in the education system.⁹¹

6.1 Institutional reforms: increasing access to education

The proposals for educational reforms reveal concerted action by the State to step up its efforts to maximise access to primary education. With the ongoing efforts at upgrading existing schools with the provision of buildings, teachers and infrastructure, the number of schools teaching up to year 13 could more than double from the current figure of 594 to 1200.⁹² These proposals, in addition to a progressive increase in the availability of year V scholarships to 10,000 from the present 7500 will enable a greater cross section of students to access quality education after the primary years. However, the effectiveness of these reforms to maximise access is marred by the policy on admission.⁹³ Quotas are allocated based on whether the parent is the chief house holder (40%), non chief house holder (7%), whether the child has siblings in the same school (20%), children of past pupils (25%), and of transferred officials or Members of Parliament (8%). Ninety nine per cent of the allocations are made on proximity of the child's residence to the school, which

⁹¹ Reform Proposals for an Education System Suitable to the 21st Century, National Education Commission, *The Sunday Observer*, 17 August 1997.

⁹² Statement issued by the Ministry of Education and Higher Education, *Sunday Island*, 17 August 1997 p. 6.

⁹³ See Circular 1614/14 dated 12 August 1996, issued by Ministry of Education and Higher Education.

affects children from areas where there are no good schools.⁹⁴ The rationale seems to be to spare the child of the drudgery of long hours of travel, the attendant fatigue and the detrimental impact on learning capacity. However, given the uneven distribution of quality education through the country this policy militates against rural students and those in urban localities without good schooling facilities.

6.2 General education

The latest Statement on Educational Reform targets three principle aspects of the current system. These are the mandate to increase the use of English, revamping the organisation and management of schools and improve the quality of education provided at the primary and secondary levels.

6.2.1 An English education

Students receiving education in vernacular languages at secondary level are handicapped at tertiary level as quality reading material, reference and instruction are generally in English. The universities themselves are constrained by incoherent policies on the language of instruction and differ from one another in their policies on language. Additionally, students are precluded from the lucrative job market in the private sector. The focus of the reforms to inculcate English is an obvious response to this. There is an acknowledgment of the importance of English as an international language and the measures suggested aim at its progressive

⁹⁴ See *National Education Commission Policy Recommendations on School Admissions 1/98*, National Education Commission (11 January 1998), p. 2 (unpublished).

incorporation into the education system. It is proposed, therefore, to teach English from Year I; provide facilities to GCE A/L students to learn English; implement special programmes for training English teachers; and provide incentives for teachers to learn English.

6.2.2 Organisation and management

Inter-regional disparities and the poor quality of educational services can be traced to defects in the organisation and management of schools throughout the country. The proposals in this area, therefore, purport to ensure twin commitments to a more equitable distribution of educational resources as well as invoke principles of decentralisation and participatory management which will make schools more directly responsible for their own development. Regional disparities are sought to be remedied in the following manner:

- (1) Schools teaching up to Year 13 (type 1AB) are sought to be increased to two per Pradeshiya Sabha. This includes a preliminary measure of upgrading existing schools with facilities to conduct GCE A/L science courses.⁹⁵ Eventually, the present number of 594 schools is proposed to be increased to 1200.
- (2) Developing junior schools in the plantation areas, remote rural areas, coastal fishing areas and undeveloped urban localities.

⁹⁵ *Ibid.*, 312 schools have been selected and necessary steps have been taken to develop them.

As regards internal management, the following measures have been recommended:

- (1) Creating a coherent hierarchy involving the ministry of Education, Provincial Education Departments and Regional Education Offices with a premium on efficiency of organisation.
- (2) School principals to be given the necessary powers regarding school administration, and Principals and Vice principals be given the necessary training for management.
- (3) The responsibility of implementation of developmental plans to be entrusted to the schools and school development societies should be created involving parents and the community at large.
- (4) Mechanism for supervision to ensure professionalism of teachers and arrangements to address institutional problems of teachers.

6.2.3 Primary education

The proposals recommend reforms at all stages of pre university education namely primary, junior secondary and secondary levels of study. The hitherto unregulated pre school education sector has for the first time been brought within the regulatory ambit of the state. The proposals are premised on a need for coherent policies in the management and the manner of instruction in pre school centres, which are for the present conducted by a variety of individuals and organisations in different ways. The suggestions include a mandate for legislation to ensure minimum

standards for pre school education, teachers' qualifications at all levels, educational institutes for teacher training, policies on syllabi and equipment and promoting bilingualism as a starting point for ethnic harmony in the future. The proposals place an onus on the Provincial Councils to start and popularise pre schools.

The primary concerns motivating reform in the primary sector are the high drop out rate and defects in the content of education and method of instruction. Weak foundations have resulted in the child not being moulded properly in the junior secondary stage. The principle recommendations are:

- (a) revision of syllabus, text books, work books and teachers' hand books with greater emphasis on activities for children, colour photographs and illustrations and creating a familiarity for English through the incorporation of familiar words of communication,
- (b) implementing the new syllabi and training teachers to use English words,
- (c) supply of equipment and resources necessary for activity education in primary classes
- (d) arrangement of necessary buildings and infrastructure to make primary classrooms an attractive environment for the child.

Years 6 to 9 have been designated as the junior secondary section. The proposals recommending revisiting the curricula and syllabi to 'give a practical thrust to education' so as to encourage the development of manipulative skills in the child in

addition to theoretical knowledge. Thus the focus of the reforms will be on imparting life skills in conformity with modern standards in science and technology. These objectives are sought to be achieved through creating Activity Centres within schools provided with modern equipment catering among other disciplines specifically to Construction and Mechanical Technologies, Electronics and Electricity, Arts, Agriculture and Home Economics. Parallel arrangements for training teachers to orient their professional skills to the practical content of education has been emphasised.

6.2.4 Secondary Education

Statistics reveal that almost 80% of those who sit the GCE O/L examination drop out from school education after the results are declared, with only 22.3% of the candidates passing in Mathematics and the mother tongue, and as little as 21.7% qualifying for entry into the GCE A/L.⁹⁶ Therefore, a prime consideration for reform in the GCE O/L is the high incidence of failure in Mathematics and Science. The education reform proposals therefore, recommend two papers each in Mathematics and Science respectively, with students having the option to take only the general papers (Maths I and Science I) in each of these subjects if they so desire. Passing in each of these papers is sufficient for passing in the subject as a whole. Students aspiring to study Mathematics and Science at the GCE A/L must additionally qualify in the second paper in each of the two subjects. By bifurcating the syllabi in the two subjects, there is an effort to make the requisite qualifications in each of the

⁹⁶ *Ibid.* Results of GCE O/L examination held in December 1996.

subjects more elementary and thus curtail the drop out rate on account of failure. The proposals are intended to take effect from December 1999.

In the case of reform at the GCE A/L, the important indicator of a lapse in the existing system is the miniscule percentage of university entrants from those who take the examination.⁹⁷ Considerations of unemployment and inadequacies in the vocational content of education remain important issues to be addressed. Given that the vast majority of school leavers after the GCE A/L examination do not enter university, it is recommended that the curriculum at this examination should include aspects which would facilitate employment in technical and technological sectors. Additionally, the proposals recommend that the number of subjects a student has to study for university entrance be reduced from four to three, to reduce the unnecessary pressure of study in a system excessively oriented towards rote memorisation and examinations.

There is an effort to alter the 'mechanical exam oriented content' of the examination system, through aptitude testing at the GCE A/L examination which gauges the student's ability to reason, solve problems, and test his or her skills in comprehension and communication.⁹⁸ The basis for eligibility to university will be the aggregate scores in the three subjects offered, in addition

⁹⁷ Only 12 500 students enter university from the 170,000 who take the GCE A/L examination.

⁹⁸ The aim of the test is to predict the aptitude of entrants for different educational courses and jobs. See T. Kariyawasam, "Aptitude testing: Is it necessary?," *The Sunday Times*, 10 August 1997.

to a pass in the proposed aptitude test. The furore and public agitation following the suggestion has led to the Ministry retracting from its stance.

6.3 University education

The proposals on reform in university education primarily address the inadequacy in facilities which resulted in less than 2% of candidates taking the GCE A/L examinations accessing a university education. There is no change in the criteria for admission (the district quota and minimum mark cutoff) but instead an expansion of facilities is envisaged. The establishment of the Raja Rata, Sabaragamuwa and South East Universities has augmented the intake from 8700 students to 12,500 in 1996. The ministry targets the establishment of two more Universities at Wayamba and Uva with an additional capacity to absorb another 15,000 students, by 2000 A.D. Official statistics reveal the expenditure of Rs. 1100 million for residential facilities which will eventually cater to 75% of the student population.⁹⁹

6.4 Teachers education

Several measures have been suggested to inculcate professionalism in teachers and ensure qualitative improvement in educational standards. Most of these seek to institutionalise recruitment into and management of the teaching profession. A National Teacher Training Authority had been proposed to plan teacher education, co-ordination and preservation of quality, train

⁹⁹ *Ibid.* A sum of Rs 1900 million has been spent from August 1994 -97 for buildings and equipment in universities in addition to the construction of hostels.

teachers and improve facilities in existing Educational institutes. There are plans to strengthen the education departments in universities and recommence the course in Bachelor of Education. Further, 84 teaching training institutes are sought to be established throughout the country to provide in-service training and continuous educational facilities to teachers.

Pursuant to the recommendations the Parliament enacted a statute establishing a National Authority on Teacher Education responsible for maintaining an integrated system of teacher education, rationalising the existing system, monitoring the progress and performance of teacher education programmes and providing professional development and research in teacher education.¹⁰⁰

7. Conclusion

The recommendations under the National Education Policy address some of the inequities under the education system. The proposals include compulsory education for all children between the age groups of 5 and 14, the introduction of English from Year 1 and the development of incentives for increasing school attendance. On institutional reform, the focus is on the establishment of activity and open schools for those who cannot attend regular schools. Further, it is proposed to increase the network of schools to at least two for every Pradeshiya Sabha which have the facilities to teach up to Year 13.¹⁰¹

¹⁰⁰ National Authority on Teacher Education Act No. 32 of 1997. See Sections 3-5.

¹⁰¹ See *Educational Reforms and Restructure: Policy and Programmes of Action*, Ministry of Education, Colombo (1997).

However, there are several issues which remain unaddressed:

- (1) There is, for instance, a needless hierarchy of schools based on the facilities and subjects taught. Type 2 and type 3 schools and others like 6-11 and 6-13 with incomplete facilities, force students to migrate as well as pressurise admission into the 'good' Type 1AB and 1C schools. Having just two categories of schools- teaching from Year 1-8 and 9-13, might resolve some of these problems by diluting existing hierarchies.
- (2) The defects in the policy of admission to schools remain untouched. This is essentially related to the question of access. There is a lack of coherence in the policy of admission at the school or university level, in the absence of a statutory framework with a clear enunciation of policy. Most statutory enactments on education vest excessive discretion on the Minister unbridled by appropriate guidelines. This has resulted in ad hoc circulars and notifications forming the basis for policies on admission and medium of instruction. The domiciliary basis to school admission discussed above is fraught with inequities. There is also excessive bureaucratisation of the system without a substantial role for educationists in the formulation of policy. At the most they may be nominated to advisory committees without any obligation on the Minister to follow the advice rendered.¹⁰² There is no provision for a periodic re-evaluation of the content of education and the utility of

¹⁰² This is evident from several innovative suggestions made by the National Education Commission which have not found articulation in the final policy reforms package of August 1997.

courses to make changes to upgrade the same. The absence of concrete legislative measures has caused an obsolete system plagued by numerous defects.

The domicile policy leads to the overcrowding of good schools with as many as 60 children per classroom, which is counter productive to some of the objectives of primary education repeatedly spelt out by policy makers. There is no attempt to address malpractices such as parents submitting fraudulent documents, false title deeds and declarations to prove domicile. Recommendations like introducing transparency in the admission procedure, suggestions to progressively relieve the State of its burden of free education, and improving the manner in which the Year 5 examination is conducted to counter allegations that the present system is detrimental to the educational development of children, their varied economic backgrounds and disabilities,¹⁰³ have not received much attention from the State. It had also been suggested that 'disadvantaged schools' rather than districts as the beneficiaries of affirmative action policies may prove more equitable.¹⁰⁴ From these, one can only infer the reluctance

¹⁰³ See *supra* 92. See also *Summary of Representations: School Admissions*, National Education Commission (unpublished). See also Progress Report, September 1994-October 1995 Policy, Planning and Review Decision (Ministry of Education and Higher Education, Colombo, 1994) p. 214: The mode in which the Year V exam has been held has been detrimental to the educational development of children, their varied economic backgrounds and disabilities.

¹⁰⁴ J.N. Oleap Fernando, "University Admission Reforms," *The Island*, 4 January 1998.

of the state to attempt genuine restructuring rather than populist declarations of intensifying the network of schools, which overlook more substantive issues.

- (3) There are inequities in the education system stemming from the hierarchy in allocation of facilities and imbalances resulting from the deprivation of resources, both in terms of infrastructure and teaching. The reforms proposed do not address deeper issues like the natural linguistic, cultural and psychological disadvantages faced by students from under-privileged areas and rural districts who migrate to urban areas for higher secondary and university education. There is no organised counselling or methods to ensure that students entering the system with a baggage of poverty and deprivation from their past, are brought to a level playing field where they can compete with students from more privileged backgrounds. With respect to the distribution of infrastructure, schools in urban areas have a better student teacher ratio, while those in under-privileged and war torn districts face in particular, a chronic shortage of trained teaching staff. The English stream usually attracts better qualified teachers, the teacher student ratio is more favourable and so is the quality of reference books and study material which are in available in English. Students studying in the vernacular are restricted for want of good translations. Thus the biggest drawback of the reforms are that they do not assess the deeper inequities after the student has entered the education system.
- (4) The flaws in the district quota system and residence as the basis for admission to university remain unaddressed

in the current reforms. The system unfortunately affects both rural and urban constituents and is largely not in consonance with the original objectives for which it was formulated.¹⁰⁵ In such a situation it is imperative to reformulate the guidelines keeping in perspective the changing contours of the categories which qualify as 'under privileged.' Also, if the Pradeshiya Sabha scheme is implemented to regularise the network of quality schools throughout districts (as promised under the reforms) it is bound to affect the profile of regional imbalance which is one of the rationales for the quota system.

Although the Universities Act of 1978 created an autonomous body called the University Grants Commission (UGC), the autonomy in practice is undermined through substantial ministerial involvement in policy making. This has meant a lack of consensus between the UGC and the government on sensitive matters like the progressive abolition of quotas, restricting district quotas to science based courses and bring the arts under the merit system and increasing the eligibility mark to maintain university standards.¹⁰⁶ On the contrary, state policies like further lowering the entrance eligibility mark from the existing 180 to 140 will only increase the pressure on an already

¹⁰⁵ The reforms in 1987 proposed a progressive decrease of the district quota system through the gradual creation of a level playing field. But the government policies only serve to entrench the advantages further.

¹⁰⁶ *Commonwealth Universities Handbook 1995-96*, Association of Commonwealth Universities, London (1996), p. 1242: The government first accepted them but then retracted under political pressure.

scarce resource. All these have also contributed to private sector participation in education as indicated by the North Colombo Medical College (NCMC) case.¹⁰⁷

This only proves that it has been politically expedient to abstain from questioning the potentially sensitive basis to affirmative action as much as policies on admission to schools, and instead pander to populist pressures.

- (5) The policy on the introduction of English is unclear. It does not address the disadvantaged students from government schools are placed at (course options, research and employment) when compared to international schools and private schools. Secondly, it is unclear as to *what* the measures entail. Is it merely as aimed to develop 'a functional vocabulary' to achieve mere conversational proficiency or is it to go beyond? How will it relate to other subjects and what will the impact on vernacular education be? Is it merely familiarising students with the use of English words as the proposals on primary education (discussed with below) indicate? Is it to be taught merely as a subject or as the basis for instruction, replacing vernacular parlance? At what stage (i.e. primary, junior secondary, secondary) will it be introduced?

¹⁰⁷ This was a fee levying private college whose students would sit for the medical examinations with the University of Colombo. Following popular protests by medical students in Colombo and other state universities, University Amendment Act No. 33 of 1998 was enacted with the objective of preventing graduates from NCMC from taking exams with the University of Colombo. Eventually, NCMC was brought under government control through the University (Amendment) Act No. 3 of 1989.

The reforms purporting to introduce English do not address the detrimental consequences of instruction in Sinhala and Tamil.¹⁰⁸ According to sociologist Sasanka Perera, this policy has dismantled social pluralism because the two types of schools (Sinhala and Tamil) based on the medium of instruction reinforced ethnic identity and the cultural separation of the two major groups.

Empirical studies reveal that a majority of Sinhalese respondents showed a disinterest in learning an additional "link language" (either English or Tamil).¹⁰⁹ On the other hand, the most consistent answer from Tamil students (especially the plantation Tamils) unwilling to learn Sinhala was that it had no practical value.¹¹⁰ Thus, even when Sinhalese and Tamils are given opportunities to learn the

¹⁰⁸ See Dr. Sasanka Perera's doctoral thesis, *Education in Sri Lanka*, (unpublished). The positive aspect of the change over from English is that it has opened the doors to secondary and higher education for both Sinhalese and Tamil masses, which had hitherto been closed to them due to lack of English proficiency.

