Sri Lanka: State of Human Rights 1999

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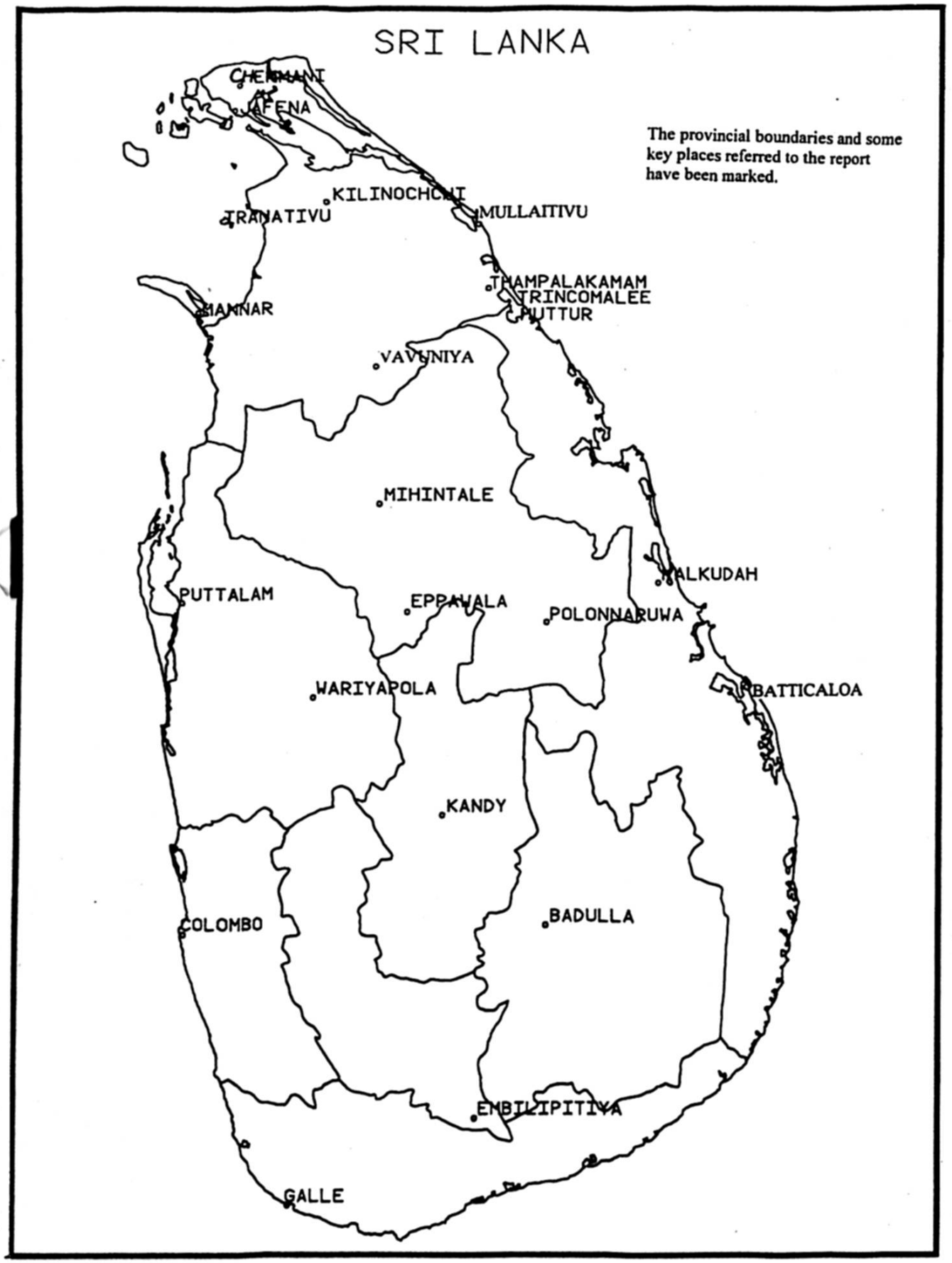
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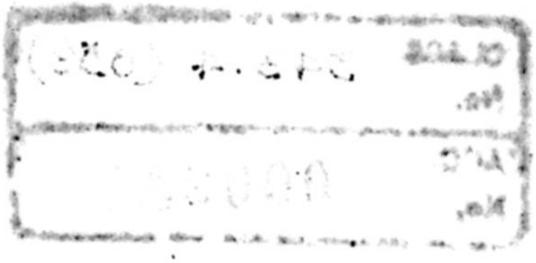
SRI LANKA:
STATE OF HUMAN RIGHTS
1999

This report covers the period
January to December 1998



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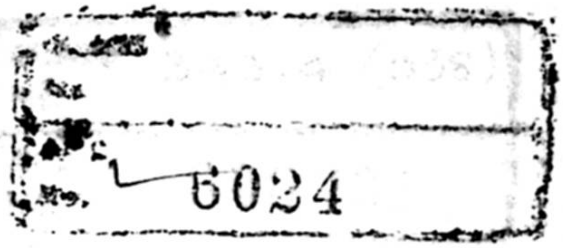

In memory of Dr. Neelan Tiruchelvam,
who was the driving force behind this report.
His vision will continue to inspire us
in the cause of human rights.

Dr Neelan Tiruchelvam, Director, Law & Trust Society Trust and Member of Parliament, was brutally and senselessly assassinated by a suicide bomber on 29th July 1999, while on his way to work. Dr Tiruchelvam was tireless in his efforts to promote human rights in Sri Lanka.

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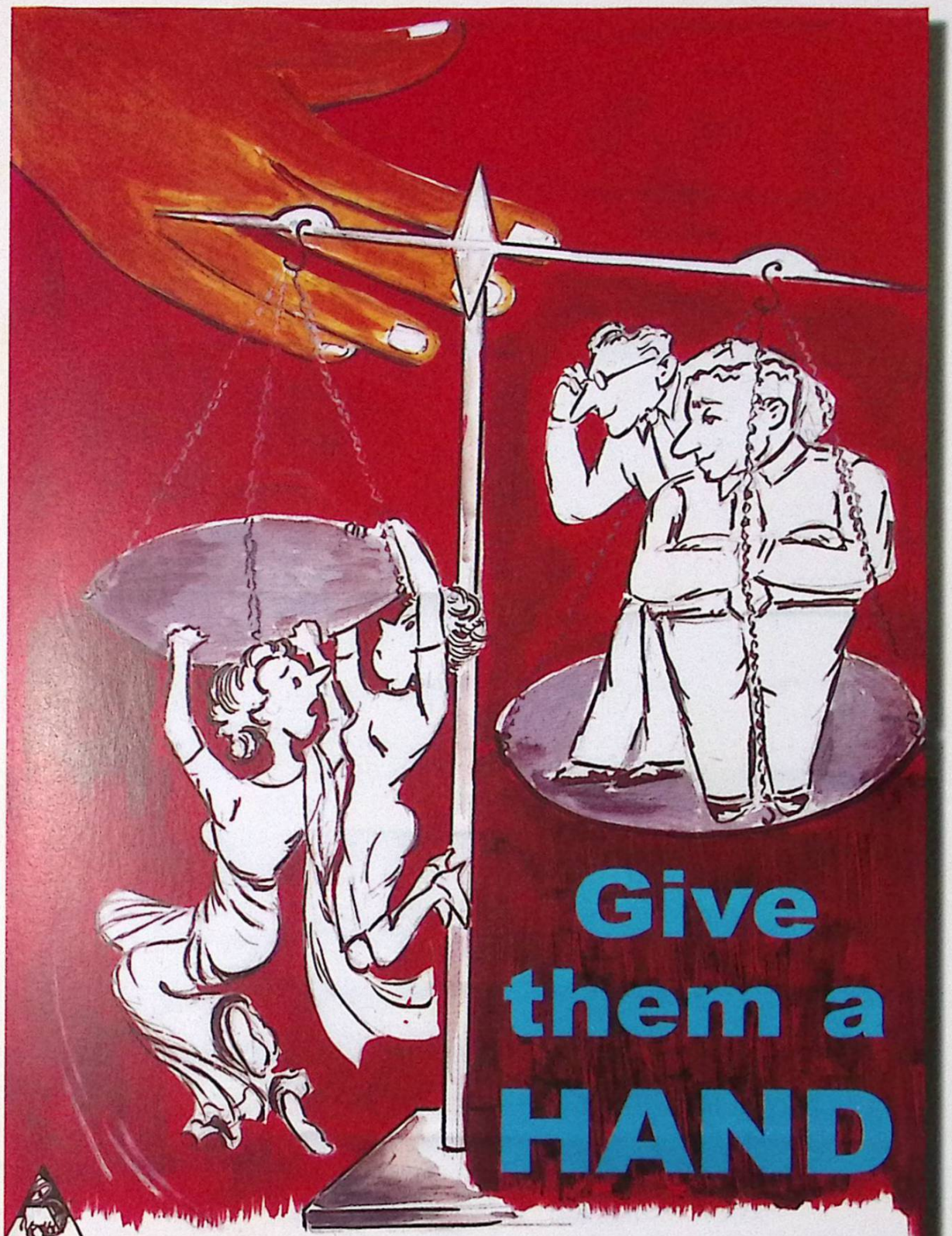
Abbreviations

ADIC	*Alcohol and Drug Information Centre*
A/Level	*Advanced Level (of the General Certificate of Education Examination)*
AG	*Attorney General*
AI	*Amnesty International*
AIDS	*Acquired Immuno-Deficiency Syndrome*
BOI	*Board of Investment*
CDB	*Crime Detection Bureau*
CAT	*Convention Against Torture*
CEB	*Ceylon Electricity Board*
CEDAW	*Convention on the Elimination of all Forms of Discrimination Against Women*
CHA	*Consortium of Humanitarian Agencies*
CID	*Criminal Investigations Department*
CPA	*Centre for Policy Alternatives*
CRC	*Convention on the Rights of the Child*
CRM	*Civil Rights Movement*
DIG	*Deputy Inspector General of Police*
EFL	*Environmental Foundation Ltd.*
EMPPR	*Emergency (Miscellaneous Provisions and Powers) Regulations*
EPDP	*Eelam People's Democratic Party*
FMM	*Free Media Movement*
FONGOADA	*Federation of Non-Governmental Organizations Against Drug Abuse*
FTZ	*Free Trade Zone*
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*
ICJ	*International Commission of Jurists*
ICRC	*International Committee of the Red Cross*
IGP	*Inspector General of Police*
ITN	*Independent Television Network*
JSC	*Judicial Services Commission*
JVP	*Janatha Vimukthi Peramuna*
LSSP	*Lanka Sama Samaja Party*
LTTE	*Liberation Tigers of Tamil Eelam*
NFEP	*Non-Formal Education Programme*
NCPA	*National Child Protection Authority*
NGOs	*Non-Governmental Organisations*
NSSP	*Nava Sama Samaja Party*
NWC	*National Committee on Women*
O/Level	*Ordinary Level (of the General Certificate of Education Examination)*
PA	*People's Alliance*
PSO	*Public Security Ordinance*
PTA	*Prevention of Terrorism Act*
SAARC	*South Asian Association for Regional Co-operation*
SACEP	*South Asia Co-operative Environment Programme*
SLANA	*Sri Lanka Anti Narcotics Association*
SLBC	*Sri Lanka Broadcasting Corporation*
SLBFE	*Sri Lanka Bureau of Foreign Employment*
SLMC	*Sri Lanka Muslim Congress*
SLRC	*Sri Lanka Rupavahini Corporation*

SPC	*State Pharmaceuticals Corporation*
STF	*Special Task Force*
TULF	*Tamil United Liberation Front*
UDHR	*Universal Declaration of Human Rights*
UN	*United Nations*
UNFPA	*United Nations Population Fund*
UNHCR	*United Nations High Commissioner for Refugees*
UNICEF	*United Nations Children's Fund*
UNP	*United National Party*
UTHR(J)	*University Teachers for Human Rights (Jaffna)*
VSSO	*Voluntary Social Service Organizations (Registration and Supervision) Act*
WHO	*World Health Organisation*



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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 information, judicial protection of human rights, and emergency rule. In addition, separate chapters are devoted to children's rights, women's rights, independence of the judiciary, mental health, and crime and state responsibility.

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 1998.

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.

Law & Society Trust
Colombo
July 1999

I

Overview

*Elizabeth Nissan**

1. Introduction

Sri Lanka celebrated its fiftieth year of independence from Great Britain in February 1998 against the backdrop of continuing conflict in the North and East. While the conflict clearly affects the lives of those living within the North and East most intensely, it also has serious repercussions on the lives of people living in all other parts of the island. Perhaps the most devastating reminder of this fact was the bombing of the Temple of the Tooth in Kandy, attributed to the Liberation Tigers of Tamil Eelam (LTTE), a few days before the national independence day celebrations were due to be held

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* Freelance Human Rights Lawyer, Specialist on Sri Lanka.

there. The LTTE was subsequently banned under emergency regulations.[1]

The continuing conflict has a most serious impact on the protection of human rights throughout Sri Lanka. With the war effort intensifying yet again in 1998, it continued to provide the context for massive displacement of the civilian population of the North and East, for grave violations of the right to integrity of the person, and for massive loss of life among combatants. In September 1998 alone it was estimated that over 2,000 combatants from both sides had been killed. Reports of torture, extrajudicial killings and disappearances continued, as discussed in the chapter on the Integrity of the Person.

Given the grave impact of the war on the whole range of human rights protection in Sri Lanka, it is imperative that a means be found to create peace. Yet in 1998 the prospects for peace remained as remote as ever. There was no movement towards implementing or further developing the devolution package which the People's Alliance (PA) Government had presented in October 1997. The opposition United National Party (UNP) remained opposed to the package and presented its own alternative. The LTTE also did not appear to support it. However, during "Heroes Week" in November, the leader of the LTTE reportedly declared his readiness to start peace negotiations, and several foreign governments offered their assistance should it be desired.

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[1] See chapter III on Emergency Rule.

There were some new initiatives from within civil society, including from a consortium of major Sri Lankan business groups which came forward in October with a ten-point programme for peace. The group held intensive discussions with both the PA and the UNP, and the PA nominated four eminent persons to pursue this peace initiative. The UNP, however, did not co-operate.

This volume contains chapters on a range of important human rights issues in Sri Lanka: the Integrity of the Person, Judicial Protection of Human Rights, the Children's Rights, the Rights of Women, Mental Health, Crime, Freedom of Information and the Independence of the Judiciary. It also contains updates on environmental protection, the freedom of association, the rights of the internally displaced, health, workers and the freedom of expression. Some of the salient themes are drawn out in this overview, particularly those relating to the conflict and human rights and to topics which have been included in this *State of Human Rights* volume for the first time. The Overview also provides a summary of international developments relating to Sri Lanka's human rights obligations.

2. The Conflict and Human Rights

The situation of people displaced by the conflict remained dire, and was highlighted in the report on Sri Lanka of the UN Committee on Economic, Social and Cultural Rights. People living in large parts of the North and East remain particularly vulnerable to abuse, and are unable to access a wide range of rights to the extent that they are enjoyed in many other parts of the country. Not only is access to food, shelter, education and health services limited for many displaced

people, but reports of forced labour in the conflict zones are becoming more widespread. In addressing these issues, the Government needs to find approaches to protect the rights of the displaced that are consistent with the recommendations of the Special Representative of the UN Secretary General on Internally Displaced Persons, Francis Deng.[2] He stresses the importance of addressing the root causes of displacement by promoting the peaceful resolution of internal conflicts, and of creating development-oriented strategies to situations of internal displacement. In addition, the Representative presented a set of "Guiding Principals on Internal Displacement" to the UN Commission on Human Rights in February 1998.[3] These stress that internally displaced persons "shall enjoy, in full equality, the same rights and freedoms under international and domestic law as do other persons in their country" and, *inter alia*, set out both the specific obligations of national authorities towards the internally displaced and the particular rights which are most vulnerable and in need of protection in situations of displacement. It is to be hoped that the Sri Lankan authorities will integrate these guiding principles into all aspects of policy concerning the internally displaced.

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[2] Francis Deng, Report of the Special Representative of the UN Secretary General on Internally Displaced Persons, submitted to the 52nd Session of the Commission on Human Rights, E/CN.4/1996 /52 (22 February 1996). See also *Sri Lanka: State of Human Rights 1995* (Law & Society Trust, Colombo, 1996), chapter X.

[3] "Further Promotion and Encouragement of Human Rights and Fundamental Freedoms, Including the Question of the Programme and Methods of Work of the Commission on Human Rights, Mass Exoduses and Displaced Persons," E/CN.4/1998/53/Add.2, 11 February 1998.

The issue of impunity has been high on the human rights agenda in Sri Lanka for many years. In the few cases of extrajudicial execution or disappearance where charges had been brought, trials dragged on for years and then failed to reach a satisfactory verdict. In July 1998, however, a verdict was reached in the Krishanthi Kumaraswamy case which had received much widespread publicity: six soldiers and a reserve policeman were convicted of the murder of Krishanthi and of her mother, brother and neighbour. Hailed as a landmark judgment, it is to be hoped that this case will represent the beginning of the end of Sri Lanka's culture of impunity. As discussed in the chapter on the Integrity of the Person, several more such cases remained under trial at the end of 1998.

Closely related to issues of impunity, of course, are forensic excavations of the sites of suspected mass graves in which victims of disappearance are believed to be buried. The revelations about a mass grave at Chemmani on the Jaffna peninsula, where the remains of hundreds of people who disappeared in 1996 are believed to be buried, have again brought these issues to the fore. The Government must do all it can to ensure that such excavations are carried out in a professional manner, using methods consistent with UN Guidelines on the Disinterment and Analysis of Skeletal Remains,[4] and ensuring proper co-ordination between the different agencies of the Government that may be involved. The evidence and any witnesses must be adequately protected. Depending on the findings, the Government must ensure

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[4] These guidelines are contained in the *Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions*, published by the UN. See "The Investigation of past Violations," *Sri Lanka: State of Human Rights 1994* (Law & Society Trust, Colombo, 1995), chapter VI.

the accountability of those persons responsible, and compensation and rehabilitation of the families of the victims.

Impunity has also been seen as a significant factor in the continuing and widespread practice of torture in Sri Lanka, whether in the context of the conflict or during the investigation of criminal or civil matters. The Supreme Court of Sri Lanka, the UN Committee against Torture, as well as local and international human rights organisations, have all called for the climate of impunity in relation to torture to be brought to an end. Yet to date there have still been no convictions for torture, although indictments have been filed by the Attorney-General against seven police officers against whom awards of compensation had been made by the Supreme Court. The Government needs to address this issue speedily and comprehensively, taking into account the range of measures recommended by both the UN Committee against Torture and Amnesty International.[5] These include reviewing legislation on detention; ensuring that legal safeguards against abuse are fully enforced; ensuring that complaints of torture are investigated by a body which is fully independent of the police; strengthening the remedies available to victims; and bringing to justice those who have been involved in acts of torture.

The conflict also had an impact on democratic practice in the country. In Jaffna, the first elections since the early 1980s were held in January 1998 to 17 local councils in an attempt by the Government to re-establish the seeds of a democratically elected civil administration. This effort was thwarted, however, when the Mayor

[5] Amnesty International, *Sri Lanka: Torture in custody*, AI Index: ASA 37/10/99, June 1999.

of Jaffna, Mrs Sarojini Yogeswaran, was assassinated by the LTTE in May. Her successor, Mr Ponnadurai Sivapalan, was killed just four months later when a bomb exploded at Nallur Municipal Office, Jaffna, in another attack widely attributed to the LTTE. Since then, in the face of threats emanating from the LTTE, the operation of the councils has been severely handicapped and the post of Mayor remains vacant.

In the South, too, the conflict has provided the pretext for an erosion of democratic standards. In June 1998, censorship on the reporting of various security matters was imposed under emergency powers for the third time under the PA administration, but this time with a military officer appointed as the Competent Authority to administer the censorship. In December 1998, a new civilian Competent Authority was appointed. Again, the scope of the censorship regulations far exceeds the legitimate limits envisaged under international human rights law within which censorship can be imposed for reasons of national security.[6]

In a move that the Supreme Court subsequently ruled to have been unconstitutional, emergency powers were invoked in August 1998 to postpone the elections that were due to five Provincial Councils. The Government had claimed that it could not provide adequate security for the elections to be held, at a time when the army was deployed in a critical offensive in the North. In August, emergency rule was re-imposed throughout the whole country.

The uncertain legal status of aspects of emergency rule in Sri Lanka is discussed in chapter III. A particular concern relates to the implications of changes to the areas of the island in which a state of emergency is

[6] See chapter III on Emergency Rule and chapter XI on Other Developments.

in force. For example, regulations relating to arrest and detention, which were introduced when the emergency applied only to specified areas of the country, could be enforced only within those areas. When the area is extended, however, what is the status of such regulations if they are not re-promulgated? As explained in the chapter on Emergency Rule, "There has hitherto been an unspoken assumption that existing emergency regulations overflow their geographical boundaries along with the extension of Part II to other parts of the country. This remains to be tested in the courts." Another enduring problem with the regulations is that they continue to be inaccessible to the general public and to practitioners of law, despite complaints having been made on this matter over many years. It thus remained very difficult to know the content of the law in force at any given time.

3. The Judiciary and Human Rights

This volume contains chapters and 'updates' on a number of issues which have been covered in previous editions, and on a number of new topics. The chapters which examine the performance of the Supreme Court in protecting human rights, and the independence of the judiciary as a whole, provide a heartening picture of judicial activism and *de facto* independence at the highest levels. Previous volumes have already stressed the important role played by the Supreme Court in its vigorous defence of fundamental rights, but this is the first time that the issue of judicial independence has been scrutinised in a *State of Human Rights* report. Certainly there is scope and need for institutional reforms to enhance judicial independence in Sri Lanka. But as expressed by the author of chapter VIII, Sri Lanka's judiciary is increasingly assertive in the defence of its own independence:

"to preserve one's independence in judicial office in spite of very grave institutional imperfections is to reach the very heights of judicial integrity."

This is not to say that remedies available for victims of human rights violations are adequate. They are not. However forthright the Supreme Court may be in its judgments on fundamental rights, they continue to fail to have the desired impact. Cases of torture continue to be brought before the Court; illegal detentions and other violations continue. The Human Rights Commission of Sri Lanka, which was established in 1997, has failed to have much impact and has yet to fulfil its mandate. As pointed out in the chapter on Emergency Rule with reference to abuse of powers of arrest and detention, "Providing for individual remedies is important but is manifestly not enough... [A]n effective mechanism is needed which does not depend on individual complaints to set it in motion."

In other respects, also, the judicial system does not always appear to operate in the defence of human rights. Reference has already been made to the very long delays experienced in the trials of suspected perpetrators of grave human rights violations, for example; in other cases, too, delay appears the norm. Indeed, in the chapter on Crime, the judicial system at lower levels is seen as failing in several respects.

4. Freedom of Information

While freedoms of expression and of the media have been addressed in each successive *State of Human Rights* report, this volume includes, for the first time, a chapter devoted exclusively to the important topic of freedom of information. Along with almost all the other promised reforms relating to freedom of expression, the legislative agenda on

freedom of information has stalled. It is most important for the Government to move forward on this issue swiftly, to create the conditions for an open, plural democracy in Sri Lanka. Instead, these crucial issues appear to have been allowed to languish for too long in a Parliamentary Select Committee process that has no clear end in sight.

5. Crime and Mental Health

Two further subjects which have not previously been discussed in *State of Human Rights* reports are crime and mental health. Crime is increasingly perceived as a major social problem in Sri Lanka, but is not often examined in a human rights framework. The chapter on crime in this volume attempts to do this, concluding that for the issue to be addressed properly, a thorough overhaul of all aspects of the criminal justice system is needed.

Finally, issues relating to Sri Lanka's woeful provision of mental health services are examined in chapter IX. This chapter reviews existing provision in various areas of mental health, as well as examining the legislative framework for mental health provision. While various mental health plans have been developed over the years, they have not been implemented. Mental health appears to remain a low priority for the Government, despite the very evident need for the provision of specialised services which are based on respect for patients' rights, rather than a preoccupation with their custody.

6. International Developments

Sri Lanka did not ratify any international human rights instruments during 1998. Although it was due to report to the Committee on the Rights of the Child in 1998, it failed to do so. However, the Government's reports to both the UN Committee on Economic, Social and Cultural Rights and the UN Committee against Torture were scrutinised during 1998, and the Special Representative of the UN Secretary-General for Children and Armed Conflict visited Sri Lanka in May.

6.1 UN Committee on Economic, Social and Cultural Rights

Sri Lanka's adherence to the International Covenant on Economic, Social and Cultural Rights was scrutinised by the relevant UN Committee in April 1998. In its concluding observations,[7] the Committee on Economic, Social and Cultural Rights noted its appreciation of Sri Lanka's co-operation with international humanitarian agencies, and the country's relatively high human development index rating as compared to other countries in the same income group. As its principal subjects of concern, the Committee highlighted the continuing conflict between the Government and the LTTE, and regretted that statistical data relating to the North and East had not been incorporated into the Government's report.[8]

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[7] "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," E/C. 12/1/Add. 24, 13 May 1998.

[8] For further discussion of this point, see "Overview," in *Sri Lanka: State of Human Rights 1998* (Law & Society Trust, Colombo, 1998), pp 3-6.

It expressed grave concern about the plight of the hundreds of thousands of people displaced from their homes by the conflict, at reports of that displaced women and children living in shelters are undernourished, and that the Government may be withholding food assistance as a kind of weapon.

The second of the Committee's principal subjects of concern was discrimination, relating especially to the uncertain status of some 85,000 Tamils of recent Indian origin living in Sri Lanka, as well as to disparities in statutory law and customary law relating to marriage and inheritance. The Committee also noted the lack of anti-discrimination mechanisms in the area of employment relating to women and minority groups.

Women and children provided the focus for the Committee's third principal subject of concern. In relation to children, the Committee deplored the fact that Sri Lanka's child labour laws are not effectively implemented, and expressed deep concern about the sexual exploitation of Sri Lankan children by foreign tourists. It regretted that the Government had provided neither detailed information on the extent of this problem, nor a satisfactory account of how serious its efforts were to combat it. The Committee further expressed concern that the Government had not made a serious effort to assess the negative impact of labour migration on children whose mothers have travelled abroad to work, and to take appropriate remedial action. With regard to the high rate of youth suicide in Sri Lanka, the Committee regretted that the Government had failed to comply with its obligations under Article 19 to protect the family, and under Article 12, which requires States Parties to take steps to achieve the highest attainable standards of physical and mental health.

6.2 Report of the UN Committee against Torture

In May 1998, the Committee against Torture completed its scrutiny of Sri Lanka's compliance with the UN Torture Convention.[9] It called for the independent and effective investigation of all allegations of torture, past, present and future, and for prompt criminal prosecutions and disciplinary proceedings against culprits. Impunity should not be tolerated, and delays in justice should be reduced. The Committee expressed concern that there had been few, if any, prosecutions or disciplinary proceedings so far, despite continuous warnings by the Supreme Court and awards of damages to victims. It also expressed concern about the admissibility under emergency regulations of confessions extracted by torture. While it recognised that the continuing conflict was a factor which impeded the implementation of the Convention against Torture in the country, it stressed that terrorism could not be cited as an excuse for acts of torture.

6.3 Visit to Sri Lanka by Special Representative of the UN Secretary-General

The Special Representative of the UN Secretary-General for Children and Armed Conflict, Olara Otunnu, visited Sri Lanka in May 1998 to investigate matters relating to the use of children in armed conflict. He met with representatives from the Government, humanitarian agencies, local government officials in affected areas and also with two senior representatives appointed by the LTTE. His visit, and the commitments made by the parties to the conflict, are

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[9] "Committee Against Torture Gives Conclusions and Recommendations on Report of Sri Lanka," HR/CAT/98/24, 19 May 1998.

discussed in the chapter on Children's Rights. Of particular significance was the undertaking made to him by the LTTE that they would not use children under 18 years of age in combat, and that they would not recruit children aged under 17 years at all.[10] The LTTE further undertook, among other things, to review its strategies and tactics with regard to the targeting of civilian populations and sites throughout the country.[11]

7. Conclusion

As ever, the intention of this volume is to provide a summary of the state of a wide range of human rights in the year under review, and by doing so, to stimulate debate and promote action towards positive reforms. Human rights need to be given far greater priority by the Government in all areas of policy making, and care needs to be taken by all involved in human rights protection to ensure that these issues do not get enmeshed in inter-party politicking. In areas where reforms have been enacted, we must not make the mistake of assuming that effective reform has, therefore, been effected. Legislative change and the creation of new institutions are important parts of a longer process of genuine reform. If they are to provide the impetus for real change which will improve the quality of people's lives, however, a determined and consistent effort must be made to ensure that laws are properly implemented and that institutions are properly resourced and

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[10] Extracts from the report reproduced in *LST Review*, Vol 9, Issue 133 (Law & Society Trust, Colombo, November 1998), p 37.

[11] Office of the Special Representative of the Secretary-General for Children and Armed Conflict, Press Release, SRSG-CAC/PR/4, 8 May 1998.

empowered. Laws to protect children, for example, still need to be rigorously enforced or they have no impact; and a new institution like the Human Rights Commission needs to be properly resourced, empowered and committed to tackle effectively the full range of its responsibilities.

It is to be hoped that this volume will stimulate debate and help raise the profile of human rights issues within Sri Lanka for the benefit of all who live on the island. Civil society organisations have a crucial role to play in providing documentation and analysis of human rights issues, in promoting public awareness and reform and in maintaining a vigilant stance on matters of government policy and its implementation. Yet ultimately it must be the Government which should take the steps necessary to ensure that a rights perspective is incorporated into all aspects of policy making and practice. We have witnessed an increasing awareness of rights issues in certain policy areas – including in debates and reforms relating to women and children. But as this volume shows, there remains very much more to be done.

II

Integrity of the Person

Sumudu Atapattu[*]

This chapter seeks to survey the developments, both negative and positive, relating to the integrity of the person during 1998. It will discuss any legislative initiatives taken by the Government, significant events relating to the integrity of the person during the year under review and suggest recommendations for the improvement of Sri Lanka's human rights record.

1. The Intensification of the Military Operation

Any assessment of the human rights situation in Sri Lanka must be discussed against the backdrop of the military operation, during which many human rights violations continued to be committed.