¹⁰⁹ *Ibid.*, Of a total of 100 students interviewed in 1988 (both Tamil and Sinhalese), about 30% showed a positive interest in learning a "link language" (either Sinhala or Tamil) if the present study load was reduced. The answers of about 12.3% were ambiguous. The most common sentiment expressed by the Sinhalese students who were unwilling to learn Tamil was, "This is our country, our language is the state language, why should we learn their language? They should learn ours."

¹¹⁰ Interviews conducted by Zaveeni Khan in the Bandarawela area. According to Dr. Sasanka Perera, the answers of these overwhelmingly poor students were rather surprising, because oral and literary skills in Sinhala would seem to expand their employment opportunities as well as help them to break down barriers with their Sinhalese counterparts.

languages of each other, the necessary enthusiasm is usually absent. Besides, schools in the form of exclusive ethnic clusters are not conducive to teaching the language of an out group. Most teachers who teach Sinhala are Sinhalese and would not feel comfortable working in an exclusively Tamil school. The reform package does not address these issues.

- (6) While the policy on vocationalising the curriculum has found reiteration, there is inadequate reflection on the causes for the failure of earlier attempts to do so. The White Paper reforms were equally elaborate in their recommendations, but were not backed by sound implementation policies or enough funds to carry them through. Critical assessment, curriculum validation, monitoring, evaluation on field and periodic upgrading facilities were found lacking.¹¹¹

There are other complex dimensions to the problem. Firstly, the suggested employment oriented reform packet comes from the government, while with contemporary policies on public sector disinvestment and privatisation, the employers' lobby is increasingly the private sector. Changing demand profiles may

¹¹¹ ADB Vol. 2, p. 118. The ADB report places a lot of emphasis on identifying constraints before selecting solutions, testing them in practice and constant feed back and evaluation of their utility. There was also improper co-ordination within the hierarchy of vocational institutions which envisaged a complex system of multiple entry and multiple terminality, depending on which stage the student left the formal education system. No techno-economic survey was conducted which could assess the input needed in curriculum design, local resource requirements and competency and linking them with employment estimates.

mean newer requirements from the students.¹¹² The extent to which technical courses cater to their demands is questionable. Secondly, sporadically organised education through a cluster of unconnected technical institutions needs to be replaced with standardised curricula and effective linkages between institutions imparting technical education. To what extent do the present reforms cater to this? Thirdly, vocational education requires large recurrent expenditure on equipment, gadgets and other practical tools as well as teachers who are trained with practical experience, all of which myopic development planning has overlooked. One of the biggest ironies of the earlier attempt was the want of teaching staff and resources for practical training and the consequent 'academisation' of technical courses.

The Policy of 17 August 1997 is a comprehensive package on educational reform. However many of the changes suggested are similar to those under the White Paper Reforms of 1981 which lack the foresight to confront deeper challenges to educational reform. Increasing the number of Type 1AB schools does not address the inherent limitations the massive burden of over 10,000 schools waiting for money to dish out a free education, which makes education rest rather too heavily on the shoulders of the state. In the absence of self generation of resources in schools and public aversion to paid education¹¹³

¹¹² See *supra* (national workshop) at p. 18: Industry in its present stage requires a 'trainable person' rather than those with high degrees in technology. Decentralised skill incentive economic activity has assumed precedence over centralised capita incentive physical input.

¹¹³ Rane Mohomed, "What's Wrong with State Schools?" *The Sunday Leader*, 19 July 1998: The author speaks of an ingrained belief that free education is non negotiable, which results in protests from parents even in making modest contributions for benefits.

the state is saddled with supporting a large sector on a relatively meagre GDP allocation of 2.9%. The policy does not address the discriminatory hierarchy created as a result of superior schools in the private sector. On the contrary, the proposals under the Draft Constitution which actually create internal differentiation between national and provincial institutions remain untouched. The possibility of exacerbation of ethnic differences under parochialised curricula is another problematic area.

Educational reform does not need mindless expansion of facilities without commensurate support infrastructure. Some of the problems plaguing the system today need introspection more than anything else. Common problems include indefinite closure of schools sometimes for trivial reasons like marking A/Level and O/Level scripts, cancelling classes and diverting students to welcome local politicians and the inordinate delay between the end of the O/Level and the time the student can recommence education for the A/Level.

With vocational education not contributing significantly to employment generation and less than 5% of those who take the A/level examination making it to university, the current educational system is useless to a majority of its adherents. This negates the fundamental canon of universal access. There are further no guidelines on the recruitment, transfer and training of teachers. The bifurcation of responsibility due to devolution will only complicate this further.

The solutions lie among others, in minimising political interference and facilitating autonomy at the school level. Re-examining the State's failing role in the education sector also means questioning its resolute in its commitment to free education and the aversion to private participation in partnership with the State.

XII

The Rights of Persons with Disabilities

*Dattathreya C.S.**

1. Introduction

The rights of persons with disabilities have not been discussed in any previous *Sri Lanka: State of Human Rights* reports. This chapter provides an introduction to international human rights standards on the rights of persons with disabilities, and summarises national legislation passed in 1996 which purportedly deals with their rights. It then discusses the work of the recently established National Council for Persons with Disabilities, and provides an assessment of the extent to which Sri Lanka fulfils its international obligations with regard to the disabled. Overall,

* Senior Researcher, Law & Society Trust.

this chapter concentrates on "rights" issues relating to disability in Sri Lanka, rather than providing a discussion of the "welfare" schemes in existence for this category of people. It bears noting, however, that many of these "welfare" schemes may be fulfilling the substance of the "rights" requirements under international covenants and instruments.¹

In 1996, Sri Lanka belatedly granted statutory recognition to the rights of persons with disabilities. Under the Protection of the Rights of Persons with Disabilities Act of 1996, "persons with disability" means any person who, as a result of any deficiency in his physical or mental capabilities, whether congenital or not, is unable by himself to ensure for himself, wholly or partly, the necessities of life.² This legislation was passed 15 years after the International Year of the Disabled in 1981, when a World Programme of Action was adopted. At the international level, the International Year was followed, starting in 1983, by the United Nations Decade of Disabled Persons. Despite this delay, however, Sri Lanka is notable as one of the few countries which have granted statutory recognition to the rights of disabled people.

The World Health Organisation (WHO) estimates that in any country, approximately 10% of the population suffers one of five broad categories of disability: physical disability, blindness,

¹ For a discussion of the requirements under international covenants and instruments, see *infra*.

² See Section 37 of the Act. The Standard Rules on the Equalization of Opportunities for Persons with Disabilities say, however, that "(T)he term 'disability' summarizes a great number of different functional limitations occurring in any population... People may be disabled by physical, intellectual or sensory impairment, medical conditions or mental illness. Such impairments, conditions or illnesses may be permanent or transitory in nature." See General Comment, *infra*, n. 9, at p. 93.

deafness, intellectual impairment and mental illness.³ In Sri Lanka, the total number of disabled people has been estimated at around 800,000.⁴ However, no official statistics on the disabled are yet available to the public, except for figures on "mentally unsound persons." The number in this category in 1995 was given as 13,071, based on the number of admissions to the Angoda and Mulleriyawa Hospitals.⁵ The Community Based Rehabilitation programme wing of the Ministry of Social Services has established a set of criteria to determine the actual figures relating to disabilities, but these were also inaccessible at the time of writing.⁶ The continuing ethnic conflict in the country has also resulted in a substantial number of combatants (both government soldiers and rebels) becoming disabled in combat, in addition to civilian casualties.

2. International Instruments

The Universal Declaration of Human Rights (UDHR) proclaims the right of every person to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.⁷

³ Adewale Maja Pearce, "Disabled Africa: Rights not Welfare," *Index on Censorship*, Vol. 27, No. 1, 1998, p.178.

⁴ Jayalath Jayawardena "Is there any way to protect the disabled?," *Divaina*, (Colombo), 3 December 1997.

⁵ *Statistical Profile of Sri Lanka* (Department of Census and Statistics, 1998), p.38.

⁶ Personal interview with Mrs. M.J. Samarasinghe of the Ministry of Social Services.

⁷ See Article 25 of the UDHR.

Although the International Covenant on Economic, Social and Cultural Rights (ICESCR) does not refer explicitly to the rights of persons with disabilities, there are other generic guarantees which acquire specific dimensions in the context of disability. In particular, Article 11 recognises the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. Article 12 recognises the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. In addition, Article 7(c) requires equality of opportunity for promotion to a higher level in employment, subject only to considerations of seniority and competence.⁸

Additionally, the General Comment on Persons with Disabilities issued by the Committee on Economic, Social and Cultural Rights⁹ provides a very useful elaboration of the international mandate with regard to persons with disabilities. The General Comment makes it clear that even though the ICESCR

does not refer explicitly to persons with disabilities, the Universal Declaration of Human Rights recognizes that all human beings are born free and equal in dignity and rights and, since the Covenant's provisions apply fully to all members of society, persons with disabilities are clearly entitled to the full range of rights recognized in the Covenant... Moreover, the requirement contained in Article 2(2) of the Covenant that the rights 'enunciated ... will

⁸ See Chapter VI on Equal Opportunity.

⁹ General Comment No. 5 (Eleventh Session, 1994) [UN Doc. E/C.12/1994/13] also published in INTERDOC No. 1, Third edition, The Nadesan Centre, Colombo, 1995, p. 93-102.

be exercised without discrimination of any kind' based on certain specified grounds 'or other status' clearly applies to discrimination on the grounds of disability.¹⁰

Further, the General Comment emphasises the need to ascertain, through regular monitoring, the nature and scope of the problems existing within the State; the need to adopt appropriately tailored policies and programmes to respond to the requirements thus identified; the need to legislate where necessary and to eliminate any existing discriminatory legislation; and the need to make appropriate budgetary provisions or, where necessary, seek international co-operation and assistance. In particular, the General Comment highlights the state's obligation to eliminate discrimination on the grounds of disability, and the following rights in the context of disability: equal rights for men and women, rights relating to work, social security, protection of the family and of mothers and children, the right to an adequate standard of living, the right to physical and mental health, the right to education and the right to take part in cultural life and enjoy the benefits of scientific progress.¹¹

The Convention on the Rights of the Child (CRC) deals more elaborately with the specific case of disabled children. This Convention not only recognises the specific needs of disabled children but also sets out guidelines for ensuring that states parties meet these needs.¹²

The General Assembly of the United Nations proclaimed the Declaration on the Rights of Mentally Retarded Persons on 20 December 1971.¹³ This Declaration, *inter alia*, said that "(t)he

¹⁰ *Ibid.*, p 93 - 94.

¹¹ *Ibid.*

¹² See Article 23 of the Convention.

mentally retarded person has, to the maximum degree of feasibility, the same rights as other human beings." The other specific rights enumerated therein include:

- (a) the right to proper medical care, physical therapy; such education, training, rehabilitation and guidance as will enable him to develop his ability and maximum potential;
- (b) the right to economic security and to a decent standard of living;
- (c) the right to live with his own family or with foster parents and participate in different forms of community life; and
- (d) the right to protection from exploitation, abuse and degrading treatment; the right to due process of law with full protection being given to his degree of mental responsibility.

The last paragraph of the Declaration contains a very important safeguard: it proclaims that whenever mentally retarded persons are so severely handicapped that they are unable to exercise their rights in a meaningful way, or that it becomes necessary to restrict or deny their rights, the procedure used to do so must contain proper legal safeguards against every form of abuse.

The Declaration on the Rights of Disabled Persons, proclaimed by the United Nations General Assembly in 1975,¹⁴ extended many of the rights enumerated in the earlier Declaration on the Rights of Mentally Retarded Persons to disabled persons in

¹³ General Assembly Resolution 2856 (XXVI) of 20 December 1971.

¹⁴ General Assembly Resolution 3447 (XXX) of 9 December 1975.

general. The 1975 Declaration additionally proscribes distinction or discrimination in the grant of these rights on the basis of race, colour, sex, language, religion, political or other opinions, national or social origin, state of wealth, birth or any other situation applying either to the disabled person himself or herself or to his or her family. This Declaration proclaims that disabled persons have the inherent right to respect for their human dignity. In addition, it provides for the following rights:

- (a) Disabled persons are entitled to have their special needs taken into consideration at all stages of economic and social planning.
- (b) Disabled persons have the right to live with their families or with foster parents and to participate in all social, creative or recreational activities. No disabled person shall be subjected, as far as his or her residence is concerned, to differential treatment other than that required by his or her condition or by the improvement which he or she may derive therefrom. If the stay of a disabled person in a specialised establishment is indispensable, the environment and living conditions therein shall be as close as possible to those of the normal life of a person of his or her age.
- (c) Disabled persons shall be protected against all exploitation, and all regulations and treatment of a discriminatory, abusive or degrading nature.
- (d) Disabled persons shall be able to avail themselves of qualified legal aid when necessary for the protection of their persons and property. If judicial proceedings are instituted against them, the legal procedure applied shall take their physical and mental condition fully into account.

While enumerating a range of rights, both the 1971 and the 1975 Declarations contain the caveat that certain countries at their present stage of development can devote only limited resources to fulfilling these rights. The General Comment issued by the Committee on Economic, Social and Cultural Rights explains what such resource constraints actually mean in practice:

(T)he obligation of States parties to the Covenant (ICESCR) to promote progressive realization of the relevant rights to the maximum of their available resources clearly requires Governments to do much more than merely abstain from taking measures which might not have a negative impact on persons with disabilities. The obligation in the case of such a vulnerable and disadvantaged group is to take positive action to reduce structural disadvantages and to give appropriate preferential treatment to people with disabilities in order to achieve the objectives of full participation and equality within society for all persons with disabilities.¹⁵

In addition to the international instruments listed above, there are other supplementary instruments relating to the rights of persons with disabilities adopted either by organs of the United Nations itself, or by other organisation such as the ILO.¹⁶

¹⁵ See General Comment, *supra* n.9 at pp.93 - 94.

¹⁶ The Standard Rules on the Equalization of Opportunities for Persons with Disabilities (adopted by the UN General Assembly in 1983); ILO Convention No.159, Vocational Rehabilitation and Employment (Disabled Persons) of 1983 (which Sri Lanka has not signed); Recommendation No.99, Vocational Rehabilitation (Disabled) of 1955; and Recommendation No. 168, Vocational Rehabilitation and Employment (Disabled Persons) of 1983.

3. National Legislation

Neither the 1978 Constitution of Sri Lanka nor the draft Constitution of October 1997 explicitly recognises the rights of persons with disabilities. Disability is not a specified ground of prohibited discrimination under the non-discrimination clause.

In 1996 legislation was passed which specifically recognises the rights of people with disabilities: the Protection of the Rights of Persons with Disabilities Act.¹⁷ The Act's objectives are two-fold: the establishment of a National Council for Persons With Disabilities and the promotion, advancement and protection of rights of persons with disabilities in Sri Lanka. However, the preamble to the Act omits any mention of the rights of persons with disabilities. It merely states that the Act was enacted to give effect to the national policy on the rehabilitation, welfare and relief of persons with disabilities, one of the components of that policy being the establishment of the National Council for Persons With Disabilities. The rights of disabled persons are tucked away under Part V of the Act.

In substantial terms, the rights listed in Part V of the Act amount to little more than an extension of the general non-discrimination norm extant in the Constitution to persons with disabilities. Section 23 of the Act states:

- (1) No person with a disability shall be discriminated against on the ground of such disability in recruitment for any employment or office or admission to any educational institution.

¹⁷ Act No. 28 of 1996.

- (2) No person with a disability shall, on the ground of such disability, be subject to any liability, restriction or condition with regard to access to, or use of, any building or place which any other member of the public has access to or is entitled to use, whether on the payment of any fee or not.

This bare substantive right is supplemented with a procedural right in Section 24, which provides that in the case of a contravention of the right under Section 23, the affected person or the National Council for Persons with Disabilities on his or her behalf, may apply to the Provincial High Court for relief or redress.

For the most part, the Act deals with the establishment, management and functioning of the National Council for Persons with Disabilities. Section 12 of the Act states that the principle function of the Council "shall be to ensure the promotion, advancement and protection of the rights of persons with disabilities." However, the Act does not specify which specific rights are referred to here. The rights enumerated in the Act itself are far from comprehensive. Consequently, the entire gamut of rights (as set out in international instruments or conceptualised elsewhere) appears to fall within the policy framework of the National Council. Section 13 of the Act enumerates the other functions of the National Council (which are to be without prejudice to the generality of the preceding section). Section 13 is so sweeping that its effect is to pass almost all responsibilities relating to persons with disabilities to the National Council for Persons with Disabilities. It does not create any kind of justiciable rights for the disabled. As a result, state accountability for rights protection is considerably eroded. Certainly, there are resource difficulties involved in incorporating all protection issues in terms

of rights, but it is nonetheless necessary to ensure that the state remains accountable in the discharge of its responsibilities.

A glaring omission in the composition of the Council, which reflects a persistent paternalistic attitude in dealing with these issues, is that there is no requirement for a person with disability to be a member of the Council. Although this does not by itself preclude persons with disabilities from being on the Council as NGO representatives, the fact that the Act does not mandate such a presence on the Council still requires rethinking. Much of the non-bureaucratic input to the Council is expected to come from NGO representatives on the Council.

The Act requires all voluntary organisations working on behalf of persons with disabilities to be registered under the Act. Section 32 of the Act provides that:

The Council may, where it considers it necessary for the purpose of discharging the functions of the Council, authorise in writing any officer to enter and inspect at all reasonable hours of the day any premises of a voluntary organisation which is engaged in providing services or assistance to persons with disabilities.

The subsequent sections further strengthen the Council's powers of supervision over private organisations extending services to the disabled.¹⁸ This is necessary to prevent activities or practices that may be prejudicial to disabled persons, such as lack of proper facilities or expertise. However, the primary responsibility

¹⁸ See Sections 33, 34 and 35 of the Act.

for the welfare of the disabled rests with the state, and it may be necessary for the state to issue more specific guidelines for the exercise of the Council's powers in this matter, to ensure that they are not abused.

The Act also creates offences of non-compliance or defiance of the supervisory authority of the Council. Where such an offence is committed by a body of persons (a body corporate or a firm), the directors, secretary and officer of the body corporate and the partners of the firm, respectively, are deemed to be guilty of that offence unless it is proved that the offence was committed without such person's knowledge or that the person exercised all diligence to prevent the commission of the offence.

4. Welfare Measures Administered by the Secretariat of the National Council

The state was hardly ever (if at all) called upon to appear as a respondent in a rights petition under this Act during 1997.¹⁹ In sharp contrast, during the same period, the Ministry of Social Services received over 700 letters from disabled individuals. These letters almost invariably seek some sort of redress or assistance, with requests for jobs being the most common.²⁰ The Secretariat of the National Council ("the Secretariat"), which is responsible for the implementation of the National Council's policies, processes these requests through the Divisional

¹⁹ Personal interview with an officer at the Attorney-General's Department. The officer indicated that he was not aware of any cases under this Act. However, as it is almost impossible to obtain specific statistics relating to the number of cases filed under a statute, it is possible that such a case may have been filed.

²⁰ Personal interview with an officer at the Ministry of Social Services.

Secretaries of the Social Services Ministry and the Provincial Secretariats and where found appropriate, one of the following measures is adopted:

- (a) providing assistive [sic] devices
- (b) self-employment
- (c) employment in the private sector and
- (d) financial assistance.

These are not, however, exhaustive of the types of assistance available through the Secretariat. Where required, a specific kind of assistance outside the scope of the above four may be provided. The assistance provided is usually routed through the Divisional Secretaries of the Social Services Ministry and the Provincial Secretariats. The "assistive" devices provided include such things as crutches, wheel chairs and spectacles. Self-employment is encouraged through the provision of vocational training for 26 types of work, which is done in co-ordination with around twenty NGOs. Similar assistance is provided by the Secretariat through the Presidential Mobile Services. Around 10,000 people, most of them visually disabled, have benefited through this last mode.²¹

One important segment of the population of persons with disabilities is persons disabled in the course of armed combat, whose numbers increase daily as the armed conflict in the North and East continues. Such people generally fall outside the purview of the welfare schemes administered by the Secretariat. Some disabled soldiers formerly with the Sri Lankan armed forces for instance, are housed in centres run by the Ministry

²¹ *Ibid*

of Defence, the Ranaviru Sevana. These centres, often with isolationist features, offer a stark contrast to the community-based approach that has been accepted as desirable for persons with disabilities generally.

5. The National Council and Policy Formulation

Throughout 1997, the National Council continued to develop policy and programmes for the disabled through the Sub-Committee on Programmes and Projects. In late October, this Sub-Committee presented a list of programmes and projects to be pursued by the Council with the following objectives:²²

- (a) creating public awareness of the needs and abilities of the disabled and eradicate negative attitudes;
- (b) providing barrier-free environment [sic] for the disabled;
- (c) providing assistive [sic] devices;
- (d) providing adequate education for disabled children;
- (e) providing rehabilitation services;
- (f) establishing self-help organisations;
- (g) enforcement [sic]

The Council envisages a wide array of programmes to pursue these objectives. However, some of the strategies and programmes listed are vague, and many involve further bureaucratisation. Furthermore, no specific time frame is given for the implementation of these programmes and projects, giving

²² See Agenda and Council Papers relating to the ninth meeting of the National Council for Persons with Disabilities held on 28 October 1997, pp 1 - 10.

rise to concern that they may not be implemented in a determined manner. Another problem is that the National Council is not doing enough to couch these efforts in a rights framework.

The week beginning 10 October 1997 was designated as The National Mental Health Week with the theme "Let us promote mental health". A series of events was organised by various NGOs to mark the occasion. These ranged from seminars and discussions to art exhibitions and essay competitions.

6. The National Situation and International Standards

Clearly the national legislation in respect of the rights of persons with disabilities lags way behind international standards. Specifically, only the non-discrimination clause is recognised under the statute whereas the Declaration on the Rights of Disabled Persons envisages a whole range of other rights (generally in the nature of socio-economic rights). Thus, considerably more should be done to enhance the substantive content of the rights segment of the protective mechanisms relating to persons with disabilities. Even in relation to the definition of "disabled person", there seems to be a discrepancy between the two.²³ The definition in the Sri Lankan enactment conspicuously omits any reference to the necessities of social life in the definition. Thus ironically, although community-based rehabilitation programmes

²³ The Declaration on the Rights of Disabled Persons defines "disabled person" as "any person unable to ensure by himself or herself, wholly or partly, the necessities of a normal individual and/or social life, as a result of deficiency, either congenital or not, in his or her physical or mental capabilities." The Sri Lankan Act defines "person with disability" as "any person, who as a result of any deficiency in his physical or mental capabilities, whether congenital or not, is unable by himself to ensure for himself, wholly or partly, the necessities of life."

form a key area of policy relating to persons with disabilities, the Act seems to demur at the prospect of a fuller articulation of the social aspect.

However, the welfare measures adopted by the Secretariat do go some way in addressing the problems of persons with disabilities. Resource constraints and the absence of comprehensive schemes have, however, limited the reach of these measures to a very small percentage of persons with disabilities. There is a need to considerably increase the number of people targeted for these welfare measures. One of the main modes adopted is to react to individual requests addressed to the Ministry; this method inherently lacks the potential to reach out to large numbers of people in need. The mode of addressing problems through the Presidential Mobile Services could be considerably expanded as a way of overcoming this problem until such time as effective long-term plans and mechanisms formulated by the National Council are put in place.

Yet another drawback to the current welfare schemes is their inherently temporary nature. Assistance to persons with disabilities is treated as a one-off measure, without the necessary follow-up. This means that the social and cultural needs of persons with disabilities are inadequately fulfilled. It thus becomes all the more necessary to put in place a comprehensive strategy and mechanism to address not just the economic security, but also the cultural and social needs, of persons with disabilities.

7. Conclusion

So far, the National Council for Persons with Disabilities has approached its task in an *ad hoc* manner. Long-term projects seem to stagnate on the planning boards. The formulation of

policy and its implementation need to be pursued in a more consistent, determined and proactive manner. If the rights regime had been more comprehensive, it might have been desirable for the National Council to support disabled litigants in accessing their rights. However, given the skeletal coverage of the Act in Sri Lanka, such an option would be unlikely to achieve significant results. The key to a positive and fruitful engagement with the problems of the disabled may well lie in education and awareness-raising among the disabled and the public more widely. Such programmes could concentrate both on the rights that are already available and on the normative rights regime envisaged by the international instruments.

XIII

The Right to Health

Dharshini Sivanathan and I.K. Zanofer***

1. Introduction

The right to health was discussed comprehensively in *Sri Lanka: State of Human Rights 1995*. This chapter seeks to provide an update on the right to health. It focuses on events during 1997 and discusses major health issues and the government's response to them, the relevant international instruments, developments with regard to health services in Sri Lanka and trade union action by the Government Medical Officers Association (GMOA).

* Programme Assistant, Law & Society Trust

** Research Assistant, Law & Society Trust

This chapter also attempts to discuss the status of the right to health in the North and East of the country. Some material on access to health services in these areas is given in Chapter X, which discusses the plight of internally displaced people in the North and East. Although comprehensive data on health and health services in the North and East is not available, it is nevertheless clear that people living in the conflict zones, and particularly within the Vanni, must be considered extremely vulnerable with regard to the realisation of their right to health. Every effort should be made to ameliorate the very stressful conditions under which they live, and to improve health services in the area.

The Committee on Economic, Social and Cultural Rights expressed its "alarm" at the results of an independent survey which estimated that 70% of women and children living in shelters as a result of displacement during the conflict were suffering from under-nourishment. It recommended that the government should re-assess the food assistance programme for displaced persons "with a view to improving the nutritional standards of food provided, particularly to children and expectant and nursing mothers."¹

The current National Health Policy of Sri Lanka is based on the government's commitment to provide comprehensive health care to all the people in the country. In 1980, the government signed the Charter for Health Development and endorsed the goal of

¹ Committee on Economic, Social and Cultural Rights, "Consideration of Reports submitted by States Parties under Article 16 and 17 of the Covenant: Concluding observations of the Committee on Economic, Social and Cultural Rights: Sri Lanka," E/C.12/1/Add. 24, 13 May 1998.

health for all by the year 2000, with primary health care as a key approach to achieving this goal. The Presidential Task Force, appointed in 1992, formulated the National Health Policy.²

In 1997, the President appointed a 19-member Committee to make recommendations on the National Health Policy. The Committee recommended the establishment of a National Health Commission and autonomous boards of management for major state-owned health care institutions. In addition, it recommended promoting revenue-generation at institutional level, and that health promotion and health education be undertaken on issues such as breast feeding and appropriate infant feeding practices.³

2. Legislation

2.1 International instruments

Article 12(1) of the ICESCR provides that, "*the State parties to the present Covenant recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.*" Further, the steps to be taken by the parties to achieve the full realisation of this right are set out in Articles 12(2)(a), (b), (c) and (d).

As Sri Lanka has ratified this Covenant, it is bound to fulfil the obligations it contains at the national level. Various other international standards which Sri Lanka has ratified also contain

² Dr A. N. A. Abeyesundere, "An Outline of the WHO Functions and Responsibilities: Health Development in the Countries of the WHO South East Asia Region, with special reference to Bangladesh and Sri Lanka" (unpublished).

³ *The Daily News*, 17 June 1997.

obligations relating to health, as set out in Chapter IX of *Sri Lanka: State of Human Rights 1995*.

2.2 Local legislation

Chapter III of the 1978 Constitution enshrines the fundamental rights that are recognised and bestowed on people in Sri Lanka. It does not embody any specific provisions relating to health matters. However, the exercise and operation of the fundamental rights declared and recognised by Articles 12, 13(1), 13(2) and 14⁴ are subject to restrictions as may be prescribed by law in the interests of national security, public order and the protection of public health.⁵

Chapter VI of the 1978 Constitution, entitled "Directive Principles and Fundamental Duties," also has a provision relevant to health under Article 27(2)(c). It sets out as one of the objectives of government policy:

*the realization by the citizens of an adequate standard of living for themselves and their families, including adequate food, clothing and housing, the continuous improvement of living conditions and the full enjoyment of leisure and social and cultural opportunities.*⁶

⁴ These articles are concerned with: the right to equality before the law and non-discrimination, the rights of arrested persons and prisoners; the rights to freedom of expression, association and movement, respectively.

⁵ Article 15(7) of the *Constitution of the Democratic Socialist Republic of Sri Lanka of 1978*.

⁶ *Ibid*, Article 27(2)(c).

However, Articles 25(1)(a), (b) and (c) of the Draft Constitution (October 1997),⁷ *"every citizen has the right to have access to health care services including emergency medical treatment, sufficient food and water and appropriate social treatment."* If these proposals were adopted, this would be a significant development as it would elevate the right to health care services, and particularly to emergency health care, to the status of a fundamental right. On the other hand, like all the social rights set out in the proposals, this right too is subject to the condition that the State shall take measures within its available resources to achieve the progressive realisation of this right.

During 1997, the Government Homeopathy Doctors' Association proposed a Patients' Rights Charter to protect and extend patients rights and make them legally enforceable.⁸ However, no progress was made in this regard.⁹

3. Major Health Issues During 1997

3.1 Triple vaccine

Some members of the GMOA expressed concern publicly about the effectiveness of a consignment of triple vaccine imported by the State Pharmaceutical Corporation (SPC).

The triple vaccine is given to infants thrice during the first year of life to immunise them against three diseases: diphtheria, tetanus and whooping cough. Previously, UNICEF had donated the

⁷ The Government Proposals for Constitutional Reform, Ministry of Justice, Constitutional Affairs, Ethnic Affairs and National Integration (October 1997).

⁸ *The Daily News*, 12 April 1997.

⁹ *Ibid.*

vaccine, but in 1997 it was purchased by the SPC. The Sri Lanka College of Paediatricians expressed concern about an apparent resurgence of whooping cough among children under one year who had received up to three doses of the triple vaccine.¹⁰

The Minister of Health responded by appointing a seven-member Committee to assess whether or not there was an epidemic of whooping cough. The Committee included three senior consultants of the Sri Lanka College of Paediatricians, a World Health Organisation (WHO) consultant epidemiologist, a WHO consultant virologist, and a consultant paediatrician. The Committee found the fears of an epidemic to be unfounded: it stated that, "with the data available to the Committee, it is our considered opinion, that at present there is no whooping cough epidemic in country". It further stated that:

*to determine whether there is a danger of an epidemic, clinicians should be on the alert for possible cases. These cases should be notified to the MOH, and be subjected to laboratory investigations. These positions should be closely monitored by the Ministry of Health.*¹¹

The Committee also pointed out that:

compared with developed countries like Australia and the Netherlands, Sri Lanka has a much lower rate of whooping cough among children. The rate was 0.2% per 100,000 of the population. In

¹⁰ *The Daily News*, 7 August 1997.

¹¹ *The Daily News*, 5 September 1997.

Australia it was 30.5% per 100,000 of the population in 1994, while in the Netherlands it was 18% per 100,000 of the population in 1996.¹²

Subsequently, the President was reported to have appointed a two-member Committee, comprising two retired Judges of the Supreme Court, to inquire into the alleged whooping cough epidemic and allegations that the authorities had not correctly followed tender procedures. This Committee recorded evidence *in camera*,¹³ and its report had not been submitted by the end of the year.

3.2 The cholera epidemic in Chilaw

From the 1st of January to 12th of December 1997, 1,545 cases of cholera were reported.¹⁴ Many were from the Chilaw area, but cases were also reported from Puttalam, Kurunegala, Gampaha and Galle Districts.

The outbreak in Chilaw was reported to have started in September 1997, after a cholera victim from the area had died at the Infectious Diseases Hospital in Colombo. The body was reportedly released to the family without the safeguards required by the Ministry of Health being taken. The body had then been washed in a canal near Thaalaiyadi Wella (near Chilaw), and other people had then been infected.¹⁵

¹² *Ibid.*

¹³ *The Daily News*, 21 November 1997.

¹⁴ *Weekly Epidemiological Report (WER)*, Sri Lanka, Vol. 25, Nos. 41 - 50.

¹⁵ See *The Island*, 14 November 1997

The outbreak worsened because the land surrounding the Chilaw Base Hospital was flooded and the drainage system opposite the hospital became blocked. About one thousand families lived near the hospital in over-crowded conditions with very poor sanitary facilities,¹⁶ and some of these people became infected with cholera.

In order to prevent mass-infection, temporary latrines were constructed and public education programmes were held, with special emphasis placed on personal hygiene and the importance of early treatment. In addition, all wells in the Chilaw area were properly chlorinated.¹⁷

3.3 Dengue fever

Dengue is a mosquito-borne infection, which in recent years has become a major international public health concern. It is found predominantly in urban and semi-urban areas in tropical regions around the world. In Sri Lanka, dengue fever is endemic with frequent epidemics occurring, especially after rainfall. Since 1989, there have regularly been over a thousand cases annually with a death rate of 5-10 per cent.¹⁸

In November 1996, a Presidential Task Force was appointed to strengthen community-based, integrated prevention of dengue in Sri Lanka. Special community-based dengue control activities were carried out on the National Dengue Control Day (5 December 1996), with schools being particularly targeted. Further, a National Dengue Week was declared from 12 to 18 May 1997 to stress the importance of combating this disease.

¹⁶ *Supra* n 14, Vol. 25 No.41, 4 - 10 October 1997.

¹⁷ *Ibid*

¹⁸ *The Daily News*, 16 May 1997.

3.4 HIV/AIDS

As of December 1997, 207 cumulative HIV infections among Sri Lankans had been reported to the National STD/AIDS Control Programme (NSACP) since the first reported case in 1987. This represents an 18% increase from the 175 cases reported up to 31 December 1996. The first case of paediatric AIDS was reported in November 1997; the patient, at the North Colombo General Hospital, was only one year and nine months old.¹⁹

Table 1 below provides the number of new infections reported to the NSACP. In addition, 32 foreign tourists have also been reported as being HIV positive since 1986.

Table 1 - Annual reported cases of people with HIV positives

Year	Males	Females	Total	Cumulative Total
1987	2	0	2	2
1988	3	0	3	5
1989	8	3	11	16
1990	6	1	7	23
1991	10	3	13	36
1992	19	8	27	63
1993	26	11	37	100
1994	15	8	23	123
1995	12	10	22	145
1996	20	10	30	175
1997	16	16	32	207

Male to Female ratio 1.9:1

Source: HIV/AIDS Surveillance - Sri Lanka STD/AIDS Control Programme

¹⁹ HIV/AIDS Surveillance - Sri Lanka STD/AIDS Control Programme, 24 February 1998 (unpublished).

By 31 December 1997, a cumulative total of 77 cases of AIDS had been reported to the NSACP, and 61 of these had already died (Table 2).