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The LTTE continued to resist and retaliate against the military. The human cost of the conflict was appalling. The true numbers cannot be ascertained with certainty as both sides tend to down-play the number of their own casualties and exaggerate the number of enemy casualties. In addition, the censorship of military news makes it all the more difficult to ascertain the exact figure of fatalities and casualties. No statistics are available of the number of people who have been disabled as a result of the conflict, either.

September was perhaps the worst month in the recent history of the conflict. In September alone, the death toll from both sides is believed to have exceeded 2,000 in the confrontation at Killinochchi[1] although, again, the exact figure is not known. The LTTE handed over 600 bodies of military personnel killed that month to the ICRC in Vavuniya.[2] In the meantime, the security forces captured the town of Mankulam where again there were high casualties.[3]

2. Extrajudicial Killings by the Military

Reports of extra-judicial killings by the armed forces continued during the year, although it was difficult to ascertain the exact number of victims of extrajudicial killing during 1998. According to the US State Department Report, at least 33 extrajudicial killings took place in the Eastern Province and in the Vavuniya area, while at least 18 more people were killed near the army's forward defence lines near Vavuniya, Mannar and Killinochchi. However, the report

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1 INFORM Situation Report, September 1998, p 7.

2 *Ibid.*

3 *Ibid.*

acknowledges that it is impossible to ascertain the exact number of such killings due to the censorship of news relating to military operations.[4]

Amnesty International recorded the killing of eight Tamil civilians, including three teenagers, who were allegedly shot at close range by police and home guards at Tampalakamam in February.[5] Amnesty described this incident as "deplorable" and called upon the authorities to take the necessary action to ensure that those responsible are brought to justice as soon as possible.

In September, 26 year old G. Anton Gunasekeran, the owner of a video shop in Gurunagar, was taken into custody by the army. His body was handed over to the Jaffna Teaching Hospital two days later. It was alleged by the army that he had committed suicide by jumping out of the window while being interrogated. Following a complaint by his father, the Additional Magistrate of Jaffna ordered that the Captain and Lieutenant serving at the Sinnakade army check point be arrested. He also ordered the exhumation of the body and a forensic examination of the remains.[6]

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[4] US Department of State, "Sri Lanka Country Report on Human Rights Practices for 1998" (Washington DC, 26 February 1999) p 4 (hereinafter referred to as "US State Department Report").

[5] AI Index: ASA 37/2/98.

[6] INFORM Situation Report, September 1998, p 9. Captain Bartholomeus and Lieutinant Rajamanthri were released on cash bail of Rs 15,000/- and personal surety of Rs 25,000/- by the Magistrate of Jaffna, Mr Ekanathan, *Virakesari*, 20 February 1999.

In another incident in October, a person named Iyanthurai Inbaraja, who had gone to the Kalkudah army camp to report for registration, did not return. Several days later, due to persistent agitation by his parents, his body was found buried on the premises of the camp with two gun shot wounds. It is not clear what action has been taken with regard to this incident.[7]

From some accounts, the situation in the East deteriorated during 1998. In February, eight youth were taken into custody from a house close to the Bharanthipuram police post by the police officers there. Their bodies were found the next day. Soon after the incident the Military Commander of Trincomalee, Brigadier Jayakody, gave an assurance that those responsible would be punished. At the identification parade, 39 suspects were identified by witnesses: 21 home guards, 17 police officers and a civilian. When the suspects were produced before the District Judge, he further remanded 21 of them while the others were released on bail.[8]

In the incident in Thampalakamma in the Trincomalee district in February, eight Tamil civilians including three children were massacred, possibly in reprisal for the LTTE bombing of the Temple of the Tooth in January. Thirty one police officers and 10 home guards were taken into custody in this connection.[9]

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7 INFORM Situation Report, October 1998, p 10. No further details were available at the time of writing.

8 INFORM Situation Report, February 1998, p 9.

9 *Supra* n 4, p 4.

3. The Alleged Mass Burials at Chemmani in the North

During the trial of those suspected of the rape and murder of Krishanthi Kumaraswamy,[10] two of the accused divulged information of a mass burial site at Chemmani near the place where the remains of Krishanthy and her family were found. They said that several hundred human bodies had been buried there by the security forces in 1996.

The Civil Rights Movement (CRM) called upon the Government to take urgent steps to test the veracity of this information and to ensure that the site is excavated with proper expertise, possibly with the involvement of UN or other international experts. It further stated:

> *This allegation has to be considered in the context of reports that several hundred persons have "disappeared" in the North subsequent to the armed forces taking control of the Jaffna peninsula in mid 1996, many of whom remain unaccounted for.*[11]

Several representations were made to the Human Rights Commission of Sri Lanka (HRC) by members of parliament, NGOs and the general public. In Jaffna, an association called "Guardians and Parents of those Arrested and Later Disappeared" (GAPALD) was formed. It threatened to launch a fast-unto-death if the Government failed to take effective action with regard to this issue.[12]

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[10] For details of this case, see *Sri Lanka: State of Human Rights 1997* (Law & Society Trust, Colombo, 1997), pp 21 and 185.

[11] "The Alleged Mass Burials at Chemmany (sic) in the North - CRM Stresses Need for Scientific Investigation," CRM, E/02/7/98.

[12] "Fast-unto-Death Threat over Delay in Chemmani Graves Inquiry," *Island*, 9 October 1998.

Although it was reported in June that the HRC was expected to fly to Jaffna with forensic experts "soon" to excavate the alleged mass grave at Chemmani,[13] by the end of the year no such visit had taken place. The failure of the Government to take any concrete steps to investigate this matter for over six months is unacceptable.

Amnesty International (AI) too appealed to the Attorney-General to allow the CID and the HRC to conduct joint preliminary investigations into the alleged mass graves with the help of forensic experts in the country. According to AI, "Chemmani is alleged to be a place where scores of bodies of people who "disappeared" in mid-1996 have been clandestinely buried."[14] They also urged that the assistance of international experts with experience in exhumation of mass graves be sought to help the local experts as "the exhumation of bodies piled on top of each other in restricted areas .... is one of the most complex forms of exhumation to carry out."[15]

Although media and public attention on the mass grave site remained high, and the HRC reportedly sought the advice of foreign forensic experts, no investigation actually took place. In August, the Federation of NGOs in Jaffna requested that security in the area be tightened to protect the site from trespassers and that the re-opening of the graves be done in the presence of independent observers and judicial officers. The leader of the TULF called on the Chairman of the HRC to visit the site to ascertain the true facts.[16]

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[13] "Forensic Experts to Visit Chenmani (sic)," *Daily News*, 27 June 1998.

[14] Sri Lanka: Chemmani Graves Need Proper Investigation," Public Statement, AI Index: ASA/37/18/98 (3 August 1998)

[15] *Ibid.*

[16] INFORM Situation Report, August 1998, p 8.

Meanwhile, the suspect (who was by now found guilty of the alleged offences) who had divulged information on the alleged mass grave at Chemmani was assaulted in prison. Human rights groups, including Amnesty International, called upon the Government to ensure his safety.[17]

The discovery of a skeleton in a well on the premises of a school in Jaffna which had been occupied by the army led to concern that there may be other unidentified grave sites on the peninsula.[18]

The parents and family members of those who have disappeared on the peninsula mounted a vigil at the office of the HRC in Jaffna in September to protest against the lack of investigation. Following a statement made by the HRC, P. Selvarasa lodged a complaint with the Jaffna Magistrate's Court with regard to his son, who had disappeared after being arrested in July 1996 at the Chemmani check point. The family members, organised under the name of "Guardians and Parents of those Arrested and Later Disappeared," expressed concern that the monsoon might flood the gravesite making it impossible to reopen the graves.[19]

The suspension of air passage between Colombo and Jaffna contributed to the delay in conducting an investigation. The Attorney General invited AI to be present at the investigation, and AI in turn asked the Government and the LTTE to issue guarantees regarding the safety of those involved in the investigation.[20]

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17 *Ibid.*

18 *Ibid.*

19 INFORM Situation Report, September 1998, p 9.

20 INFORM Situation Report, October 1998, p 8.

Although William de Haglund, an international forensic expert, arrived in Colombo in December at the request of the Government to assist in the investigations, by the end of the year no progress had been made. The delays surrounding the investigation of the Chemanni site are totally unacceptable.

4. Arbitrary Killings by the LTTE

During 1998, several killings were attributed to the LTTE. The shooting down of a civilian plane in September, allegedly by the LTTE, was particularly shocking, and resulted in over 50 deaths.

The UTHR(J) examined the sequence of events leading to loss of the plane, and believed the LTTE were responsible. There were 48 passengers and seven crew members on board when the Lionair Flight 602 from Jaffna to Colombo went missing on 29 September. The security forces intercepted an LTTE radio message "from jubilant sounding cadre" that the aircraft had crashed into the sea off the coast of Mannar.

In order to find out the fate of the aircraft, Father Thevasahayampillai had visited the LTTE controlled area and talked to two fisherfolk who had seen the aircraft on fire, nose-diving into the sea near Iranativu, 15 miles north of Mannar Island. Six bodies had been recovered in a state of decay north of Iranativu and been buried. It was not, however, clear how the flight met its fate.

Threatening letters from the LTTE had been received by both Monara and Lionair bearing the letterhead of "Tamileelam Administrative Service," according to the UTHR(J) report. These ordered them to

stop co-operating with the armed forces and said they would face attack if they did not suspend flights to Jaffna after the 15th of September.

The UTHR(J) also verified another incident relating to the plane crash. The LTTE had erected a platform near the church on North Island in Iranativu and fisherfolk reported that two Sea Tiger boats had rushed to the area where the aircraft had plunged to the sea. It is believed that a missile was fired at the plane from this platform.

The UTHR(J) criticised the Government for its lack of co-operation in locating the aircraft or the missing persons and for suppressing information about the threats allegedly made by the LTTE. Above all, it admonished the Government for not offering even a word of sympathy for the victims or their families.

UTHR(J) also drew attention to the regular deviation by aircraft from the safe route approved by the Ministry of Defence. Although the authorities had known about this deviation, which was apparently intended to reduce flight time, they had taken no action to prevent such deviation.[21]

Other killings of civilians attributed to the LTTE included the killing of the recently elected Mayor of Jaffna, Sarojini Yogeswaran, who was shot at her residence; the TULF Jaffna Vice President, S. Namasivayam, who was killed at his residence in June; and two weeks later, the SLFP Jaffna Branch Secretary S. Oswald, who was shot

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[21] Information here is based on University Teachers for Human Rights (Jaffna), "Lionair Flight 602 from Jaffna: Crossing the Bar into the Twilight of Silence," UTHR(J) Information Bulletin No 10 (16.10.1998).

dead by an unidentified gunman at his residence;[22] Mayor of Jaffna Ponnadurai Sivapalan; Reverend Sridharan in Jaffna in November while at prayer; and Mr Pon Mathimugaraja, the Secretary of the TULF's Jaffna branch, who was shot dead by an unidentified gunman at a public function in Nallur, Jaffna, in December.

According to the US State Department Report, the LTTE carried out several public executions during 1998.[23] The LTTE also issued threats to the members of local government bodies to resign. Many did so, but those who resisted the demand were assassinated. In October, the EPDP member of the Karaveddy Pradeshiya Sabha - Kanagasabai Rasadorai - was shot dead by two unidentified gunmen.[24]

The LTTE also continued its attacks in the South and East. In January, a powerful bomb exploded in Kandy at the Temple of the Tooth - a sacred Buddhist shrine - killing 17 people and injuring many more. In February, a suicide bomber blew herself up at an Air Force check point in Colombo, killing nine people and in March a bomb exploded in a busy area in Maradana during the lunch hour, killing thirty two people, injuring about 235 and causing extensive damage to property.

5. Torture

The Government submitted its first report under the UN Convention Against Torture to the Committee against Torture in April 1998. The contents of the report and the submissions of the CRM were discussed in *Sri Lanka: State of Human Rights 1998*.[25]

[22] INFORM Situation Report, June 1998, p 7.

[23] *Supra* n 4, p 7.

[24] *Supra* n 7, p 8.

[25] (Law & Society Trust, Colombo, 1998) pp 26-29.

In response to the initial Report of Sri Lanka, the Committee against Torture expressed concern over the numerous reports of abuses, including torture linked with disappearances. While commending Sri Lanka for ratifying the Convention at a difficult period and for the Supreme Court's unequivocal stand with regard to payment of compensation to victims of torture, it called upon the Government to institute criminal proceedings against those who have committed acts of torture.[26] Among the recommendations of the Committee were:

- All allegations of torture be independently and effectively investigated;
- Delays in holding trials be reduced;
- The Human Rights Commission be strengthened:
- Review the Convention against Torture Act and other relevant laws to ensure compliance with the Convention;
- Review emergency regulations, the PTA as well as rules and practices of detention, to ensure that they conform with the provisions of the Convention;
- All action be taken to ensure that impunity will not be tolerated.
- A declaration be made under Articles 21 and 22 of the Convention.[27]

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[26] "Committee against Torture Gives Conclusions and Recommendations on Report of Sri Lanka," [HR/CAT/98/24], 19 May 1998.

[27] *Ibid.*

While noting that the present armed conflict, including frequent acts of terrorism, have impeded the implementation of the Convention, the Committee pointed out that terrorism should not be cited as an excuse for acts of torture.[28]

Several incidents of torture were reported during 1998. The HRC received 64 complaints for the months of January to June. It is not, however, clear that the complaints actually refer to incidents that took place during the year under review. Of these complaints, six specifically referred to 'torture' while the rest referred to 'assault.' In addition, in one instance, the detainee had died in the custody of the Peliyagoda police while another had complained of sexual harassment by the army.

Amnesty International recorded the torture of one Thambirajah Kamalathasan. He had been arrested by police on 15th July and tortured for several days.[29] In another incident in August a youth who was manacled hand and foot had entered the premises of a church in Vavuniya and had appealed to the priest to save his life. This man had escaped from a torture chamber operated by a Tamil militant group in the area. Following several complaints of the existence of such torture chambers, Amnesty International requested the President to take immediate steps to stop this practice.[30]

Amnesty International in a recent report, records several incidents of torture during 1997 and 1998. It states that recent information provided by the Committee to Inquire into Unlawful Arrests and

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28 *Ibid.*

29 Amnesty International, AI/ASA 37/21/98, 6 August 1998.

30 INFORM Situation Report, September 1998, pp 10-11.

Harassment established by the Government of Sri Lanka in July 1998, 47 complaints have been received by it.

The Attorney General's Department took the long-overdue step of filing indictments under the Convention against Torture Act. Seven indictments have been filed in the High Court against police officers found guilty of torture in fundamental rights cases filed against them.

According to the US State Department Report, humanitarian organisations have reported that "while torture and abuse by the security forces remained widespread, its use had diminished especially on the Jaffna pennisula;"[31] the LTTE, on the other hand, allegedly used torture regularly. The Report further stated that there were no reports of rape in detention.[32]

6. Disappearances

Reports of alleged disappearances continued in 1998, although here again, no exact figures are available. According to the statistics available at the HRC, it had received complaints of a total of 1,153 disappearances between January and October. Of these, 536 missing people had been traced.[33] However, it must be noted that these figures do not represent the number of disappearances which took place in these months, as many reports were of cases from earlier times.

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31 *Supra* n 4, p 10.

32 *Ibid* at p 11.

33 Information from the HRC.

The US State Department Report, on the other hand, records that there were no reports of disappearances in Colombo, Trincomalee and Jaffna, although disappearances at the hands of the security forces continued in the North and East. According to the Report, at least 11 of those who disappeared were last known to be in the custody of the security forces in Vavuniya while seven had disappeared after being seen near the Army's forward defence lines.[34] Amnesty International has documented 14 cases of disappearances for the year under review; no reports of disappearances have been recorded from Jaffna.[35] The UN Working Group on Enforced or Involuntary Disappearances in its report states that it transmitted 13 reported cases of disappearances to the Government of Sri Lanka during the period under review.[36]

It is believed that pro-government militants in the North and East were also responsible for disappearances. The US State Department Report records that according to human rights observers, "PLOTE is a major offender in the case of disappearances."[37] The LTTE was also believed responsible for a number of disappearances of civilians in the North and East during the year, although the exact figure was not available.

The new Presidential Commission of Inquiry into Disappearances and Involuntary Removal of Persons chaired by Ms Manouri Muttetuwegama began sittings in August. Its mandate is to investigate

[34] *Ibid* at p 8.

[35] *Amnesty International Report 1999* (1999) p 310.

[36] "Civil and Political Rights, Including Questions of Disappearances and Summary Executions," Report of the Working Group on Enforced or Involuntary Disappearances (28 December 1998) UN Committee on Human Rights, 55th Session, E/CN.4/1999/62.

[37] *Supra* n 4, p 9.

the cases of disappearances which had been reported to the three previous Commissions, but which they had been unable to investigate. It commenced sittings at Mihintale in Anuradhapura and at the Badulla Divisional Secretariat. In October it held sittings in Wariyapola, where 225 complaints of disappearances remained to be investigated.

The Commission announced in November that it had to postpone its planned visit to Jaffna as it could not trace many of the complainants because they had left their former places of residence. Attempts to trace them through the Government Agents and the ICRC had not been successful, and the Commission was planning to advertise for people to inform the Commission of their current addresses. The Commission held sittings in Trincomalee and Batticaloa during November. There were 12 uninvestigated cases for Trincomalee, 150 for Polonnaruwa and 34 for Batticaloa.[38]

7. Investigations into Alleged Violations and Trials of Perpetrators

The previous *State of Human Rights Reports* followed the progress of the Krishanthi Kumaraswamy case, which was heard by a Trial-at-Bar.[39] The case continued in 1998. Two accused escaped from custody, one of whom was still at large at the end of the year. The 9th accused was acquitted and turned a witness for the State. Another accused died in custody due to natural causes.

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[38] INFORM Situation Report, November 1998, p 10.

[39] See *Sri Lanka: State of Human Rights 1998* (Law & Society Trust, Colombo, 1998), pp 30-31.

On 3rd July the verdict was announced in a packed court house. Six soldiers and one reserve policeman, including the absconder, were found guilty of the murder of Krishanthi and her mother, brother and neighbour and were sentenced to death.[40] Three of the accused were also found guilty of abduction and were sentenced to 10 years rigorous imprisonment. The first five accused were found guilty of the rape of Krishanthi and were given a further sentence of 20 years rigorous imprisonment.[41] The Trial-at-Bar lasted a period of 20 months.

The verdict was welcomed by the international community as well as by the local human rights community. This was the first time that security forces personnel had been convicted for murder. Amnesty International issued a statement welcoming the verdict, calling it a landmark judgment. It further requested the reconsideration of the death sentence. The human rights community expressed hope that the judgment would send a clear message to the armed forces and the police that impunity will no longer be tolerated.

Meanwhile, a similar incident - the rape and murder of 18 year old Rajani Velilyumpillai of Kondavil in Jaffna, alleged to have committed on 30th September 1996 - was committed for trial at the Colombo High Court in July. Four soldiers are charged in this case.[42]

The trial of seven army officers in relation to the abduction and disappearance of school boys in Embilipitiya continued before the Ratnapura High Court Judge. The verdict is expected to be delivered in early 1999.

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[40] INFORM Situation Report, July 1998, p 10.

[41] *Ibid.*

[42] *Ibid.*

With regard to the Kumparapuram massacre, the Mutur Magistrate committed the accused in this case to trial at the High Court, on the basis that there was sufficient evidence to do so. In this case, six soldiers and two civilians are charged with the murder of 24 Tamil civilians and the attempted murder of 26 more in February 1996. There are 103 charges and 54 civilian witnesses.

With regard to the Mailatenne killings, in which 21 army personnel are on trial, the case is expected to commence in the High Court of Colombo in March 1999, seven years after the incident.[43]

The rape case of Sivajothy Krishnapillai, for which three STF members are charged, was taken up before the Batticoloa District Court in November. The accused are in remand. The incident took place in December 1996.

An inquest was held into the death in police custody of Sathasivam Sanjeevan, a 18 year old school boy. At the inquest held at the Kalmunai District Court, the deceased's father alleged that his son had been subjected to severe torture by the police while in their custody.[44]

8. The Work of the HRC

The HRC functioned through 1998 without much impact. It was highly criticised for its inaction in relation to the Chemmani graves.

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[43] See *Sri Lanka: State of Human Rights 1998* (Law & Society Trust, Colombo, 1998) p 32.

[44] INFORM Situation Report, December 1998, p 6.

According to the statistics of the HRC, a total of 1,499 arrests were reported to the HRC during the months from January and October. Of these, 756 arrests were in Vavuniya, while the Head Office and Jaffna branch received 324 and 152 reports of arrests respectively. The HRC had made 971 visits to police stations and 321 visits to detention centres, visiting a total of 3,837 detainees, most of whom were Tamil. The HRC received a total of 129 complaints regarding arrest and torture (or assault) during the period January to June.[45] The figures for the other six months were not available at the time of writing.

With regard to violations of fundamental rights, the HRC received a total of 1,272 complaints against the police and armed forces, and 2,663 complaints against other authorities. Of these complaints (3935), a total of 1,286 were disposed of during the first half of the year.[46]

9. New Measures Taken to Protect Human Rights

9.1 New legislation

Ragging in universities and other educational institutions, which escalated to unprecedented levels in recent years, resulted in two deaths in 1998. Public opinion against ragging mounted and the general consensus was that the Government ought to intervene by passing special legislation, even though general penal law is applicable to incidents of ragging. When the Bill was presented in Parliament, two petitions were filed in the Supreme Court under Article 121 of the

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[45] Information from the HRC.

[46] *Ibid*

Constitution alleging that certain provisions in the Bill contravened the fundamental rights chapter of the Constitution. The petitions were filed by the Inter-University Students' Federation of Sri Jayewardenepura University and by a student of the same university.

The Supreme Court found that some provisions did violate certain constitutional guarantees and suggested several amendments. The Court held that the definition of ragging was overbroad and that the provisions in the Bill on mandatory minimum sentences, automatic expulsion and disability and granting of bail were unconsitutional and should be amended. The Bill was modified accordingly and was subsequently passed.[47]

9.2 The establishment of the Anti Harassment Committee

A Special Presidential Committee was appointed in July to look into complaints of harassment made by Tamil civilians in Colombo.[48] The Anti Harassment Committee is headed by Minister Lakshman Jayakody. Other members are Ministers G.L. Peiris and Batty Weerakoon, and Members of Parliament P. Sambanthan (TULF), M.M. Zuhair (SLMC) and Douglas Devananda (EPDP). The IGP, the Army Commander and representatives of the Navy and the Air Force and the Attorney General's Department also participate in the Committee.

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[47] See *LST Review* (Law & Society Trust, Colombo) Vol 8, Issue 126 (April 1998).

[48] INFORM Situation Report, July 1998, p 4.

It was decided by the Committee that all arrests made under the emergency regulations and the PTA should be reported to the Attorney General through the DIG (Crimes). The mandate of the Committee is to inquire into instances of arrests and harassment of the public. It was also decided to set up a separate unit in the Police Department to assist in its activities. Headed by a DIG, this unit would be mandated to conduct investigations and to liaise between detainees and their families. A Senior State Counsel was assigned to function as the Legal Advisor to this unit.[49]

Several incidents of harassment of Tamil civilians living in Colombo and its suburbs were brought to the attention of the Committee. Indiscriminate arrest and detention remains the worst problem. Following repeated complaints in this regard, the Committee issued instructions to the police setting out guidelines to be followed with regard to search operations leading to arrest and detention. These included that a certificate should be issued immediately upon arrest by the armed forces in Colombo or the suburbs and that the forces should refrain from carrying out large-scale cordon and search operations at night. Plans were also made to create a database to prevent the same person being repeatedly arrested and detained.

The Committee decided to change its name to "The Committee of Inquiry into Undue Arrest and Harassment." It also initiated inquiries into allegations of harassment made against four policemen.[50]

Numerous complaints made to the Committee concerned problems created by the regulations requiring registration of temporary residents

[49] INFORM Situation Report, August 1998, p 9.

[50] INFORM Situation Report, September 1998, p 12.

in Colombo. Although the Committee announced that the police would put a new set of regulations in place, concern was expressed that the new requirements were even more complicated and cumbersome than the previous ones.[51]

It may be recalled that the Human Rights Task Force (HRTF) which was dissolved in 1997 carried out exactly the same functions now entrusted to the new Anti Harassment Committee. It is ironical that less than two years after the dissolution of the HRTF (which was highly criticised by the human rights community), on the pretext that its functions were being absorbed into the HRC, the Government had to establish another committee to look after the welfare of the detainees. In addition, the establishment of the Committee also demonstrates the inability of the HRC to fulfil its mandate fully.

10. Conclusions and Recommendations

While it seems that the security forces were more restrained in their conduct and generally adhered to international humanitarian norms (in which they undergo training), violations still occurred, although arguably civilian casualties decreased. The LTTE, on the other hand, continued to use excessive force, kill informants and to recruit children as combatants. Parties to the conflict must refrain from attacking civilians and civilian objects, particularly places of worship and cultural significance, and must also refrain from carrying out reprisal attacks in violation of humanitarian principles.

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[51] INFORM Situation Report, December 1998, p 10.

It is of particular concern that disappearances and torture continue to take place. It is hard to assess whether their frequency has reduced as accurate information is lacking. The statistics available at the HRC and the number of fundamental rights petitions filed under Article 11 indicate that torture is not a thing in the past. It is heartening to note that the Attorney-General has, at long last, filed seven indictments under the Convention against Torture Act of 1994 against police officers against whom awards of compensation had been made by the Supreme Court. While this represents only a fraction of the number of cases of alleged torture and ill-treatment, and the indictments were filed ***five years*** after passing the legislation, it is hoped that this step will contribute towards eliminating the culture of impunity in Sri Lanka. The Government must send a clear message that impunity will not be tolerated in any circumstance.

We reiterate the recommendations that we made in our previous reports.[52] It is no secret that many human rights violations take place in the context of the armed conflict. Unless a peaceful solution to the ethnic conflict is found, these violations will continue and those who are internally displaced will continue to suffer in many respects.

The State as the guardian of human rights must ensure that its subordinate branches of government respect human rights and that they are transparent in their activities, particularly in relation to the actions by the security forces; those who violate basic norms of human rights and humanitarian law must be severely dealt with.

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[52] See *Sri Lanka: State of Human Rights 1998* (Law & Society Trust, Colombo, 1998), pp 39-41.

The year 1998 marked the fiftieth anniversary of the adoption of the UDHR. This is a good time to reflect upon its provisions, and to make a pledge to the people that the commitments made therein do not remain only on paper.

III

Emergency Rule

*Suriya Wickremasinghe**

1. Introduction

During the course of 1998 emergency rule was extended to cover the whole country, elections due to five Provincial Councils were postponed, and the Liberation Tigers of Tamil Eelam (LTTE) was banned. Censorship of military news was re-imposed, and a new ban on publishing certain types of photographs was introduced. Judicial challenges to the exercise of emergency powers continued, and in several interesting cases the judgments provided a perturbing insight into the basis on which arrests and detentions take place.

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2. Extension of Emergency Islandwide

At the beginning of the year, emergency rule remained confined to specified parts of the country, mainly Colombo and adjoining areas, the North and East and "border" areas.[1] On 4 August 1998, however, it was made operative throughout the country. The context of this action was the simultaneous postponement, by exercise of emergency powers, of elections due to be held in five Provincial Councils (discussed further below). The validity of this resort to the Public Security Ordinance was under legal challenge at the end of the year.

3. The Banning of the LTTE

The commemoration ceremony of the fiftieth anniversary of independence on 4 February 1998 was to take place in the environs of the historic *Dalada Maligawa* (Temple of the Tooth) in the heart of the city of Kandy. On 25 January 1998, a truck bomb crashed through a security barrier and exploded in front of the temple killing a number of people (including the suicide bombers) and causing extensive damage to the building. Apparently as an attempt to assuage public outrage, the Government promptly announced it had decided to ban the LTTE.

Consequently on 27 January 1998, the Emergency (Proscribing of Liberation Tigers of Tamil Eelam) Regulations No 1 of 1998 were made.[2] The regulations ban the LTTE, and the consequences of the ban also apply to bodies which carry on activities "substantially similar" to the LTTE.

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1 *Sri Lanka: State of Human Rights 1998* (Law & Society Trust, Colombo, 1998) p 73.

2 Gazette Extraordinary No 1012/16 of 27.01.1998.

The following conduct in connection with a banned organisation is made an offence: wearing uniforms, emblems etc; summoning or attending meetings or participating in activities; supporting by inviting enrolment of members, contributing or collecting funds, or furnishing information or securing other assistance; harbouring or otherwise assisting a member with intent to interfere with apprehension, trial or punishment; involvement in the making, printing or publication or distribution of writing or printed matter; communicating an order, decision, declaration or exhortation. An offender is liable, on conviction, to a prison term of a minimum of seven and maximum of fifteen years.

When the intention to impose the ban was announced, concern was felt lest it affect the work of international humanitarian organisations such as the ICRC. It was welcome, therefore, that the regulations specifically make it clear, "for the avoidance of doubts," that they in no way affect the right of any international organisation which has entered into an agreement with the Government, and which is specified by the Defence Secretary, to engage in any activity connected with the rendering of humanitarian assistance.

While the decision of whether a person has committed an offence under the regulations and is, therefore, liable to punishment has rightly been left to the courts, a very different provision has been made regarding money suspected to be used or intended for a banned organisation. It is left to the Minister "after such inquiry as he thinks fit" to make order that such moneys, securities or credits in the custody of a person shall be forfeited to the State. The order may extend to any such moneys that may come into such person's custody after the making of the order, "and any movable and immovable property

belonging to such organisation." (The reference to movable and immovable property is included in a somewhat clumsy manner and appears to be an afterthought). There is no provision for any judicial determination of the facts; on the contrary, it is expressly stated that the determination of the Minister shall be final and conclusive and shall not be called in question in any court. It is apparently thought that an aggrieved person who claims his property is wrongly forfeited to the State as a result of an erroneous or otherwise wrongful exercise of ministerial power should have no legal redress.

4. Arrest and Detention under Emergency

4.1 Authorised places of detention

Two such places, namely the Siyambalanduwa and Buttala police stations, were gazetted during 1998. It may be noted that these same police stations appeared in a previous Gazette in 1996.[3] This is not the first instance of a place being gazetted more than once. The legal implications of such repetitions, and whether they are connected to the changes in the areas in which the Public Security Ordinance has been in force from time to time (discussed further on in this chapter), remain to be explored. In the meantime it may be noted that up to the end of 1998, under the present Emergency (Miscellaneous Provisions and Powers) Regulations, a total of 386 authorised places of detention have been listed in nine separate Gazettes.