Table 2 - Annual reported AIDS cases and deaths

Year	Males	Females	Total	Cumulative Total	Deaths / Year
1987	2	0	2	2	0
1988	2	0	2	4	1
1989	1	2	3	7	4
1990	2	0	2	9	2
1991	2	1	3	12	3
1992	8	2	10	22	10
1993	8	3	11	33	8
1994	13	1	14	47	10
1995	9	2	11	58	11
1996	9	2	11	69	8
1997	3	5	8	77	4
Total	59	18	77	77	61

Source: HIV/AIDS Surveillance - Sri Lanka STD/AIDS Control Programme.

In 1997, five females were reported with AIDS compared to two cases in 1996. This number included the paediatric AIDS case.

These figures probably do not reflect the true extent of HIV and AIDS infection in Sri Lanka, or the true number of people who have died of AIDS. A serious shortage of surveillance staff has meant that there has been minimal follow-up on reported

HIV positive persons. Indeed, since the surveillance officers' services were discontinued in December 1996, follow-up of these cases has virtually ceased.²⁰

4. Public Health Services in Sri Lanka:

*In Sri Lanka, health care is provided by both public and private sectors. The public sector provides health care for nearly 60% of the population. The Ministry of Health and the Provincial Health Sector encompass the entire range of preventive, curative and rehabilitative health care provision. The private sector provides mainly curative care, which accounts for nearly 50% of the outpatient care of the population and is largely concentrated in the urban and suburban areas. Ninety five percent of inpatient care is given by the public sector.*²¹

In addition to the services provided by the Ministry of Health, Provincial Councils and Local Authorities, there are special units for the armed forces and police personnel, and for the estate population.

The main function of the Public Health Service is to promote health and prevent disease. Health units are headed by Medical Officers of Health, who are assisted by public health inspectors, public health nurses, supervisory public health midwives and public health midwives. Family health services are co-ordinated by the Family Health Bureau (FHB), which is the central

²⁰ *Ibid.*

²¹ Annual Health Bulletin -1996, Ministry of Health Sri Lanka (Colombo, 1997) at p.12.

organisation responsible for planning, directing, monitoring and evaluating maternal and child health and family planning programmes in the country.²²

Some of the FHB's projects received overseas funding. These included projects on the development of family health, nutrition, development of school health and adolescent health, universal child immunisation and child mental health. Some programmes were implemented in collaboration with the Epidemiological Unit of the Ministry of Health, including universal child immunisation, control of diarrhoeal diseases and control of acute respiratory infections.

The Epidemiological Unit undertakes surveillance of all communicable and non-communicable diseases except for malaria, filaria, tuberculosis, leprosy, STD/AIDS and cancer, for which there are special units. The incidence of communicable diseases in 1997 was reportedly lower than in 1996.²³

An expanded programme of immunisation was also introduced in order to control six vaccine-preventable diseases: tuberculosis, diphtheria, pertussis, tetanus, poliomyelitis and measles.²⁴ A rubella immunisation programme was introduced for the first time in Sri Lanka during 1996.²⁵

In relation to environmental health, the Ministry of Health is not directly responsible for the provision of clean water. However, it conducts health education programmes on the need to consume

²² *Ibid* at p.30.

²³ *Ibid* at p.37.

²⁴ *Ibid* at p.38.

²⁵ *Ibid* at p. 37.

safe water. It also provides money to low-income families to construct latrines. All new houses must possess toilet facilities in order to obtain local authority approval. The Ministry of Health provides Rs 1,500 to people on incomes under Rs 1,000 per month who cannot afford to construct a sanitary latrine themselves. In 1996, Rs 27,000,000 was allocated for this purpose.²⁶

The Quarantine Services in Sri Lanka are mainly concerned with implementing international health regulations. The health office at the Colombo Port is the only centre in Sri Lanka designated by the WHO for providing immunisation against yellow fever.²⁷ People entering Sri Lanka are not required to have a cholera vaccine certificate, in keeping with the WHO recommendations.²⁸

5. Health Situation in the North and East

This area has long suffered the terrible effects of civil war, with grave consequences for the health of people living there and the provision of health service. The conflict zone has been divided into three sectors: uncleared areas, newly cleared areas and the grey areas.

5.1 Uncleared areas: LTTE held areas in the Vanni

Whether in camps or with relatives, the displaced families have poor access to health facilities. Primarily decreasing food production and livelihood security, decreased public health and

²⁶ *Ibid* at p. 33.

²⁷ *Ibid* at p.34.

²⁸ *Ibid*.

sanitation resources, and more recently the heavy rains. There is a continued undermining of the existing health structures. Preventive health staff such as Public Health Inspectors (PHIs) and Family Health Workers (FHWs) no longer function in the uncleared areas of Mannar and are severely understaffed in the other districts. A number of NGOs have responded to this virtual collapse of preventive health services by training and paying paramedic staff.²⁹

5.2 Newly cleared areas: Jaffna peninsular, and border areas south of the Vanni

The health sector on the peninsular has revived to some extent, and drug supplies increased in quantity and regularity. As of November 1997, 17 doctors from the South had been posted to either the Jaffna Teaching Hospital, other district hospitals or as Medical Officers of Health (MOH) in the divisions. The health status of the returnees to these areas is a particular cause for concern with many children and adults suffering from under nutrition and high numbers of malaria cases, typhoid and other serious infections.³⁰

5.3 The grey areas: Trincomalee, Batticaloa and Ampara

Government officials are increasingly fearful and unwilling to move outside of urban areas unless escorted by international organisations, or else do not have the resources to do so. Government services and infrastructure continue to deteriorate

²⁹ *Save the Children*, Situation Report: Children affected by Armed Conflict in North and East Sri Lanka, (February, 1998), p.6.

³⁰ *Ibid* p.18.

as a result of either direct destruction, a reluctance on the part of government to use limited resources replacing equipment in these areas. Needs cannot be identified or assessed if government officers are unable to enter these areas.³¹

6. Trade Union Action by the GMOA

During 1997, the GMOA resorted to trade union action several times in protest against an anomaly created by the B. C. Perera Salary Revision Commission. The effect of the salary review had been to reduce the overall income of government medical officers because certain allowances were cancelled. A half-day token strike was carried out on 27 February, and a countrywide token strike was carried out on 5 March. Strike action was immediately called off once a three-member Cabinet sub-committee was appointed to investigate the matter.³²

Although the GMOA was reportedly satisfied with the sub-committee's recommendations, it was said to be dissatisfied that the government had not published the report and was not acting upon the recommendations.

Action of this kind poses a dilemma in human rights terms. Government medical officers had suffered a loss of income and were exercising their right to strike, but the exercise of this right may put at risk the right of the public to adequate health care. Indeed, international human rights standards, and the Constitution of Sri Lanka, place the right to public health on a higher footing than the right to form and join trade unions. It is the poor who are most vulnerable to the effects of such action;

³¹ *Ibid* p.13.

³² *The Daily News*, 6 March 1997.

without the means to seek private health care, they may be left without any access to medical care at all.

The GMOA also threatened to take stern action if the government did not guarantee that the vaccines it used met WHO quality standards, and that there would be no violations of the Cosmetic Devices and Drugs Act of³³ with regard to the importation or use of any vaccine or drug.³⁴

6. Conclusion

The government considered several new health initiatives in 1997, such as drawing up a Patients' Rights Charter and the appointment of Commissions to look into health-related issues, but no significant steps were taken with regard to new legislation.

Although, the October 1997 Draft Constitution contains provisions on access to emergency health care facilities, such a right would still be subject to the available resources limitation. It has been argued that core social rights such as access to emergency health care should not be resource based, more so because the government has provided such services anyway.³⁵ Despite the efforts by the government to provide free health care for everyone, there is still a great disparity between the facilities available in urban and rural areas, which results from disparities in the distribution of resources. In addition, the health status of Sri Lanka's many thousands of displaced people remains deeply

³³ Act No. 27 of 1980 (amended from time to time)

³⁴ *The Island*, 12 September 1997.

³⁵ See Mario Gomez, "A Right to Emergency Health Care." *LST Review*, Vol. 8, Issue 124 (February 1998) p. 25.

worrying, and prompt action needs to be taken to ameliorate the conditions under which they live. These issues need to be urgently remedied.

The government should also take action to draw up a legally enforceable Patients' Rights Charter. This should emphasise the remedies available to patients when their rights are violated by professional negligence. So far, only a few cases relating to professional negligence have been taken to Court. A Patients' Rights Charter would help make the broader public more aware of their rights with regard to health care, making the public health system more accountable and responsive to their needs. Such action would accord with the recommendation made in the *Sri Lanka: State of Human Rights 1995* report that health policy needs to be imbued with a human rights approach.

XIV

Workers' Rights

*Sumangalie Atulugama**

1. Introduction

In its previous *Sri Lanka: State of Human Rights* reports,¹ Law & Society Trust reported on the international standards and domestic legislation relevant to workers' rights. This chapter provides an update to those earlier chapters, giving information on various developments relating to workers' rights during 1997. According to the *Quarterly Bulletin of Labour Force Statistics of Sri Lanka*,² which does not include data on the North and

* Programme Assistant, Law & Society Trust.

¹ See *Sri Lanka: State of Human Rights 1994 & 1995* (Law & Society Trust, Colombo).

² Published by the Department of Census & Statistics under the Ministry of Finance and Planning. Issue No. 5, Fourth Quarter 1997.

East, approximately 5.5 million people in Sri Lanka are employed (out of a total population of about 18 million).³ The majority of workers are employed in the informal sector. Indeed, according to the *Central Bank of Sri Lanka - Annual Report 1997*, the number of people employed in the informal sector has increased. The many people who work in the informal sector lack adequate protection against a range of abuses by employers. These include discrimination, violation of terms and conditions of employment, constructive termination and sexual harassment. Despite the various statutes that embody workers' rights, and despite the existence of industrial courts and tribunals to determine the grievances of employees, the list of petitioners grows daily.

2. Labour Disputes

A "workman" in Sri Lankan law is defined as:

*any person who has entered into or worked under a contract with an employer in any capacity, whether the contract is express or implied, oral or in writing and whether it is a contract of service or apprenticeship, or a contract personally to execute any work or labour, and includes any person ordinarily employed under any such contract whether such person is or is not in employment at any particular time, and includes any person whose services have been terminated.*⁴

³ Economic data as at 1996.

⁴ Industrial Disputes Act No. 43 of 1950, Section 48. Interpretation of a "workman" was amended by section 26, of Act No. 62 of 1957 and section 2, of Act No. 39 of 1968 respectively.

The provisions of the Industrial Disputes Act do not apply to the government or to workers who are employed by the government. Many disputes between employer and employee arise from the terms and conditions stated in the contract of employment. Dismissal, termination and constructive termination are just some of the acts by employers that are disputed in labour courts. An employee who successfully proves unreasonable or unjust dismissal is generally awarded compensation or reinstated with back wages, depending on the circumstances of the case. However, the terms and conditions set out in the contract of service are important factors that are taken into account in determining whether or not the employer has acted unreasonably, unjustly or with malice.

Every contract of employment includes terms and conditions which specify liabilities and responsibilities of both the employer and employee. The contract of employment should accord with the statutory benefits laid down by law. Any agreement that denies the worker these statutory rights will be considered null and void. Therefore, the Contract of Hire and Services Ordinance, the freedom to contract and the law of contracts with reference to employment are all subject to the Industrial Disputes Act, the Wages Board Ordinance, the Termination of Employment (Special Provisions) Act, the Employees Provident Fund Act, the Employees Trust Fund Act, the Workers' Compensation Ordinance and other labour laws.⁵

Another factor that contributes to disputes between employer and employee, and which does not arise from the terms and conditions stated in the contract of employment, is the rising

⁵ *Sri Lanka Labour Law Guide for Employers and Employees (1997)*, Chapter 1, p. 1

cost of living. As prices rise, wages seem too low to many workers, but employers often find it hard to pay higher rates. The free flow of imports puts employers in a highly competitive market, and they are unable to pass increased costs on to the consumer. The textile industry provides an example of this dilemma. During 1996, the Pugoda Textile Mill was compelled to close down when it became unable to pay the wages of its staff. The State took over the mill and now bears all its expenses. The government has placed it under the control of a Competent Authority until another manager is found. At the request of the Textile Manufacturers Association, the government has come forward to help textile industry to survive, and has promised to provide financial support in the future.

Other factors contributing to disputes between employer and employee are changed conditions of work, and a reduced sense of job security.

3. Protection of Workers' Rights

3.1 1978 Constitution of Sri Lanka

Under Article 14(1)(c) of the 1978 Constitution of the Democratic Socialist Republic of Sri Lanka (hereinafter referred to as "the Constitution"), every citizen is entitled to freedom of association.⁶ All workers (provided they are citizens),⁷ therefore, have the right to join a trade union if they so desire. The trade union acts as a medium through which the employee can bring

⁶ The Constitution of the Democratic Socialist Republic of Sri Lanka (1978), Article 14(1)(c).

⁷ The right to join a trade union is accorded only to citizens of Sri Lanka.

grievances to the notice of the employer, and in some instances to the public as well. It enables workers to exercise the freedom of expression to which every citizen of Sri Lanka is entitled under the Constitution.⁸ However, Article 15(4) of the Constitution provides that:

the exercise and operation of the fundamental right declared and recognised by Article 14(1) (c) shall be subject to such restrictions as may be prescribed by law in the interest of racial and religious harmony or national economy.

In companies or institutions that do not recognise a trade union - that is, in companies approved by the Board of Investment (BOI) or other institutions in the private sector - there is often a communication gap between the employer and employee. However, certain companies which have foreign investments, conscious of Sri Lanka's strict labour laws, have given their workers an alternative. Although workers cannot join a trade union and strikes are not recognised, the workers have the option to negotiate with the employer, personally or collectively.

3.2 Termination of employment

Security of employment is a major concern in Sri Lanka and it was with this in mind that the Termination of Employment (Special Provisions) Act⁹ was enacted. However, employers are putting considerable pressure on the government to change the law to give them greater flexibility in restructuring their companies and

⁸ Article 14(1)(a).

⁹ Termination of Employment of Workmen (Special Provisions) Act No. 45 of 1971.

in retrenchment. Unions and other organisations dealing with workers' rights have expressed considerable concern about these proposals, fearing that they would threaten the job security and means of livelihood of many workers.

Depending upon the situation of the company, retrenchment is sometimes essential. The law provides certain procedures to be followed in the event of retrenchment, which offer some protection against arbitrary dismissal. Some employers might offer an *ex-gratia* payment (or 'golden handshake') to an employee whose services it is terminating, although this is not a statutory requirement. In the event of retrenchment, the normal procedure is for an employer to give the worker one month's notice in writing of the intention to retrench. If the employee is a member of a trade union, a copy of such notice must also be forwarded to the union. When terminating the services of a worker, the employer must obtain the prior, written consent of the worker or the written approval of the Commissioner of Labour, unless and except when the termination is made on disciplinary grounds.¹⁰ Termination in any other manner, in contravention of the sections stated in the Act, will be deemed null and void. If termination is on disciplinary grounds, the employer must hold a domestic inquiry complying with the principles of natural justice.¹¹ Both the employer and worker have a right to be heard.

However, the provisions of the Termination of Employment (Special Provisions) Act do not apply to certain categories of employer and employee. These are: employers who have

¹⁰ *Ibid.*

¹¹ The principles of natural justice are that both sides should be given an opportunity to state their case and defend themselves where necessary and that one should not be the judge in his own case.

employed less than 15 workers per working day in the month prior to the month in which notice of retrenchment is given; any employer in an industry of a seasonal character; where work is performed intermittently; and any worker who has been employed for less than one year.¹²

In addition, the Termination of Employment (Special Provisions) Act does not apply to plantation workers employed by the Janatha Estate Development Board or the Sri Lanka State Plantation Corporation¹³ and nor does it protect employees of public corporations. However, people employed in newly-privatised industries, such as those working in the newly-privatised estates, now enjoy the benefit of this Act, which had not previously applied to them.

One fundamental rights case brought before the Supreme Court in 1997 concerned the wrongful dismissal of an employee by the Hadabima Authority of Sri Lanka. In *P.B.H. Denuwara v. Hadabima Authority of Sri Lanka and three others*¹⁴ the petitioner had been employed on an annually-renewable contract. He had maintained a high standard of work, which had been recognised through awards and certificates. While still in service and prior to the expiry of the contract, the Chairman of the Hadabima Authority gave the petitioner two weeks notice to vacate the official quarters which had been allocated to him. The petitioner did not comply, and his services were terminated on the grounds that his conduct brought disrepute to the Authority,

¹² Industrial Disputes Act No 43 of 1950, Part IVB.

¹³ *Supra* n 5, Chapter 4, p 9.

¹⁴ S.C. Application No. 135/95, S.C. Minutes 25.02.1997. There is further discussion of this case in Chapter IV on Judicial Protection of Human Rights.

although no details were given of how "disrepute" had occurred. The petitioner claimed that he had not been given an opportunity to defend himself when he was dismissed, in contravention of the law¹⁵ and principles of natural justice. In addition, he claimed that the real reason for his sudden dismissal was that he was an active supporter and office-holder of the opposition United National Party and its trade union, the Jatika Sevaka Sangamaya (JSS).¹⁶ The petitioner claimed that his fundamental rights under Article 12(1) and 12(2) of the Constitution had been violated. The Supreme Court held that the Hadabima Authority had indeed violated the petitioner's fundamental rights and that the termination of his contract of service was invalid and of no effect in law. The petitioner was reinstated in his former position and granted compensation.