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[3] See Gazette Extraordinary No. 946/5 of 22 October 1996 at locations 178 and 179.

4.2 Misuse of powers of arrest and detention

The manner in which arrests and detention take place under the emergency regulations continued to attract censure of the Supreme Court. Decisions in this regard are described below.

5. Misuse of Emergency Powers - Judicial Challenges

5.1 The Etul Kotte children's case[4]

Last year's review highlighted the controversial regulations which sought, in respect of the generation of electrical power, to remove the vital safeguards against damage to health and environment provided by the National Environmental Act, the Urban Development Authority Law, the Nuisances Ordinance and the Criminal Procedure Code.[5] These regulations remained under legal challenge at the end of 1997, despite the fact that they had been rescinded. When the case - a fundamental rights application on behalf of five infants - came up for hearing before the Supreme Court in August 1998, a settlement was reached. As a result there was no ruling on the legality of these regulations, the validity of which was in serious doubt.

5.2 Postponement of Provincial Council Elections

The resort to emergency powers to postpone Provincial Council elections was a highly controversial issue during 1998 and the subject of country-wide debate. It is discussed separately below.

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4 SC Application No 323/97.

5 *Sri Lanka: State of Human Rights 1998* (Law & Society Trust, Colombo, 1998), p 66. See also chapter XI on Other Developments.

5.3 Arrest and detention

5.3.1 *The Jayaratne Case* (Batalanda police officers)[6]

The background to this case is of particular interest to the human rights community. Among the extremely grave human rights violations during the previous administration which were inquired into after the change of government in 1994, were allegations of horrific torture at a secret location in Batalanda. A Commission of Inquiry (popularly known as the "Batalanda Commission") was appointed to look into this. The *Jayaratne case* is an illustration of the basic principle that the rule of law must apply without discrimination whatever the nature of the suspected crime and culprits. Police officers are entitled to their rights no more and no less than any other persons, however gross the betrayal of the public trust and shocking the human rights violations of which they are suspected.

The petitioner in this case was a police sergeant. Ten other police officers had also filed similar applications and all eleven cases were taken up together as they involved the same questions of law and fact. It was agreed that the decision in this case would apply to eleven.

The petitioner was arrested on 10 August 1996 under a preventive detention order made by the Secretary to the Ministry of Defence (1st respondent) acting under Regulation 17(1)[7] of the Emergency

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[6] *Ihalapandithagedera Jayaratne* v. *Chandrananda de Silva and Others*, SC Application No 609/96.

[7] This regulation empowers the Secretary to the Ministry of Defence to make order that a person be taken into custody and *detained for a period* not exceeding three months at a time, subject to a maximum of 12 months, if he is *satisfied* that it is necessary to do so to prevent such person, *inter alia*, from acting in any manner prejudicial to the national security or to the maintenance of public order or to the maintenance of essential services.

(Miscellaneous Provisions and Powers) Regulations No. 4 of 1994, and detained without being produced before a Magistrate. The basis for issuing the detention order was said to be to prevent the petitioner from acting in any manner prejudicial to national security and public order. Upon the revocation of the detention order by the 1st respondent on 19 September, the petitioner was released on 21 September 1996.

The preventive detention order was undated, the period of detention was not specified in the order, and the stipulated place of detention was not an authorised place of detention under the emergency regulations. It was not disputed that the failure to specify the period of detention in the order rendered the detention order invalid as per the decisions of the Supreme Court in *Rodrigo* v. *de Silva*[8] and *Perera* v. *Rajaguru.*[9]

Regarding the arrest itself, the petitioner complained that he had not been informed of the reasons for his arrest. The arresting officer stated that he had informed the petitioner that the Secretary had issued a detention order "on the basis that his detention would be required to prevent him from acting in a manner prejudicial to public order." The Supreme Court, referring to the reasons stated in *Rodrigo* v. *de Silva,* held that communicating the ***purpose*** or the ***object*** of the arrest does not satisfy the constitutional requirement that the ***reasons*** for the arrest must be disclosed.

It was submitted on behalf of the petitioners that (in addition to the defects mentioned above) the Secretary's order was illegal because he had no material on which he could have formed the opinion that the arrest and detention of any of the petitioners was necessary to

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[8] (1997) 3 Sri LR p 265.

[9] (1997) 3 Sri LR p 141.

prevent them from acting in a manner prejudicial to national security or the maintenance of public order.

The Secretary stated that he had issued the detention order after considering material submitted to him which included:

(i) A letter he had received from the Director, Criminal Investigation Department (CID) requesting preventive detention orders in respect of the petitioners on the basis that :

(a) On the evidence led before the Presidential Commission Regarding Crimes Committed at Batalanda,[10] the petitioners had been found to be responsible for committing various offences, and that intelligence reports had indicated that they were conspiring to subvert the course of justice and to act in a manner prejudicial to the national security.

(b) It had been reported that they could leave the country by illicit means to avoid due process of law.

(c) Confidential information had indicated that the petitioners before leaving the country could inflict violence on the Commissioners of the judicial forum looking into these criminal acts and the witnesses who testified before the Commission.

(ii) Information received of the various threats directed at the Commission investigating the incidents at Batalanda, and information that police officers whose names transpired before

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[10] Presidential Commission of Inquiry into the Disappearance of Persons, Unlawful Arrest of Persons, and the Operation of Places of Detention at the Batalanda Housing Scheme.

> the Commission were attempting to leave the island and that there was a possibility that they could inflict violence on the Commissioners and witnesses who had testified before the Commission.

The affidavit which the Director, CID filed in Court revealed that his letter to the Secretary requesting preventive detention orders contained wilful exaggerations and even mis-statements as to the material the Director CID actually had. For example, although the Director, CID asserted in his letter to the Secretary that the petitioners had been "found responsible" for offences, his affidavit to Court only mentions that their conduct "would possibly be investigated."

The Court stated that the Secretary was under a duty to form an independent opinion after considering the material available, and where that was insufficient after calling for additional material. Examining the material on which the impugned detention orders were made, the Court held that the Secretary had not actually formed an ***independent opinion*** that the petitioners had been found responsible for any offence, or were engaged in any conspiracy, or were likely to resort to force or violence against the Commissioners or witnesses. Further, the Court pointed out that not only was the tenuous material available to the Secretary vague and lacking in particulars, it was also pure hearsay.

With such material, the Court explained, the Secretary could not reasonably have formed an opinion adverse to the petitioners. Therefore, it further held, that the Secretary could not have entertained a genuine apprehension that the petitioners would act in a manner prejudicial to national security or to the maintenance of public order.

5.3.2 The "balance of convenience" argument

It was conceded on behalf of the respondents that there was no material implicating the petitioners placed before the Secretary, or even before the Court. Nevertheless, it was submitted, that the 4th respondent,[11] the Head of the Police Force, had deposed that he had reports and information that the petitioners were attempting to disrupt the activities of the Commission and to use force on witnesses and even on the Commissioners, and that this was enough to justify the detention orders, even though the material was not disclosed to Court.

The Court rejected this argument out of hand. It stated that a reasonable suspicion or apprehension of past or future wrongdoing is an essential pre-requisite for the deprivation of personal liberty. The Court explained that such deprivation can never be justified by resorting to an expedient "balance of convenience" which can be made to tilt towards the Executive, on the purely speculative assumption that something untoward might happen, but without any reasonable basis for thinking that it would. The Court reiterated that the Secretary's order can only be upheld if the material placed before him justified such an order.

In conclusion the Court stated that the entire process of arrest and detention had been contrary to basic constitutional safeguards, which rendered the detention order illegal and void. It declared that the petitioner's fundamental rights guaranteed under Articles 13(1)[12] and 13(2)[13] had been violated by the Secretary and directed the State to

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[11] Inspector General of Police.

[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] The essence of this Constitutional provision relevant in the present context is the requirement of bringing the person in custody before a judge within 24 hours of arrest.

pay the petitioner (and as agreed, each of the other ten petitioners) a sum of Rs. 50,000 as compensation and Rs. 5,000 as costs.

The following three cases decided in 1998 reveal different ways in which emergency regulations on arrest and detention have been misused by officers of the State. Only the basic facts sufficient to enable the reader to appreciate the nature of the misuse (which would be comic if not for the effect on the victim) are recounted. These are instances in which the victim had the determination and the ability to come to court. They make one fear how many abuses may without redress and unremarked.

5.3.3 The Military Aircraft purchase case[14]

This case reveals how the Executive, using emergency powers, incarcerated a person for 57 days, construing an inquiry made from the People's Bank (a State Bank) by an associate of his regarding the possibility of opening Letters of Credit on behalf of the Sri Lanka Air Force to purchase helicopters for it, as an attempt to wage war against the State.

This was an application made to the Supreme Court by an Attorney-at-law on behalf of Ranjith Dahanayeke, the petitioner, who was in custody.

The petitioner was arrested and detained under emergency regulations on the basis that he had committed offences under Regulation 24 read with Regulation 32 of the Emergency (Miscellaneous Provisions and Powers) Regulations No. 4 of 1994 (EMPPR). Regulation 24

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[14] *Kolitha Susantha Bandara Wijeratne, Attorney-at-law, on behalf of Ranjith Dahanayeke* v. *T.V. Sumanasekera, Deputy Inspector General, Criminal Investigation Department and Others* (S.C. Application No 643/97). See also chapter IV on Judicial Protection of Human Rights.

deals, *inter alia,* with offences connected with waging war against the State and Regulation 32, *inter alia,* with attempts to commit such offences.

The position of the respondents was that one Rajan Vairavanathan had inquired from the People's Bank regarding the possibility of obtaining a large loan facility for purchasing military aircraft (helicopter gunships). Since, according to the respondents, there were intelligence reports that the LTTE had their agents approaching banks to secure financial arrangements to procure arms, they claimed that a reasonable suspicion arose that Vairavanathan was involved in efforts to secure aircraft for the LTTE and he was arrested. Subsequent to his arrest, Vairavanathan made a statement in which he said that one Farook Sally and the petitioner had been associated with him on a ***previous*** occasion to purchase helicopter gunships from a company known as Kolnet Ltd, in Israel. This was confirmed by a statement Farook Sally made after his arrest.

These circumstances, the respondents submitted, created a reasonable suspicion that the petitioner together with Vairavanathan and Sally had attempted to purchase helicopter gunships for the LTTE, and consequently they contended that the arrest and detention of the petitioner was justified.

From an examination of the material submitted to Court it became apparent that Vairavanathan had in fact told the People's Bank that he was working for a company which was seeking to act as an agent or broker in respect of a transaction for the purchase of helicopters for the Sri Lanka Air Force. Vairavanathan had wanted to know whether the People's Bank could open Letters of Credit on behalf of the Sri Lanka Air Force in favour of a foreign supplier in the event of a decision to so purchase.

In these circumstances, the Court pointed out, it was "inconceivable" that one could entertain a reasonable suspicion that the LTTE was seeking to import helicopters for itself through a stratagem of getting Letters of Credit opened by a State bank in favour of the Sri Lanka Air Force.

Furthermore, the Court pointed out that not only was there no evidence that the petitioner had been involved in any attempt to purchase helicopters for the LTTE, there was no evidence that Vairavanathan, Farook Sally, the petitioner or his wife had even been questioned by the CID regarding the complicity of the petitioner with the LTTE, the alleged attempt to purchase helicopters or offences concerning waging war against the State.

Holding that there was no justification for entertaining any reasonable suspicion that the petitioner was involved in any offence regarding the waging of war against the State, the Court declared his arrest and detention unconstitutional. The State was ordered to pay Rs. 100,000 and the DIG, CID personally to pay Rs. 25,000 as compensation and costs.

5.3.4 The NSSP Posters case[15]

In this case a motor cycle rider and pillion rider were arrested under emergency regulations on the basis of possessing posters that incited violence. The Court, however, took a different view.

The two cases were taken together because they related to a single incident.

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[15] *Ravindra Johana Marian Anandappa; Koththugoda Kankanange Gnanasiri* v. *Rohan Upasena, Officer in Charge of Police Station, Wellawatte and Others* (S.C. Application Nos 495/96 and 496/96).

A motor cycle rider and the pillion rider were arrested by a police officer under emergency regulations. The basis for arrest was the possession of posters which, the arresting officer believed, incited violence against the President and the Government and which also attempted to influence members of the armed forces from performing their duties in respect of the continuing armed conflict. The posters said:[16]

"මැයි.... දිනය කළු දිනයක් කිරීම ගැන චන්ද්‍රිකා වගකිව යුතුයි / වන්දි ගෙවිය යුතුයි"

"හෙටත්.... චන්ද්‍රිකාගේ පොලිස් ප්‍රහාර නොතකා පුද්ගලීකරනයට / යුද්ධයට එරෙහිව සටන් වැදීමට එක්වෙමු"

When the petitioners were produced before the Magistrate they were released on bail despite objections from the police.

Counsel for the petitioners submitted that the posters were in protest at the revocation of the permission granted to the Nava Sama Samaja Party (NSSP) to hold a procession.[17] The impugned posters merely called for a legitimate campaign, just as any other claim or demand for rights. The Sinhala term "satana" used in the posters means "struggle" and does not import an element of violence.

The Court, too, indicated that the facts appeared to constitute a legitimate exercise of the freedom of expression, and that in any event there was no justification for delaying until the next afternoon to produce the petitioners before a Magistrate.

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[16] A rough translation would be: "Chandrika is responsible for and must pay for making May Day a Black Day." "Despite Chandrika's police attacks let us unite in our struggle against privatisation and the war."

[17] 'May Day Ban of 1996: The Aftermath' in *Sri Lanka: State of Human Rights 1998* (Law & Society Trust, Colombo 1998) p 62.

After judgment was reserved, the parties filed a consent motion to settle each case by the payment of Rs. 5000 by the respondents to each petitioner, which the Court accepted and so ordered.

5.3.5 The short-leave register case[18]

In this case a detention order was issued under emergency regulations detaining the petitioner for seven days for allegedly tearing pages off the short-leave register of his place of work.

The petitioner, an employee of the Rent Board of Review (a State institution), was issued with a detention order under emergency regulations[19] for seven days, because he was suspected of having torn pages off the short-leave register. As to motive, it was stated that a disciplinary inquiry was pending into charges which included that the petitioner had left the office before the time stated in the register. The police appear to have acted on a complaint made by the Secretary of the Rent Board of Review, who was cited as the 3rd respondent. The basis of the issue of the detention order was apparently that the petitioner had destroyed government property.

The Court found that there was sufficient credible material for the original arrest of the petitioner, and that an infringement of the fundamental right guaranteed under Article 13(1)[20] of the Constitution

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[18] *A.G.R.P. Rajakaruna* v. *Sub Inspector of Police Abeywardena, Police Station, Maradana, Colombo 10 and Others* (S.C. Application No 878/96).

[19] The judgment does not state under which provisions the detention order was issued, but the tenor of the judgment indicates that it was issued under emergency regulations.

[20] See supra n 13.

had not been established. However, the Senior State Counsel for the respondents conceded that there was no justification for the issuing of the seven day detention order.

In the circumstances, the Court held that there was a violation of the petitioner's fundamental rights guaranteed by Article 13(2)[21] and directed the State to pay him Rs10,000 as compensation.

6. Postponement of Provincial Council Elections

Elections to five Provincial Councils were due in the second half of 1998. As they approached, however, speculation became rife - fuelled by statements made by members of the ruling People's Alliance - that they would be postponed by resort to emergency regulations. Civil liberties bodies found this "deeply disturbing."

> *The exercise of the franchise is a very basic right which should be interfered with only in the most exceptional circumstances. The reason given for possible postponement is, we understand, the conflict in the North and security considerations. However elections in the past have been held in worse situations, while the armed conflict in the North continued and there were grave security problems in the South. Furthermore, we understand that at one stage the possibility of having a Presidential Election instead of Provincial Council Elections was seriously contemplated; a measure which would also have required extensive security. The Government found it possible to hold the Independence celebrations in February and the SAARC*

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[21] *Ibid.*

meeting last month despite the conflict in the North and the security implications for the rest of the country. CRM feels that the same determination should be able to find an acceptable balance between security considerations and safeguarding the franchise rights of the people.[22]

The same statement also stressed that:

... the need for unusual security at election time is largely due to the violence and other acts of misconduct perpetrated by political parties and candidates themselves. Candidates and political parties, at every level of party leadership, should pledge not to indulge in such practices and should deal promptly and firmly with any miscreants from among their own ranks.

The Government was faced with a legal difficulty in that the 13th Amendment to the Constitution (which created Provincial Councils) provides that the Councils stand dissolved at the end of their terms of office. To alter that provision would require a constitutional amendment, which cannot be done by means of emergency regulations. The solution it found was to allow the Councils to stand dissolved, and to let the dates for the elections be gazetted by the Commissioner of Elections. Then, by emergency regulation,[23] the President purported to suspend the operation of the new date fixed by the Commissioner. This did not require tinkering with any constitutional provision, but

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[22] SAFEGUARD FRANCHISE RIGHTS OF THE PEOPLE: CRM urges holding of Provincial Council Elections, Statement of the Civil Rights Movement of 4 August 1998, E 01/8/98.

[23] Published in Gazette Extraordinary No 1039/5 of 4 August 1998.

only an interference with the "normal law" - in this instance the Provincial Councils Elections Act which provides for the implementation of the constitutional provisions creating Provincial Councils. It was thus sought to achieve indirectly what could not be done directly. The result was a regulation unlike any that has been made before, which reads curiously. Its brief text is reproduced below.

Regulation

For so long, and so long only, as Part II of the Public Security Ordinance is in operation in a Province for which a Provincial Council specified in Column I of the Schedule hereto has been established, such part of the Notice under Section 22 of the Provincial Councils Elections Act No 2 of 1988, published in the *Gazette* specified in the corresponding entry in Column II of the Schedule hereto, as relates to the date of poll for the holding of elections to such Provincial Council, shall be deemed for all purposes, to be of no effect.

Schedule

Column I	**Column II**
Provincial Council	**Number and date of Gazette**
Uva Provincial Council	1036/4 — 15.07.1998
Central Provincial Council	1036/5 — 15.07.1998
North-Central Provincial Council	1036/6 — 15.07.1998
Sabaragamuwa Provincial Council	1036/7 — 15.07.1998
Western Provincial Council	1036/8 — 15.07.1998

The text itself is manifestly illogical. As a leading legal columnist pointed out:

> *The rhetorical introduction - "For so long and so long only" seems to indicate that the maker of the order is acutely conscious of the unfavourable response it is likely to generate. In fact, rhetoric seems to have triumphed over logic, because the notice fixing the date of the elections cannot be suspended "for so long" as the state of emergency lasts: it ceases to be operative the moment the date mentioned in the notice has passed and a fresh notice will have to be issued at such time as a new date is fixed.*[24]

In order to make the suspension/postponement effective, it became necessary to make emergency rule operative throughout the island, and this was done by a proclamation under the Public Security Ordinance (PSO) dated 4 August 1998. A fundamental rights case challenging both the proclamation (bringing part II of the PSO into operation islandwide) and the regulation (suspending the dates fixed for elections to the five Provincial Councils) was filed by two journalists, Waruna Karunatilleke and Sunanda Deshapriya, and was pending before the Supreme Court at the end of the year.

7. Censorship

Two emergency regulations imposing media censorship were made during 1998.

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[24] Nayana, Legal Watch, *Sunday Island*, 9 August 1998

7.1 Re-imposition of censorship of military information

The main regulation was the re-imposition, in June 1998, in substantially similar terms, of the censorship imposed on two previous occasions by the present administration (September to December 1995 and April to October 1996).[25] As in the case of the second of these periods of censorship, this time too the subject of procurement of arms was excluded from the banned topics. In August, the Ministry of Defence issued a statement asking the media to stop publishing information regarding the transfer of senior military officers,[26] a step that was decried in journalistic circles as an "expansion of media censorship."

Criticism of the content of these regulations, which also highlights anomalies in them, has been published elsewhere (including in the relevant chapters in earlier issues of *Sri Lanka: State of Human Rights*) and is not reiterated here. A new feature of the implementation of the present censorship was that for the first time a military officer rather than a civil servant was named as Competent Authority.[27] This gave rise to alarm in some circles as an indication of increased power of the armed services and the militarisation of society. An older generation of human rights activists, however, recalled how in an earlier era the blue pencil was wielded by civil servants against a wide variety of comment unconnected with national security but unpalatable to

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[25] The Emergency (Prohibition on Publication and Transmission of Sensitive Military Information) Regulations No 1 of 1998 published in Gazette Extraordinary No 1030/28 of 5 June 1998.

[26] *Sunday Leader*, 23 August 1998.

[27] Major General J. Nammuni was succeeded in August 1998 by Major General S.T.T. Jayasundara. In December 1998 he was succeeded by Mr Ariya Rubasinghe, Director of Information.

their political masters. The hope was expressed (not without some cynicism) that a military censor might at least be less solicitous of the feelings of politicians and uninterested in straying outside the confines of military matters.

A study of how precisely the censorship has operated and how it compares with earlier periods is outside the scope of this paper. In December 1998, a civilian succeeded the military censor. At the end of the year censorship under the emergency regulations remained in force.

7.2 The publication of photographs

The other censorship provision introduced during the year was one restricting the publication of certain photographs.[28] This prohibits the publication in a newspaper or the electronic media, without the permission of the Competent Authority, of any photograph depicting a person, or any part of the body of a person, killed or injured as a result of a bomb explosion or any other act which constitutes an offence under the Prevention of Terrorism Act. "Newspaper" is defined so as to include "any journal, pamphlet, magazine or other publication."

This regulation was a response to the extremely gruesome pictures commonly carried in the media in the aftermath of a bomb explosion or massacre of civilians by or attributed to the LTTE. Colour close-ups of severed heads and limbs, and blood-spattered bodies, dead and alive, including of children, were the constant fare served to newspaper readers and television watchers. There was little public reaction to or discussion of the new ban; many people breathed a sigh of relief to be spared such distressing sights in future.

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[28] The Emergency (Publication of Photographs) Regulations No 1 of 1998 published in Gazette Extraordinary No 1015/8 of 17 February 1998.

But questions arise and require to be addressed on what is clearly an instance of censorship. To what extent should the public be protected from ugly and shocking truths? How conducive is this to the search for an end to the conflict? On the other hand, what of the possible danger of provoking retaliatory terror? And from the point of view of journalistic freedom and the right of the public to information, how does one seek the elusive border balance between truthful albeit brutal reportage on the one hand, and unmitigated sensationalism bordering on voyeurism on the other? A dispassionate and thoughtful debate on these issues remains to take place.

8. Other Regulations

In April, the Postal and Telecommunication services were declared essential and specified services in terms of Regulation 29A of the Emergency (Miscellaneous Provisions and Powers) Regulations. These orders were rescinded the following month.

Other measures under emergency powers taken during the year related to the term of office of local authorities,[29] the law relating to recovery of possession of local authority quarters,[30] amendment to the

[29] Emergency (Term of office of Local Authorities) Regulations No 1 of 1998 published in Gazette Extraordinary No 1010/14 of 17.01.1998 appointing 18 February 1999 as the date for the commencement of the term of office of specified local authorities in the Kilinochchi, Mannar, Vavuniya and Mullaitivu administrative districts.

[30] Emergency (Local Authorities Quarters) Regulations No 1 of 1998 published in Gazette Extraordinary No 1020/15 of 25 March 1998 amending the Local Authority Quarters (Recovery of Possession) Law No 42 of 1978. These regulations, *inter alia*, transfer to the Secretary to the Ministry of Defence the power of issuing 'quit notices' in respect of local authority quarters requisitioned under any emergency regulation.

Emergency (Control of Colombo Security Zone) Regulation No 1 of 1996,[31] and the Emergency (High Security Zone) Regulations No 1 of 1998.[32]

9. Applicability of Emergency Regulations to New Areas Brought Under Emergency Rule

The operation of the PSO was described in *Sri Lanka: State of Human Rights 1993*. One particular aspect of the operation of this law merits further attention at present.

The PSO provides that by proclamation Part II of the Ordinance may be brought into operation in all or any part of Sri Lanka; this is popularly referred to as "declaring emergency" or "bringing emergency into force." Once Part II is brought into operation, then the President can exercise legislative power (by-passing Parliament) and make emergency regulations which have the force of law. Before 1988, where emergency rule was extended each month, all the regulations lapsed unless they were made and gazetted afresh. By an amendment to the PSO in 1988, however, it was provided that where there is an extension of the emergency at or before the expiry of the month without a break, the regulations remain in force and do not have to be promulgated again. This was a simple and straightforward amendment to the PSO which made its operation far less cumbersome. It was based on the dismal but realistic assumption that emergency rule, far

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[31] Gazette Extraordinary No 1032/25 of 19.06. 1998 extending the security zone in Colombo.

[32] Gazette Extraordinary No 1032/26 of 19.06. 1998 placing restrictions on entry and parking of lorries and trailers in specified areas in the city of Colombo.

from being a temporary measure of short duration, was now liable to last for months and years on end.

It is submitted, however, that different considerations apply where the geographical area in which the emergency is in force is altered. Take the case where the Part II of the PSO is brought into operation in certain parts of the country only, and emergency regulations - including, say, provisions relating to arrest and detention - are made under it. These regulations will be in force only in respect of those areas in which Part II of the PSO has been made operative. If, thereafter, the operation of Part II of the PSO is extended to the entire country, what is the status of these pre-existing regulations in the "new areas"? It is submitted that they have no legal status and are not operative in these areas. Bringing Part II of the PSO into operation merely ***enables*** the President to make regulations; and in respect of these "new areas" there will be no regulations in force unless and until some are made. There is nothing in the law to justify an assumption that regulations in force in other areas automatically extend to fresh areas as and when they are brought within the ambit of Part II.

There has hitherto been an unspoken assumption that existing emergency regulations overflow their geographical boundaries along with the extension of Part II to other parts of the country. This remains to be tested in the courts.

10. Some Overdue Steps

Substantive review and reform of the emergency regulations and the exercise of emergency powers is long overdue, and is not expanded on here. We refer below to just a few steps of a simple, mainly technical nature, that should be taken without delay.

At the end of 1998, the present version of the EMPPR completes four years of its existence, and during this period important amendments have been introduced. Due to the general difficulty in gaining access to the Gazettes Extraordinary containing these amendments, it would be helpful to both the general public and law enforcement officers (including judges) if a consolidated version of the EMPPR were published incorporating all amendments.

Such an exercise would also provide an opportunity for correcting the numerous typographical errors, reformulating the text in areas that need clarity, and removing discrepancies between the different language texts (which at times are in direct contradiction to each other).

The publication of a consolidated list of authorised places of detention under the EMPPR is another felt need because of the numerous times that additional places have been gazetted.

A separate numbering system for gazettes containing proclamations, regulations, orders and other notifications made under the PSO is another crying need. At present, an assorted array of information including - but by no means confined to - matters falling under the ambit of the PSO is published in the Gazette Extraordinary. In order to be certain that one does not miss a Gazette relevant to the PSO, one must go through each and every published Gazette Extraordinary, which in practical terms appears to be an impossibility. The experience of the Civil Rights Movement and the Nadesan Centre Library, which seek to specialise in the study of emergency laws, is that even subscribers to the Gazette Extraordinary are not supplied with every issue, and that there are often inordinate delays before copies are received. No "file copy" for public reference is available at the Government Press, we are informed, and attempts to check with the

National Library whether one's holdings are complete also run into problems. A sequential numbering system for PSO-related notifications would at least make any gaps in the series immediately clear.

11. Conclusion

During 1998, the mixture continued very much as before, with a few new elements - such as the postponement of elections to five Provincial Councils and the banning of the LTTE - thrown in. Emergency regulations inherited from the previous year remained in force and were not rescinded. The present chapter, confined as it is to developments during the year, does not purport to give a complete account of emergency rule as it existed in 1998. The composite picture has to be obtained by reading it along with the chapters on emergency rule in the previous five issues of *Sri Lanka: State of Human Rights*.

Judicial pronouncements made during the year on arrest and detention under the emergency regulations were the cause of both solace and serious apprehension. It was, on the one hand, encouraging to find the Supreme Court continuing to reject, in no uncertain terms, spurious claims put forward by the executive in a curious variety of situations, to justify depriving persons of their liberty. However, one cannot but remain painfully conscious of the fact that these cases represent just a few instances where the victims managed to reach the court system. They give rise to disquiet about the extent to which they may reflect a general attitude and practice, and about how much more may lie beneath the surface. Providing for individual remedies is important but is manifestly not enough. There is a clear need for a continuing, independent review and control of the exercise of powers of arrest and detention; an effective mechanism is needed which does not depend on individual complaints to set it in motion.

IV

Judicial Protection of Human Rights

*Sumudu Atapattu**

1. Introduction

This chapter seeks to discuss the role played by the Supreme Court[1] in redressing violations of fundamental rights due to State action. The important role played by the Court in providing relief to victims of violations cannot be over-emphasised. The Court has taken its role as the final arbiter very seriously and has adopted a liberal approach to violations of fundamental rights. However, violations persist despite the Court's pronouncements.

The fundamental rights chapter of the 1978 Constitution provides the juridical base for the jurisdiction of the Court in the event of violations

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[1] Hereinafter, "the Court."

or imminent violations of fundamental rights. Under Article 17 of the Constitution an aggrieved person can forward a petition to the Court and Article 126 provides that the Court has the sole and exclusive jurisdiction in relation to violations of fundamental rights enshrined in the Constitution. A two-tier process - which also serves to filter applications - is followed by the Court in dealing with these petitions: first, leave to proceed with the application must be obtained from the Court; then, once such leave is granted, the Court will move to the merits phase where the issues will be decided. This chapter will not discuss unsuccessful leave to proceed cases unless they involve important legal issues.

2. Case Law

The trend noted in previous *State of Human Rights* report continued in 1998: the petitions filed under Article 12 outnumbered the petitions filed under the other articles, and particularly those filed under Articles 11 and 13.

2.1 Cases under Articles 11,[2] 13(1)[3] and 13(2)[4]

Several cases filed under these articles related to assault and allegations of torture by police officers. It is disturbing to note the continuation of such incidents despite pronouncements by the Court on these matters and the grant of compensation to the petitioners. Although the Court has directed the Registrar of the Court to forward such judgments to

[2] Article 11 deals with freedom from torture, cruel, inhuman or degrading treatment or punishment.

[3] Article 13(1) deals with freedom from arbitrary arrest and detention.

[4] Article 13(2) 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.

the Inspector-General of Police for suitable action, this does not seem to have had a deterrent effect. This issue needs further investigation.