3.3 Wages Boards Ordinance

Where there is any conflict or inconsistency between the provisions of the Wages Board Ordinance and any other written law, the provisions of the Wages Board Ordinance prevails.¹⁷ With regard to deductions of wages, such deduction cannot exceed 75% of wages in any trade specified by the Minister by notification in the Gazette and 50% in others. These deductions do not affect deductions authorised under the Inland Revenue Act or in terms of an order of a Court of Law. Any other deductions can only be made with the consent of the workman.

¹⁵ Termination of Employment of Workmen Act No.45 of 1971, Section 2.

¹⁶ *Supra* n 14.

¹⁷ Wages Boards Ordinance No. 27 of 1941, Section 65.

According to the Statistics Department of the Labour Ministry,

*the current minimum wage is about \$34 (SL Rs.2000/=) per month in industry, commerce and the service sector; \$1.27 (SL Rs.75/=) per day in agriculture. The minimum wage in the garment sector is \$34 (SL Rs.2000/=) per month.*¹⁸

As the cost of living has risen, these minimum wages are inadequate to support a worker and his family. The majority of families require more than one breadwinner in order to make ends meet.

3.4 Shop and Office Employees Act¹⁹

It is essential for workers to be provided with a suitable working environment. Hours of work, holidays, leave, safety measures, sanitary facilities and such-like, must be provided according to the relevant statutes. A woman worker has added benefits with regard to maternity leave. In addition, the Employment of Women, Young Persons and Children's Act embodies provisions that govern the employment of women and young persons. This legislation was introduced to protect the rising number of women and young workers.

Two fundamental rights cases decided by the Supreme Court in 1997 concerned religious holidays. The petitioners alleged that their fundamental rights had been violated after the

¹⁸ Sri Lanka Country Report on Human Rights Practices for 1997, US State Department Report (January 1997).

¹⁹ Shop and Office Employees Act No.19 of 1954

Hindu Maha Sivaratri²⁰ festival and the Muslim Hadji festival²¹ were withdrawn as public holidays. With regard to the contention that the right guaranteed by Article 12(2) of the Constitution had been violated, the Court took into account the fact that an employee was entitled to 42 days of leave in addition to the public holidays,²² which means he or she might work for just over half the year. It held that the government had to consider various matters when determining public holidays and the petitioner was unable to show that the elimination of Hadji and make Sivaratri as holidays was in fact unreasonable, arbitrary, capricious or for an improper purpose and, therefore, Article 12(1) had not been infringed.²³ The applications, therefore, failed.

3.5 National Workers' Charter

The Minister of Labour and Vocational Training presented the National Workers' Charter to President Kumaratunga in September 1995. The creation of the Charter fulfilled an election pledge by the People's Alliance, and it was drafted in consultation with trade unionists and employers' representatives. It expressed the government's intent with regard to labour reform and the promise that it would be implemented through legislation.

²⁰ *S. Jeevakaran v. The Minister of Public Administration, Home Affairs Plantation Industries and Parliamentary Affairs and three others*; S.C. Application No. 623/96, S C Minutes 24.02.1997. See also Chapter IV on Judicial Protection of Human Rights.

²¹ *M.K.M. Shakeeb v. Minister of Public Administration, Home Affairs, Plantation Industries and Parliamentary Affairs and three others* SC Application No. 624/96, SC Minutes 24.2.1997

²² Under Section 6 of the Shop and Office Employees Act, No 19 of 1956, employees are permitted 14 days annual leave, 7 days casual leave and - at the discretion of the employer - 21 days medical leave.

²³ Other aspects of these cases are discussed in Chapter IV on the Judicial Protection of Human Rights.

However, the Charter is not legally binding, and two years later there was still no progress in its implementation.²⁴

In 1996 the President appointed a special task force to examine the implications of the Charter, and to examine generation of employment. Subsequently, the task force submitted their recommendations in the form of a draft Bill to a Cabinet Sub-Committee.

3.6 The Protection and Rehabilitation of Persons with Disabilities Act

By introducing of the Protection and Rehabilitation of Persons with Disabilities Act²⁵ (hereinafter shall be referred to as the 'Act') the Government has broadened the scope of the term "workman". This Act gives disabled persons equal opportunity to gain employment. Section 23 of the Act embodies the provision for the protection and advancement of persons with disability.²⁶ In the event of section 23 being contravened, any person affected by such contravention or the Provincial Council, on behalf of such person, may apply to the Provincial High Court within which the affected person resides, for relief or redress.²⁷

²⁴ For a full discussion of the contents of the National Workers' Charter see *Sri Lanka: State of Human Rights 1995* (Law & Society Trust, Colombo, 1996) Chapter VI.

²⁵ The Protection of the Rights of Persons with Disabilities Act No. 28 of 1996. Also see Chapters VI and XII on Equal Opportunity and Rights of Persons with Disabilities, in this volume.

²⁶ Section 23 of the Act.

²⁷ *Ibid*, Section 24.

The number of disabled people in Sri Lanka has risen as a result of the armed conflict. However, the exact numbers have not been released for "security" reasons. In addition to the many disabled ex-servicemen, civilians have also suffered long-term injuries as a result of the conflict. Many disabled people would prefer to work and the new legislation gives them the opportunity to find employment and states that there should be no discrimination against the physically handicapped. However, it must be recognised that not all disabled persons will be employable, depending on the nature of their disabilities and the requirements of the job in question, and not all employers will be able to provide the facilities needed for disabled workers.

If the armed conflict continues, Sri Lanka will have an increasing number of disabled people dependent upon State support. In addition to enacting new legislation, the government should allocate funds to support those who are unable to seek employment because of injuries sustained as a result of the conflict, whether they fall within the purview of this Act or not.

4. Workers in the Free Trade Zones

The enterprises in the Free Trade Zones (FTZ) provide jobs for many people and earn considerable foreign revenue. However, factory employees undergo considerable hardship. The *Sunday Times*²⁸ reported that especially where garment factories have successfully banned union activities, the workers (who are mostly women) are paid low basic wages of \$44 or less per month, work long hours for seven days a week and are physically and verbally harassed for the slightest mistake.²⁹ According to one

²⁸ *Sunday Times*, 14 December 1997, and see also *Weekend Express*, 29 December 1997.

²⁹ *Sunday Times*, *ibid.*

worker, the overseers set impossible targets and then punish failure by shouting at and occasionally beating workers. These companies prevent external trade unions from entering the premises, which are heavily guarded. In place of unions, they encourage in-house workers' councils. Due to the low wages, more than half of women garment workers have been found to be underweight and under-nourished.³⁰ In addition, FTZ workers lack security of employment, often live in unhealthy conditions and are subject to sexual harassment at work.

Under the law, workers in the FTZs have the same right to join unions as other workers. However, no unions have been formed within the FTZs because union organisers are denied access. Instead, there are Workers Councils which are chaired by representatives of the BOI and which consist of equal delegations from both labour and management.³¹ Such councils are only empowered to make recommendations; they have no powers of enforcement.

Workers in the FTZ have hardly any means of making their grievances heard. In the absence of trade unions and activist groups, FTZ workers often have no alternative but to comply with the employer demands. Workers in these areas need to be extended the full protection to which they are entitled under international labour standards.

³⁰ *Ibid.*

³¹ *Ibid.*

5. Key Events During 1997

There were many trade union actions during 1997, especially in the plantation sector, the GMOA³² and ports. Several issues also arose in the context of factories.

There was an increase in the number of strikes on the estates in 1997, which had serious consequences for the tea industry. Conditions for workers on the estates remain extremely poor. One strike involved a demand for better sanitation and access to safe drinking water. "So far only 45% of the workers' sanitation needs have been met while only 60% have access to safe drinking water."³³ The government has said it intends to develop plantation workers' housing and welfare facilities with aid from Norway and the Netherlands.³⁴

The issue of proposed changes to the Queen Elizabeth Quay (QEY) provoked considerable concern among trade unions. Fearing privatisation, but denied information on the actual content of proposals for the QEY, the unions faced a difficult task in articulating the interests of their members, but nonetheless sought to make their concerns felt.

When speaking about workers' rights one must not overlook the employer altogether. The principles of natural justice must be adhered to and the employer given an opportunity to be heard. A worker cannot invoke a right at whim; a certain responsibility

³² For trade union action by the GMOA, see Chapter XIII on Right to Health.

³³ *Sunday Observer*, 21 December 1997.

³⁴ *Ibid.*

is attached to it. This was made clear in the decision of the Court of Appeal to dismiss a writ application challenging the dismissal of a worker of Associated Battery Manufacturers (Ceylon) Ltd.³⁵ The court held that:

unauthorised and unlawful meeting convened by Trade Union officials and workmen of the company, which accelerated a fall in discipline and renewed violence leading to the closure of the work place, was misconduct which justified termination of service.

The factory had been closed in November 1992 after a worker had aroused colleagues against the employer at an unauthorised meeting. It reopened in March 1993. The arbitrator, while not finding fault with the worker for taking part in union activities, had held him responsible for providing leadership in summoning the unlawful meeting and for the general unrest - which had threatened lives and property - that subsequently occurred.

Workers today assert their rights not just as workers, by joining a union to provide them with support, but also as human beings entitled to a full range of fundamental rights. This was evident, for example, at a discussion on privatisation and its impact on workers held at the Sri Lankan Foundation Institute in April 1998. An employee of Sri Lanka Telecom Ltd. (hereinafter "SLT") asked the Head of Customer Services at SLT (who was one of the panelists) why staff had not yet received anything from funds which had been allocated to grant benefits to SLT staff. This assertiveness demonstrated the manner in which the

³⁵ *Ceylon Daily News*, 17 April 1997.

fundamental rights to freedom of expression and opinion are claimed on issues that affect the work place.

6. Conclusion

Workers who have recourse under the Industrial Disputes Act (IDA) are advised to make representations to the Commissioner, either personally or through their union, in the event of a dispute.³⁶ Civil servants have the option of submitting labour grievances to the Public Service Commission but do not have legal grounds to strike.³⁷

Trade unions are essential. They can help minimise the gap between employer and employee, and protect the interests of their members. But trade union officials must not misuse the rights granted by the Constitution and other statutes. Today's trade unions too easily resort to violence to compel the employer to give into their demands. Although this attracts media attention, it does not always benefit either the employee or the trade union in question. The debate on privatisation mentioned above provided a good example of how union representatives can use their freedom to voice workers' opinions to the public instead of resorting to violence within the work place. However, it must also be recognised - without condoning their acts of violence - that other factors, such as delays in labour courts and tribunals, may also contribute to undesirable behaviour by trade union activists. When unable to obtain quick relief for their grievances, they tend to take the law into their own hands.

³⁶ Industrial Disputes Act No. 43 of 1950.

³⁷ *Supra* n 18.

Conciliation and arbitration are alternatives when disputes occur, but many employers who deal with trade union activities prefer to let professionals handle the matter. For this they employ the services of the Employers' Federation, which acts as an independent body. This provides a much quicker way to resolve disputes and prevent employees from resorting to violent action. However, the Federation will only intervene when disputes arise within companies that are registered with the Federation.

New legislation is needed which sets out strict standards for employers to provide proper wages and facilities (such as sanitation, welfare and safety provisions). It should also set out strict standards for trade unions and employees, to prevent them resorting to violence and other illegal acts which could cause apprehension of loss of life or property. However, care must be taken to guard against employers being able to claim that any sort of behaviour by an employee had given occasion to be apprehensive, by ensuring that the standards are "reasonable."³⁸ The legislation should avoid placing too many restrictions on either party, and should comply with principles of natural justice. In short, it should ensure a balance in the bargaining process, leaving room for negotiation while protecting workers' rights, in keeping with the pledges contained in the National Workers' Charter.

³⁸ What a reasonable person is expected to do considering the circumstances and the foreseeable consequences (Oxford Reference - A Dictionary of Law, Third edition 1994).

Schedule I

Human Rights Instruments Ratified By Sri Lanka

(December 1997)

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. **First Optional Protocol to the International Covenant on Civil and Political Rights.**

Schedule II

Human Rights Instruments Not Ratified By Sri Lanka

1. Second Optional Protocol to the International Covenant on Civil and Political Rights aiming at the abolition of the death penalty 1989.
2. Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity 1968.
3. ILO Convention (No. 105) concerning the Abolition of Forced Labour.
4. Declaration regarding Article 21 of the above (relating to the entertainment of complaints by one State Party against another).
5. Declaration regarding Article 22 of the above (relating to the entertainment of complaints by individuals).
6. Convention on the International Right of Correction.
7. ILO Convention (No. 102) concerning Minimum Standards of Social Security.
8. Convention Relating to the Status of Refugees 1951.
9. Protocol to the 1951 Refugees Convention 1967.
10. Convention Relating to the Status of Stateless Persons 1954.
11. ILO Convention (No.143) concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers.
12. ILO Convention (No.122) concerning Employment Policy.

13. ILO Convention (No. 141) concerning Organisations of Rural Workers and Their Role in Economic and Social Development.
14. ILO Convention (No.151) concerning Protection of the Right to Organize and Procedures for Determining Conditions of Employment in the Public Service.
15. Convention on the Political Rights of Women 1953.
16. Convention on Consent to Marriage, Minimum Age for Marriage and Registration of marriages.
17. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I).
18. Protocol Additional to the Geneva Convention of 2 August 1949, and relating to the Protection of Victims of Non-international Armed Conflicts (Protocol II).
19. International Convention against Apartheid in Sports.
20. Protocol Instituting a Conciliation and Good Offices Commission to the UNESCO Convention against discrimination in Education 1962.
21. ILO Convention (No. 111) concerning Discrimination in respect of Employment and Occupation.
22. Convention for the Prevention and Punishment of Terrorism 1937.
23. 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 1997

Articles 11, 13(1) & 13(2)

M.A Cader Ayoob v. The I.G.P. of Colombo-1 and Others
S.C. Application No: 482/96

D. M. Piyasena v. Sandasiri Bandara, Inspector of Police, Gampola and Others
S.C. Application No: 501/95

Ajith Kumara Jayasinghe v. B.L.B. Appuhamy, Chief Inspector of Police, Kantalai and Others
S.C. Application No: 15/95

Gamini Perera v. W.B. Rajaguru, I.G.P., Police Headquarters, Colombo and Others
S.C. Application No: 600/95

Nalika Kumudini Kalupahana v. Nihal Mahinda, O.I.C., Police Station, Hungama and Others
S.C. Application No: 615/95

Sooryasena Abeywickrama v. Ivon Gunaratne, Chief Inspector, Police Station, Maradana and Others
S.C. Application No: 93/96

E.R.D. Shelton Ranaraja v. Sub Inspector M.G. Dias and Others
S.C. Application No: 373/96

A.L. Karunaratne v. Berty Gopallawa, Superintendent of Police, Bandarawela, and Others
S.C. Application No: 704/96

Sehismail Mohamed Jiffry v. Inspector of Police Nimalasiri, Police Station, Kohuwela and Others
S.C. Application No: 507/95

G.D.A.S. Kahanawita v. The D.I.G. Western Province, Colombo and Others
S.C. Application No: 183/95

Mahapathiranage Ariyapala and three others v. O.I.C. Police Station, Kollupitiya
S.C. Application No: 593/95

Seenithamby Vadivel v. O.I.C., Special Task Force, Arayampathi and Others
S.C. Application No: 637/95

Sunil Kumara Rodrigo v. R. K. Chandrananda de Silva, Secretary, Ministry of Defence and Others
S.C. application No: 478/97

Article 12

N. R. Gajasinghe and S.W.B. Gajasinghe v. K.Yoganathan, Director of Irrigation, and Others
S.C. Application No: 67/94

K. Hewamallikage and B. Bulathsinghala v. The People's Bank and Others
S.C. Application No: 52/95

Tudor Herbert Wickremasinghe and Others v. Monetary Board of the Central Bank and Others

S.C. Application No: 62/95

Dr. D.S.P.A.H. de Silva v. Dr. Dudley Senanayake and Others

S.C. Application No: 77/95

T. B. Weerasinghe v. S. M. Dissanayake and Others

S.C. Application No: 143/95

M. A. Dhanapala v. S. M. Dissanayake and Others

S.C. Application No: 145/95

Mrs. R.H.I.S. Ranasinghe v. The University of Kelaniya and Others

S.C. Application No: 244/95

P. G. Ratnayake v. The Secretary, Ministry of Public Administration and the Attorney-General

S.C. Application No: 277/95

A. B. Samaratunga and T.H.D.A Jayasekera v. Ceylon Petroleum Corporation and Others

S.C. Application Nos: 323/95, 324/95

Susiripala Talagala v. Monetary Board of the Central Bank and Others

S.C. Application No: 481/95

D.G P. H. Devasinghe v. P.S.A. Jayaratne , Secretary / Ministry of Plantation Industries, and Others

S.C. Application: 516/95

Cyril A. Fernando v. Minister of Public administration, Home Affairs, Plantation Industries, and Parliamentary Affairs

S.C. Application No: 324/96

G. Jayasooriya v. Monetary Board of the Central Bank of Sri Lanka and Others

S.C. Application No: 584/95

Sandhya Neelamani Malawarachchi v. M.B.C de Silva Secretary to the Chief Minister of Western Province and Others