A.J. Hiran Priyankara v. *PC Sisira Kumara, Police Station, Puttalam and four others*[5] the petitioner alleged that he had been assaulted by a person who had boarded a bus with a lit cigarette, after the petitioner had requested him to extinguish the cigarette. The assailant turned out to be a policeman attached to the Puttalam Police Station. The petitioner went to the police station to make a complaint, but was then assaulted by the Officer-in-Charge on the grounds that the petitioner had assaulted "one of their officers." The petitioner suffered severe pain and discomfort and had to be hospitalised. He had also been arrested, locked up in a cell and was not produced before a Magistrate as required by law. The petitioner's injuries were corroborated by medical evidence, and his version of events was corroborated by a passer-by and by the Member of Parliament who had been contacted by the petitioner's father.

The Court held that the petitioner's fundamental rights guaranteed under Articles 11, 13(1) and 13(2) had been infringed by the respondents. Justice Perera further stated:

> *I trust that I will be failing in my duty in this case if I fail to alert the Inspector-General of Police to the urgent necessity to give appropriate instructions to Officers-in-Charge of Police Stations in regard to the manner, the care and courtesy which private persons having legitimate business in Police Stations are entitled to receive at the hands of the Police with a view to ensuring that incidents such as this would not recur in the future.*[6]

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5 SC Application No 214/96 (Spl), SC Minutes 1.9. 1998.

6 *Ibid* at p 9.

In another case, *S.J. Dias* v. *Honourable Reggie Ranatunga, Deputy Minister of Transport, Environment and Women's Affairs and six others*,[7] a petitioner who worked for the Independent Television Network (ITN), alleged violations of Articles 11, 13(1) and 14(1)(a) of the Constitution. The petitioner and an ITN team were returning from filming a programme when they noticed a burning lorry on the Colombo-Kandy Road at around 10.00 pm. As it appeared to be a newsworthy item, the petitioner decided to film the event. Just then, the 1st respondent, the Deputy Minister, who was passing by in an unregistered vehicle, stopped and demanded to know why the petitioner had filmed his vehicle. When the petitioner denied he had done so, the first respondent's security guards assaulted him, put him into a jeep (where he was again assaulted by a police officer) and took him to Gampaha Police Station. He was produced before the JMO, Gampaha, but no proper examination was carried out. Although the police recorded a statement, it was not read to the petitioner before he signed it. The petitioner was held in police custody for over six and a half hours before he was finally released.

The petitioner specifically alleged that the illegal acts were carried out at the behest of the 1st respondent, who made no attempt to prevent the petitioner being assaulted. The report of the JMO, Colombo South, indicated that the petitioner had seven injuries on his body, and noted that all the injuries were fresh and could have been caused by a blunt weapon. With regard to the contention that the mere fact of an assault and some injury is not necessarily a violation of Article 11, Justice A. de Z. Gunawardana referred to Justice A.R.B. Amerasinghe's book entitled *Our Fundamental Rights of Personal Security and Physical Liberty*:

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[7] SC Application No 98/97, SC Minutes 17.12.1998.

> *'Torture' implies that the suffering occasioned must be of a particular intensity or cruelty. In order that ill treatment may be regarded as inhuman or degrading it must be 'severe.' There must be the crossing of the 'threshold' set by the prohibition. There must be an attainment of 'the seriousness of treatment' envisaged by the prohibition in order to sustain a case based on torture or inhuman or degrading treatment or punishment.*[8]

Applying the above criteria to the case before it, the Court held that the threshold set by the prohibition under Article 11 had been crossed and, therefore, there was a violation of Article 11. The Court further held that since there was no basis for the arrest of the petitioner, there was a violation of Article 13(1).

With regard to the question of whether this case involved executive or administrative action, the Court held:

> *What would otherwise have been the purely private action of the 1st to 3rd Respondents was transformed into executive action by reason of the approval, connivance, acquiescence, participation and inaction of the 5th Respondent and other Police officers.*[9]

Neetha Dissanayake, Attorney-at-Law on behalf of K.M. Lal v. *Sujeewa, Sub Inpsector of Police, Police Station, Meetiyagoda and four others*[10] also involved assault by police officers. In this case, the petitioner alleged that the 1st respondent and a few officers from the Meetiyagoda Police Station had entered the petitioner's house and that the 1st respondent had assaulted the petitioner while he was

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8 Quoted in *ibid* at p 8.

9 *Supra* n 7 referring to *Faiz* v. *AG* (1995) 2 Sri LR p 372 at p 383.

10 SC Application No 524/96, SC Minutes 16.12.1998.

asleep. The petitioner was transferred from the Karapitiya Hospital, Galle, to the National Hospital in Colombo for five days of treatment, and then returned to the Karapitiya Hospital. When he was transferred to Colombo, the petitioner was unconscious. He underwent neuro-surgery to remove a blood clot in his brain (according to the bed head ticket, an "extradural-haemorrhage in the left parietal area of the head"). According to the JMO, Colombo, the petitioner's injuries would have been "fatal in the ordinary course of nature:" without prompt surgery, he would have died. According to the petitioner's affidavit, he had been assaulted by the 1st and 2nd respondents, who had used their hands and feet as well as a club. Other witnesses corroborated the fact that the 1st respondent had held a club in his hand and had assaulted the petitioner with it.

The Court held that there was a violation of Article 11 as well as Articles 13(1) and 13(2), as the arrest and detention of the petitioner had also been wrongful.

These cases highlight the dangers that the general public face when police officers – who are supposed to ***enforce*** the law - abuse the power vested in them. The affidavits tendered by the respondents suppressed the true facts of the incident. The question thus arises as to the effect of giving false information to the Court. If the respondents in these cases go scot free after torturing innocent people and lying to Court, there is something very wrong with the system. In cases where there is compelling evidence of torture and perjury, the State should bring charges against the perpetrators under the Penal Code or the Convention against Torture Act.

In *Pradeep Kumar Dharmaratne* v. *Inspector of Police, W. Dharmaratne, OIC, Police Station, Aranayake and five others*,[11] the petitioner was a provincial correspondent for the *Dinamina* Newspaper. He had written several articles on the unlawfully distilled liquor industry in the area and had criticised police inaction. After the publication of one such article, the petitioner was taken into custody by the 2nd, 3rd and 4th respondents, all of whom were police officers attached to the Aranayake Police Station. The petitioner alleged that he was dragged along the ridge of a paddy field whilst being assaulted by the respondents when he was taken from his home to the police jeep. The Court, however, found that medical evidence did not substantiate this claim and held that the petitioner's fundamental rights had not been violated by the 2nd, 3rd and 4th respondents. The petitioner also alleged that the 1st respondent had assaulted him on his face and abdomen. The medical evidence corroborated injury to the face as well as injury to his kidneys, and the Court held that Article 11 had been violated by the 1st respondent. Subsequently, the petitioner's house had been destroyed by arsonists. The Court held that although it was possible that the police were involved in this incident, it was difficult to hold the 1st respondent personally responsible.

Justice Weerasekera admonished the judiciary and the legal profession for their failure to investigate allegations of torture properly:

> *In my opinion it is indeed a matter of concern and trepidation that Magistrate's (sic) inspite of repeated reminders by this Court do not exercise what is their duty namely to question and probe from a person produced before them from Police custody and to so record his observations. It has been my experience that Magistrate (sic) did act so and it was a*

[11] SC Application No 163/98, SC Minutes 17.12.1998.

> *deterrent to breaches of fundamental rights even when they were not enshrined by a constitution. It is a further tragedy that some members of the legal profession do not act with courage and fearlessness in what is their duty.*[12]

In *T. Jayaratne* v. *Chandrananda de Silva, Secretary, Ministry of Defence and four others*[13] the petitioner, a Police Sergeant, had been detained under emergency regulations. The 1st respondent – the Secretary, Ministry of Defence – had issued a detention order under Emergency Regulation 17(1) without specifying the period of detention. The petitioner was kept in detention for approximately six weeks without being produced before a Magistrate. Referring to *Rodrigo* v. *Silva*[14] and *Perera* v. *Rajaguru*,[15] Justice Fernando held that the failure to stipulate the period of detention rendered that order invalid. Furthermore, the petitioner was held in an unauthorised place of detention. Referring again to *Rodrigo* v. *Silva*,[16] Justice Fernando held that that "communicating the ***purpose*** or the ***object*** of the arrest does not satisfy the constitutional requirement that the ***reasons*** for the arrest must be disclosed."[17]

With regard to the duty of the 1st respondent to form an opinion on the reasons for detention as required by law, Justice Fernando said:

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[12] *Ibid* at p 7.

[13] SC Application No 609/96, SC Minutes 21.9.1998. Ten other applications were taken with this case as they involved the same questions of law and fact (SC Application Nos 583/96; 590/96; 591/96; 610/96; 611/96; 612/96; 628/96; 660/96; 661/96; and 671/96). See aslo chapter III.

[14] (1997) 3 Sri LR p 265.

[15] *Ibid* at p 141.

[16] *Supra* n 14.

[17] *Ibid* at p 5.

> *The 1st Respondent was under a duty to form an opinion himself, after considering the material available, and (where that was insufficient) after calling for additional material; he could not abdicate his responsibility to call for, peruse and assess the relevant material, by simply adopting the opinion of the Director, CID.*[18]

Justice Fernando rejected the respondents' argument on the "balance of convenience" which, they argued, had required the arrest and preventive detention of the petitioners. He stated:

> *A reasonable suspicion or apprehension of past or future wrongdoing is an essential pre-requisite for the deprivation of personal liberty. Such deprivation can never be justified by resorting to an expedient "balance of convenience", which can be made to tilt towards the Executive on the purely speculative assumption that something untoward might happen, but without any reasonable basis for thinking that it would.*[19]

The Court also held that if the material before the 1st respondent was insufficient, he should have called for additional material; his failure to do so was a serious lapse. While accepting that allegations against police officers must be dealt with promptly and effectively, the Court stated that "it is distressing and disturbing that the entire process of arrest and detention of the Petitioners has been contrary to basic Constitutional safeguards."[20] It was held that there was a violation of Articles 13(1) and 13(2).

In *K.S.B. Wijeratne, Attorney-at-Law for and on behalf of Ranjith Dahanayeke* v. *Deputy Inspector General, CID and five others*[21]

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[18] *Supra* n 13 at p 8.

[19] *Ibid* at p 9.

[20] *Ibid* at p 13.

[21] SC Application No 643/97, SC Minutes 25.11.1998. See also chapter III.

the CID had visited the petitioner's home and asked his wife to tell the petitioner to report to the CID. They gave no reasons for this request. The petitioner reported to the CID on 14 July 1997, where he was detained, and subsequently transferred to the Pelawatte Detention Camp. When his wife visited him there, the petitioner informed her that he had not been informed of the reasons for his arrest and that no detention order had been shown to him or served on him.

The respondents averred that they had detained the petitioner under Emergency Regulation 19(2) because they had reason to believe that the LTTE was trying to purchase military aircraft through him and two others, whom they had also questioned. However, upon a perusal of the facts of the case, Justice Bandaranayke stated that there was no justification for the respondents' suspicion that the petitioner had either committed or was about commit the offence of attempting to wage war against the State by seeking to import military aircraft for the LTTE. Justice Bandaranayake stated that under Regulation 19(2) a person can be detained only for a maximum period of seven days, whereas in this case, the petitioner had been detained and deprived of his liberty for 57 days. The Court held that there was a violation of Articles 13(1) and 13(2).

2.2 Cases under Article 12[22]

Many applications under Article 12 dealt with promotion, transfer and recruitment. This year, too, none of the cases decided related to

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[22] Article 12(1) deals with equality before the law and the equal protection of the law which is accorded to every person while Article 12(2) deals with the right not to be discriminated on grounds of race, religion, language, caste, sex, political opinion, place of birth or any one of such grounds which is accorded to citizens only.

discrimination based on gender, although one case has important ramifications in relation to ethnicity and ethnic quotas.

A. Sangadasa Silva v. *Hon Anuruddha Ratwatte, Minister of Irrigation, Power and Energy and three others*,[23] involved the forcible possession of the premises from which the petitioner operated a dealership in petrol, diesel and other petroleum products. The petitioner contended the violation of Articles 12(1) and 12(2), the latter on the basis of political opinion. As the 2nd respondent did not produce the Board Paper that was purported to authorise him to terminate the dealership agreement with the petitioner, the Court referred to Illustration (f) to section 114 of the Evidence Ordinance. This provides that "The Court may presume that evidence which could be and is not produced would if produced, be unfavourable to the person who withholds it." The Court said that if such a Board Paper exists, then the failure to produce it would entitle the Court to draw the above presumption. If on the other hand, no such Board Paper existed, then the petitioner's contention that the termination of his dealership was entirely arbitrary and, therefore, violated his fundamental rights was substantiated.

Justice Wadugodapitiya referred to Justice Fernando's decision in *Kuruppu Gunaratne's Case*:[24]

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[23] SC Application No 251/95 (F/R), SC Minutes 3.4. 1998.

[24] *Kuruppu Gunaratne* v. *Ceylon Petroleum Corporation*, SC Application 99/94, referred to in the above judgment.

> *It is now well settled that powers vested in the State, public officers and public authorities are not absolute or unfettered, but are held in trust for the public, to be used for the public benefit, and not for improper purposes.*

With regard to the alleged violation of Article 12(2) on political grounds, Justice Wadugodapitiya stated that the "arbitrariness with which the Board acted also lends credence to this view."

V.D.S. Gunaratne v. *The Homagama Pradeshiya Sabha and five others*,[25] involved the refusal by the Central Environmental Authority (CEA), without adducing any reasons, to approve the application made by the petitioner to establish a saw mill. The petitioner then applied to the Secretary to the Ministry of Environment, whereupon the CEA granted approval subject to certain conditions. The *Pradeshiya Sabha* (the Local Authority) informed the petitioner that he had to obtain an Environmental Protection Licence before he could commence the operations.

The petitioner then proceeded to prepare the premises to establish the saw mill, but was then informed by the *Pradeshiya Sabha* that the CEA (the 5th respondent) had decided not to approve the proposed industry on the ground that it would cause a nuisance to the public in the area and, therefore, the initial authorisation had been withdrawn. Thereupon the petitioner filed this case, alleging a violation of his fundamental rights guaranteed under Article 12(1).

Justice Amerasinghe said in this case that a petitioner who receives a favourable response to a site clearance application must comply with the terms and conditions stipulated therein. No operations can

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[25] SC Application No 210/97 (F/R), SC Minutes 3.4. 1998.

commence until the petitioner has obtained an Environmental Protection Licence. Justice Amerasinghe referred to the importance of the necessity to give an opportunity to both parties to air their grievances:

> *One would expect that the Central Environmental Authority and delegate institutions, like the Homagama Pradeshiya Sabha, would hear neighbourhood objections, inform the industrialist of the objections, hear the views of the industrialist, and after weighing the evidence in the light of the submissions made by both sides, decide for reasons stated in writing and no other, that the licence will be granted or refused. The decision and the reasons should be communicated to the industrialist and the persons who raised objections.*[26]

The Court also dealt with the concept of sustainable development:

> *Publicity, transparency and fairness are essential if the goal of sustainable development is to be achieved. In the matter before us, none of these elements were present and in my view the First and Fifth respondents acted in an arbitrary manner in suspending the authorization granted earlier.*[27]

The Court held that the petitioner's fundamental right under Article 12(1) had been violated by the 1st and 5th respondents.

In *A.H.J.S. Jayasinghe* v. *People's Bank and fourteen others*[28] Justice Perera described the application of the principle of equal protection of the law as follows:

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[26] *Ibid* at p 4.

[27] *Ibid* at p 5.

[28] SC Application No 667/96 (F/R), SC Minutes 20.10. 1998.

> *Equal protection of the law means the right to equal treatment in similar circumstances. What Article 12(1) forbids is discrimination between persons who are substantially in similar circumstances or conditions. The rule is that like should be treated alike and not that unlike should be treated alike. Therefore, discrimination can exist only where two persons who are similarly situated or circumstanced are treated differently. Dissimilar treatment does not necessarily offend the guarantee of equality so long as the dissimilar treatment is based on a rational differentiation, fairly applied.*[29]

In *R.P. Jayasooriya* v. *R. Vandergert, Secretary, Ministry of Foreign Affairs and two others*,[30] the petitioner alleged that the refusal to grant permission to import the vehicle he had used in Kathmandu, Nepal, while he was on duty there, constituted a violation of Article 12(1). The position of the 1st respondent was that the vehicle in question (a Mercedez Benz) fell outside the provisions of the regulations relating to the importation of vehicles. However, the petitioner alleged that previously another person had been granted permission in similar circumstances to import his vehicle with a tax concession.

Justice Bandaranayake, holding that the petitioner does not have a right to import the vehicle in question, stated that the petitioner's complaint is based on "an inequality in a matter of illegal treatment. Article 12(1) of the Constitution provides only for the equal protection of the law; it does not provide for the equal violation of the law. It cannot be understood as requiring officers to act illegally, because they have acted illegally previously." Justice Bandaranayake quoted

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[29] *Ibid* at p 5.

[30] SC Application No 620/97, SC Minutes 30.10. 1998.

Justice Sharvananda in *C.W. Mackie and Company Ltd* v. *Hugh Molagoda, Commissioner General of Inland Revenue and Others*:[31]

> *But the equal treatment guaranteed by Article 12 is equal treatment in the performance of a lawful act. Via Article 12, one cannot seek the execution of any illegal or invalid act. Fundamental to this postulate of equal treatment is that it should be referable to the exercise of a valid right, founded in law in contradistinction to an illegal right which is invalid in law.*

In *Udeni Dharmalatha and 65 others* v. *Secretary, Ministry of Irrigation, Power and Energy and four others*[32] the Court stated that recruitment for public office should be done in accordance with the procedures prescribed for public office, covering such issues as schemes of recruitment, advertisement and written examinations. In this case, the vacancies in question had not been advertised and the Court said that:

> *It is in the public interest to get the best recruits for any post. The purpose of advertisement is two-fold: from the point of view of the State, to get the best recruits, and from the point of view of prospective applicants, to ensure fairness and equality of treatment. ..... The law relating to recruitment for public employment provides certain protections, particularly the advertisement of vacancies, to ensure equal treatment, in the sense of an equal opportunity to be* ***considered*** *for recruitment. That has been denied to the Petitioners.*[33]

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[31] (1986) 1 Sri LR p 300 at p 309.

[32] SC Application No (SPL) 237/96, SC Minutes 2. 12.1998.

[33] *Ibid* at p 10.

Sherifdeen M. Shafeek and two others v. *The Secretary, Public Services Commission and seventeen others*,[34] involved ethnic quotas in relation to recruitment to public service. Justice Gunesekera held in this case that the petitioner's fundamental rights guaranteed under Article 12(1) were violated and declared that "Public Administration Circular No 15/90 in so far as it embodies the principle of ethnic quotas in relation to the ***recruitment*** to the Public Service is inconsistent with Articles 12(1) and 12(2)"[35] (emphasis added). It is, however, unfortunate that the decision of the Court on this issue was rather brief.

In *Dr Y. de Silva* v. *Professor W.D. Lakshman, Vice Chancellor, University of Colombo and seventeen others*[36] the petitioner alleged that the refusal by the Postgraduate Institute of Medicine (PGIM) to grant her "Board Certification" as a consultant anaesthetist after she had undergone the required training abroad was contrary to Article 12(1). Justice Fernando referred at length to the correspondence between the PGIM and the consultant under whose supervision she had trained abroad and found serious discrepencies in the consultant's correspondence. With regard to the decision-making process, the Court held that "in a matter of vital importance to the Petitioner in her professional capacity, the PGIM deprived her of the protection of the ***audi alteram partem*** rule."[37]

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[34] SC Application No 249/96, SC Minutes 19.11.1998.

[35] The earlier decision of the Court related to promotions: it was held in *Ramupillai* v. *Festus Perera*, (1991) 1 Sri LR p 11 that this circular (15/90) dealing with ethnic quotas was invalid insofar as promotions are concerned.

[36] SC Application No 648/96, SC Application 25.9.1998.

[37] *Ibid* at p 13. One of the two rules of natural justice, the *audi alteram partem* rule requires that both parties to a dispute must be heard before a decision is taken.

The Court, however, held that it could not conclude that the petitioner had completed her training abroad satisfactorily. The PGIM had said that she should undergo a further period of local training, but the Court held that this was contrary to the regulations and that any past practice deviating from this regulation which required foreign training did not - and indeed could not - result in amending this regulation: "On a matter of such importance - to patients, the profession and the nation - nothing short of an express amendment made after due consideration will suffice." While holding that there was a violation of Article 12(1) due to the failure to follow rules of natural justice, the Court directed the PGIM to send the petitioner on further foreign training at its own expense. It also awarded her compensation and costs.

E.O.B. Ratnayake v. *The Sri Lanka Rupavahini Corporation and thirteen others*[38] involved the alleged violation of Articles 12(1) and 14(1)(a). The petitioner contended that SLRC's refusal to telecast the Sinhala telefilm *Makara Vijithaya* during "prime time" was in violation of his fundamental rights guaranteed under Articles 12(1) and 14(1)(a).

The Court was asked to make a declaration that the procedure leading to the refusal was unfair and subjective and, therefore, violated Article 12(1). The Court held that at each stage in the process (when the telefilm was first reviewed, when the first appeal was made and when the second appeal was made) "the petitioner had not been told who the members of the board were, how they had been appointed, what procedure they would follow, what criteria they would apply, what their views were about "Makara Vijithaya," and the reasons for their decision."[39] Justice Fernando in delivering the judgment stated that "uncertainty as to procedure and criteria tends to result in a denial of

[38] SC Application No 867/96, SC Minutes 11.6. 1998.

[39] *Ibid* at p 4.

the equal protection of the law."[40] The Court stressed, yet again, that statutory powers are not absolute:

> *The statutory powers which the 1st Respondent has are, like most statutory powers, not absolute, unfettered, or unreviewable; they are held in trust for the benefit of the public; and they cannot be exercised arbitrarily, or capriciously, or unreasonably. The powers which a statutory body, such as the 1st Respondent, has in respect of television and broadcasting are much greater than in the case of other media, such as the print media - ... The airwaves are public property and the State is under an obligation to ensure that they are used for the benefit of the pubic.*[41]

The Court held that the 1st respondent had failed to implement the obligation on it to establish a fair and objective procedure and that the powers it held in respect of telecasting on airwaves were held in trust for the public.

The Court also directed the 1st respondent to give publicity in all three languages to the procedure and criteria for the selection of telefilms to be telecast during prime time and outside prime time.

In *A. Ariyasiri* v. *P.C. Rajapakse, Police Station Middeniya and three others*[42] the petitioner alleged that he had been arrested twice without adducing any reasons for arrest. He also alleged that he had been falsely implicated by the 1st respondent in two Magistrate's Court cases. The Court held that the respondent's conduct had violated Articles 12(1) and 13(1).

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[40] *Ibid* at p 12.

[41] *Ibid.*

[42] SC Application No 1060/96, SC Minutes 15.10. 1998.

In *Samadasa* v. *Wijeratne, Commissioner General of Excise and six others*[43] the Court said that the 1st respondent - the Commissioner General of Excise - was the person empowered by law to issue or refuse liquor licences. The petitioner alleged that his application for a liquor licence had been unfairly dealt with despite the recommendations by the *Grama Seva Niladhari* (the Village Headman), the Superintendent of Excise, Galle, and the Assistant Commissioner General of Excise (Southern Province) to issue the licence. The Court found in his favour, saying that the Commissioner General "has in my view abdicated his authority by blindly accepting the recommendation of the Divisional Secretary, with the result that he has acted in violation of the petitioner's rights to equal treatment under the law."[44]

In *P.D. Jayaweera* v. *National Youth Services Council and three others*[45] the petitioner was the Director (Development) of the 1st respondent Council - the National Youth Services Council (NYSC). Upon reaching the age of 55 years in 1995, the petitioner applied for the first extension of services which was granted. When he applied for the second extension in August 1996, although it was approved by the Secretary to the Ministry of Samurdhi, Youth Affairs and Sports (the 3rd respondent), no intimation was made to the petitioner until December 1996. A few days later, the 2nd respondent - the Chairman, NYSC - informed the petitioner that a decision was taken by the 1st respondent Council that officers will not be granted extensions of service beyond 55 years of age with effect from 12.12. 1996.

The petitioner averred that the 2nd respondent had acted *mala fide* and that the refusal to grant the extension was discriminatory and

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[43] SC Application No 495/97 and SC Application No 172/98, SC Minutes 17.10. 1998.

[44] *Ibid* at p 5.

[45] SC Application No 19/98, SC Minutes 30.10. 1998.

violative of the equal protection of the law guaranteed by Article 12(1) of the Constitution.

The Court held that the failure to obtain the concurrence or the approval of the Minister for the decision taken by the 1st respondent was a violation of Article 12(1) and that the application for extension was not considered on its merits and was refused purely on the basis of the decision taken on 12.12. 1996 by the 1st respondent Council.

2.3 Cases under Article 14[46]

The case of *Pradeep Kumar Dharmaratne* v. *Inspector of Police, W. Dharmaratne, OIC, Police Station, Aranayake and five others* (discussed above) also involved an alleged violation of Article 14(1)(a). With regard to the freedom of expression Justice Weerasekera stated:

> *A free society is founded on the conviction that there must be freedom of thought that we cherish but also thought that we find repulsive. Freedom not only for free thought for those who agree with us, but freedom for the thought that we hate. Thus it was envisaged in Article 14(1)(a) that public issues be debated with uninhibited robustness and transparency.*[47]

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[46] Article 14(1) accords every citizen the following rights: (a) freedom of speech and expression including publication; (b) freedom of peaceful assembly; (c) freedom of association; (d) freedom to form and join a trade union; (e) freedom to manifest one's religion; (f) freedom to promote one's culture and use one's language; (g) freedom to engage in any lawful occupation, profession, trade, business or enterprise; (h) freedom of movement and of choosing one's residence within Sri Lanka; and (i) freedom to return to Sri Lanka.

[47] *Supra* n 11 at p 9.

The Court, however, could not find an overt act to point to a violation of this provision by the 1st respondent:

> *I believe that inspite of frequent strictures by this Court this stupid act done so blatantly by persons who appears (sic) to fail to appreciate critical evaluation is reprehensible but in the absence of an overt act to point to a violation of article 14(a) (sic) by the 1st Respondent, I come to no finding against him in this regard.*[48]

In *M.K. Victor Ivan* v. *Hon. Sarath N. Silva, Attorney General*,[49] although leave to proceed was refused, the Court made important pronouncements in relation to freedom of expression as well as executive action. In this case, the petitioner - the editor of *Ravaya*, a Sinhala weekly newspaper which has a reputation for exposing misconduct and corruption - complained of two indictments filed against him for criminal defamation of a former Minister of Fisheries. The petitioner argued that the Attorney General had acted arbitrarily without a proper assessment of the facts necessary to file action for criminal defamation and without regard to the constitutional guarantees given to journalists in indicting him in the High Court. The petitioner contended that his rights under Articles 12(1), 14(1)(a) and 14(1)(g) had been violated by the action of the Attorney-General.

The Court had to decide whether the Attorney General's discretion with regard to the institution of criminal proceedings is "absolute, unfettered and unreviewable." If so, leave to proceed must be refused without proceeding any further. Justice Fernando held that the discretion vested in the Attorney General is subject to obvious limits:

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[48] *Ibid.*

[49] SC Application No 89/98, SC Minutes 3.4. 1998.

> *It is enough, for the purpose of this case, to say that the Attorney-General's power to file (or not to file) an indictment for criminal defamation is a discretionary power, which is neither absolute nor unfettered. It is similar to other powers vested by law in public functionaries. They are held in trust for the public, to be exercised for the purposes for which they have been conferred, and not otherwise. Where such a power or discretion is exercised in violation of a fundamental right, it can be reviewed in proceedings under Article 126.*[50]

With regard to the submission made by counsel for the petitioner that a journalist or a newspaper should be considered differently to other people, Justice Fernando held that it cannot be accepted that the Attorney General's decision to indict a newspaper editor "must be scrutinised with any greater strictness than a similar decision to indict any other citizen."[51]

With regard to Article 14(1)(a), Justice Fernando said:

> *The freedom of the press is not a distinct fundamental right, but is part of the freedom of speech and expression, including publication, which Article 14(1)(a) has entrenched for everyone alike. It surely does allow the pen of the journalist to be used as a mighty sword to rip open the facades which hide misconduct and corruption, but it is a two-edged weapon which he must wield with care not to wound the innocent while exposing the guilty.*[52]

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[50] *Ibid* at p 6.

[51] *Ibid* at p 7.

[52] *Ibid.*

The Court further pointed out that errors and omissions are in themselves not proof that the decision in question was arbitrary or unreasonable[53] or was intended to interfere with the petitioner's freedom of speech. Justice Fernando also dealt with the question of "administrative or executive action" and held that the Attorney General's activities fell within this category:

> *A primary consideration is that the constitutional jurisdiction of this Court to grant relief for infringement of fundamental rights by executive or administrative action must necessarily apply to the exercise of any power of discretion conferred on a public officer by an Act of Parliament, in the absence of a constitutionally valid derogation from that jurisdiction.*[54]

In *Dr R. Ramasamy* v. *Institute of Fundamental Studies and two others*[55] the Court had occasion to pronounce on Article 14(1)(g) relating to the right to engage in a profession:

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[53] The petitioner further alleged that proper information was not provided to the AG - that investigations were pending about the alleged misconduct and corruption on the part of the then Minister of Fisheries. The Court made a general reference to the purpose of criminal law here:

> *A citizen is entitled to a proper investigation - one which is fair, competent, timely and appropriate - of a criminal complaint, whether it be by him or against him. The criminal law exists for the protection of his rights - of person, property and reputation - and lack of a due investigation will deprive him of the protection of the law. But the alleged lack of a proper investigation, ... was a lapse on the part of those whose duty it was to investigate, and not on the part of the Attorney-General* (*ibid* at p 8).

[54] *Ibid* at p 4.

[55] SC Application No 499/97 (FR), SC Minutes 27.3. 1998.

> *The freedom guaranteed to a citizen by Article 14(1)(g) to engage in any lawful occupation, profession etc. does not confer unbridled freedom. A person must at all times observe the rules applicable to his or her occupation or profession. If he or she fails to do so, such a person loses the constitutional protection guaranteed by Article 14(1)(g).*[56]

In *S.J. Dias* v. *Honourable Reggie Ranatunga, Deputy Minister of Transport, Environment and Women's Affairs and six others*[57] (see above) the Court said, with regard to a possible violation of Article 14(1)(a), that although there had not been a direct violation of the petitioner's freedom of speech and expression, there had been interference with the petitioner's legitimate activity, namely, gathering of information. The telecast of the news item would have been an exercise of the petitioner's freedom of speech and expression; therefore, the first respondent's conduct indirectly impaired the petitioner's fundamental right under Article 14(1)(a). The Court also referred to its decision in *Fernando* v. *Sri Lanka Broadcasting Corporation*[58] that although the Constitution does not embody the right to information, such a right is implicit in the freedom of thought guaranteed by Article 10. The Court held that freedom of speech may include other rights, such as the right to obtain and record information by means of interviews, photographs and the like, needed to make the actual exercise of that freedom effective.[59]

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[56] *Ibid* at p 43.

[57] *Supra* n 7.

[58] (1996) 1 Sri LR p 157. See also *Sri Lanka: State of Human Rights 1997* (Law & Society Trust, Colombo, 1997) pp 64 and 99.

[59] See also chapter VII on the Freedom of Information.

3. Remedies

The remedies that are generally granted by the Court include payment of compensation and costs, a declaration of illegality and orders to do certain acts or to cancel illegal acts. The Court has also imposed personal liability on those officers found guilty of violating Articles 11 and 13. In addition, a considerable number of cases are settled in Court after the respondents agree to grant the main relief sought by the petitioners. The Court has always welcomed such settlements.

The Court generally takes the circumstances of each case into consideration in awarding compensation to ensure that the compensation in question is commensurate with the damage suffered. However, the amount of compensation granted to the petitioner in *Neetha Dissanayake, Attorney-at-Law on behalf of K.M. Lal* v. *Sujeewa, Sub Inpsector of Police, Police Station, Meetiyagoda and four others*[60] (discussed above) seemed wholly inadequate in relation to the injuries he had suffered: the Court granted Rs 50,000 payable by the State and only Rs 5,000 to be paid by the 1st respondent personally. In total the petitioner was entitled to a sum of Rs 60,000 as compensation and costs when he nearly lost his life as a result of the injuries inflicted on him by the 1st respondent.

4. Conclusions and Recommendations

While the Court continued to grant relief to victims whose fundamental rights were violated due to State action, *M.J. Abeysuriya appearing as next friend for her minor son I.C. Abeysuriya v. T.B. Damunupola, Principal, Ananda College and six others*[61] can be

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[60] *Supra* n 10.

[61] SC Application No 162/98 (F/R), SC Minutes 15.12. 1998.

taken as a warning that this right should not be abused. In this case, the petitioner alleged that her younger son was not admitted to Ananda College although her elder son was already there and, therefore, the petitioners were denied equality before the law under Article 12(1). In the course of the proceedings it transpired that the petitioner and her husband had made false statements. The Court directed the Registrar to forward a copy of the judgment to the Attorney General for appropriate action to be taken against the petitioner's husband for making a false statement to a public officer and against the petitioner for making a false declaration in an affidavit filed in the Court. This does not, however, seem to be happening in relation to police officers and members of the armed forces where they file false affidavits, particularly when such misconduct is blatantly obvious as in *Neetha Dissanayake's Case*.[62] Filing false affidavits by law enforcement officers, especially where the alleged violation is one of torture, should be taken very seriously by the Court.

It is also a cause for concern that, despite many reprimands by the Court, torture continues to be committed. In relation to Article 12, too, public officers continue to make the same mistakes, failing to make use of the existing jurisprudence in relation to their work and responsibilities. In *Sri Lanka: State of Human Rights 1998*, we recommended that the Court's judgments should form part of the training of public officials so that violations could be minimised. At present, the number of such petitions seems to be increasing considerably. While this indicates that people are more aware of their rights, it also means that violations continue at a high level and that the Court's rulings are often ignored.

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[62] *Supra* n 10.

V

Children's Rights

Melloshini Perera[*]

1. Introduction

Nineteen ninety-eight was essentially a year of understanding and new initiatives in the field of child rights. Many heard and learnt about the United Nations Convention on the Rights of the Child (CRC) for the first time – including the majority of members of the present Sri Lankan Parliament and many children deprived of rights themselves. The CRC provides the base-line for assessing the observation of child rights in Sri Lanka, and the concepts embodied there, though simplistic at first sight, need to be grasped in a context which asserts the importance of the child as a human being. We need to accept child

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rights fully as a condition of civilised society and as an entitlement that every child is born with, regardless of adult preferences. Although we have made some progress in this direction, we have only taken very little steps forward so far.

Nineteen ninety-eight saw some significant events in the process of realising child rights. A number of issues received wide media coverage, amidst the ethnic conflict and other national issues, creating both a consciousness of the place of children in society and a clear desire for change and improvement. However, this desire still mostly exists at the level of opinion and policy, and has yet to be implemented in practice.

This chapter focuses on several developments in child rights: children affected by the armed conflict, political initiatives to establish child rights, the new National Child Protection Authority, Juvenile Justice and the amendments to the Penal Code and other statutes passed by Parliament, and cases involving child sexual abuse heard or completed by the courts in 1998.

2. Obligations in Times of Armed Conflict

The Government invited the Special Representative of the UN Secretary-General for Children and Armed Conflict, Mr Olara Otunnu, to visit conflict areas in Sri Lanka and to make recommendations to alleviate the suffering of children affected by the conflict. In May 1998, he visited two of the three major areas affected by the conflict, the Jaffna Peninsula and the Vanni region.

The LTTE has long recruited children in the conflict and border areas. According to Sri Lanka's Directorate of Military Intelligence, an estimated 60% of LTTE fighters are below the age of eighteen. Even

if this figure may be questioned, another assessment of LTTE fighters who had been killed in combat revealed that 40% (both male and female) were aged between nine and eighteen years.[1]

Otunnu discussed a number of relevant issues with both the Government of Sri Lanka and the LTTE, and subsequently the LTTE leadership undertook to refrain from using children below the age of 18 years in combat and to stop recruiting children under the age of 17 years. The LTTE also accepted a proposal to create a framework to monitor these commitments, and showed interest in having its cadres educated on the principles of the CRC.[2]

On 12 May 1998 at a press conference in Colombo, Otunnu said that he could not yet say who would actually monitor the LTTE or what the precise monitoring mechanism would be, as these had yet to be worked out. It has been most disappointing that since then, no follow-up action or monitoring efforts have been evident. As a third party with high international status, Otunnu would have the independence and status needed to bring pressure on the LTTE to bring their practice in relation to children into line with international standards. This will only be achieved, however, if there is consistent follow-up to his first visit.

In practice, the LTTE has not treated their undertaking to Otunnu seriously: 26 child soldiers aged between 13 and 18 years were reported to have surrendered during the capture of the northern town

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1 Rohan Gunaratna, "Childhood – A Continuous Casualty of the Conflict in Sri Lanka," Jane's Intelligence Review (July 1998).

2 Olara Otunnu, "Report of the Special Representative of the Secretary General for Children and Armed Conflict," in accordance with UN General Assembly Resolution 51/77 (October 1998).

of Mankulum in 1998. Despite the commitment made to Otunnu in May, the LTTE at least continued to use the children already recruited, instead of setting them free.[3]

3. Political Initiatives to Establish Child Rights

In June 1998, a multi-party Parliamentary Lobby for Child Rights was inaugurated under the auspices of all mainstream political parties with members representing almost all areas of the country. The Lobby was founded as a result of inter-party discussion initiated by three Members of Parliament from the two main political parties in Sri Lanka. The Lobby's mandate includes developing the understanding of each and every article of the UN Convention on the Rights of the Child (CRC), expounding this knowledge to the public, investigating child related issues and complaints, mobilising mechanisms within constituencies to monitor child rights and moulding national policy in favour of children.

This is the first Lobby of its kind in Asia and it is on the only cause that is fully supported by both the Government and the Opposition in a practical form. As a result the Lobby has provided a short cut to the desks of most Cabinet Ministers for urgent issues concerning children. Its methods of working have given its members a certain respect and authority in discussions on the subject in Parliament.

The competence and commitment of the Lobby was first tested during the parliamentary debate on the National Child Protection Authority (NCPA) Bill.[4] The Minister of Justice extended the debate by a day

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[3] Reported in the *Daily News* during the time that Mankulum was captured.

[4] See *infra* for the discussion on the National Child Protection Authority.

in order to allow all the Lobby members to make their individual contributions, and subsequently accepted 13 amendments to the Bill proposed by members of the Lobby. A further proposed amendment that was not accepted at this stage was that two children should be included as members of the Board of the Authority, in line with the participation rights of children embodied in Articles 12 and 13 of the CRC.[5] However, the Minister later discussed this issue in private with the Lobby, and there is still a good possibility that it may become a reality once the Authority is established. If this does happen, it would give a most significant start to the process of realising the participation rights of children in Sri Lanka at the national level. This cluster of rights in the CRC is usually misunderstood and disregarded. The discussion on this issue demonstrated the open-minded manner in which the Ministry of Justice and the Lobby were willing to consider and encourage a range of ideas to promote child rights, which is relatively new in Sri Lanka.

In order to become more effective, the Lobby Members need to open Secretariats in their constituencies as soon as possible and advertise its availability to the public and its mandate to address and act on child related grievances. At present, Members of Parliament have an open day weekly for the public. This concept can be extended to cover the specific problems of children. There is a practical role that is much needed from this Lobby group that has probably not been a characteristic of other Parliamentary Lobbies. In areas outside Colombo the remedial facilities for child abuse and protection are

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[5] Article 12 deals with the right of the child to express views freely in all matters affecting the child, the views being given due weight in accordance with age and maturity of the child. Article 13 deals with the freedom of expression, and the right to seek, receive and impart information and ideas of all kinds.

almost non-existent. Although NGOs are involved in programmes for child welfare in rural areas, there is no systematic procedure for reporting or taking action when children are victimised. The police are not trained to deal with or probe into complaints made by children themselves and most grievances exist unnoticed by those who are responsible for protecting children. The Members of Parliament have the power in their constituencies to ensure that child protection is a priority in local government. They can insist that the police take these matters seriously and whenever necessary communicate prevailing problems to the NCPA. They can help speed up processes by issuing requests to various authorities and broadly act as overseers of upholding child rights. This would be an aid to the NCPA. The Lobby, as individuals assigned to various parts of the country, must activate quick procedures and avenues for preventing and combating child abuse in all its varied forms. Finances should not be a problem if the intentions for forming this Lobby were genuine, as they no doubt were.

The Lobby is a useful national tool with considerable potential to act as a catalyst in the process of upholding child rights. If the Government, institutions and public use it appropriately, it could be capable of achieving far-reaching national objectives, despite the political pressures it faces at any given time because of its multi-party membership and common interest.

4. The National Child Protection Authority (NCPA)

In September 1998, Parliament passed legislation to establish the NCPA for the purpose of formulating a national policy on the prevention of child abuse, the protection and treatment of children who are victims of such abuse, and the co-ordination and monitoring of action against all forms of child abuse. This is one of the initiatives

that emanated from the recommendations of the Presidential Task Force on Child Abuse set up in 1997, whose work created much publicity for this issue.

The statute establishing the NCPA provides that it is only concerned with the physical abuse and its consequent effects and employment of under aged children. So while it covers the protection rights embodied in the CRC, this Authority is not mandated to attempt to uphold the entire spectrum of rights contained in the CRC. That is not its purpose.

At the time of writing, the Act had yet to be implemented and the Authority had not yet been established. However, while the anticipated functions of this Authority are numerous and widespread,[6] in the form that they are listed in the Act in sections 14(a) to (r), its actual power seems limited. The NCPA will advise, consult, recommend, monitor, liaise, engage in dialogue, create awareness, and such like, but it does not expressly have the power to issue directives or to prosecute on behalf of victims of child abuse cases. It thus remains to be seen whether the Authority will be effective when it apparently lacks any "teeth."

Section 16 of the NCPA Act provides for the establishment of a Panel of Resource Personnel consisting of senior officials from the Ministries of Justice, Education, Defence, Health, Social Services, Provincial Councils, Women's Affairs and Labour. This is mainly to provide the NCPA with easy access to the Ministries that are concerned with the various aspects of child welfare. Since the Authority

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[6] The functions of the NCPA are discussed as it was proposed by the Presidential Task Force on Child Abuse in *Sri Lanka: State of Human Rights 1998* (Law & Society Trust, Colombo, 1998), pp 201-203.

has no explicit directive power of its own, it can use this avenue to advise government departments and other institutions through the relevant Ministries, which could issue general or special directions based on the Authority's advice.

It must not be forgotten, however, that the idea of establishing a Child Protection Authority arose because of the distressing situation that prevails in State agencies that have any responsibility for acting as "guardians" of children. These agencies have failed to protect children in any systematic or satisfactory way; instead, they have caused added grief to children through delays in procedure and inefficiencies caused by lack of funds. Given this situation, it might have been expected that the Authority would have been given a higher status and greater powers, to enable it to issue directions to those dysfunctional agencies, or to take on their child-related responsibilities itself. The NCPA was initially intended to be an independent and autonomous body that had the primary power under the law to protect victimised children. As currently constituted, however, it will not fully achieve this purpose.

The NCPA attracted much publicity while the Bill was being debated and passed by Parliament, but the logistics and finances necessary to implement the Authority are still to be mobilised and the Members of the Authority are still to be selected. The reason for such delay by the executive is not clear.

5. New Laws Relating to Child Abuse

Changes to the Penal Code in favour of children began in 1995, when an Amendment was enacted to deal with the sexual abuse of children. Under the new section 286A, the use of children in obscene or indecent exhibitions, shows, photographs or films, and the sale, distribution or possession of such material, are punishable by law. This provision

was amended by the 1998 Penal Code (Amendment) Act which requires those who develop photographs and films to inform the police of any discovery of any indecent or obscene photographs and films. Non-disclosure is an offence punishable with imprisonment for a term extending to two years and/or a fine. Neither the 1995 nor the 1998 amendments however, protect children from exposure to pornographic literature, in that a person who provides or exposes a child to pornography cannot be charged under this section.[7]

Since child abuse was not defined in the Penal Code or any other legislation, there was considerable scope for misinterpretation, especially by the police when filing charges. To address this problem, the Criminal Procedure Code (Amendment) Act No 28 of 1998 amended section 2 of the Criminal Procedure Code by defining "child abuse" as an offence under sections 286A, 288, 288A, 288B, 308A, 360A, 360B, 360C, 363, 364A, 365, 365A, or 365B of the Penal Code when the offences concerned were committed in relation to children. Reference to another law may be an unsatisfactory way of defining a legal concept (for example, "*child abuse means section 288 of the Penal Code*"), but it does at least clarify the status of these particular sections of the Penal Code in relation to offences against children.

However, the incorporation of this same definition of child abuse into the National Child Protection Authority Act was not at all satisfactory. Considering the purpose of this Act, a comprehensive definition of child abuse should have been included which bridged the clinical definition of child abuse and a very broadly formulated definition in

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7 "The Study on The Substantive and Procedural Laws Relating to Children Requiring Reforms," report by Lawyers for Human Rights and Development (1998), pp 8-9.

order to make sure that the law does not allow for any actions which are clearly instances of child abuse, to be excluded from the competence of the Authority.

The question whether a child could give consent to a sexual act, which left unclear in the 1995 amendment to the Penal Code, was answered by the Penal Code Amendment Act of 1998. This added a new paragraph that stated that any sexual conduct committed with or without the consent of the other person when the other person is under 16 years of age is punishable. Also, if the sexual conduct is committed with the consent of the other person or while such other person was in lawful or unlawful detention or when that consent has been obtained by use of force, or intimidation or threat of detention or by putting such other person in fear of death or hurt, it is punishable.[8]

A continuing problem is the excessive period of time it takes to conclude trials of rape cases. On 13 June 1998, *Divaina* newspaper reported that the initial trial of a suspected rapist, who had committed the offence in March 1984, only concluded in May 1998 in the Panadura High Court. The Attorney General's Department is unable to indict suspects in child abuse and cruelty cases expeditiously due to the pressure of other responsibilities. This causes unnecessary suffering to child victims, who are kept in remand homes and children's homes awaiting the outcome of trials and decisions which will affect their future. In order to reduce this strain and suffering, a new provision was introduced under the Criminal Procedure Act of 1998; section 453A requires the courts to give priority to the trials of persons charged with or indicted for child abuse and to the hearing of appeals in those cases.

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[8] Penal Code (Amendment) Act No. 29 of 1998 passed by Parliament in May 1998.

However, as Lawyers for Human Rights and Development[9] have pointed out, other Acts, such as the PTA and Emergency Regulations, already contain similar provisions requiring the courts to hear cases within a short period of time. These are clear legal requirements, which were enacted because of the gravity of such cases, but they are nevertheless ignored. Inquiries into cases under these laws still go on for years, rather than the specified two or three months. The same can be expected in cases involving child abuse. In order to rectify this problem, more effective procedures need to be introduced. These could include issuing definite directions to the police to conclude their investigations in child abuse cases and to submit files to the Attorney General's Department within a specific time frame; setting up a separate unit in the Attorney General's Department with the sole responsibility for indicting child abusers; establishing separate courts or sessions to hear cases involving children; and instructing that trials involving children should be taken up on a continuous daily basis until their conclusion.

It can take a little time for new laws to take effect after they have been enacted; the police, lawyers, judges and others involved cannot instantly develop their understanding of the new laws, nor see how to interpret and apply them to actual circumstances and facts. It is, therefore, most important that new legislation is made publicly available as soon as it is enacted, and is given wide publicity and brought to the notice of those who implement it. The Judicature (Amendment) Act No 27, the Criminal Procedure Code (Amendment) Act No 28 and the Penal Code (Amendment) No 29 all came into force in May 1998. Yet these Acts of Parliament were not available in print for distribution even at the end of August 1998.

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[9] *Supra* n 7.

6. Administration of Juvenile Justice

A thorough examination of the juvenile justice system in Sri Lanka would point out that there is, in fact, no juvenile justice system in this country. After all, the existing structures are useless if their effects do not match their purpose. Its malfunctioning is equal to the system not existing in the first place. No matter how controversial that statement may sound, we have no choice but to accept it because it is the sad truth.

There is a makeshift legal process where organs of the mainstream legal system and its characteristics act as substitutes to piece together a financially drained, crude and haphazard attempt at administering juvenile justice. There is only one Juvenile Court in the whole of Sri Lanka. Only five Children's Desks at police stations function satisfactorily. The handling of cases by the police and legal representation of children suffer from the antiquated laws, practices and attitudes within the institutions of the law. A number of State appointed Commissions and private organisations have brought to light the severe deficiencies in the administration, but the magnitude of the changes and restructuring imperative for delivering juvenile justice has obviously overwhelmed anyone considering further action.[10]

The Sub-Committee on Juvenile Justice Administration submitted its findings and recommendations to the Law Commission of Sri Lanka in 1998. This again documents and highlights the shortcomings of the system and requests improvements that have been recommended before.

[10] For further details see Vijaya Samaraweera, "Report on the Abused Child and the Legal Process in Sri Lanka" (1998); Melloshini Perera, "Report: Justice for Juveniles," Save the Children Fund Main Data (1998); and Melloshini Perera, "Institutionalisation in the Juvenile Justice System," Save the Children Fund Main Data (1998).

The following are the main recommendations made by the Sub-Committee, and these also indicate what is presently not being done:

- Juveniles should only be remanded based on the principles in the new Bail Act. Juveniles should be kept separate from adult remandees or convicted persons of any age group. Normal juveniles should be separated from those who are particularly unruly or have past convictions.

- There should be Juvenile Courts in each judicial division. Alternatively, Magistrate's Courts should sit as Juvenile Courts on a day of the week assigned to juvenile cases.

- All Judicial Officers should be given training in juvenile justice.

- A psychiatrist's report should accompany a compulsory report from the Probation Officer [Section 17(2) of the Children and Young Persons Ordinance].

- The President of the Bar Association should set up a mechanism within the Association to provide representation for juveniles. This should be a permanent, ongoing and readily identifiable authority charged with the duty of ensuring legal representation for children.

- Places of safety which are commonly referred to as "Detention Homes" should be renamed "Protection Homes" to emphasise the fact that they are for the purpose of care and protection and not the treatment of offenders.

- Places of detention and supervision should be classified more simply and rationally, as follows: (1) Protection Homes concerned with

providing care for the destitute and homeless and those in need of medical care. "Fit Persons" and "Receiving Homes" would fall into this category. (2) Remand Homes – Places of detention for juveniles awaiting trial. (3) Places of Correction for those found guilty of delinquency including Certified Schools and Approved Schools. (4) A fourth category of places should be available to enable a judge to release a convicted juvenile to the care of a suitable person subject to terms and conditions the judge may prescribe.

- Since the treatment meted out to juveniles in the custody of the State falls far short of the requirements of international and domestic laws, apparently due to the lack of resources, only such number that can be accommodated in satisfactory conditions should be detained.

- Convicted juveniles should only be institutionalised where he/she is of such unruly or depraved character as to constitute a menace to the public.

- Probation Orders should be used more. Suitable community service projects should be identified.

- Corporal punishment should be abolished.

Although a number of amendments have been made to the law in order to make the prosecution of child abusers more effective, the results of these changes have been minimised because of the absence of a legal system capable of supporting them. Similarly, child offenders are not dealt with in a way that the characteristics of their childhood could be preserved because they are treated with the same contempt

and degradation that is shown by the system towards hard-core adult criminals. As a result the need to rehabilitate and return them to civil society as ethical human beings is still largely non-existent.

7. Child Abuse Cases in 1998

A number of child abuse cases received publicity during 1998, including a case involving a schoolmaster from Mahinda College in Galle, the *Beach Baba Case* from Hikkaduwa, the *Akmeemana Case* where children were alleged to have been abused in a "home" run by a religious order, and a case in Marawila Magistrate's Court. However, these cases were still proceeding at the end of the year, and no significant judgments were passed.

One principle of the CRC is that children will be protected from any form of exploitation prejudicial to any aspect of their welfare, and States Parties are required to take all appropriate measures to protect children from maltreatment or exploitation while in the care of parents, legal guardians or any other person who has the care of the child.[11] This is relevant to the attitudes of some lawyers and judges in child abuse cases, who still do not differentiate between the way a child is questioned in Court and the way an adult is questioned. This can lead to the maltreatment and exploitation of children in court under the "protection" of the law.

In the *Mahinda College Case*, observers noted that the court failed to prevent the defence from asking the child lewd and salacious questions.[12] State Counsel, Mr S Thurairaja from the Attorney

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[11] Articles 19(1), (2) and 36 of the CRC.

[12] Arun Tampoe, Attorney-at-Law, Child Rights Activist working with PEACE.

General's Department, who often appears on behalf of the State in child abuse cases, has made similar observations in relation to other cases.[13]

The Report on the Abused Child and the Legal Process of Sri Lanka by Dr Vijaya Samaraweera[14] highlighted the problems children encounter both in and out of court during the typical process of a juvenile case. This report also documents the phenomenon of derogatory references being made to the child during Court proceedings, which both the prosecution and the Magistrate have found permissible in the given examples.

It is difficult to supervise the actions of the judiciary within any proceeding case since the judge is the highest authority in a court of law. The counsels may be cautioned if they harass the witnesses, but this would inevitably be done by those judges who already understand the atmosphere that needs to be maintained when a child is present in court. It is unlikely that these judges would then go on to violate their own principles. On the other hand, if the counsels are mindful of harassment on the judges' part, they should be able to object and remind the court that specific speech or manner of address is inappropriate in the presence of the child. If this is ignored, the incident must be reported to the Chief Justice and the NCPA so that corrective action may be taken in relation to the judge in question. Formal complaints should also be made by anyone present at a juvenile case

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[13] Comment from a discussion held at the Workshop for Lawyers for Child Rights Group, August 1998, organised by Save the Children Fund (UK) Sri Lanka.

[14] Presented to the National Monitoring Committee of the Children's Charter in May 1998.

who witnesses during the process, any form of treatment towards the child which, in that person's view, is unsuitable. Corrective measures should, in the first instance, be a compulsory training session on the strict standards to be upheld in cases that involve children, in line with the obligations binding on us as a party to the CRC.

The *Mahinda College Case* demonstrated other problems: the court process caused delays, and there was no effective counsel for the child. The 1998 amendment to the Code of Criminal Procedure[15] requires courts to give priority to trials of persons accused of child abuse, but this was overlooked in both this case and the *Akmeemana Case*, which is now proceeding in its third year.

The *Marawila Case* involved a nine-year-old child who lost half of his right hand as a result of operating machinery while being illegally employed by a tile factory proprietor in Chilaw. This case had been filed twice, first by the police and then by the Labour Department under section 13(3) of the Employment of Women, Young Persons and Children Ordinance No 47 of 1956, for employing a child who was only nine years old. This shows the lack of co-ordination between the two agencies, and is likely to increase the trauma for the child, who will have to appear in both cases. The State prosecution may be doing its best as far as the criminal charges are concerned, but the child victim and his parents are offered minimal support and care, if any, and the trial is proceeding very slowly, regardless of the serious implications of the crime for the child.

8. Reporting to the UN Committee

States Parties to the CRC, including Sri Lanka, have an important mandatory obligation under Article 44 to report to the UN Committee

[15] See *supra*.

on the Rights of the Child every five years. This is to confirm to the UN that measures have been taken, and are being taken, to give effect to the provisions of the CRC.[16] The report must also indicate factors and difficulties, if any, affecting the extent to which the obligations have been fulfilled and give sufficient information for the Committee to understand the implementation of the Convention in the country concerned.[17]

The Government of Sri Lanka submitted its first report to the Committee in February 1994, and the Committee responded with its comments and recommendations thereafter.[18] The next report was due in 1998, but had not been completed by the end of the year.

9. Conclusions and Recommendations

The events of 1998 indicate that Sri Lanka's efforts to understand and uphold the rights of the child and combat child abuse are continuing, although the problems that hinder those efforts are sometimes the fundamental issues that caused a need for action in the first place. Major obstacles to fully realising child rights are financial, allocation of resources and current national priorities, such as the ethnic conflict. However, such obstacles cannot provide excuses for inaction.

From a strictly legal point of view, it might be thought that sufficient progress has been made in the year, with the passing of legislation to establish the NCPA and various amendments to the Penal Code and

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[16] Article 44 (1) of the CRC.

[17] Article 44 (2) of the CRC.

[18] The recommendations of the UN Committee are discussed in *Sri Lanka: State of Human Rights 1995* (Law & Society Trust, Colombo, 1996), pp 175-182.

other laws that have an impact on children. However, the existence of laws *per se* does not solve anything if the legislation is ignored or if the necessary machinery to implement the principles and obligations is not put in place. Therefore, the hard work to actually implement the principles embodied in the legislative changes is still awaited.

The allocated funds for implementing the NCPA must be released and used to enable this institution to function as soon as possible. It has a considerable backlog of work, and a crucial role to play in expediting the remedies for victims of child abuse. It also has an important responsibility in *preventing* child abuse by creating awareness and co-ordinating action between relevant agencies.

At present, the urgent need is to correct some of the fundamental problems of the legal process in relation to children. There is less need at present for new legal provisions. Many professionals and academics have repeatedly made this point. The justice system needs to be completely overhauled and modernised to enable it to realise and uphold child rights. Without such reform, new legislation would be like throwing water on a duck's back. It may be argued that the system is not only dysfunctional in relation to children, but also to any adult requiring its services. But we could at least start by reforming the process where children are concerned. Those who are involved in implementing juvenile justice - such as the police, lawyers, judges and probation officers - need to understand that different standards apply to children. Their practice may also need to be monitored and controlled through such bodies as the Judicial Services Commission, the Bar Association and the Commissioner for Probation and Child Care. Fundamental changes can only be made when each individual involved in the process fully understands and *practices* methods that

are in the best interest of the child. Precedents need to be created not only in the form of law, but also in the form of the action taken in specific situations by those who administer justice.

The State also needs to give priority to ensuring that it reports to the UN Committee on the Rights of the Child are submitted on time, in accordance with its international obligations. The report can be a useful tool for assessing the realisation of child rights at present. Instead of commissioning experts on report writing in various institutions to compile the report in a way that is palatable to the Government, individual State institutions which deal with child welfare could be entrusted with completing relevant sections of the report. This would give them an opportunity to assess the progress they have made during a given period, make comparisons and set targets for the future. They could then use comments from the Committee to either confirm or rethink their own strategies where appropriate. In order to ensure objectivity in the reporting NGOs and child rights activists should be invited to comment on or add to the report prepared by these agencies.

At a time when Sri Lanka is losing a generation to war, abuse and social negligence, we must stop praising ourselves for our small achievements and get down to achieving the landmark results that would show an undisputed, positive difference to the lives of children. We are truly capable of this as soon as the Government and the public realise the special circumstances of children and their significance in developing the quality of our society.

VI

The Rights of Women

Sepali Kottegoda[*]

1. Introduction

This chapter seeks to discuss the rights of women in Sri Lanka, concentrating on key issues which were of concern during 1998 and examining the relevant international instruments and the national policy framework relating to these issues. The chapter addresses the following themes:

- The impact of economic development policies on women with special reference to women in the labour force and female headed households;
- Issues relating to women migrant workers and women workers in the Free Trade Zones ;
- Women's participation in political and decision-making;
- Women and health.

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2. The Conceptual Framework of Women's Rights: International and National

At the international level, the efforts to win recognition for women's rights have seen the establishment of new legal frameworks and institutional mechanisms dealing with women's rights. These have expanded on the existing traditional liberal conceptualisation of political rights and freedoms as enshrined in the UDHR, the ICCPR and the ICESCR. The application of the rights codified in these two human rights Covenants in terms of State accountability exemplifies the ideological biases which underpin their conceptualisation. Whereas the ICCPR focuses on individual rights and mandates the States Parties to the Covenant to protect these rights and provide redress for violations of civil or political rights, the rights contained in the ICESCR are formulated in terms of the State's duty to achieve progressive realisation of these rights. It has been noted that the ICESCR has come under critical scrutiny by human rights advocates particularly in relation to tensions in the principles enshrined in the ICESCR and the prevalent cultural practices in some countries which have a negative impact on women.[1]

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the appointment of a Special Rapporteur on Violence Against Women, the International Convention on the Protection of the Rights of Migrant Workers and Their Families, the

[1] See Abdullahi Ahmed An-Na'im. "State Responsibility Under International Human Rights Law to Change Religious and Customary Laws," in Rebecca J. Cook (ed) *Human Rights of Women: National and International Perspectives* (University of Pennsylvania Press, 1994), pp.167-188. See also, Abeysekera, S. "Conceptualising Women's Human Rights: Questions of Equality and Difference," unpublished MA Thesis, Institute of Social Studies, The Hague (1995) for discussion on this issue.

sexual and reproductive rights discourse, and the Tribunal on Violence Against Women during the Vienna Human Rights Conference add new dimensions to the conceptual framework of human rights.