S.C. Application No: 588/95

A.M. Dhanawathie v. Divisional Director, Director of Post, Monaragala and Others

S.C. Application No: 31/96

R. A. Ratnadasa v. The Government Agent Gampaha and Others

S.C. Application No: 66/96

R.B.P. Range Bandara v. Gen. Anuruddha Ratwatte Deputy Minister of Defence and three Others

S.C. Application No: 128/96

Gamage Neil Aroshan and L.A.G. Kodituwakku v. Ven. Diviyagaha Gnanananda Mahasthaweera and Others

S.C. (Special) Application Nos: 183/96, 184/96

K. S. Madurapperuma, Chief Clerk, Development Lottery Trust and 24 Others v. M.N. Junaid, and Others

S.C. Application No: 437/96

D.L.S.L. Silva v. Senanayake Upasena, Additional Secretary, Ministry of Education and Higher Education and Others

S.C. Application No: 472/96

A.J. Ranasooriya and four Others v. Ratnasiri Wickremanayake, Minister of Public Administration, Plantation Industries, Parliamentary Affairs and Home Affairs and Others

S.C. Application No: 493/96

R. M. B. Ratnayake, v. Dr. (Mrs) Y. Anver, The Deputy Director of Provincial Health Services North Western Province, and Others
S.C. Application No: 586/96

Roy Wilfered Wijetilake, and two Others v. Sri Lanka Telecom and Others
S.C. Application No: 672/96

Edirisinghe Arachchige Somipala v. The Board of Directors, the Co-operative Wholesale Establishment and Others
S.C. Application No: 694/96

M. L. Halimdeen v. Secretary, Ministry of Education and Higher Education and Others
S.C. Application No: 719/96

R.P.D.D. Pearly v. A. S. Premaratne, Acting Secretary, Educational Services Board, and the Attorney - General
S.C. Application No: 790/96

SmithKline Beecham Biologicals S.A., and SmithKline Beecham Mackwoods Ltd. v. State Pharmaceutical Corporation and Others
S.C. Application No: 89/97

D. S. Wijegunaratna and M. S. S. Paramananda v. K. Kuhathason and Others
S.C. Application Nos: 577/96, 373/97

A. G. R. P. Rajakaruna v. Nimal Siripala de Silva, Minister of Housing, Construction and Public Utilities, Battaramulla and Others
S.C. Application No: 201/95

W.M. Mahindaratne v. P. Jayasinghe and Others
S.C. Application No: 28/95

Palitha Bandula Herath Denuwara v. Hadabima Authority of Sri Lanka and Others
S.C. Application No: 135/95

M.A.W. Sunil Jayalath v. Hadabima Authority of Sri Lanka
S.C. Application No: 136/95

Akuressa Hewage Norman v. Coconut Research Board and Others
S.C. Application No: 610/95

Nilaweera Patabendige Malani v. Divisional Superintendent of Post, Hambantota and Others
S.C. Application No: 49/96

V. S. Marapana v. The Bank of Ceylon and Others
S.C. Application No: 749/96

U. Lalith C. Wickremasinghe v. Ceylon Petroleum Corporation and Others
S.C. Application No: 310/95

C. Wickramatunga v. Gen. Anuruddha Ratwatte, Minister of Irrigation, Power and Energy and Others
S.C. Application No: 228/96

P.R. Jayawardena v. Akmeemana Pradeshiya Sabha and Others
S.C. Application No: 594/96

Asoka Gunawardena and P. A. P. Wijeratne v. S.C.W. Pathirana, O.I.C. Police Station, Elpitiya
S.C. Application No: 519/95

Article 14

S. Jeevakaran v. Hon. Ratnasiri Wickremenayake, Minister of Public Administration, Home Affairs, Plantation Industries and Parliamentary Affairs and Others

S.C. Application No: 623/96

M.K.M. Shakeeb v. Hon. Ratnasiri Wickremenayake, Minister of Public Administration, Home Affairs, Plantation Industries and Parliamentary Affairs and Others

S.C. Application No: 624/96

P. D. Saranapala v. S.A.D.B.R. Solanga Arachchi, S. S. P. Police Headquarters and Others

S. C. Application No: 470/96

Schedule IV

Chapter III

Fundamental Rights and Freedoms

Inherent Right to Life

8. (1) Every person has an inherent right to life and a person shall not be arbitrarily deprived of life.
- (2) Any restriction shall not be placed on the rights declared and recognized by this Article.

Freedom from Torture or Cruel, Inhuman or Degrading Treatment.

9. (1) A person shall not be subjected to torture or to cruel, inhuman or degrading treatment or punishment.
- (2) Any restriction shall not be placed on the rights declared and recognized by this Article.

Freedom from Arbitrary Arrest, Detention and Punishment and Prohibition of Retroactive Penal Legislation & C.

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

- (3) (a) Any person arrested shall at the time of arrest be informed, in a language which the person appears to understand, of the reason for the arrest and of the person's rights under paragraphs (4) and (5) of this Article.
- (b) Any person arrested, if the person so requests, shall be informed in writing of the reasons for the arrest within a reasonable time.
- (4) Any person arrested shall have the right to communicate with any relative or friend of the person's choice, and, if the person so requests, such person shall be afforded means of communicating with such relative or friend.
- (5) Any person arrested shall have the right to consult and retain an Attorney-at-law of the person's choice and such Attorney-at-law shall be afforded all reasonable facilities by the State.
- (6) Any person arrested shall not be detained in custody or confined for a longer period than under all the circumstances of the case is reasonable, and shall, in any case be brought before the judge of a competent court within twenty-four hours of the arrest, exclusive of the time necessary for the journey from the place of arrest to such judge, and a person shall not be detained in custody beyond such period except upon and in terms of the order of such judge made in accordance with procedure established by law.
- (7) (a) Any person detained in custody or confined who is entitled, under the provisions of any law, to be released on bail or on the person executing a bond, shall be so released.

- (b) The amount of bail and the amount of every such bond shall be fixed with due regard to the circumstances of the case and shall not be excessive.
- (8) Any person suspected of committing an offence shall be charged or indicted or released, without unreasonable delay.
- (9) Any person charged with or indicted for an offence shall be entitled to be heard in person or by an Attorney-at-law of the person's own choosing and shall be so informed by the judge.
- (10) (a) Any person charged with or indicted for an offence shall be entitled to be tried -
 - (i) without undue delay;
 - (ii) at a fair trial;
 - (iii) by a competent court; and
 - (iv) subject to sub-paragraph (b) of this paragraph, at a public hearing.
- (b) A judge may, in the judge's discretion, whenever the judge considers it necessary, in proceedings relating to sexual matters, or where the interests of juveniles so require, or in the interests of national security or public order necessary in a democratic society or in the interests of order and security within the precincts of such court, exclude therefrom such persons as are not directly interested in the proceedings.
- (11) (a) Every person shall be presumed innocent until the person is proved guilty.

- (b) Anything contained in any law shall not be held to be inconsistent with sub-paragraph (a) of this paragraph to the extent that such law imposes upon an accused the burden of proving particular facts.
- (12) A person shall not be compelled to testify against the person or to confess guilt.
- (13)
 - (a) A person shall not be held guilty of an offence on account of any act or omission which did not, at the time of such act or omission, constitute an offence, except for any act or omission which, at the time it was committed, was criminal according to the principles of public international law
 - (b) Any penalty more severe than the penalty in force at the time when an offence was committed shall not be imposed for such offence.
- (14) Any person who has been convicted or acquitted of an offence in accordance with law by a competent court shall not be liable to be tried for the same offence save on the order of a court exercising appellate or revisionary jurisdiction.
 - (a) A person shall not be punished with death or imprisonment except by order of a competent court made in accordance with procedure established by law.
 - (b) The arrest, holding in custody, detention or other deprivation of personal liberty of a person-

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

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

(16) All persons deprived of their liberty shall be treated humanely and with respect for the inherent dignity of the human person.

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

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

Right to Equality

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

- (2) (a) Subject to sub-paragraphs (b) and (c) of this paragraph, a citizen shall not be discriminated against on the grounds of ethnicity, religion, language, caste, gender, sex, political or other opinion, national or social origin, place of birth, mode of acquisition of citizenship, marital status, maternity, parental status or any one of such grounds.
- (b) It shall be lawful to require a person to acquire within a reasonable time sufficient knowledge of any national language as a qualification for employment or office in the service of the State or in the service of any public corporation, where such knowledge is reasonably necessary for the discharge of such employment or office.
- (c) It shall be lawful to require a person to have a sufficient knowledge of any language as a qualification for any such employment or office where no function of that employment or office can be discharged otherwise than with a knowledge of that language.
- (3) A person shall not, on the grounds of ethnicity, religion, language, caste, gender, sex, political or other opinion, national or social origin, place of birth or any one of such grounds, be subject to any disability, liability, restriction or condition with regard to access to shops, public restaurants, hotels, places of public entertainment and places of public worship of such person's own religion.
- (4) Anything in this Article shall not prevent special measures being taken by law, subordinate legislation

or executive action where necessary for the sole purpose of the protection or advancement of disadvantaged or underprivileged individuals or groups including those that are disadvantaged or underprivileged because of ethnicity, gender, sex, age or mental or physical disability.

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

Freedom of Movement

12. (1) Every person lawfully resident within the Republic is entitled to the freedom of movement within the Republic and of choosing such person's residence within the Republic.
- (2) Every person shall be free to leave the Republic.
- (3) Any restrictions shall not be placed on the exercise of the rights declared and recognized by this Article other than such restrictions prescribed by law as are necessary in a democratic society in the interests of national security or public order or national economy or the protection of public health or morality or for the purpose of securing due recognition and respect for the rights and freedoms of others or for the extradition of persons from the Republic.

Freedom to Return to Sri Lanka

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

Right to Private and Family Life

14. (1) Every person has the right to respect for such person's private and family life, home, correspondence and communications and shall not be subjected to unlawful attacks on such person's honour and reputation.
- (2) Any restrictions shall not be placed on the exercise of the rights declared and recognized by this Article other than such restrictions prescribed by law as are necessary in a democratic society in the interests of national security, public order or national economy or the protection of public health or morality or for the purpose of securing due recognition and respect for the rights and freedoms of others or for the enforcement of a judgement or order of a competent court.

Freedom of Thought Conscience and Religion

15. (1) Every person is entitled to freedom of thought, conscience and religion including the freedom to have or to adopt a religion or belief of the person's choice.
- (2) Any restriction shall not be placed on the rights declared and recognized by paragraph (1) of this Article.
- (3) Every person is entitled to the freedom, either alone or in association with others, and either in public or in

private, to manifest the person's religion or belief in worship, observance, practice and teaching.

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

Freedom of Speech and Expression Including Publication and Freedom of Information

16. (1) Every person is entitled to the freedom of speech and expression including publication and this right shall include the freedom to hold and express opinions and to seek, receive and impart information and ideas either orally, in writing, in print, in the form of art, or through any other medium.
- (2) Any restrictions shall not be placed on the right declared and recognized by this Article other than such restrictions prescribed by law as are necessary in a democratic society in the interests of national security, public order, the protection of public health or morality, racial and religious harmony or in relation to parliamentary privilege, contempt of Court, defamation or incitement of an offence or for the purpose of securing due recognition and respect for the rights and freedoms of others.

Freedom of Peaceful Assembly

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

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

Freedom of Association

18. (1) Every person is entitled to the freedom of association.
- (2) Every citizen is entitled to the freedom to form and join a trade union.
- (3) Any restrictions shall not be placed on the exercise of the rights declared and recognized by this Article other than such restrictions prescribed by law as are necessary in a democratic society in the interests of national security, public order, racial or religious harmony, national economy or for the purpose of securing due recognition and respect for the rights and freedoms of others.

Right to Enjoy and Promote Culture and Use of Language

19. (1) Every citizen is entitled alone or in association with others to enjoy and promote such citizen's own culture and to use such citizen's own language.
- (2) Any restrictions shall not be placed on the exercise of the right declared and recognized by this Article other than such restrictions prescribed by law as are

necessary in a democratic society in the interests of national security, public order, racial or religious harmony or the protection of public health or morality or for the purpose of securing due recognition and respect for the rights and freedoms of others.

Freedom to engage in any Lawful Trade, Occupation, Profession, Business or Enterprise

20. (1) Every citizen is entitled to the freedom to engage alone or in association with others in any lawful occupation, profession, trade, business or enterprise.
- (2) Any restrictions shall not be placed on the exercise of the rights declared and recognized by this Article other than such restrictions prescribed by law as are necessary in a democratic society in the interests of the national economy, national security, public order, protection of public health or morality, the environment or for the purpose of securing due recognition and respect for the rights and freedoms of others or in relation to -
- (a) the professional, technical, academic, financial and other qualifications necessary for practising any profession or carrying on any occupation, trade, business or enterprise, and the licensing and disciplinary control of the person entitled to such fundamental right; and
- (b) the carrying on by the State, a State agency or a public corporation of any trade, business, industry, service or enterprise, whether to the exclusion, complete or partial, of citizens or otherwise.

Right to Ownership of Property

21. (1) Every citizen is entitled to own property alone or in association with others subject to the preservation and protection of the environment and the rights of the community.
- (2) Any person shall not be deprived of the person's property except as permitted by law.
- (3) Any property shall not be compulsorily acquired or requisitioned save for a public purpose or for reasons of public utility or public order and save by authority of law which provides for the payment of fair compensation.

Special Rights of Children

22. (1) Every child has the right -
- (a) to a name from birth;
 - (b) to be protected from maltreatment, neglect, abuse or degradation; and
 - (c) to have an Attorney-at-Law assigned to the child by the State, and at State expense, in criminal proceedings affecting the child, if substantial injustice would otherwise result.
- (2) Every child has the right-
- (a) to family care or parental care or to appropriate alternative care when removed from the family environment; and
 - (b) to basic nutrition, shelter, basic health care services and social services.

- (3) The State shall take reasonable legislative and other measures within its available resources with a view to achieving the progressive realisation of the rights guaranteed by paragraph (2).
- (4) In all matters concerning children, whether undertaken by public or private social welfare institutions, courts, administrative authorities or legislative bodies the best interest of the child shall be of paramount importance.
- (5) Every child shall have the right to grow up in an environment protected from the negative consequences of the consumption of addictive substances harmful to the health of the child and, to the extent possible, from the promotion of such substances.
- (6) Every child between the ages of five and fourteen years shall have access to free education provided by the State.
- (7) A child shall not be employed in any hazardous activity.
- (8) The rights recognized by this Article shall be in addition to any other right to which a child is entitled as a citizen or person under this Chapter.
- (9) For the purposes of this Article "child" means a person under the age of eighteen years.

Freedom from Forced Labour

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

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

- (a) any labour required as a result of a lawful sentence or order of a competent court;
- (b) any services of a military character, or in the case of a person who has conscientious objections to service as a member of the armed forces, any labour which that person is required by law to perform in place of such service;
- (c) any service that may be reasonably required in the event of an emergency or calamity that threatens the life and well-being of the community; and
- (d) any labour reasonably required as a part of normal civil obligations.

Right to Safe Conditions of Work

24. (1) Every person has the right to safe conditions of work.
- (2) The State shall take reasonable legislative and other measures within its available resources with a view to achieving the progressive realisation of the rights guaranteed by paragraph (1).

Social Rights

25. (1) Every citizen has the right to have access to -
- (a) health-care services including emergency medical treatment;
 - (b) sufficient food and water; and
 - (c) appropriate social assistance.
- (2) The State shall take reasonable legislative and other measures within its available resources with a view

to achieving the progressive realisation of the rights guaranteed by paragraph (1).

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

Operation of Certain Fundamental Rights in Their Application to Armed Forces to be Subject to Restrictions Prescribed Law

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

Derogation in Times of Public Emergency

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

Article "law" includes regulations made under the law for the time being in force relating to public security.

- (2) In prescribing measures under paragraph (1) of this Article, there shall be no derogation-
- (a) from any of the rights declared and recognized by Articles 8, 9, 10(1), 10(2), 10(9), 10(10)(a)(ii), 10(10)(a)(iii), 10(13), 10(15), 10(16), 13 and 15;
 - (b) from the right declared and recognized by Article 10(6) unless at the same time legal provision is made requiring-
 - (i) the Magistrate of the area in which such arrest was made to be notified of the arrest, and
 - (ii) the person arrested to be produced before any Magistrate, within such time as is reasonable in all the circumstances of the case.

Existing Written Law and Unwritten Law

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

- inconsistent with the provisions of this Chapter.
- (b) In appointing the members of such Commission, the President shall have due regard to the necessity of ensuring the representation of the three major communities on the Commission.
 - (c) The Commission shall submit its report to the President within a period of three years from the date of its establishment and the President shall, as soon as practicable, cause such report to be placed before Parliament.
 - (3) The subjection of any person on the order of a court to any form of punishment recognized by any existing written law shall not be a contravention of the provisions of this Chapter.

Interpretation of Law

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

Remedy for the Infringement of Fundamental Rights by State Action

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

by judicial action by courts exercising original criminal jurisdiction, of a fundamental right to which such person is entitled under Article 10.

- (b) Where the person aggrieved is unable or incapable of making an application under Article 171 by reason of physical, social or economic disability or other reasonable cause, an application may be made on behalf of such a person, by any relative or friend of such person, if the person aggrieved raises no objection to such application.
 - (c) An application under this Article may be made in respect of any person or persons affected, in the public interest, by any person or by any incorporated or unincorporated body of persons acting bona fide.
- (2) For the purposes of this Article and of Article 171 "State action" includes judicial action to the extent provided in this Article but does not include legislative action.