The primary international mechanism which will be referred to here is the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). Sri Lanka was among the first to sign the Convention in 1978, and this event had a direct impact on national policy. The State recognised that women are indeed integral to development in the country, and established the Women's Bureau in 1979. The Women's Bureau focuses largely on initiating projects to provide the skills and training necessary to enable especially rural women to engage in income earning activities.

In 1983 the Ministry of Women's Affairs was established, but for over a decade it was under a Minister with several other portfolios. It was only in 1997 that the Ministry of Women's Affairs was formally recognised as a separate entity by itself, with a Minister responsible only for women's issues. This fact has enabled the Ministry to devote its full attention to its mandate of addressing and formulating necessary policy interventions on behalf of women.

In 1993, the Women's Charter of Sri Lanka was formulated, and in March that year it was accepted as the Government's policy document on women. It is based on the CEDAW, but has been adapted to focus on priority concerns in Sri Lanka.[2] It includes a new focus area of women's rights in the context of gender-based violence against women, and identifies the following rights:

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[2] Many of the issues addressed in both the Women's Charter as well as the National Plan of Action for Women reflect the issues set out in CEDAW and the Beijing Platform for Action.

- political and civil rights;
- rights within the family;
- right to education and training;
- right to economic activity and benefits;
- right to health care and nutrition;
- right to protection from social discrimination; and
- right to protection from gender-based violence.

The Women's Charter also includes provisions for the establishment, for the first time in Sri Lanka, of a National Committee on Women (NWC) under the Ministry of Women's Affairs. The first NWC was established in 1994 consisting of a membership of Sri Lanka's most distinguished career women. The second NWC was appointed in 1997. The Women's Charter has been actively promoted over the past few years by the Ministry of Women's Affairs through its implementing arms - the Women's Bureau and the National Committee on Women.

After the Fourth UN World Conference on Women at which the Beijing Platform for Action on Women was adopted (which Sri Lanka signed), a National Plan of Action on Women was formulated in 1996. This document is widely regarded as setting out the implementation of the policies identified in the Women' Charter. It focuses on the following areas:

- violence against women, human rights and armed conflict;
- political participation and decision making;
- health;

- education and training ;
- media and communication;
- environment; and
- institutional strengthening and support.

The National Plan of Action for Women addresses these issues by setting out the problem, the activities or measures necessary to address the problem, the agencies which should implement these measures and the time frame within which these measures should be implemented. The agencies include both government and non-governmental bodies and organisations.

In 1998, Sri Lanka along with eight other countries also ratified the UN Convention on the Protection of the Rights of Migrant Workers and Their Families of 1990.

3. Women and the Economy

3.1 Women in the domestic sphere

Within the debate on women's participation and contribution to national economies and the development of nations, the issue of how women's work is defined has important implications for women's rights and the status of women in a country. Conventional definitions of work as used in all the official statistics in Sri Lanka clearly differentiate between work which is seen as 'economically active' (and remunerated/ market oriented) and that which is seen as 'economically not active' (non-remunerated/work within the domestic sphere). Hence, those activities carried out primarily by women, which take place within the household, are not considered to be "work" and remain outside the conventional definition of work.

According to the most recent data available from the Department of Census and Statistics, while the total number of women over the age of 10 years (which is the cut off age for being considered to be in the labour force) was 6.4 million, 66.6% or 4.3 million were considered "not in the labour force." Of these approximately 54% were found to be engaged in "household work."[3] As noted in the National Plan of Action for Women:

> *Recognition of women's economic contributions at both the household and national level is also a key to the formulation of policies and programmes to advance the status of women as decision makers at the national level...*[4]

The non-recognition of women's contributions in the domestic sphere to the national economy deprives women of enjoying the dignity of housework and denies the economic value of their contribution.

3.2 Women income earners

The right of women to engage in economic activities for financial benefit on par with men is an important recognition of women's economic capabilities and their role as social actors within the community. Both the Women's Charter and the National Plan of Action for Women stress women's right to training, to appropriate technology and to remuneration on par with men. Both documents assume that women's right to income will enhance her status and role as a decision-maker within the household, the family or the community.

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[3] *Ibid* at p.58

[4] "National Plan of Action for Women in Sri Lanka," Ministry of Transport, Environment and Women's Affairs, Colombo (1996), p 60.

Since the last census of population was undertaken for the whole country in 1981, there has been a significant increase in the number of women within the labour force.[5] From 1981 to 1996, the number of women estimated to be in the labour force doubled from 1.6 million to 2.3 million; it is further estimated that this figure will rise to 2.5 million by the year 2001.[6] Out of the total female population over the age of 10 years, the percentage of women in the labour force had increased from 44% in 1981 to 48% in 1996.[7]

The socio-economic changes that have been taking place in the country over the last two decades have had a sharp impact on the number of women in the labour force. The State has promoted female labour intensive industries and occupations in the past two decades, and two new categories of women workers - the migrant worker and the garment factory worker - have joined the women in the plantation sector as being the main sources of foreign exchange earnings for the country.

3.2.1 Women in the plantation sector

The plantation sector is the oldest employee of women. Developed by the British over 150 years ago, the plantations employ women primarily in tea plucking and processing activities as unskilled or semi-skilled labour. Labour on the plantations has been among the most

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5 Subsequent to the 1981 Census of Population, the data collection has been constrained due to the on-going war in the North and East of the country and hence, by and large excludes information from these two Provinces.

6 "Changing Role of Women in Sri Lanka," Department of Census and Statistics, Colombo (1997).

7 *Ibid.*

organised sectors in Sri Lanka, with several trade unions actively fighting for workers' rights. Yet, while the majority of trade union members are women, even 50 years after independence, these labour organisations have still failed to support the emergence of women within the leadership or as key decision-makers in relation to plantation workers' rights.

The non-recognition of women's capacity as decision-makers in the plantation sector has serious consequences. For example, in the 1980s, the wages of men and women plantation workers were "equalised" after more than 100 years of discriminatory wage rates. Yet, men continue to collect women's wages in the plantation community, despite agitation by various women's groups. This clearly shows that women need to be better represented at decision-making levels in trade unions active in the plantation sector, and that changes to social practices at the household and community level are essential if women are to realise their rights as income earners. At present, the non-representation of women within these decision-making structures and the pervasive ideology of women's secondary role mean that women do not have access to or control over their income. Hence, at the level of the household and the community, the concept of women's rights remains alien.

In 1998, it was reported that plantation unions supported a significant number of women plantation workers to resort to strike action demanding an increase in wages from Rs. 85 to Rs. 105 per day.[8] This dispute was settled after a compromise wage of Rs. 95 was

[8] Women's Rights Watch, 1st Quarter 1998, The Women & Media Collective, Colombo.

agreed to by the unions and the Ministry of Labour. Such incidents, while enabling women workers the avenues to obtain better wages, still do not challenge the cultural practices noted above.

3.2.2 Women in agriculture

In 1992, an estimated 51.9% of employees in the agriculture, forestry and fishing industries were women.[9] However, gender-based notions regarding the status of women in society also impact negatively on the rights of women in the agricultural sector. Wage differentials continue to exist in the agricultural sector, where women often receive about half the wage given to men. For example, in 1998 it was found that men who harvest paddy were paid approximately Rs. 150 per day while women were paid Rs. 75-100 for the same work[10]

Unpaid family labour, particularly in the agricultural sector, is counted as part of the country's gross national product and women engaged in such occupations are considered to belong to the labour force.[11] In 1995 (1st Quarter) an estimated 16.2% of women in the labour force were classified as Unpaid Family Workers.[12] Such workers are not covered by labour regulations and have no entitlements to work related benefits.

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9 *Supra* n 6, p 65.

10 "Sri Lanka Shadow Report on CEDAW" (Draft), Sri Lanka Women's NGO Forum, Colombo (1999).

11 Unpaid family labour generally refers to the family labour (productive labour) input into agricultural production activities for which no payment is made and should be differentiated from women's domestic work in focusing primarily on reproductive activities such as care of dependants, preparation of food, collection of water etc. (reproductive labour).

12 *Supra* n 6, p 60.

One significant factor affecting the status of women in the agricultural sector is that, although women have a long history of involvement in agriculture and are officially recognised as employees engaged in agricultural activities, there is very little acceptance either socially or politically of women as farmers. This has important implications for women's access to land and credit, as was clearly demonstrated in government policy on land distribution during the Mahaweli Development Project, where women were regarded only as housewives and/or secondary earners. In view of these discriminatory practices, the National Plan of Action for Women called for the amendment of the Land Settlement Ordinance to ensure equal land rights for women in settlement areas.[13]

3.2.3 Free Trade Zones

In the Free Trade Zones (or Export Promotion Zones) where women's labour constitutes the main input into manufacturing, the age of women workers ranges between 18 and 30 years. There are currently three main Export Promotion Zones in Sri Lanka - at Katunayake, Biyagama and Koggala. These Zones are estimated to employ around 60,000, 46,000 and 5,300 women workers respectively.[14] The educational level of female employees is high: approximately 70% have studied up to GCE Ordinary Level and 27% up to GCE Advanced Level.[15]

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[13] *Supra* n 4, p 61

[14] *A Review of Free Trade Zones in Sri Lanka*, Dabindu Collective (Colombo, 1995).

[15] *Rights at Risk: A Study on Sri Lanka's Free Trade Zones*, All Ceylon Federation of Free Trade Unions et al. (Colombo, 1995).

Employment in the Free Trade Zones has the following characteristics:

- the estimated total number of workers is 200,000, which is approximately 4.4% of the total number of people employed in the country;
- there are no specific laws preventing unionisation within the FTZ, but strikes are banned;
- while unionisation outside the FTZ is around 25%, within the FTZ it is around 0.2 per cent; and
- The Board of Investment (BOI) of Sri Lanka (a government body for the promotion of investment in the country) has the authority to set minimum wages and monitor social security and occupational safety and health within the FTZs.[16]

The FTZs have operated for over 20 years, and in recent years a shortage in the supply of female labour to these industries has been noted. As an incentive, under a BOI directive, the minimum wages for women workers was raised in 1998 by Rs. 500 to Rs. 2500.

A Special Committee was appointed by the Presidential Secretariat in 1998 to study safety and welfare measures for FTZ workers. It concentrated on health related problems, reproductive health, mental health and nutrition and also paid attention to the housing problems of workers, particularly in the light of poor living conditions and inadequate hygiene and sanitation facilities. In addition, it also examined occupational safety and sexual harassment. The Special Committee made the following recommendations:

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[16] *Supra* n 14.

- boarding houses for workers should be registered;
- transport should be provided for workers in line with their duty shifts;
- street lighting should be provided;
- police should provide security for workers; and
- a loan schemes for workers should be established.

There are several proposals to set up hostels for garment factory workers in the FTZs particularly in the Southern Province.[17] In the Katunayake FTZ, the BOI commissioned a survey of the housing facilities available to garment factory workers. The BOI also initiated steps to provide transport facilities for the workers in both the Katunayake and Biyagama FTZs in line with their working shifts.

While these measures were being undertaken, there were several reports during 1998 of low levels of hygiene in the working environment and of poor facilities available to workers in garment factories, especially in enterprises which are located outside the FTZs but which are also major suppliers of finished garments for export. In 1998 a number of instances of food poisoning were reported among women workers who had eaten from factory canteens. Workers both within and outside the FTZs are particularly vulnerable to such poor standards as they have little recourse to existing labour regulations or organised and recognised unions through which their concerns could be addressed.

Despite the fact that unionisation is strongly discouraged in the FTZs and is virtually non-existent in factories operating outside the zones,

[17] "Hostels for Girls in the Garment Industry," *Daily News*, 30 June 1998.

1998 saw several strikes launched by women workers regarding wages and working conditions. In most such instances, the demonstrations were severely repressed by the police and the factory owners, thus highlighting the fact that although the garment industry is one of the highest foreign exchange earners for the national economy, the rights of garment factory workers remain seriously curtailed.[18]

3.2.4 Migrant women workers

The situation of migrant women workers in 1998 remained similar to that discussed for 1997, with minor changes in government policy on the monitoring of workers leaving the country.[19] It is estimated that over one million Sri Lankan migrant workers are employed overseas, most of whom are women. The Sri Lanka Bureau of Foreign Employment (SLBFE) projects that this number could increase to 1.2 million by the year 2000. Remittances from migrant workers overseas rose to Rs. 60-70 million in 1998 in comparison with Rs. 55 million in 1997.[20]

While the Ministry of Labour, the SLBFE and some private employment agencies have actively promoted employment overseas, the East Asian crisis of 1998 affected some of these workers adversely, with the drying up of promised job opportunities in countries such as South Korea and Malaysia.[21]

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18 *Women's Rights Watch*, 2nd and 3rd Quarters, The Women and Media Collective, Colombo (1998).

19 *Sri Lanka: State of Human Rights 1998* (Law & Society Trust, Colombo, 1998), pp 219-236.

20 Women's Rights Watch, 4th Quarter, The Women and Media Collective, Colombo (1998).

21 *Supra* n 8.

In 1998, the Government issued a number of regulations with regard to migrant workers. All migrant workers are now required to register with the SLBFE, which would enable the Government to monitor the situation of overseas workers better. All migrant workers must now have the SLBFE stamp on their passports prior to departure from Sri Lanka. SLBFE officers are stationed at the airport on a 24 hour basis to assist prospective migrant workers if necessary.[22] Each migrant worker is required to pay a registration fee to the SLBFE ranging from Rs. 5,200-10,500, depending on the wages the worker will receive overseas. This fee guarantees insurance cover for the migrant worker and his/her family.

The Ministry of Labour also attempted to negotiate labour contracts for housemaids with some receiving countries in West Asia. These contracts were drafted in collaboration with the SLBFE and several leading job agencies in Sri Lanka as well as Saudi Arabia and the United Arab Emirates.[23] The employment contracts for women workers would ensure that women would be able to find work not only in the category of housemaids but also as garment factory workers in countries such as the UAE. It was reported that by the end of 1998, most countries in West Asia had agreed to the labour contracts for Sri Lankan migrant workers.

Reports of physical, sexual and mental abuse of women migrant workers, as well as non-payment of wages, continued during 1998. The SLBFE recorded at least 750 cases of returnee women migrant workers who had complained of sexual and physical abuse. It is believed that many more such cases go unrecorded, as many victims

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[22] *Daily News*, 16 October 1998, p.17

[23] *Supra* n 8.

do not report their experiences on their return to Sri Lanka.[24] This clearly demonstrates the need for further negotiations with receiving countries and more stringent agreements to ensure that the rights of these migrant women workers are fully protected.

4. Violence Against Women

Incidents of violence against women continued to cause much concern. Amongst the international standards which provide a framework to protect women from rape, sexual abuse, sexual harassment, domestic violence and murder are:

- the right to equality without distinction of sex (Article 2 of the UDHR and Article 26 of the ICCPR);
- the right to life, liberty and security of person (Article 3 of the UDHR and Articles 6 and 9 of the ICCPR);
- the protection against torture or cruel, inhuman or degrading treatment (Article 5 of the UDHR and Article 8 of the ICCPR).[25]

The Women's Charter addresses this issue specifically in recognising the rights of women to protection from gender-based violence.[26]

4.1 Domestic violence

While Sri Lankan society places high value on the institution of the family, domestic violence has emerged as a key area of violence against women in the country. Despite the fact that most often societal and

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[24] *Supra* n 20.

[25] *Ibid.*

[26] The Women's Charter of Sri Lanka, Ministry of Women's Affairs, Colombo (1993).

cultural pressures prevent many victims from making such incidents public, the monitoring of newspaper reports in 1998 has revealed that these incidents occur with disturbing regularity.[27]

From January to December 1998, the Women's Rights Watch recorded 129 murders of women within their homes. In 82 of these cases the perpetrator of the crime was the husband. Within the same period, 85 incidents of domestic assault on women were monitored of which in 46 instances, the husband of the victim was the perpetrator.[28] In other cases, the reports indicate the perpetrators tend to be the father, brother, uncle, or son of the victim.

Despite the growing visibility of such crimes committed against women within the sanctity of marriage and the family, there is no specific law which addresses the issue of domestic violence except the Penal Code.

4.2 Rape

Similar disturbing trends were seen in relation to incidents of rape of women in 1998. One hundred and forty five incidents of rape committed on adult women were recorded between January and December 1998, most of such incidents appeared to have been committed by persons outside the victim's household. There were a few reported cases of rape by the uncle, grandfather, ex-husband, lover, father or brother-in-law of the victim.[29]

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[27] It has to be noted that reports would only appear in the press if it has been considered important by the reporter and editor, hence, many such incidents would still be largely undocumented.

[28] Women's Rights Watch, 1st, 2nd, 3rd and 4th Quarters, The Women and Media Collective, Colombo (1998).

[29] *Ibid.*

The rape of minors also emerged as an issue of grave concern during this period. A total of 230 incidents of rape of girl children were monitored during 1998. Of these, 45 of the perpetrators were found to be relatives of the victims.[30] While the sentences meted out in some of these cases reflect the changes brought about by the Penal Code reforms of 1995, the rising incidence of rape of women calls for urgent action to address the issue both at the societal and policy levels.

The trial was concluded in July 1998 of the accused in the Krishanthi Kumaraswamy rape and murder case of 1996. The 17 year old school girl had been raped and murdered by several members of the armed forces on duty at the Chenmani check point in Jaffna. Her mother, brother and a neighbour who had gone in search of her had also been murdered. Although eight soldiers and one policeman were initially accused of the crime of the rape and murder of the schoolgirl and the murder of the other three, at the end of the trial in July 1998 only five of the accused were tried.[31] The trial was conducted amidst high publicity with women's groups establishing with others a 'Vigil Coalition' to exert pressure on the State to conduct the investigations expeditiously and prosecute those changed with the offences. The case was completed in a relatively short period of 20 months; it is regarded as a landmark case where, for the first time, members of the armed forces and the police have been given maximum sentences for grave human rights violations.[32]

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[30] *Ibid*

[31] Of the nine accused, one died in custody and the 6th and 9th were acquitted. In March 1998, three of the accused staged a dramatic escape from the Colombo High Court. Two were later apprehended while the 8th accused was still at large when the trial was completed. Women's Rights Watch, 2nd Quarter 1998.

[32] See also chapter II on the Integrity of the Person.

In October, the gang rape and murder in Colombo of Rita John, a young Indian woman married to a Sri Lankan, brought the issue of insecurity of women into the public arena once more. While the media concentrated on highlighting the sensational aspects of this case, protests about the lack of security for women and the negligence of police and State agencies in providing protection to women was highlighted in pickets and demonstrations by women's groups. The suspects in this gruesome rape and murder were arrested and a Trial-at Bar was set to commence in January 1999.[33]

4.3 Sexual harassment

The offence of sexual harassment was recognised as a crime with the Penal Code reforms of 1995. Sexual harassment is defined as follows: whoever by assault or by the use of criminal force sexually harasses another person or by the use of words or actions causes sexual annoyance or harassment commits the offence of sexual harassment.[34] Those convicted can be punished by the imposition of a fine or imprisonment or both.

While even this definition still leaves the many forms of sexual harassment to be proven by the victim in a court of law (for example, sexually suggestive looks, physical molestation in buses, words with sexual innuendo) the inclusion of the offence into the Penal Code has been welcomed by many. It is also important to note that three years after the introduction of the law on sexual harassment, in 1998, 46 complaints were recorded in the press as having been lodged with the

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[33] See also chapter X on Crime, Human Rights and State Responsibility.

[34] *Supra* n 8.

police and as legal cases in the courts in 1998.[35] In most of the cases, the harassment reportedly occurred outside the domestic sphere and victims have filed complaints in court.

The relatively small number of complaints recorded and reported in the press brings out several problems related to the issue of sexual harassment. First, many women in the country still remain unaware that it is an offence. Second, the onus is on the victim to prove that sexual harassment did take place and that her rights were violated.

5. Reproductive Rights

Sri Lanka is often cited as a country where a high rate of utilisation of health services by women at childbirth is correlated with a high level of education among women.[36] It is also often observed that the relatively low population growth rate in the country, as compared with other South Asian countries, is associated with a high level of female literacy. The assumption here is that a woman's access to education *per se* leads her to her having fewer children. But this takes no account of whether the woman has a ***choice*** as to the number of children she has, or whether the size of her family or her right to have children is decided by agents other than herself. The reportedly high incidence of (illegal) septic abortions in the country indicates that high health and education levels are not sufficient in themselves to guarantee the safety of women's reproductive health in an environment which denies her right to decisions about her own body.[37]

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[35] *Supra* n 28.

[36] "National Household Survey - 1993: Indicators on Selected World Summit Goals for Children and Women," Department of Census and Statistics, Colombo (1994).

[37] *Supra* n 4.

In 1998, abortion emerged as a key issue amongst both health sector workers as well as UN agencies working on reproductive health. The Family Planning Association of Sri Lanka again urged that abortion be urgently legalised, at least in instances of rape, incest and congenital abnormalities. With the publication of UNFPA data estimating that approximately 1000 abortions may be performed daily around the country, the issue received considerable media attention. Several English language newspapers ran highly emotive features raising controversial aspects of legalising abortion in terms of the ability of women to take life indiscriminately.[38]

While the Minister of Justice tabled reforms to the Penal Code in 1995 which included the legalising of abortion in exceptional circumstances, he was compelled to withdraw this amendment primarily due to pressure from religious groups. Abortion continues to be seen as a highly sensitive moral issue; women's rights to control over their bodies even where they have been victims of rape or incest continue to be denied.

The decision on whether a woman goes through with a pregnancy or on the number of children she bears continues to be firmly grounded in the prevailing gender ideology and dominant moral perceptions. These pressures severely constrain the access that a woman has to legal, material and psychological resources and support that would recognise her rights and enable her to decide and carry through her decisions on issues related to her reproductive health.

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[38] Women's Rights Watch, 3rd Quarter, The Women and Media Collective (1998), Colombo; *Island*, 8 May 1998, 25 September 1998, 3 October 1998, 19 October 1998; *Sunday Leader*, 4 October 1998.

6. Participation in the Political Processes

Despite the facts that Sri Lanka had the first woman Prime Minister in the world and that currently both the President and the Prime Minister are women, the participation of women at the decision-making levels in the political as well as professional fields has been uniformly low for the last 50 years. For example, the total number of women in parliament was 2.6% in 1947; in 1994 it had risen to a mere 5.0 per cent.[39]

The remarkably low representation of women at the highest levels of national office is in stark contrast to the number of women who are involved in canvassing for votes for (usually male) candidates during elections. While organisations such as Women's Education and Research Centre, Centre for Women's Research and the Sri Lanka Women's NGO Forum have actively called for an increase in the participation of women in political processes, the response from most political parties has been poor.

Echoing some of the concerns of women's groups, in 1998 the Minister of Women's Affairs called for the reservation of 25% seats for women in Parliament. Significantly, the Draft Constitution presented by the present Government makes note of a quota of 25% for women at the local government level. Thus, List II (Regional List) appended to the Draft Constitution (October 1997 version), provides in section 42 that in relation to elections to local authorities the election laws shall ensure that not less than 25% of members elected to local authorities shall be women.

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[39] *Supra* n 6, p 140.

However, 1998 saw an important development in the field of women's participation in political processes. For the first time in Sri Lanka, a group of women came forth to contest the planned Provincial Council Elections as an independent group. This group from the Sinhala Tamil Rural Women's Network in the Nuwara Eliya District of the Central Province, had over a decade of experience of working within a multi-ethnic constituency in a plantation dominated area. This multi-ethnic dimension was reflected in the group's candidates to the Provincial Council elections.

The emergence of women organised to contest in the mainstream political arena was welcomed by many women activists and organisations around the country. At the same time, the threats of violence that the candidates from this group faced show that this development was not necessarily welcomed by others contesting the election in the same area.[40]

7. Women in Situations of Armed Conflict

In the North and East over the past two decades, as well as the South in the late 1980s-early 1990s, military action has been primarily undertaken by males (whether in the Government armed forces or in militant groups). On the other hand, it is estimated that approximately

[40] "Women's Party Pledges Politics Without Profit," *Midweek Mirror*, 15 July 1998. It is important to also note that the Sri Lanka Women's NGO Forum launched a media campaign on women's rights which began with the issue of women's participation in political and decision-making processes. A number of advertisements in all three language newspapers were placed during 1998 challenging political parties on the inclusion of women's issues in their manifestos and women as candidates on their party lists.

60-70% of the displaced population in the country is female.[41] Official information on female-headed households still continues to describe displaced women as "households with widows," "vulnerable women," "destitute women," and "unsupported women." It thus fails to recognise that this is in fact a relatively new and distinct social phenomenon with far reaching implications for Sri Lankan society and economy.

At the national level, excluding comprehensive data on the North and East, the proportion of female-headed households has increased from 16% in 1981 to 19% in 1992 to 21% in 1994.[42] It has to be noted that, given the situation of war and displacement in the North and East, this estimate of female headed households is likely to be higher. Female headed households are in effect those households with no adult male/s present, and their emergence necessitates a serious reappraisal of official policy towards households in general.

Another important aspect of women in situations of armed conflict has been the increasing involvement of women as combatants. While the Sri Lankan army actively promoted the inclusion of women into its forces and sent some into combat in the North, women suicide bombers remained integral to the LTTE's military strategy. In February

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[41] Reports from the East indicate that due to the on-going conflict, an estimated 10,000 to 15,000 women have been widowed in the last 6 years, most of whom are living below the poverty line. For example, in the Eravur Pattu D.S. Division, there are 1174 registered widows most of whom are under 40 years of age; Women's Rights Watch, 3rd Quarter 1998 notes that the military's Operation Jayasikuru resulted in at least 663 soldiers killed by mid 1998. The on-going war has seen the continuous search by family members for information on soldiers 'missing in action'.

[42] "Gender Indicators of Sri Lanka," Department of Census and Statistics, Colombo (1995).

1998, a woman suicide bomber blew herself up at an airforce checkpoint in Slave Island in Colombo, killing herself and nine other persons including civilians. Security checks tightened, particularly within Colombo, with an increased emphasis on checks on Tamil women as a result.[43]

Mrs. Sarojini Yogeswaran of the Tamil United Liberation Front (TULF), who became Jaffna's first elected woman Mayor in the January local government elections, was shot dead at her residence in May by a suspected LTTE group. Mrs. Yogeswaran was widely respected for her stand on non-violence and her efforts to re-establish non-military democracy in Jaffna.[44]

8. Women and Sports

Sri Lankan women emerged as national and international sports figures with the withdrawal of one international gold medallist, Susanthika Jayasinghe, and the entry of another, Damayanthi Dharsha, into the international sporting arena as gold medalists. The sports arena in Sri Lanka has tended to be dominated by males, especially in the game of cricket, but 1998 saw the national media and popular sentiments focusing on the achievements of Sri Lankan women in international athletics.

9. Conclusions and Recommendations

This overview of the status and rights of women in Sri Lanka in 1998 has touched on some of the critical areas of concern for women. It is evident that despite Sri Lanka's high social development indicators in general, gender-based notions often act as constraints to women

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[43] *Supra* n 8.

[44] See also chapter II on the Integrity of the Person.

achieving full rights as citizens of the country. While more women are found to be engaged in income earning activities, they continue to be concentrated in the lower echelons of the labour market.

Women's contributions to the household and through the household to the national economy continue to be overlooked. While women migrant workers have found a degree of protection through the efforts of the SLBFE, they continue to suffer physical and mental trauma from employers in the receiving countries.

Incidents of violence against women continue to rise despite reforms to the Penal Code which allow harsher punishment to perpetrators of crimes against women. This has raised concern about the State's capacity and commitment to implement the laws pertaining to the protection of women's rights. The continuing armed conflict in the North and East has been found to have a specific impact on the lives of women as emerging household heads, with little recognition of their rights at the official level. The visibility and involvement of women in suicide squads of the LTTE has resulted in increasing pressures on Tamil women civilians by the State security machinery.

The recommendations can be summarised as follows:

- There is a need for legal provision for equality of opportunity which would strengthen women's bargaining power in access to employment and wages.[45]

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[45] See Panditaratne, D., "Equal Opportunity" in *Sri Lanka: State of Human Rights 1998* (Law & Society Trust, Colombo, 1998), chapter VI.

- There is a need for the formulation of gender sensitive educational material, both for training teachers and for use in school text books, which would aim to alter prevailing gender biased notions amongst women and men.
- The NWC should be strengthened to enable it to establish a Gender Complaints Unit as suggested in the Women's Charter of 1993. This would be an important avenue for women to seek justice in issues of discrimination on the basis of gender. At present, such instances are rare.[46]
- There should be lobbying for the formulation of a Domestic Violence Act which would enable women victims to obtain legal redress.
- There should be State recognition of the contributions women make to the national economy through their involvement and activities in the domestic sphere. Women involved in housework should be included in the labour force.
- There should be State recognition of women involved in agricultural activities as farmers.

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[46] See chapter IV on Judicial Protection of Human Rights and the previous *Sri Lanka: State of Human Rights Reports* where it is reiterated each year that not a single case has been decided by the Supreme Court on the basis of gender discrimination.

VII

The Right to Information in Sri Lanka

*Deepika Udagama**

1. Introduction

The right to receive information (popularly referred to as the 'right to know') and the right to impart information and ideas (free expression) are widely recognised as two sides of the same coin. Without the right of access to information and ideas, one cannot effectively formulate ideas and opinions to express. This linkage is strongly recognised by international norms on free expression.

Those norms recognise the right to "seek, receive and impart information and ideas" as equally important components of the right to free expression.[1]

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[1] See section 1 of the chapter.

The demand by civil society for open and accountable government was largely responsible for the election of the PA Government into office in 1994. Access to information is crucial to open and accountable governance, and within Sri Lanka there is a strong lobby, especially emanating from the mass media, demanding a legal framework guaranteeing the right to information. Mainly in response to this lobby, the ruling PA Government's Statement on Media Policy,[2] formulated in 1994, pledged to strengthen the legal regime pertaining to free expression and the right to information.