Rights of Non-Citizens Permanently and Legally Resident

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

Bibliography

Abeyesundere, A.N.A., "An Outline of the WHO Functions and Responsibilities" (Unpublished).

----- "Health Development in the Countries of the WHO, South East Asian Region, with special reference to Bangladesh and Sri Lanka" (Unpublished).

Adewale, Maja Pearce, "Disabled Africa: Rights not Welfare," *Index on Censorship*, Vol.27, No. 1998, p.178.

Amnesty International, "Human Rights Defenders: Breaching the Walls of Silence", IOR 40/07/95 (August 1995).

----- "Sri Lanka: Implementation of the Recommendations of the UN Working Group on Enforced or Involuntary Disappearances Following Their Visit to Sri Lanka in 1991 and 1992," AI Index: ASA 37/04 /98 (February 1998).

An Action Oriented Strategy Towards the National Education Policy, National Education Commission (Colombo, 1995).

Annual Health Bulletin - 1996, Ministry of Health Sri Lanka (Colombo, 1997).

Arulpragasam, K.D., "Admission Policies," in *National Workshop on Higher Education Policy: Papers Presented at the Workshop and Summary of Recommendations*, National Education Commission, (Colombo, 1995).

Annual Report, Central Bank of Sri Lanka (1997).

Centre for Monitoring Election Violence, *Final Report of Election-related Violence during the Local Government Election Campaign* (25 April 1997).

Centre for Policy Alternatives, *Media Monitor*, Vol.1, Issue 1 (June 1997).

Civil Rights Movement of Sri Lanka, "Shock and Dismay at the SLBA Bill," CRM ref. E01/4/97 (Colombo 25 April 1997).

Commonwealth Universities Handbook 1995-96, Association of Commonwealth Universities, London (1996).

Consortium of Humanitarian Agencies Yearbook 1997.

Cooray, J.A.L., *"Constitutional and Administrative Law of Sri Lanka"* (Colombo, 1995).

de Silva, C.R., "The Politics of University Admissions: A Review of Some Aspects of the Admission Policy of Sri Lanka, 1971-78," *Sri Lanka Journal of Social Sciences*, I (2) (1978).

----- "Education in Sri Lanka: A Development Oriented Analysis," paper read at the conference on *The Political, Economic and Social Reconstruction of Sri Lanka*, Harvard University, Boston, Mass (20-22 November 1997).

----- "University Admissions and Ethnic Tensions in Sri Lanka, 1977-1982" in Goldman, Robert A., and Jeyaratnam Wilson, A. (eds) *From Independence to Statehood: Managing Ethnic Conflict in Five Asian and African Countries* (Frances Pinter, London 1984).

----- "Affirmative Action Policies: The Sri Lankan Experience," *Ethnic Studies Report*, Vol. XV, No. 2 (July 1997).

Deng, Francis, "Compilation and Analysis of Legal Norms," UN Doc.E/CN. 4/1996/52/Add.2, 5 December 1995.

Department of Census and Statistics, *Statistical Profile of Sri Lanka* (Colombo, 1998).

----- *Quarterly Bulletin of Labour Force Statistics of Sri Lanka*, Issue No.5 Fourth Quarter (Colombo, 1997).

Economic and Political Weekly, Vol. XXXII No. 36, 6-12 September (1997).

Educational Proposals for Reform: General, University and Tertiary (Vocational, Technical and Professional), (Ministry of Education, Colombo, 1981).

Educational Reforms and Restructure: Policy and Programmes of Action (Ministry of Education, Colombo, 1997).

Educational Statistics of Sri Lanka, 1992. (Ministry of Education, Colombo, 1993).

Education and Training in Sri Lanka: An Asian Development Bank Project, Vol. I-IV, Educational Consultants of India, New Delhi (1989).

Fredman, Sandra, "Reversing Discrimination" (1997) 113 *Law Quarterly Review* 575.

Gomez, M, "A Right to Emergency Health Care," *LST Review*, Vol 8, Issue 124. (Law & Society Trust, Colombo, February 1998).

..... "The Internally Displaced: Some International & Domestic Norms" (Unpublished).

Goodwin, Guy - Cohn, Gill & Iiene, "*Child Soldiers - The Role of Children in Armed Conflict*" (Clarendon Press, Oxford, 1994).

Graca, Machel, "Impact of Armed Conflict on Children," Submitted pursuant to General Assembly Resolution 48/157 (A/51/306) November 1996.

Higgins, Rosalyn, "Problems and Process: International Law and How we Use it"(Oxford University Press, 1995).

HIV/AIDS Surveillance -Sri Lanka STD/AIDS Control Programme, 24 February 1998 (Unpublished).

Human Rights: *A Compilation of International Instruments*, Vol. I (United Nations, New York, 1994).

INFORM Situation Report January 1997 (Colombo).

----- Situation Report February 1997 (Colombo).

----- Situation Report March 1997 (Colombo).

----- Situation Report April 1997 (Colombo).

----- Situation Report May 1997 (Colombo).

----- Situation Report June 1997 (Colombo).

----- Situation Report, July 1997 (Colombo).

----- Situation Report August 1997 (Colombo).

----- Situation Report September 1997 (Colombo).

----- Situation Report October 1997 (Colombo).

----- Situation Report November 1997 (Colombo).

----- Situation Report December 1997 (Colombo).

International Centre for Ethnic Studies, *Sri Lanka: The Devolution Debate* (3rd ed. Colombo,1997).

Jandhyala, B.G. Tilak, "Five Decades of Under-investment in Education," *Economic and Political Weekly*, Vol. XXXII, No.36 (6-12 September 1997).

Law & Society Trust, *LST Review*, Vol 7, Issue No: 113 (Colombo, March 1997).

----- *LST Review*, Vol 8, Issue 124 (Colombo, February 1998).

----- *Sri Lanka: State of Human Rights 1994* (Colombo, 1995).

----- *Sri Lanka: State of Human Rights 1995* (Colombo, 1996).

----- *Sri Lanka: State of Human Rights 1997* (Colombo, 1997).

Leach LR (ed.), "Aspects of Caste in South India, Ceylon and North-West Pakistan" (Cambridge University Press, 1960).

Lofsedt, J.I., Jayaweera S. and Little, A., "Human Resource Development in Sri Lanka: An Analysis of Education and Training" (Stockholm, 1985).

National Workshop on Higher Education Policy: Papers Presented at the Workshop and Summary of Recommendations (National Education Commission, Colombo, 1996).

Nissan, Elizabeth, "Sri Lanka: A Bitter Harvest" (Minority Rights Group, 1996).

Peiris, G.H. *Development and Change in Sri Lanka: Geographical Perspectives* (Kandy, 1996).

Ranasinghe, P, "An Overview of the Global Child Labour Situation, History, Magnitude, Causes, and Consequences," *Child Labour in Sri Lanka, Report of the Workshop Action Plan* (September 1996).

Report of the Committee appointed to Review University Admission Policy (University Grants Commission, 1987).

Sartori, Giovanni, *"Comparative Constitutional Engineering"* (2nd ed., Macmillan, 1997).

Secondary Educational Developmental Project-Curriculum Development Final report Vol. I & II (CANEDCOM Intl. Ltd., Toronto, April 1996).

School Census (Ministry of Education and Higher Education, Colombo, 1996).

Sri Lanka Labour Law Guide for Employers and Employees (1997).

Sri Lanka Socio - Economic Data 1997 (Statistical Department, Central Bank of Sri Lanka, June 1997).

Sri Lankan Universities Yearbook (1996).

Summary Representations: School Admissions, National Education Commission (Unpublished).

Tiruchelvam, Neelan, "Equal Opportunity and the Role of Civil Society," *Fortnightly Review*, Vol. VIII, Issue No.118 (Law & Society Trust, Colombo, 1997).

UNICEF, *The State of the World's Children 1997* (Colombo, 1997).

University Teachers for Human Rights (Jaffna), Special Report No. 09, "Jaffna, A Vision Skewed" (7 June 1997).

----- Information Bulletin, "Jaffna: Current Situation & Prospects - A Survey" (24 August 1997).

Vienna Declaration and Programme of Action, UN Doc. A/Conf. 157/24, 13 October 1993.

Weekly Epidemiological Report, Sri Lanka, Vol. 25, No.41 (October 1997).

What Children Learn after Five Years of Schooling (Evaluation Department, National Institute of Education, Colombo, 1995).

Wijemanne, E.L., "Study on Educational Financing in Sri Lanka-Summary Report" (Colombo, Marga Institute, 1995).

William, Joe, "Internally Displaced Persons in Sri Lanka" (October 1997, Unpublished).

Daily News, 5 January 1997.

Daily News, 16 January 1997.

Daily News, 25 January 1997.

Daily News, 7 February 1997.

Daily News, 8 February 1997.

Daily News, 11 February 1997.

Daily News, 12 February 1997.

Daily News, 17 February 1997.

Daily News, 24 February 1997.

Daily News, 20 March 1997.

Daily News, 12 April 1997.

Daily News, 17 April 1997.

Daily News, 16 May 1997.

Daily News, 12 June 1997.

Daily News, 17 June 1997.

Daily News, 18 July 1997.

Daily News, 22 July 1997.

Daily News, 31 July 1997.

Daily News, 7 August 1997.

Daily News, 26 August 1997.

Daily News, 3 September 1997.

Daily News, 5 September 1997.

Daily News, 11 October 1997.

Daily News, 20 November 1997.

Daily News, 8 December 1997.

Daily News, 10 January 1998.

Emirate News, 15 June 1997.

Sunday Leader 9 March 1997.

Sunday Leader, 25 May 1997.

Sunday Leader, 6 July 1997.

Sunday Leader, 27 July 1997.

Sunday Leader, 2 November 1997.

Sunday Leader, 11 November 1997.

Sunday Observer, 23 February 1997.

Sunday Observer, 9 March 1997.

Sunday Observer, 17 August 1997.

Sunday Observer, 21 December 1997.

Sunday Times, 19 January 1997.

Sunday Times, 16 February 1997.

Sunday Times, 23 February 1997.

Sunday Times, 30 February 1997.

Sunday Times, 2 March 1997.

Sunday Times, 9 June 1997.

Sunday Times, 29 June 1997.

Sunday Times, 9 November 1997.

Sunday Times, 14 December 1997.

Sunday Times, 24 May 1998.

The Evening Observer, 12 March 1997.

The Evening Observer, 25 August 1997.

The Island, 4 January 1997.

The Island, 25 January 1997.

The Island, 12 February 1997.

The Island, 17 February 1997.

The Island, 20 March 1997.

The Island, 18 July 1997.

The Island, 17 August 1997.

The Island, 15 September 1997.

The Island, 20 October 1997.

The Island, 13 November 1997.

The Island, 4 January 1998.

The Observer, 9 May 1997.

Weekend Express, 7-8 June 1997.

Weekend Express, 30-31 August 1997.

Weekend Express, 20-21 December 1997.

Weekend Express, 29 December 1997.

Index

- 13th Amendment to the Constitution, 270, 293, 295
- 1978 Constitution, 76, 136, 143, 146, 147, 150, 163, 165, 180, 257, 324, 336, 353
- 1995 Act amending the Penal Code, 152
- abduction and disappearance, 32, 46
- abuse, 7, 8, 19, 22, 45, 86, 121, 178, 190, 193, 194, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 217, 218, 225, 227, 321, 327, 351
- access
 - to education, 139, 178, 212, 214, 216, 261, 269, 270, 273, 298
 - to shelter, health, food, water and sanitation, 238
 - to conflict zones 241
- accountability, 87, 126, 325
- Additional Protocol I, 17
- adequate food, clothing and housing;, 187
- adult domestics, 205
- aesthetics and creativity, 281
- affirmative action, 128, 130, 131, 133, 135, 136, 148, 151, 160, 162, 288, 291, 308, 311
- aided schools, 264, 271
- AIDS, 341, 342, 344
- Amnesty International, 6, 15, 18, 24, 25, 29, 30, 40, 242
- Annual Education Development Plan, 294
- anti-discrimination, 131, 141
- arbitrary
 - arrest, 72, 76, 238
 - arrest and detention, 253
 - detention, 118
 - dismissal, 355
- areas under LTTE control, 3
- armed
 - conflict, 1, 6, 12, 14, 19, 27, 209, 211, 212, 214, 259, 328, 361
 - confrontation, 20, 21
 - secessionist movement, 104
- arrest and detention, 23, 24, 26, 44, 72, 77, 82
- arrested without a warrant, 26, 56

- authorised places of detention, 44, 70
- barriers to equal opportunity, 139, 142
- Basnayake Commission Report of 1970, 29
- Board of Investment, 354, 362
- Business Acquisition Act, 106
- caste-based discrimination, 159
- censorship, 4, 106
- Centre for Monitoring Election Violence (CMEV), 33, 34, 35
- Centre for Policy Alternatives (CPA), 114, 124, 125
- Charter for Health Development, 334
- child
 - abuse and rape, 193
 - labour, 192, 200, 204, 205, 207, 208, 216, 217
 - pornography, 194
 - prisoners of war, 213
 - soldiers, 192, 210, 211, 212, 213, 214
- child's right to citizenship, 215
- children
 - care of, 209
 - living in conflict areas, 217
- Children's
 - Charter, 203, 207, 209, 216
 - rights as fundamental rights, 193
 - trafficking in, 190
- cholera, 339, 340, 345
- Civil Rights Movement (CRM), 28, 29, 48, 59
- civil war, 104, 140, 345
- civilians, 3, 4, 7, 11, 14, 15, 16, 17, 19, 20, 22, 23, 24, 39, 140, 239, 245
- classification of schools, 273
- cleared areas, 15, 345
- Code of Criminal Procedure (CCP), 13, 54, 56, 57, 58, 68, 82, 66, 182
- Commission
 - of Official Languages, 167
 - on the Elimination of Discrimination and Monitoring of Fundamental Rights, 72
- Commissioner of Labour, 355

- Committee on Economic, Social and Cultural Rights, 6, 319, 323, 334
- compulsory education, 216, 306
- conflict zone, 241, 334, 345
- Constitution of Sri Lanka, 185, 347
 - constitutional reform, 1, 2, 8, 149, 175, 293
 - draft constitution, 2, 38, 75, 149, 150, 151, 163, 171, 173, 178, 181, 184, 185, 186, 192, 193, 214, 215, 216, 217, 270, 295, 315, 324, 337, 348
 - Draft Constitutional Proposals, 337
 - draft of the government's proposals for constitutional reform, 149
- Convention
 - against Discrimination in Education, 268
 - against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 13, 26, 39
 - against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Act (CAT Act), 27, 28, 39
 - on the Rights of the Child (CRC), 178, 193, 320
- Cosmetic Devices and Drugs Act, 96, 348
- Criminal Investigation Department (CID), 120
- criminal defamation, 107, 114, 115, 116

- dengue, 340
- Department
 - of Education, 270
 - of Official Languages, 146, 147, 167
 - of Social Services, 154
- detention, 21, 24, 26, 29, 30, 41, 43, 44, 46, 49, 50, 51, 52, 53, 55, 57, 58, 59, 70, 71, 72, 76, 77, 78, 79, 81, 82, 83, 118, 119, 213, 238
- devolution, 270, 293, 295, 296
- Directive Principles of State Policy and Fundamental Duties, 136, 163
- disability, 127, 128, 141, 144, 147, 150, 151, 152, 153, 154, 317, 324, 326, 330
- disabled, 8, 39, 129, 135, 140, 141, 148, 150, 153, 154, 162, 164, 167, 317, 318, 320, 321, 322, 324, 325, 326, 327, 328, 329, 330, 332, 360
 - children, 189, 271, 320
 - people, 39, 361
 - workers, 361
- disappearance, 6, 29, 30, 31, 32, 39, 40, 46, 48, 238, 246

- discrimination, 6, 10, 36, 64, 68, 72, 84, 92, 94, 127, 128; 130, 131, 132, 133, 134, 135, 136, 137, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 157, 158, 159, 160, 162, 165, 166, 170, 171, 172, 176, 181, 183, 189, 256, 320, 322, 324, 330, 336, 351, 361
 - against women in employment, 158
 - and equal opportunity, 166
 - in education, 268
 - on the ground of disability, 150
 - on the ground of language, 145, 150
 - on the ground of socio-economic status, 157
 - on the ground of youth, 141
 - on the grounds of mode of acquisition of citizenship, marital status, maternity and parental status, 150
- discriminatory legislation, 320
- displaced
 - children, 217, 251
 - persons, 18, 39, 334
- district quota system, 159, 160, 172, 265, 266, 290, 309, 310
- domiciliary basis for admission, 266
- Education Ordinance No. 31 of 1939, 270
- Educational reform, 315
- educationally underprivileged, 160
- election-related violence, 33
- Emergency
 - (Games of Chance) (Jack-pots) Regulations No 1 of 1995, 65
 - (Generation of Electrical Power and Energy) Regulation No 1 of 1997, 66
 - (Miscellaneous Provisions and Powers) Regulations, 45, 49, 61, 69, 70, 71
 - (Miscellaneous Provisions and Powers) Regulations (EMPPR), 49
 - (Prison Visits) Regulation, 59
- health care, 179, 337, 348
 - powers, 43, 49, 61
 - regulation, 20, 21, 24, 42, 43, 44, 45, 46, 49, 50, 53, 54, 56, 59, 60, 61, 62, 63, 64, 65, 66, 68, 69, 70, 71, 72, 80
- Employees
 - Provident Fund Act, 352

- Trust Fund Act, 352
- Employers' Federation, 366
- Employment
 - Convention, 132, 134, 146
 - of Women, Young Persons and Children Act, No. 47 of 1956, 156, 358
 - enabling measures, 128, 130, 131, 133, 135, 141, 148, 151, 155, 162, 172
 - environmental health, 344
 - Epidemiological Unit of the Ministry of Health, 344
 - equal
 - access to public buildings and spaces, 141
 - justice, 143
 - opportunity, 85, 93, 95, 97, 127, 129, 130, 131, 132, 133, 134, 135, 136, 139, 143, 144, 148, 151, 163, 164, 165, 172, 360
 - opportunity for minorities, 161
 - opportunity in Sri Lanka, 139
 - opportunity in training and employment, 140
 - pay for equal work, 187
 - protection of the law, 84, 85, 95, 100, 143, 257
 - remuneration for work of equal value, 187
 - rights, 130, 143
 - rights for men and women, 320
 - treatment, 91, 93, 131, 145
 - treatment or opportunity, 158
 - wages, 170, 172
- equality, 64, 84, 85, 88, 90, 92, 93, 95, 100, 129, 134, 136, 140, 143, 156, 323, 336
 - before the law, 143,
 - of opportunity, 131, 132, 134, 135, 136, 145
 - of opportunity for promotion, 319
 - of opportunity or treatment in employment or occupation, 132
 - of treatment, 134
- eradication of illiteracy, 270
- ethnic
 - conflict, 112, 123, 292, 318
 - harmony, 302
 - identity, 312
 - quotas, 161

representation, 126
ethnicity, 84, 127, 128, 136, 142, 147, 148, 149, 151
extrajudicial and arbitrary executions, 7, 11, 18, 19
extrajudicial killings, 17, 18, 20

Family

Health Bureau, 344
health services, 343
Health workers (FWWs), 346

free

education, 178, 188
expression, 63, 64, 99, 117, 118
health care services, 188
speech 63, 257

Free Media Movement (FMM), 109

Free Trade Zones, 9, 361

freedom from

arbitrary arrest, 72
arbitrary arrest and detention, 76
arbitrary arrest, detention and punishment, 257
cruel inhuman or degrading treatment, 68
discrimination, 68, 72
forced labour, 176, 179
torture, cruel, inhuman or degrading treatment or punishment, 76,
257

freedom

of association, 243, 353
of expression, 9, 63, 65, 98, 99, 100, 105, 107, 108, 117, 336, 354
of expression and media freedom, 122
of information and expression, 116
of movement, 68, 176, 238, 245, 247, 256
of movement including choosing one's residence, 68
of religion, expression and cultural self-determination, 159
of speech, 100, 104, 108
of speech and expression, 240
of speech and expression including publication, 105
of speech;, 100
of worship, 90

- to choose one's residence, 256
- to engage in a lawful occupation, 68, 257
- fundamental right, 10, 24, 27, 28, 38, 47, 49, 54, 55, 57, 58, 62, 68, 75, 80, 81, 82, 84, 85, 88, 90, 94, 96, 98, 100, 136, 143, 148, 163, 165, 175, 181, 337, 354
- of everyone to be free from hunger, 188
- to equality before the law, 100
- rights cases, 170
- rights chapter of the 1978 Constitution, 76, 149, 152, 165, 168
- rights jurisdiction of the Supreme Court, 167
- rights of freedom of thought and expression, 110
- rights of persons taken into custody, 24
- rights petitions, 75, 84, 139
- rights to freedom of expression and opinion, 365
- right to life, 68
- rights violations, 75

- GDP, 262
- gender, 36, 84, 123, 125, 126, 149, 151
 - differences, 262
 - relations, 222
 - neutral language, 175
 - stereotyped limitations, 138
- General Certificate of Education Ordinary Level (GCE O/L), 273, 284, 285, 290, 303
- General Certificate of Education, Advanced Level (GCE A/L), 263, 274, 284, 285, 286, 287, 289, 300, 303, 304, 305
- Geneva Conventions, 17, 39, 41, 258
- GMOA, 333, 337, 347, 348
- Goonsekere Committee on Laws on Media Freedom and Freedom of Expression, 116
- Government Homeopathy Doctors' Association, 337
- Government Medical Officers Association, 333, 347
- government schools, 273, 274, 276, 277, 278, 279, 286, 311

- Higher Education, 264, 265, 274, 276, 277, 287, 298, 308
- HIV infections, 341
- human rights, 1, 3, 5, 8, 9, 10, 13, 14, 18, 22, 30, 36, 38, 39, 40, 41, 43, 46,

- 47, 48, 60, 72, 108, 109, 112, 113, 114, 115, 116, 118, 122, 125, 130, 136, 159, 165, 167, 185, 347, 349
- abuses, 12, 20
- and equal opportunity mechanisms, 169
- and humanitarian standards, 39
- violations, 12, 40
- Human Rights Commission (HRC), 24, 30, 36, 47, 48, 72, 165, 166, 167
- Human Rights Commission of Sri Lanka Act, 72
- Human Rights Committee, 13
- Human Rights Task Force (HRTF), 9, 24, 36, 38, 43, 44, 45, 46, 47, 48, 72, 165
- humanitarian
 - assistance, 239
 - law, 5, 6, 209, 213, 241, 256, 258
- impact of the armed conflict on children 211, 213
- indemnity legislation, 41
- independence of the judiciary, 117
- Indian Tamils, 144, 147
- indiscriminate attacks, 17
- integrity of the person, 3, 12, 13, 38, 39
- inter-ethnic relations, 280
- internal displacement, 14
- internally displaced people, 239, 243, 334
- International Covenant on Civil and Political Rights (ICCPR) 13, 182
- Covenant on Economic, Social and Cultural Rights (ICESCR) 4, 6, 133, 179, 189, 187, 267, 319, 323, 335
- health regulations, 345
- human rights law, 13
- human rights standards, 40, 316, 347
- humanitarian law, 17, 209, 213, 256
- humanitarian organisations, 259
- labour migration, 229
- labour standards, 362
- legislation, 134
- schools, 277, 278,
- Labour Organisation (ILO), 219

investigative journalism, 114

Jaffna Peninsula, 15, 16, 244, 245, 246

Teaching Hospital, 346

Krishanthi Kumaraswamy, 30

Labour

courts 352, 365

laws, 155, 172

reform, 359

Department, 158

Tribunals, 158

language rights, 167

Lanka Sama Samaja Party, 63, 99

Liberation Tigers of Tamil Eelam, (LTTE) 1, 4, 7, 11, 12, 14, 16, 17, 19, 20,
21, 22, 23, 24, 25, 39, 104, 124, 125, 209, 210, 211, 213, 214, 237, 238,
244

link language, 312

literacy levels, 6, 262

mass media, 104, 110, 111, 113, 121, 123, 126

industry, 123, 126

media

freedom, 106

rights and freedoms, 108

Medical Officers Health (MOH), 346

Medicins Sans Frontieres (MSF), 16

Migrant labour, 221

migration, 195, 219, 220, 222, 234, 235, 265, 290

Ministry

of Education and Higher Education, 274, 276, 277, 298, 308

of Labour, 155, 206, 207, 221, 227, 229, 231, 232

of Social Services, 154, 318, 327

missing persons, 36, 37, 46, 70

misuse of powers, 91

mob violence, 118

National

- Advisory Group of the HRTF, 36, 48
- Archives, 70
- Authority on Teacher Education, 273, 306
- Authority on Teacher Education Act of 1997, 273
- Child Protection Authority (NCPA), 193, 200, 201
- Committee on Women, 164
- Council for Persons with Disabilities, 153, 154, 163, 164, 316, 325, 331
- Dengue Control Day, 340
- Desk for Child Abuse and Violence against Women, 201
- Education Commission, 265, 272, 283, 284, 292, 295, 297, 298, 299, 307, 308
- Education Policy, 283, 306
- Environmental Act, 66
- Health Commission, 335
- health policy, 334, 335
- Human Rights Commission, 9
- Institute of Education, 272, 284, 295
- Intelligence Bureau, 63
- languages, 147
- Monitoring Committee on the Children's Charter, 203, 207
- Policy on Technological and Vocational Education, 297
- schools, 277, 278, 295, 296
- security, 5, 52, 53, 64, 65, 82, 99, 336
- Steering Committee on Eliminating Child Labour, 193
- STD/AIDS Control Programme, 341, 342
- Teacher Training Authority, 305
- Workers' Charter, 359, 360, 366
- natural justice, 29, 83, 87, 93, 355, 363
- Nava Sama Samaja Party (NSSP), 62, 98
- non-discrimination, 84, 131, 134, 144, 148, 170, 324, 330, 336
- policies, 135
- North and East, 2, 3, 5, 6, 10, 12, 14, 15, 18, 29, 43, 61, 70, 147, 238, 246, 253, 259, 328, 334, 345, 346
- Nuisances Ordinance, 66
- Official Language Act, 136
- Ombudsman, 10, 167, 168, 169

Optional Protocol, 10, 13

Parliamentary

 Commissioner for Administration (See
 Ombudsman)

 Powers and Privileges Act, 107

 privilege, 105, 107

 Select Committee on the Constitution,
 2, 182.

Patients'

 rights, 337

 Rights Charter, 337, 348, 349

People's Alliance, 1, 62, 63, 99, 100,
 113, 118, 119, 359

persons with disability, 317, 360

plantation

 areas, 300

 sector, 139, 144, 170, 284, 363

 Tamils, 139, 277

Police Ordinance, 62, 63, 86, 98, 99

political

 discrimination, 64

 environment, 104

 opinion, 65, 84, 94, 100, 111, 132,
 135, 139, 143, 145, 147, 170

presumption of innocence, 78

pre-university education, 281

Prevention

 of Social Disabilities Act, 159

 of Terrorism Act (PTA), 30, 41, 45, 46, 59, 69, 106, 118, 119, 253

preventive

 detention, 43, 49, 55, 58

 detention order, 49, 58

 health staff, 346

principle

 of pluralism, 111, 126

 of natural justice, 29, 87, 355, 357, 366

 of reasonableness and proportionality, 60

Prison Rules, 49, 50

private

schools, 277, 278, 279, 286, 311

sector, 148, 158, 163, 202, 268, 278, 299, 311, 313, 315, 328, 343, 354

privatization, 313

professional negligence, 349

proportionality, 60, 87

proposed Optional Protocol to the Convention on the Rights of the Child, 212

Protection of the Rights of Persons with Disabilities Act, 153, 163, 317, 360

Protocol II of the Geneva Conventions, 256, 257

Protocols I and II Additional to the Geneva Conventions, 41

Provincial

Council's Act, 293

Education Departments, 301

High Courts, 154

Public

Health Inspectors (PHIs), 346

Health Service, 343

interest, 38, 66, 67, 85, 89, 177

interest litigation, 38, 177, 180

order, 52, 53, 63, 99, 100, 336

Performance Ordinance (1912), 65, 106

Petitions Committee (PPC) of Parliament, 169

Security Ordinance, 42, 43, 66, 69, 71, 106

Service and Public Corporations, 161, 162

Services Commission, 92, 365

rape, 25, 30, 193, 198, 199, 201, 203, 214, 224

recruitment of children into the armed cadres, 209

refugees, 124

Regional

Councils, 295, 296

Education Offices, 301

HRTF offices, 45

List, 152

regionalisation of education, 271

rehabilitation, 39, 214, 254, 318, 323, 330

retrenchment, 355, 356

reverse discrimination, 162

right

not to be discriminated against, 257

not to be discriminated against on the grounds of political opinion,
65

not to be evicted from one's home, 177

of a detained person to be produced before a judge according to
procedure established by law, 76

of every citizen to enjoy and promote his own culture and to use his
own language, 175

of every citizen to own property, 175

of every person to a standard of living, 318

of everyone to an adequate standard of living, 187

of everyone to the enjoyment of just and favourable conditions of
work, 133

of everyone to the enjoyment of the highest attainable standard of
mental and physical health, 188

of peaceful assembly, 100

to a clean environment, 179, 181

to a livelihood, 181

to a name from birth, 215

to an adequate standard of living, 256, 320

to be informed of reasons for arrest, 76

to education, 8, 127, 188, 266, 270, 320

to equal opportunity and non-discrimination, 159

to equality, 143

to equality of opportunity, 8, 170

to form and join trade unions, 347, 353, 362

to freedom of expression, 103, 104

to go in processions, 63

to have access to health care services, 177, 337

to health, 8, 333, 334, 337, 347

to housing, 179

to liberty, 38

to life, 19, 26, 35, 38, 174, 180, 182, 256

to privacy, 38

to protection against discrimination, 256

- to receive and impart information, 175
- to recognition, 256
- to respect for private and family life, 175
- to safe conditions of work, 176
- to social security, 187
- to stand for elections, 186
- to strike, 347
- to vote, 186
- rights
 - of children, 176, 267
 - of disabled people, 317
 - of migrant workers, 223, 224
 - to freedom of thought, conscience and religion, 257
- rubella vaccine, 95
- sex-based discrimination, 151, 152
- sexual
 - exploitation and sexual abuse, 190
 - exploitation of children, 192, 198, 201, 203
 - harassment, 125, 138, 152, 153, 171, 230, 351, 362
- orientation, 141, 152
- sexually abused
 - at a children's home, 198
 - while at school, 198
- Shop and Office Employees (Regulation of Employment and Remuneration) Act, 156, 157
- social
 - disabilities, 159
 - discrimination, 140
 - pluralism, 312
 - rights, 176, 179, 181, 337
- socio-economic rights, 178, 179, 186, 330
- Sri Lanka
 - Broadcasting Authority (SLBA) Bill, 107, 108
 - Bureau of Foreign Employment (SLBFE), 220, 221, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235
 - Foundation's Centre for the Elimination of Discrimination, 10, 36
 - Press Council Law, 105

Sri Lanka's plantation sector Tamils, 139, 144
 standardisation, 137, 159, 288, 290
 State Pharmaceutical Corporation (SPC), 337
 stateless persons, 149, 171
 supremacy of the Constitution, 184, 186
 Supreme Court, 9, 10, 27, 28, 36, 43, 44, 48, 58, 62, 68, 75, 76, 81, 107, 108,
 109, 110, 112, 113, 122, 126, 135, 139, 148, 163, 169, 170, 175, 180, 181,
 183, 339, 356, 358
 swabasha policy, 287

Termination of Employment (Special Provisions) Act, 352, 354, 355, 356
 tiered quota system, 292
 torture, 7, 25, 26, 27, 28, 30, 39, 84, 101, 238, 257
 trade unions, 365
 transparency, 85, 95

UN

Children's Fund (UNICEF), 198, 205, 250, 337
 Commission on Human Rights, 19
 Committee against Torture, 26
 Decade of Disabled Persons, 317
 High Commissioner for Refugees, 16
 Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions,
 10, 13, 15, 19, 20, 21, 22, 26, 35, 40, 241
 Working Group on Enforced or Involuntary Disappearances, 30, 40
 uncleared areas, 239, 240, 345, 346
 under-privileged districts, 265, 277, 285, 289, 291, 292
 unemployment, 138, 234, 264, 283, 284, 285, 304, 318
 unequal treatment, 93
 United National Party (UNP), 2, 7, 49, 77, 119, 357
 Universal Declaration of Human Rights, 266, 318, 319
 Universities Act of 1978, 272, 310
 University
 admission policy, 292
 entrance, 287, 288, 289, 290, 292, 304
 Grants Commission (UGC), 272, 310
 Teachers for Human Rights (Jaffna), 14, 15, 16, 17, 23, 25, 241
 Urban Development Authority Law, 66

US State Department, 6, 10, 17, 24, 25, 29, 31

vernacular languages, 285, 299

violation

of human rights and harassment, 114, 255

of terms and conditions of employment, 351

violence against women, 246

Wages Boards Ordinance, 155, 352 357

whooping cough, 337, 338, 339

women, 8, 123, 125, 131, 135, 138, 148, 150, 152, 155, 156, 157, 158, 170,

172, 185, 187, 200, 205, 215, 220, 222, 225, 334, 361

in employment, 155

migrant workers, 222, 224, 227, 228

Women's

Charter, 156, 163, 172

concerns as a basic issue of human rights, 125

equality of opportunity, 138

Workers'

Compensation Ordinance, 352

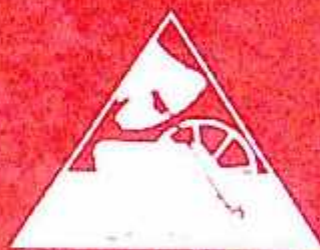
rights, 9, 350, 351, 353, 355, 363

World Health Organisation (WHO), 317, 335, 338, 345, 348

Sri Lanka: State of Human Rights 1998

This is a detailed account of the state of human rights in Sri Lanka focusing on events which occurred in the country in 1997.

The report considers civil and political rights in relation to the integrity of the person; freedom of expression and media freedom; emergency rule and judicial protection of human rights. Separate chapters are devoted to internally displaced persons; rights of persons with disabilities; equal opportunity; children's rights; migrant women workers; workers' rights; right to health; and education. The report also discusses the fundamental rights chapter of the proposed Constitution. The report therefore 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
e-mail: lst@slt.lk

ISBN 955-9062-53-0