In international and comparative jurisprudence, the right to information encompasses two aspects: the right of access to government-held information, and the right to receive information and ideas from third parties without hindrance.

Since the adoption of the 1978 Constitution of Sri Lanka (hereinafter "the Constitution"), many highly acclaimed fundamental rights judgments have been delivered on freedom of expression. Over the years, the Supreme Court has progressively expanded the scope of this right, which is enshrined in Article 14(1)(a), drawing liberally from comparative jurisprudence and international standards on free expression.[3]

As far back as 1984 a five-judge bench of the Supreme Court held that readers of a newspaper have *locus standi* to bring a fundamental rights petition challenging the banning of the newspaper.[4] Thereafter,

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2 "Statement of the PA Government's Media Policy," *Sunday Observer*, 6 November 1994.

3 See for example, *Gamini Athukorale* v. *The Attorney General*, Supreme Court S.D. No. 1/97-15/97.

4 *Visuvalingam* v. *Liyanage* (1984) 2 Sri LR. p 123 (decided in 1984), discussed *infra.*

for over a decade, the right to information did not receive much attention from the Court. Recently, however, the Supreme Court has delivered two judgments that recognise the right to receive information from third parties without arbitrary interference by the State.[5] As discussed below, the reasoning of the Court is unique and perhaps problematic, in that the right of a passive recipient is deemed to fall within the freedom of thought guaranteed by Article 10 of the Constitution, whereas the right of an active recipient is thought to fall within the scope of Article 14(1)(a) that guarantees the right to free expression.

So far, there has been no attempt in Sri Lanka to secure the right to receive government-held information through fundamental rights litigation. Also, there is no comprehensive legislative framework in Sri Lanka guaranteeing the right to information. This chapter seeks to examine how the State has responded to the demand for a guarantee of the right to information and to suggest ways and means by which the right could be best protected.

2. International Obligations of Sri Lanka Regarding the Right to Information

Article 19 of the ICCPR[6] represents Sri Lanka's international legal obligations with regard to the right to free expression. It guarantees to everyone the right to hold opinions and the right to free expression, which includes the "freedom to ***seek, receive***, and impart information and ideas of all kinds, regardless of frontiers ... through any other media of his choice" (emphasis added). The freedom of expression can be limited only on grounds of protecting the rights or reputation of

[5] *Wimal Fernando's Case* and the judgment in the *Broadcasting Authority Bill Case*, discussed *infra*.

[6] General Assembly Resolution 2200 A (XXI), adopted on 16 December 1966, and entered into force on 23 March 1976.

others, of protecting national security, public order, public health or morals when such limitations are prescribed by law and are necessary to achieve those grounds.

Sri Lanka's legal framework on the right needs to be examined within the framework of Article 19, given Sri Lanka's obligations as a State Party to the ICCPR to bring its domestic law in line with the Covenant. Unfortunately, neither the General Comments of the UN Human Rights Committee[7] (established under the Covenant to monitor State compliance with the ICCPR), nor its opinions relating to individual communications under the First Optional Protocol to the ICCPR, give clear indications as to the scope of the right to information under the ICCPR.[8]

On the other hand, the jurisprudence of the European human rights institutions interpreting the European Convention for the Protection of Human Rights and Fundamental Freedoms[9] has unequivocally upheld the right to receive information from third parties without arbitrary interference by the State.[10] Article 10 of the European

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[7] See General Comment 10 of the UN Human Rights Committee, UN Doc. A/38/40, p.109.

[8] McGoldrick, *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights* (Oxford University Press, 1991) pp 459-471.

[9] Adopted by the European Council in Rome on 4 November 1950, entered into force 3 September 1953.

[10] See for example, *Autronic AG* v. *Switzerland*, 12 European Human Rights Reports, p 485 and *Open Door Counselling and Dublin Well Woman* v. *Ireland*, 15 European Human Rights Reports, p.244. However, the European Court on Human Rights has consistently held that Article 10 of the Convention does not guarantee a right of access to government-held information, *Leander* v. *Sweden*, 9 European Human Rights Reports, p 433 and *Guerra and Others* v. *Italy*, 26 European Human Rights Reports, p 357.

Convention also recognises the right to information as a component of free expression. The Supreme Court of Sri Lanka frequently uses European human rights jurisprudence as persuasive authorities in interpreting the fundamental rights chapter of the Sri Lanka Constitution. However, as shown below, the Supreme Court has shown a degree of discomfort, or reluctance, to give expression to a general formulation that recognises the right to information as a part of free expression.

3. Constitutional Guarantees of Fundamental Rights and the Right to Information

The free expression clause in the Constitution - Article 14(1)(a) - is very bare in comparison with Sri Lanka's international obligations. It does not expressly guarantee the right to information. It simply guarantees to every citizen "the freedom of speech and expression including publication."

Although Article 19 of the ICCPR has been used to flesh out the scope of the constitutional guarantee of free expression (in the sense of imparting information), the Supreme Court has in recent years shown a degree of reluctance to recognise the ICCPR formulation. Under the ICCPR, the right to information is seen as an integral component of free expression in relation to all recipients without a distinction being drawn between "active" and "passive" recipients.

The first fundamental rights case that challenged the Court into implying the right to information in the free expression clause was *Visuvalingam* v. *Liyanage*.[11] In that case, the Competent Authority appointed under emergency regulations had sealed a press that printed a newspaper published in Jaffna, *The Saturday Review*, using emergency powers, and thereby prohibiting its printing and publication. The ban had been

[11] *Supra* n 4.

imposed on the basis that the newspaper had carried several articles considered to pose a threat to national security. The articles, it was alleged, had espoused the minority separatist cause and were said to be calculated to incite Tamil youth to violence.[12]

Several readers of the newspaper petitioned the Supreme Court under Article 126 of the Constitution alleging, *inter alia*, that their right to receive information was implied in the free expression clause of the Constitution, and that this right was violated by the arbitrary sealing of the press. The petitioners averred that *The Saturday Review* was a newspaper that sought to build bridges between the Sinhala and Tamil communities in the country. It focused on the news and views of the public in the North, providing information that was not made available by other media sources. The sealing of the press, therefore, deprived them of a unique source of information. Nadesan Q.C., arguing on behalf of the petitioners, referred to Article 19 of the ICCPR as a binding source of law on Sri Lanka that required an interpretation of the free expression clause of the Constitution which included the right to information. According to his reasoning, the freedom of expression is but a hollow concept if the freedom of the recipient to receive information is not recognised.[13]

On the other hand, the State argued that the petitioners did not have *locus standi* as readers, as the banning order affected only the printers, publishers and distributors of the newspaper and not their "dependents" such as readers and newspaper vendors.[14] Implicit in this argument was a refusal to acknowledge that free expression also included the rights of recipients.

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[12] *Ibid* at pp 135-142.

[13] *Ibid* at p129.

[14] *Ibid* at pp 128-129.

Four of the five judges who heard the cases accepted the argument of Nadesan Q.C. Wimalaratne J., delivering the majority judgment, declared:

> *Public discussion is not a one sided affair. Public discussion needs for its full realisation the recognition, respect and advancement, by all organs of government, of the right of the person who is the recipient of information as well. Otherwise the freedom of speech and expression will loose [sic] much of its value.*[15]

Reasoning thus, the majority concluded that the right of free expression of the Constitution did indeed include the right to receive information. The petitioners' *locus standi*, therefore, was recognised.

Justice Rodrigo dissenting, was sceptical of the reasoning of the majority. He found it "perhaps significant that it [the right to information] finds no place specifically in the present Constitution."[16] In any event, he declared, it is not necessary to "reach a conclusion on this alleged right [to information] in this application."[17]

The seminal judgment of the Supreme Court in relation to the right to information was delivered in May 1996, by Justice Mark Fernando in *Wimal Fernando* v. *Sri Lanka Broadcasting Authority.*[18] There, Wimal Fernando, a frequent listener of the Non-Formal Education Programme (NFEP) broadcast by the state-run Sri Lanka Broadcasting Corporation (SLBC), petitioned the Supreme Court

[15] *Ibid* at p 131.

[16] *Ibid* at p 149.

[17] *Ibid.*

[18] (1996) 1 Sri LR p 157. Discussed in *Sri Lanka: State of Human Rights 1997* (Law & Society Trust, Colombo, 1997), pp 64-65.

alleging that his rights under the free expression clause of the Constitution had been violated in two ways when the SLBC arbitrarily discontinued the NFEP: as a listener to the programme, and as a participatory listener who frequently contributed to the programme.

He averred that the NFEP covered a broad range of issues and was a very important source of information. The termination of the programme deprived him both of a source of information and also of the right to participate in the programme.

Justice Fernando, delivering the judgment of the three-judge bench, found no grounds to recognise "a right to information *simpliciter*." He accepted that the freedom of information was important to the effective exercise of the right to free expression. He categorised instances in which courts in other jurisdictions had made findings based on the right to information as follows:[19]

(a) where a person is entitled to receive information because it is related to or necessary for the exercise of free speech, such as in the case of journalists;

(b) where constitutional provisions on free expression explicitly uphold the right to information;

(c) where listeners' right to information is acknowledged in situations when it is necessary to receive information in order to reply to adverse comments made about them; and

(d) where constitutional provisions such as the free expression clause in the Sri Lanka Constitution have been construed to contain a guarantee of the right to information.

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[19] *Ibid* at pp 173-177.

Justice Fernando differentiated the first three categories from the last. The last category, in his opinion, was not related to free expression. He illustrated the fourth category with *Stanley* v. *Georgia,*[20] where the US Supreme Court found that the First Amendment of the US Constitution had been violated when the State interfered with private possession of pornographic material, as such interference abridged the individual right to access information of one's choice.

According to Justice Fernando, the fourth category is based on the freedom of thought rather than on the right to free expression.[21] In contrast, the first three categories are purposive, in that they envisage the rights of recipients who need the information for a free expression purpose.

The majority judgment of the five judge bench in *Visuvalingam* v. *Liyanage* is referred to in the *Wimal Fernando* judgment. But the latter judgment gives no clear reasons for departing from that precedent, contrary to the doctrine of *stare decisis,* other than the Court's refusal to accept what it calls a "right to information *simpliciter*" - or in other words, a right to receive information that is not related to a purpose connected with free expression. The following paragraph gives an insight into Justice Fernando's thinking and that of the Court:

> *[i]n the strict sense, when A merely reads (or hears) what B writes (or says) in the exercise of B's freedom of speech, it does not seem that A receives information in the exercise of A's freedom of speech, because that would be to equate reading to writing, and listening to speaking. Accordingly, while preventing A from reading or listening would constitute a violation of B's freedom of speech, it may not infringe A's*

[20] 394 US p 557.

[21] *Supra* n 16, p 175

> *freedom of speech. A's right to read or listen is much more appropriately referable to his freedom of thought, because it is information that enables him to exercise that right fruitfully.* [22]

The judgment then goes on to declare that while it doubts whether the "the right to information *simpliciter*" is, in fact, included in the free expression clause in the Sri Lanka Constitution, it is very definitely included in Article 10, which guarantees freedom of thought. On the basis of that reasoning, the Court refused to acknowledge that the rights of the petitioner **as a listener** were violated. On the other hand, the Court found the petitioner's right to free expression as a **participatory listener** had been infringed, as the arbitrary termination of the NFEP had deprived him of the opportunity to articulate his ideas and opinions on that programme.[23]

By including "the right to information *simpliciter*" in the freedom of thought guarantee, the judgment has elevated the right to information to a right that cannot, under international law, be either limited or derogated from during public emergencies.[24] The rights of recipients related to freedom of expression, on the other hand, can be subjected to limitations and are derogable during periods of emergency. The salient feature of this judgment is the bifurcation of the right to information into a right *simpliciter* and one that has a free expression purpose.

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[22] *Ibid* at p177.

[23] *Ibid* at pp 179-180.

[24] See Article 4 of the ICCPR.

According to the argument of the *Wimal Fernando* judgment, the right to information **when related to the right of free expression** is implied in the existing free expression clause. Yet on the other hand, if the right to information had expressly been included in the free expression clause in the Constitution, then the distinction drawn between the purposive and non-purposive rights of recipients would be of no relevance [see category (b), above, referred to in the judgment]. Ultimately, the problem is about reading in a right which is not expressly guaranteed by the Constitution.

The *Wimal Fernando* judgment was subsequently referred to by the Supreme Court in the landmark judgment of *Athukorale et.al.* v. *Attorney General*[25] (popularly known as the *Media Authority Bill Case*) with approval. There, the constitutionality of a Bill seeking to establish a Broadcasting Authority to regulate the electronic media was challenged. The petitioners, who ranged from opposition politicians, private television channels to ordinary television viewers, argued that the Bill in question, if enacted, would discriminate between State-run and private electronic media stations and establish a politically biased regulatory body packed with government appointees and entrusted with enormous powers.

Again a three judge bench heard the case. In a unanimous opinion the court found that the impugned provisions of the Bill did indeed violate constitutional guarantees of equality, freedom of thought and free expression. The Court, following the *dictum* in the *Wimal Fernando* judgment, drew a distinction between the free expression rights of broadcasters, on the one hand, and the right to information of listeners and viewers as an aspect of freedom of thought, on the other. The

[25] *Supra* n 3.

distinction appeared to be drawn here mainly to discern the degree of limitations that could be imposed on each right:

> *As far as the fundamental right of freedom of thought is concerned, no abridgement, restriction or denial is possible except by an Act of Parliament passed by not less than two-thirds of the whole number of Members (including those not present) and approved by the people at a referendum.*[26] *However, the right of freedom of speech and expression, which includes the freedom to hold opinions* ***and to receive*** *and impart information and ideas without interference by public authority, guaranteed by Article 14(1)(a), since it carries with it duties and responsibilities, may be subject in its exercise to some restrictions.*[27] (emphasis added)

Of particular significance here is that, despite the strict distinction drawn between the two rights, the Court also refers specifically to freedom of speech and expression guaranteed by the Constitution as encompassing the right to receive information and ideas. The tenor of the entire judgment seems to suggest once again, as in *Wimal Fernando*, the bifurcation of the right to information into a right *simpliciter* that cannot be subjected to limitations, on the one hand, and a purposive right that can be subjected to limitations, on the other. This position of the apex court is the extant law in Sri Lanka relating

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[26] Although the Constitution permits the imposition of limitations by a special majority, it is in total violation of the international obligations of Sri Lanka under the ICCPR that recognise the freedom of thought as an absolute right subject to no limitations.

[27] *Ibid at* p 29.

to the right to information.[28] It should also be noted that the judgments primarily address the right of recipients to receive information freely from third parties and are not concerned with the right of access to government-held information.

The recognition of the right to information, which is not specifically mentioned in the Constitution, is a salutary development. However, with due respect to the Court, the bifurcation of the right, as described above, is unlikely to be tenable in practice. For instance, can one surmise that Wimal Fernando needed the information only to confine it to his own thought processes? As social and political beings we need information to feed and nurture our thought processes; to enable us to form opinions which we may or may not articulate. How can one be sure that A is seeking information merely to think, whereas Y is seeking information necessarily to articulate? Could not Wimal Fernando have discussed the opinions he formed with the aid of the information he obtained from the NFEP with his colleagues at work, his relatives, friends or neighbours, adding to the marketplace of ideas around him? The formulation of Article 19 of both the UDHR and the ICCPR reflects this human reality.

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[28] In a judgment delivered in December 1998, the Supreme Court once again reiterated the position taken in *Wimal Fernando*. See *Dias* v. *Ranatunga et al*, SC Application No 98/97, SC Minutes 17.12. 1998, pp 9-10. It is also of interest to note that the Court was of the opinion that arbitrarily interfering in the gathering of information by a television journalist for purposes of free expression merely ***impaired***, and did not totally deny, the right to free expression (at p 9). Again, the Court has placed excessive emphasis on the right to impart information, as opposed to the right to seek and receive information. See also chapter IV on Judicial Protection of Human Rights.

Of further difficulty is the fact that one right is subject to two limitation regimes. The right of a passive recipient of information is absolute and non-derogable as it is covered by the guarantee of freedom of thought. On the other hand, the right of a person who wishes to receive information for a stated free expression purpose is subject to limitations. Given the difficulty in classifying recipients of information in these terms as pointed out above, this difference in the limitation regimes is, at best, extremely artificial.

Also, serious legal problems could arise in situations where persons require information merely to "think" when the availability of such information, quite justifiably, has to be restricted in the interest of individual privacy or a wider State interest. As the person is demanding the information in the exercise of the freedom of thought, access to such information cannot be lawfully restricted. But, on the other hand, is it justifiable to disregard the other competing interests that warrant a restriction of the release of the information? For instance, if X wishes to find out more about the incidence of HIV/AIDS in the country merely to "think" about the issue and requests information from health authorities about individuals who have contracted the virus, how should the authorities deal with such a request? On the one hand, the information has to be released because the freedom of thought cannot be restricted. But, on the other hand, serious legal and medical ethics problems are bound to arise by divulging personal information in total disregard of the privacy rights of the patients. This problem would not arise if the right to information of all recipients was recognised as a part of free expression that is subject to limitations. Therefore, it is submitted with due respect, that the bifurcation maintained by the Court is untenable.

4. The Absence of a Statutory Regime

Currently there is no comprehensive statutory regime providing for free access to government-held information. On the contrary, some statutes, such as those listed below, limit access to information either by restricting physical access to information or by imposing censorship on the publication of certain types of information and ideas:

- Official Secrets Act No 32 of 1955
- Sri Lanka Press Council Law No 5 of 1973
- Profane Publications Act No 41 of 1958
- Obscene Publications Ordinance No 4 of 1927
- Public Performances Ordinance No 7 of 1912
- Prevention of Terrorism Act No 48 of 1979.[29]

In the absence of a clear-cut legislative framework providing access to government-held information, the practice today seems to be that access will not be permitted unless exceptional circumstances warrant disclosure. Attempts by the Law Commission of Sri Lanka to formulate a proposed legislative framework to guarantee access to government-held information are discussed below in Part 6.

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[29] In addition, emergency regulations promulgated under the PSO have been used to impose censorship. See chapter III on Emergency Rule.

5. Limitations Imposed by Emergency Regulations

From time to time the right of the public to receive certain specified types of information has been restricted by the Government using emergency powers. Currently, Emergency Regulation No.1030/28 of 5 June 1998[30] prohibits the publication or broadcast of:

> *...any material containing any matter which pertains to any operations carried out or proposed to be carried out, by the Armed Forces or the Police Force (including the Special Task Force), the deployment of troops or personnel, or the deployment or use of equipment, including aircraft or naval vessels, by any such forces, or any statement pertaining to the official conduct or the performance of the Head or any member of any of the Armed Forces or the Police Force.*[31]

Any publication or broadcast made in contravention of the regulation is deemed to be an offence.[32] The President is empowered to appoint a Competent Authority for the purposes of the regulation.[33] So far, there has been no successful constitutional challenge to the overbreadth of the regulation either by the media or by a potential recipient.[34]

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[30] Emergency (Prohibition on Publication and Transmission of Sensitive Military Information) Regulations, No. 1 of 1998. See also chapter III on Emergency Rule.

[31] *Ibid*, Regulation 2.

[32] *Ibid, Regulation 5.*

[33] *Ibid*, Regulation 4.

[34] An identical emergency regulation which was in force earlier was unsuccessfully challenged on the basis that it violated both the freedom of expression and equality clauses of the Constitution. See *Sri Lanka: State of Human Rights 1995* (Law and Society Trust, Colombo, 1996) pp 76-68.

Clearly, this emergency regulation is in violation of Sri Lanka's international obligations. Article 4 of the ICCPR requires that the derogation of rights during times of public emergency must be only "to the extent strictly required by the exigencies of the situation. The Regulation is also at variance with the widely respected Johannesburg Principles on National Security, Freedom of Expression and Access to Information (hereinafter the "Johannesburg Principles").[35] Principle 12 thereof declares:

> *[a] State may not categorically deny access to all information related to national security, but must designate in law only those specific and narrow categories of information that it is necessary to withhold in order to protect a legitimate national security interest.*

Principle 1(d) recognises that the "burden of demonstrating the validity of the restriction (to freedom of expression or information) rests with the government."

6. Attempts at Law Reform

The PA Government's Media Policy Statement declares:

> *[i]n order to rescind or amend where necessary, the government will draft legislation, reforming the Press Council Law, the Official Secrets Act, Parliamentary Powers and Privileges Act, and the existing Laws relating to Cabinet secrets and contempt of court so that the freedom of expression as well as the public right to information concerning the spheres of governmental activity [will] be ensured.*

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[35] Reproduced in the *Human Rights Quarterly*, Vol. 20 (February 1998), p 2.

While the Statement recognises the need for law reform to ensure the public's right to have access to information on government activities, it does not suggest the adoption of one comprehensive legal regime, such as a Freedom of Information Act, as a main aim of the Government's media policy. The Statement clearly suggests that reform of existing laws will be adequate to ensure access to information on the activities of Government. Yet that would be a piecemeal effort at best. There is also no mention of constitutional reform in this regard.

6.1 Constitutional reform

The Draft Constitution that was published in October 1997 guarantees the right to receive information and ideas as an integral component of the right to free expression.[36] The guarantee is subject to the following limitations regime:

> *Any restrictions shall not be placed on the right declared and recognised 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.*[37]

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[36] *The Government's Proposals for Constitutional Reform* (October 1997), Draft Article 16 (1).

[37] *Ibid*, Article 16(2).

The inclusion of the phrase "as are necessary in a democratic society" is significant. This qualification, which is included in Article 10 of the European Convention on Human Rights and Fundamental Freedoms, narrows the scope of the limitation regime. Human rights organisations lobbied hard for its inclusion in the Draft Constitution.

If the Draft Constitution is adopted, it remains to be seen whether the judiciary will interpret the above provision as encompassing a positive obligation of the State to ensure the right of access to government-held information, in addition to a negative obligation not to arbitrarily interfere with the right of the public to receive information from third parties.

6.2 Legislative initiatives

The Law Commission of Sri Lanka initiated a study with a view to formulating a statutory regime on the right of access to government-held information. A preliminary draft of the proposed "Access to Official Information Act" was released by the Commission in November 1996. So far, no attempt appears to have been made to present the draft or a modified version of it to Parliament.

The Report of the Committee to Advise on the Reform of Laws Affecting Media Freedom and Freedom of Expression[38] (hereinafer the "Media Law Reform Committee") was presented to the Government in May 1996. The Minister of Media had appointed this Committee on 5 January 1995. The Committee provided detailed recommendations regarding the formulation of such a statutory

[38] See Annex I of this Chapter.

framework. Such an Act should make a clear commitment to open government and should include the following principles:[39]

- disclosures should be the rule rather than the exception;
- all individuals should have an equal right of access to information;
- the burden of justification for withholding information should rest with the government; the person requesting information should not bear the burden of justification for disclosure;
- individuals improperly denied access to documents or other information should have a right to seek relief in the courts.

In contrast to the principles of open government proposed by this Committee, The Draft Access to Official Information Act presented by the Law Commission[40] "may be seen by the media and proponents of the freedom of information as restrictive," on the Commission's own admission. Indeed, the Draft contains a diluted guarantee of access to what it defines as "official information."

Although its Preamble declares that the (draft) Act is based on the principle "that information shall be made available unless there is good reason for withholding it," it is clearly not meant to be an overarching law that governs the entire subject of accessing government-held information. According to the draft (draft sections 2 and 3), if any other law either gives a right of access or denies access to information,

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[39] *Report of the Committee to Advise on the Reform of Laws Affecting Media Freedom and Freedom of Expression* (27 May 1996) p 61 (hereinafter the "Media Law Reform Committee").

[40] See Annex II of this Chapter.

then the Access to Official Information Act would have no application to such a situation. If, for example, another legislative enactment does not accept the presumption in favour of disclosure, the existence of the Official Information Act would have no deterrent effect over that legislation. Such a position clearly does not bode well for the establishment of a universal open government policy.

Furthermore, the draft Act does not provide for any procedural matters relating to accessing government-held information. It contains no requirements on how a request for information should be made, the fee structure, the timeframe within which the information has to be provided, the processing of requests by government departments, or the manner and mode in which access to the requested information is to be given. Such matters will be decided by the Minister in charge of the subject of information by regulation, which has to be gazetted (draft section 8). Thereafter, "as soon as convenient" the regulations will be placed before Parliament merely for its approval. Obtaining approval for regulations in this manner is quite different to enactment by Parliament. Given current parliamentary practice, it is likely that such regulations would be adopted by default without much scrutiny. Leaving such matters to ministerial discretion is also extremely objectionable. Most other freedom of information laws around the world lay down the procedure that has to be followed. In the final analysis, it is the procedural details of the law that are crucial for the effective implementation of freedom of information laws.

An extensive catalogue of grounds on which a request can be refused is stipulated in draft section 6. When a request is turned down, the aggrieved person can appeal to the Supreme Court or to the Ombudsman. The latter has to be approached if the refusal is on the basis that the information consists of inter-agency memoranda or letters.

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However, the draft Act does not require a government authority to give reasons for refusing to accede to a request. Similarly, it contains no provisions on disciplinary action for errant officials who arbitrarily deny information to the public. Both those principles are important if government authorities, hitherto accustomed to maintaining secrecy, are to be made responsive to a legal regime requiring disclosure as a rule.[41]

7. Conclusions and Recommendations

The right of access to government-held information has to be an overarching principle that guides all law making, which is why it is best to incorporate it into the Constitution. Such a constitutional principle will then be mandatory, guiding State policy on disclosure of government-held information. Such a principle must be in addition to recognition of the negative obligations of the State to refrain from arbitrary interference with the right of the public to receive information from third parties.

Examples of such constitutional provisions are offered by the Swedish and South African Constitutions. The Swedish Constitution contains both The Freedom of the Press Act and The Fundamental Law on Freedom of Expression which, *inter alia*, embody detailed provisions relating to accessing government-held information. The recently adopted South African Constitution also recognises the fundamental right of everyone to have access to: (a) any information held by the State; and (b) any information that is held by another person and that is required for the exercise or protection of any rights. It then stipulates

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[41] See the recommendations made by the Media Law Reform Committee, reproduced in Annex I of this Chapter.

that national legislation must be adopted to give effect to that right.[42] It is submitted that the South African model offers a sound framework for Sri Lanka to emulate.

There should be one comprehensive freedom of information statute that governs the subject of public access to government-held information. Such a statute should be in keeping with the recommendations of the Media Law Reform Committee. Emergency regulations imposing any restrictions on the right of the public to receive information must be formulated in keeping with the Johannesburg Principles.

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[42] *The Constitution of the Republic of South Africa,* Act No 108 of 1996, Article 32.

ANNEX I

REPORT OF THE COMMITTEE TO ADVISE ON THE REFORM OF LAWS AFFECTING MEDIA FREEDOM AND FREEDOM OF EXPRESSION

A FREEDOM OF INFORMATION ACT

16.26 A Freedom of Information Act should be enacted which makes a clear commitment to the general principle of open government and includes the following principles:

- disclosure to be the rule rather than the exception;
- all individuals have an equal right of access to information;
- the burden of justification for withholding information rests with the government, not the burden of justification for disclosure with the person requesting information;
- individuals improperly denied access to documents or other information have a right to seek relief in the courts.

16.27 The law should specifically list the types of information that may be withheld, indicating also the duration of secrecy. Legal provision must be made for enforcement of access, with provision for appeal to an independent authority, including the courts, whosdecisions shall be binding.

16.28 The law should make provision for exempt categories, such as those required to protect individual privacy including medical records, trade secrets and confidential commercial information, law enforcement investigations, information obtained on the basis of confidentiality, and national security.

16.29 The legislation should include a punitive provision whereby arbitrary or capricious denial of information could result in administrative penalties, including loss of salary, for government employees found in default.

16.30 Secrecy provisions in other laws must be subordinate to the freedom of information law or must be amended to conform with it in practice and in spirit.

ANNEX II

ACCESS TO OFFICIAL INFORMATION ACT (DRAFT)

Preamble

Whereas the purpose of this Act is to extend the present laws of Sri Lanka to provide a right of access to information in records under the control of a government institution in accordance with the principle that government information should be available to the public, that necessary exceptions to the right of access should be limited and specific and that decisions on the disclosure of government information should be reviewed independently of government; and

Whereas this Act is intended to complement and not replace existing procedures for access to government information and is not intended to limit in any way access to the type of government information that is normally available to the general public; and

Whereas the question whether any government information is to be made available, where that question arises under this Act, shall be determined, except where this Act otherwise expressly requires, in accordance with the purposes of this Act and the principle that the information shall be made available unless there is good reason for withholding it.

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

Short Title

1. This Act may be cited as the Access to Official Information Act No. of 1996.

Written law giving access to prevail

2. Where under any written law the public is given a right of access to information, such access shall be governed by the said written law and this Act shall not apply to such information.

Written law denying access to prevail

3. Where under any written law the public is denied access to information such information shall be governed by the said written law and this Act shall not apply to such information.

Application of this Act

4. (1) This Act shall apply to information, in the possession, custody or control of all government departments, Corporations, Statutory Boards, Provincial Councils, Provincial Agencies, and Local Authorities (hereinafter referred to as "Official Information") save and except information referred to in sections 2 and 3 of this Act.

(2) The Minister in charge of the subject of information may where it is in the public interest to do so, by order published in the Gazette exempt any government department, Corporation, Statutory Board, Provincial Council, Provincial Agency or Local Authority from the operation of this Act.

Right of access to official information

5. Every citizen of Sri Lanka shall have a right to and shall, on request, be given access to official information:

   (a) if such information is declared for the time being under section 7 subsection (i)(e) of this Act to be public information; or

   (b) if such information relates to decisions made, proceedings taken or acts performed under any written law, whether enacted before or after this Act, and such decisions, proceedings, or acts affect the citizen requesting such information.

Grounds for denying access

6. Any request for official information made under section of this Act may be refused if:

   (a) information relates to or has an impact on national defence, foreign policy or international relations and should in the public interest be kept secret; or

   (b) such information consists of trade secrets or commercial or financial information obtained from a person by the government; or

   (c) such information consists of memoranda or letters within a government department or agency or between one government departments or agency, and another except where such information may be available to a litigant, litigating with such government department ..... agency; or

(d) the giving of such information would constitute an invasion of personal privacy; or

(e) such information has been obtained or compiled for, and if released would prejudice the purposes of law enforcement; or

(f) such information will endanger the safety of any person; or

(g) such information was gathered by or on behalf of or for the use of a government department or agency for the regulation or supervision of a financial institution; or

(h) such information would adverse (sic) affect seriously the economy of Sri Lanka by disclosing prematurely decisions to change or continue government economic or financial policies relating to -

(i) exchange rates or the control of overseas exchange transactions; or

(ii) the regulation of banking or credit; or

(iii) taxation; or

(iv) the stability, control, and adjustment of prices of goods and services, rents, and other costs, and rates of wages, salaries, and other incomes; or

(v) the borrowing of money by the government; or

(vi) the entering into of overseas trade agreements; or

(i) such information is geological and geophysical information; or

(j) such information is privileged or should otherwise be kept confidential by reason of the existence of a fiduciary or like relationship between the government department or agency having the information and another government department or agency or person to whom such information was given or intended or from whom such information was received.

Ministerial Publication

7 (1) Every Minister shall cause to be published, on a periodic basis *(sic)* less frequently than once each two years, a publication containing -

(a) a description of the organisation and responsibilities of each and every government department, agency, corporation or statutory body assigned (hereinafter referred to as "government institution") to such Minister, including details on the programmes and functions of each division or branch;

(b) a description of all classes of records under the control of each such government institution in sufficient detail to facilitate the exercise of the right of access under this Act;

(c) a description of all manuals and guidelines used by employees of each such government institution in administering or carrying out any of the programmes or activities of such government institutions; and

(d) the title and address of the appropriate officer for each such government institution to whom requests for access to information under this Act should be sent.

(e) a declaration of information would be available to the public under this Act and as such treated as public information.

(2) The publication referred to in subsection (1) of this Section shall be made available to the public.

(3) The publication referred to in subsection (1) of this Section shall be made available to the public for purchase at a reasonable price or free or charges (sic).

Regulations

8 (1) Within one year of this Act, the Minister in charge of the subject of information shall prescribe:

(a) the procedure to be followed in making requests for access to information under this Act;

(b) the fees to be charged for processing such requests, searching for records and information, and copying documents and records;

(c) the conditions under which the pre-payment of such fees may be required and the circumstances in which such fees may be waived;

(d) the price to be charged for publication under this Act or the manner in which such price shall be fixed;

(e) the procedure to be followed by government institutions in processing requests for information made under this Act, including the notification of decisions on such requests, mandatory time limits applicable to various steps in this procedure, the manner and circumstances in which such time limits may be extended and the transferring of requests from one government institution to a more appropriate government institution;

(f) the manner and mode in which access to information and records shall be given including the language in which such access shall be given.

(g) the manner in which information received from or pertaining to a third party may be given, including the procedure for the notification of such third party prior to the release of information and the affording of an opportunity to such third party to object to the giving of such information.

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

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

9. Any person requesting access to information under this Act who is aggrieved by any decision under this Act may within one month of the receipt of the decision appeal to the Supreme Court against such decision, except where the decision relates to the refusal to give access to information under Section 6(c) of this Act, in which case such person may within one month of the decision appeal to the Parliamentary Commissioner for Administration, appointed under Article 156(2) of the Constitution.

Investigations

10. The Supreme Court, or the Parliamentary Commissioner for Administration shall have power to investigate or cause to be investigated matters relating to such appeals, including the power to summon government officials and other witnesses and to peruse documents and other information whether confidentially or otherwise, in the possession, custody or control of the relevant government institution.

Decision on appeal

11. The Supreme Court or the Parliamentary Commissioner for Administration shall have power to affirm, vary or reverse the decision appealed against and may remit the matter back to the official concerned.

Interpretation

12. In this Act unless the context otherwise requires "information" includes any correspondence, memorandum, book, plan, map, drawing, diagram, pictorial or graphic work, photograph, film, microfilm, sound recording, video tape, machine readable record, and any other documentary material regardless of physical form or characteristics, and any copy thereof.

VIII

Protecting the Independence of the Judiciary: A Critical Analysis of the Sri Lankan Law

*Kishali Pinto Jayawardena**

1. Introduction

The contextual flavour of the Sri Lankan legal provisions relating to the independence of the judiciary may best be summed up by a curiously piquant clause in the 1978 Constitution[1] which specifies dire sanctions including deprivation of civic rights for anyone who, "without legal authority," interferes or attempts to interfere with the judicial powers and functions of any judge. Modelled on a similar provision in the preceding 1972 Constitution,[2] both provisions appear to endorse interference by persons "with legal authority," a

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1 Article 116.

2 Article 131.

constitutional irony that any critical observer of 50 years of judicial independence in Sri Lanka can only but appreciate.

Interference with the independence of the Sri Lankan judiciary has, of course, seldom been so blunt as to bring itself within this prohibitive clause. That is not to say that it has been any the less dangerous or subversive. On the contrary, the subtlety with which fundamental structures of the country's judicial system and the judiciary have been undermined historically has contributed immensely to a paralytic feeling of complacency with which the *status quo* is viewed, a feeling of "well, things are not as bad as they could be." In turn, a sufficient critical mass of public opinion has not developed calling for a radical revision of the present laws, regulations and conventions relating to the protection of the independence of the judiciary. The result has, until very recently, been an agonising "one step forward, two steps backwards" dance in which the Executive has unquestionably held the upper hand. This has inevitably left its own negative stamp on the role of the Sri Lankan judiciary as the guardian of constitutionalism and human rights in the country.

2. The Independence Constitution

It has been a recurring theme since independence that Sri Lanka's constitutional provisions with regard to the independence of the judiciary have been compelled by particular political forces, rather than by reasoned thinking based on democratic necessities. This historical process has seen its own peculiar landmarks. The enactment of the Independence Constitution in 1947 followed a strict line of reasoning that the judiciary must be established as a body separate from the executive and the legislature. Accordingly, the Chief Justice and the judges of the Supreme Court were appointed by the Governor

General, held office during good behaviour and could not be removed from office except by the Governor General upon an address of the Senate and the House of Representatives. A Judicial Service Commission (JSC) consisting of the Chief Justice, a judge of the Supreme Court and any other person who shall be or shall have been a judge of the Supreme Court was also established. The JSC was vested with the authority of appointing, transferring, dismissing and exercising disciplinary control over all judicial officers, except a judge of the Supreme Court and a Commissioner of Assize. In this particular legal order, the independence of the judiciary was safeguarded to some extent: the appointment of judges of the apex court was entrusted to the Governor General, who was a representative of the Queen and not a political figure, and the JSC was a body independent of either the legislature or the executive. However, ten years later, this separation of powers came under direct threat by legislation that attempted to give the Minister of Justice authority in the appointment of judicial officers. The Supreme Court responded by declaring the legislation invalid.[3]

Executive and legislative efforts to venture beyond its legitimate authority were not to stop at that. In quick succession, the Supreme Court struck down further legislation perceived as affecting its independence.[4] Not unnaturally, these demonstrations of judicial strength were little to the liking of the holders of political power at that time. Equally worrying to their minds was the thinking of the Supreme Court in the *Ranasinghe Case,* later affirmed by the Privy Council,[5]

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[3] *Senadheera* v. *The Bribery Commissioner* (1960) 63 NLR, p 313.

[4] *Queen* v. *Liyanage* (1966) 68, NLR 265; *The Bribery Commissioner* v. *Ranasinghe* (1964) 66 NLR, p 73.

[5] *Kodeeswaran* v. *The Attorney-General* (1969) 72 NLR, p 337.

that the provisions of section 29(2) of the Independence Constitution "represented the solemn balance of rights between the citizens of Ceylon, the fundamental conditions on which inter se they accepted the Constitution and are therefore unalterable under the Constitution."[6]

The reasoning was, in a sense, similar to the "basic structure" doctrine articulated some years later by the Indian Supreme Court in the landmark *Keshavananda Case*,[7] where the Court laid down the principle that the legislature cannot change the basic structure of the Constitution. In India, this decision was to spearhead an innovative judicial creativity that was to take the country's legal system by storm.

3. The First Republican Constitution

Angered by what it saw as an unwarranted bridling of their political reins, the United Front Government that swept the polls in 1970 determined on a new constitutional contract. The National State Assembly was to be the sole and supreme repository of power. The argument was simple. The people were supreme. Parliament was elected by the people. Therefore, Parliament ought to be supreme. All other institutions had to give way. As the then Justice Minister, Felix R. Dias Bandaranaike, made it abundantly clear:

> *Nobody should be higher than the elected representatives of the people, nor should any person not elected by the people have the right to throw out the decisions of the people elected by the people. Why are you saying that the judge once appointed should have the right to declare that Parliament is wrong?*

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6 per Lord Pearce in *The Bribery Commissioner* v. *Ranasinghe*, *supra* n 4.

7 *Keshavananda Bharaeti* v. *State of Kerala*, AIR (1973) SC p 1461.

Thus, it was in 1972 that Sri Lanka broke from its constitutional past not so much to declare its republican identity to the world but in pique over judicial decisions that ran contrary to declared policies of legislative supremacy. Acting in a spirit of what they saw as righteous anger (the tragic consequences of which were acknowledged only years later), the framers of the new Constitution deliberately set out to marginalise the role of the judiciary. The first Republican Constitution categorically declared in Article 3 that the judicial power of the people through courts and other institutions created by law may be exercised directly by the National State Assembly. The right of appeal to the Privy Council was abolished and the judiciary was deliberately and systematically stripped of its power to the extent that the judges of that time were even deprived of their traditional trappings of office such as their robes and wigs. Replacing the Governor General who was under the Independence Constitution required to exercise his powers, authority and functions as far as possible in accordance with the constitutional conventions in the United Kingdom, the first Republican Constitution validated political interference in the judiciary by handing the power of appointment of judges of the higher courts to a non- elective President acting on the advice of the Prime Minister.[8] In place of the earlier Judicial Service Commission, a twin Judicial Services Advisory Board (JSAB) and Judicial Services Disciplinary Board (JSDB) were established. The JSAB had no right to appoint judges of the minor courts but only to recommend their appointment to the Cabinet of Ministers, while the JSDB had the power to exercise disciplinary control and dismissal of judges of the minor courts and State officers exercising judicial power.[9] Here too, political control over the JSAB was ensured by requiring that two of the five member commission of the JSAB be officers other than judicial officers; the

[8] Article 122.

[9] Articles 126 and 127.

actual appointees turned out to be, in fact, the Secretary to the Ministry of Justice and the Attorney General. Similarly, while the composition of the JSDB was not to be faulted, their decisions could be set aside by an appeal to the Cabinet, thus rendering their powers largely nugatory.

The supreme law of the land made legal a number of other astonishingly undemocratic features including the passing of emergency regulations without a debate, abolishing judicial review and establishing a Constitutional Court which had the limited power to scrutinise Bills, and this, too, in 24 hours when the Bill was certified as being urgent in the national interest.[10] Fundamental rights were included in the Constitution but made impotent by open ended restrictions and no specific enforcement procedure.[11]

Interpreting the democratically subversive theory of the Constitution into practice, it was not long before open conflict became apparent. Parliament and the newly established Constitutional Court clashed head on at the first sitting of the Court over the Press Council Bill when the legislature decreed that the Court had no discretion to give a liberal interpretation to a specified time limit within which to determine the constitutionality of the Bill. The entire Court resigned and the Government was compelled to appoint a fresh Court. From this point onwards, relations between the courts and the then Justice Minister plummeted downhill. It was, in truth, the lamentable start of the settling in of the Sri Lankan judiciary into what could, with just reason, be referred to as a state of siege.

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[10] Article 54.

[11] Only one case alleging violation of fundamental rights was filed during this time in the District Court, *Ariyapala Guneratne* v. *The Peoples Bank* (1986) Sri LR p 338, which was ultimately decided under a different political regime.

4. The Second Republican Constitution

Five years later, the new dispensation of power under the UNP headed by President J.R. Jayewardene promised an illusionary breathing space as far as the Sri Lankan judiciary was concerned. The second Republican Constitution of 1978 did indeed contain many features that were a definite improvement on what had prevailed. The role of the Supreme Court as the "highest and final superior court" was constitutionally protected and the Court was given special jurisdiction in respect of election petitions, appeals, constitutional matters, fundamental rights (now made justiciable) and breach of the privileges of Parliament. The appointment of judges of the superior courts was by an elected President "by warrant under his hand."[12] As in the two previous Constitutions, the security and tenure of the judges were guaranteed and judges of the superior courts held office during good behaviour and could be removed only after an address of Parliament. Additionally, it was specified that the address for removal should be on grounds of proved misbehaviour or incapacity and that the full particulars of such allegations should be set out.[13] The JSAB and the JSDB, which had proved to be notoriously incapable of preventing political interference in the minor judiciary, were replaced by a Judicial Service Commission (JSC) vested with the same powers. The JSC was to consist of the Chief Justice and two other judges of the Supreme Court, named by the President, who could be removed only for cause assigned.[14]

Old habits, however, die hard. A misleadingly innocuous clause in the Constitution that specified that all judges of the appellate courts shall,

[12] Article 107.

[13] Article 107(2).

[14] Article 112.

on the commencement of the new Constitution, cease to hold office was soon used by the executive to radically "reconstitute" the higher courts. Seven out of the 19 judges holding office were not re-appointed, thus reducing their guaranteed tenure. Writing with characteristically trenchant effect, Dr N.M. Perera, the Minister of Finance in the previous government, saw this as the beginning of the end:

> *It is quite one thing to pretend a deep concern for the independence of the judiciary and quite another to behave in a manner that enhances that independence. A constitution that professes to guarantee continuity of service during good behaviour cannot in the same breath allow the President to dismiss the entirety of the superior judges without eroding the spirit of independence that should animate them.*[15]

His predictions were not far from the truth. Before long, it became evident that political usurpation of the authority of the judiciary could not be contained by the new constitutional order. Rather, it increased in ferocity until it became a moot point as to which was worse: a Constitution which legitimised an inferior judiciary or a Constitution which was institutionally better, but under which judges were threatened by the most appalling executive and legislative excesses. Barely three months after the promulgation of the new Constitution, a decision of the Court of Appeal was nullified by a legislative response that amended the new Constitution in a manner which denied the Court of Appeal jurisdiction in certain specified cases. The Court had held with the former Prime Minister that a Special Presidential Commission of Inquiry appointed to look into her actions during the preceding years could

[15] *Critical Analysis of the New Constitution of the Sri Lanka Government Promulgated on 31/8/1978* (Colombo 1978) p 95.

not be vested with retrospective powers. Subsequent events were even more devastating. Police officers found responsible for the violation of fundamental rights were not only promoted, but their damages and costs were paid by the Government. Procedural difficulties in judicial officers taking the oath of allegiance under the Sixth Amendment resulted in the police locking and barring the Supreme Court and the Court of Appeal and refusing entry to judges who reported for work. Following unpopular decisions, judges' houses were stoned and vulgar abuse was shouted at them by thugs. "The judiciary would pose difficulties for the executive if they are wholly outside anyone's control" the then President said, making his position on the independence of the country's judiciary abundantly clear.[16]

Meanwhile, angered by the criticism of government made by the then Chief Justice, Neville Samarakoon, during the course of a speech at a school prize giving, the Government appointed a Select Committee to investigate his conduct. The Committee's report, which was divided according to party affiliations, found no "proved misbehaviour" which could justify the Chief Justice's removal, but saw his conduct as a serious breach of convention. The action taken by the Government on the Chief Justice's speech was roundly condemned by senior lawyers and civil society groups as being unconstitutional and violating his right to freedom of expression.

> *The Chief Justice has expressed his views and people are free to counter his views and express contrary views. It should be noted that no restraint on such expression of views by judges is found in the Constitution unlike in the case of Army personnel and police officers. If nevertheless it is felt that the*

[16] *Daily News*, 5 February 1981.

> *expression of such views impairs his functioning as a judge and warrants his removal from office, then the only constitutional course of action open would be by means of notice of resolution signed by one third of the Members of Parliament asking for his removal.....*

the Civil Rights Movement stated in a terse telegram addressed to the executive.[17]

Undeterred by these protests, Parliament affirmed its superiority by going on to amend the law relating to parliamentary privilege so as to permit newspapers to publish allegations against judges made in Parliament, even though it may amount to contempt of court.[18]

All these developments were to have a detrimental effect on the robustness with which the Sri Lankan judiciary took on its constitutional role of protecting the rights of the people. Thus, it was that in 1982, when the UNP government made a rude break with time honoured electoral traditions and substituted a referendum for the general election that was then due, the Supreme Court upheld the decision of the Government. In the subsequent *Thirteenth Amendment Case*, the Court was again politically correct in refusing to engage in a debate on the substantive merits and demerits of devolution while approving the amendments on the technical basis that they did not violate the unitary nature of the State.[19] More recent times saw the *Expulsion Case*, where the Court upheld the UNP decision to expel members involved in the abortive impeachment motion against the then President

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[17] CRM EOI/4/84.

[18] Section 19 of the Parliament (Powers and Privileges) Act No 21 of 1953 (as amended).

[19] SC Application Nos 7-47/87 (Spl) and SD 1&2/87 (Presidential Reference) [*Re the Thirteenth Amendment to the Constitution* (1987) 2 Sri LR p 312].

Premadasa.[20] The expelled UNPers, including frontliners Lalith Athulathmudali and Gamini Dissanayake, complained that they had been expelled unfairly without any charges being served on them and without a hearing being given to them. The Supreme Court preferred to state, however, that the Working Committee had no choice but to act with speed and take disciplinary action against the petitioners. The rules of natural justice were held not to be applicable to the case. Meanwhile, the manner in which the Supreme Court exercised its fundamental rights jurisdiction also revealed its innate reluctance to get embroiled in contentious issues. While the Court showed occasional bursts of sympathy in individual cases, on the whole, its attitude was shaped by a somewhat excessive caution and restraint.

It was in the 1990s that any real change became evident. Along with a less sledge hammer approach adopted towards the judiciary by the executive, the courts began to take a firmer stand on issues of democratic governance. In 1993, the *Provincial Councils Governor's Case,*[21] decided that the appointment of a Chief Minister by a Governor was not a purely political matter and, therefore, immune from judicial review. The Court claimed the power to decide whether the Governor's action was reasonable and stated that in the instant case, the appointments should be set aside and fresh appointments made. This case, in particular, is interesting as the court could have chosen an easier option by pleading political discretion as a reason for non interference. In general, the period saw the Supreme Court exercising a bolder fundamental rights jurisdiction, striking examples of this being *Mohammed Faiz* v. *The Attorney-General,*[22] where a

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[20] SC (Special) 4/11 (1991).

[21] *Premachandra* v. *Jayawickreme* (1993) 2 Sri LR p 294.

[22] (1995) 2 Sri LR p 372.

ranger obtained relief from the Supreme Court not only against the police officers who violated his rights but also against two Members of Parliament and a Provincial Council member who had "instigated' this violation; the *Joseph Perera Case*, which struck down an emergency regulation as being unconstitutional;[23] and the *Jana Gosha Case*,[24] where the Court admonished police officers for interfering in a non violent citizens' protest against the Government.

5. The Independence of the Judiciary After 1994

Thus, it was that when the PA under the leadership of Chandrika Bandaranaike Kumaratunga captured the polls in 1994, the judiciary has been demonstrating a fairly consistent approach towards curtailing the executive abuse of power. Post 1994, this mood took a dramatic upswing with decisions such as the *Broadcasting Authority Bill Case*,[25] in which a Bill which sought to set up a State -aligned broadcasting authority with extensive powers to grant or refuse licences to private broadcasters was declared unconstitutional, the landmark *Wadduwa Case*,[26] and the *Sirisena Cooray Case*.[27] The latter decisions upheld the rights of freedom from arbitrary arrest and detention under emergency rule. Meanwhile, in late 1995, a majority of the Supreme Court ruled that remarks made by the then Deputy

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[23] *Joseph Perera* v. *The Attorney-General*, SC 107/109/86, SC Minutes 25.5.1987.

[24] SC Application No 468/92.

[25] *Atukorale* v. *The Attorney-General*, SD No 41-15/97.

[26] *Channa Peiris* v. *The Attorney-General* (1994) 1 Sri LR p 1.

[27] *Sunil Kumara Rodrigo* v. *Secretary, Ministry of Defence and Others*, SC Application 478/97, SC Minutes 19.8. 1997. See also *Sri Lanka: State of Human Rights 1998* (Law & Society Trust, Colombo, 1998), chapters III and IV.

Minister of Plan Implementation and National Integration, Jeyaraj Fernandopulle, in Parliament and recorded in the Hansard, could be used as evidence to contradict utterances made by him in an affidavit to court.[28] As a result, the Minister was found guilty of violating the fundamental rights of the petitioners, who were taxi drivers at the Bandaranaike International Airport taxi stand with trade union affiliations to the Opposition. As displeasure over the decision increased among Parliamentarians, especially on the Government benches, who saw the Supreme Court as encroaching on their privileges, Minister Fernandopulle moved for a revision of this judgment by a fuller bench of the Supreme Court. Contrary to established traditions, his application was allowed by the Acting Chief Justice of that time without consulting members of the original Bench, who were also not invited to sit on the revision Bench. Subsequently, the Acting Chief Justice declined to sit on the bench, even though he had nominated himself as a member; another judge who had also been nominated was appointed as Attorney General. The Bench was then reconstituted by the Chief Justice and the case listed before it for consideration. Speculation mounted as to the way things would turn in the face of sustained pressure from Parliament to set aside the original decision. This was deflated, however, by a subsequent carefully reasoned judgment by the fuller Bench declining to rehear the case and stating that as a general rule, the Court has no power to rehear, review, alter or vary any judgment or order made by it after it has been entered. There were declared to be only very specific exceptions to this rule and the mere fact that a question is of general or public importance could not be a ground by itself for revision of a judgment of the Court.[29]

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[28] SC Application 66, 67/95, SC Minutes 30.11.1995.

[29] (1996) 1 Sri LR p 70.

It was not to be expected that these decisions would particularly endear the judges to the executive and the legislature. Judges were attacked in personal terms in Parliament by Ministers taking refuge under the protection of parliamentary privilege and raising dark shadows of a previous era where such open intimidation of the judiciary had been all too common. President Chandrika Kumaratunga herself was quick to engage in public and unrestrained criticism of the judiciary whenever decisions calling her officers to account were delivered by the Court, particularly following the *Sirisena Cooray Case*, in which the Secretary of Defence was reprimanded over the arbitrary arrest and detention of a once powerful Minister of the previous regime. It is again of note that immediately prior to the deliverance of the judgment in *Silva* v. *Bandaranayake*,[30] the Minister of Justice, Professor G.L. Peiris, speaking in Parliament at the Committee stage of discussions of the votes of his Ministry stated that: "it is very important for the Court to confine itself to the proper sphere and not to overreach itself and not to arrogate to itself the functions that belong to the Executive and the Legislature."

The case dealt with a rights challenge over a disputed appointment to the Supreme Court where a unanimous Bench of the Court refused leave to proceed, but a divided judgment held that Article 107 of the Constitution did not confer on the President the sole and unfettered power of making high judicial appointments and that "considerations of comity" required co-operation between the executive and the legislature in making such appointments. Commenting on the case, the Minister of Justice further stated:

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[30] *Silva* v. *Bandaranayake* (1997) 1 Sri LR p 92, discussed morefully below.

> *Why is it that these conditions were not imposed on President J.R. Jayewardene, President Ranasinghe Premadasa and President D.B. Wijetunge? Why is it that these conditions are being sought to be imposed only on President Chandrika Kumaratunga? When this is done, I say with responsibility that there is a natural feeling that the Court makes these decisions on political considerations.*[31]

The Minister's plaintive query was made in a context where the Government felt besieged by civil actors calling it to account for actions that had been blithely indulged in by others in the past, but his reference to the highest Court of the land being motivated by political considerations even before it had made public its decision, was unfortunate. The question was, of course, not why earlier Presidents had not been called to account for their actions, but rather why a government that had captured power promising to reverse the past should repeat the actions of its predecessors. Why could those in power not see that this "activist" decision making by the Court did not owe its origins solely to the change of government in 1994 but had been clearly manifest in the preceding years.

In this tug and pull of acrimonious and quite unnecessary debate, 1998 may well be seen as a watershed year. Quiet though it may have been in terms of any direct impact on the body politic by notable judicial decision making, the Sri Lankan courts nevertheless consistently affirmed their judicial function to protect the citizen from the excesses of the executive regardless of consequences. Meanwhile, proposals for constitutional reform that the Government had previously put forward - including the independence of the judiciary – remained unimplemented four years into power. While their implementation

[31] *The Island*, 22 November 1996.

was caught up in endless political wrangling, the proposals themselves anyway remained deficient in a number of respects. The views expressed by the Supreme Court in *Silva* v. *Bandaranayake* were only given effect in a half hearted manner in the suggested reforms, which still left the procedure for the selection and appointment of judges to the appellate courts in the hands of the President, with only a vague obligation to "ascertain the views of the Chief Justice."[32] This was in distinct contrast, for example, to similar provisions in India[33] which the Indian Supreme Court has interpreted to mean that the consent of the Chief Justice is compulsory in appointments to the appellate courts.[34] Recent developments in India have fine-tuned these safeguards still further by requiring that the phrase "in consultation with the Chief Justice of India" means consultation with a plurality of judges in the formation of the opinion of the Chief Justice.[35]

Similar concerns govern the appointment of the Chief Justice. The present Article 107, which entrusts this power solely to the discretion of the President, is left intact by the reform proposals, a situation that is far from satisfactory if the independence of the judiciary is to be properly secured.

As far as removal from office of judges of the superior courts is concerned, the reform proposals envisage only a marginal improvement. In the case of all judges excepting the Chief Justice,

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[32] Article 151(2) of the Draft Constitution (October 1997).

[33] Articles 217(1) and 222(1) of the Indian Constitution.

[34] *Supreme Court Advocates-on-Record Association* v. *Union of India*, JT (1993) (5) SC p 479; *S.P. Gupta* v. *Union of India*, AIR (1982) SC p 149 popularly referred to respectively as the *First Judges Case*, and the *Second Judges Case*.

[35] The decision of a Constitution Bench of the Supreme Court of India in the *Third Judges Case*, *Frontline*, 20 November 1998.

the proposals provide that before the allegations on which removal is sought are referred to a Parliamentary Committee, an inquiry should be held by a Committee of three persons who hold or have held office as a judge of the appellate courts and who are appointed by the Speaker. This Committee would determine whether a *prima facie* case of misbehaviour or incapacity has been established.[36] Where the Chief Justice is concerned, the Committee will consist of three persons who hold or have held office as a judge of the highest court of any Commonwealth country.[37] The findings of these Committees are then put before Parliament, followed by a debate and a vote, which could result in the removal of the highest judicial officer by a simple majority, if the allegations against him or her are established.

Meanwhile, the appointment and functioning of Special Presidential Commissions of Inquiry has given rise to further contention. The Special Presidential Commissions of Inquiry Act, under which sitting judges can be appointed by the President to hear politically inflammable cases which most often involve abuse of power by politicians of the previous Government, has been roundly and constantly criticised. It bypasses requirements of natural justice and evidential safeguards stipulated in the normal law of the land. As a result, the very participation of sitting judges of the superior courts on the Commissions has been questioned, although a majority of judges appointed to these Commissions serve reluctantly and are scrupulous in observing procedural safeguards. An additional issue has been executive power over appointments to these Commissions, as well as to normal Commissions of Inquiry. Calls have been made for the abolition of Articles 110(1) and (2) of the Constitution, which give the President power to require any judge of the Supreme Court and the Court of

[36] Article 151(4)(b)(ii).

[37] Article 151(4)(b)(i).

Appeal to perform or discharge any other appropriate duties or functions under any written law and to permit, by written consent, sitting judges to perform any other office or to accept any profit or emoluments. These provisions have been understandably critiqued on the basis that they give an unwarranted Presidential influence over sitting judges, primarily in appointments to the Commissions. Alternately, it has been proposed that such powers of appointment should be constitutionally handed over to the Chief Justice. As a corollary to this recommendation, it has also been proposed that judges of the superior courts be ineligible for appointment to paid office by the executive after their retirement, and that this prohibition should be counterbalanced by provision for appropriate increases in the retirement benefits of judges. The draft Constitution, however, completely disregards these calls for reform and merely reproduces the old provisions.[38]

6. The Report of the International Commission of Jurists, 1997

Summing up the above situation, a mission sent by the International Commission of Jurists (ICJ) to Sri Lanka in 1997 to examine the situation relating to the independence of the judiciary concluded that while the reform proposals are an improvement on the present constitutional provisions, they do not go far enough.[39] The report of the ICJ Mission headed by Lord William Goodheart QC and consisting of a former Chief Justice of India, P.N. Bhagwati, and a member of the South African Judicial Service Commission and Law Commission, Phineas M. Mojapelo, was published in late 1997.

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[38] Article 154 of the Draft Constitution (October 1997).

[39] *Judicial Independence in Sri Lanka*, Report of a Mission 14-23 September, Centre for the Independence of Judges and Lawyers, Geneva (1997). .

The Mission voiced some particular concerns related primarily to the manner of appointments to the higher judiciary and the nature of the JSC. It unfortunately expressed its concerns in an unusually harsh manner, considering the nature of its visit to Sri Lanka as judicial observers and the fact that the visit lasted only about ten days. Its recommendations focused on the fact that the appointment and promotion of judges to the appellate courts should be based on merit, through selection by the JSC or by the President from a short list of names selected by the JSC. The ICJ mission proposed that if this method was not adopted, then constitutional force should be given to the convention that the President must consult the Chief Justice before making appointments. An additional recommendation was that the two senior judges of the Supreme Court with the Chief Justice should make up the JSC and that the Secretary of the JSC should be appointed by the Chief Justice and not by the President. With regard to the removal of judges, the report pointed out that the proposed removal procedure, whereby a finding of a judicial committee as to a *prima facie* case is referred to a parliamentary committee to determine whether misbehaviour or incapacity has been proved, is inappropriate and inconsistent with the UN Basic Principles on the Independence of the Judiciary. Instead, it was stated that the judicial committee should be solely responsible for the determination of misbehaviour or incapacity.

The report of the Mission meanwhile went on to suggest that delays in the appointments of judges to the appellate courts should be avoided and that consideration should be given to permitting newly appointed judges to continue hearing cases which they were hearing at the time of promotion. This was in reference to the filling of vacancies in the Court of Appeal in 1996 and 1997. One such appointment was the senior High Court judge, Upali Gunawardene, who had been the

presiding judge in a prolonged criminal defamation trial against *The Sunday Times* which had been accused of defaming the President and with regard to which the editor was ultimately found guilty. The ICJ report commented:

> .....*(the delay).....inevitably led to speculation that the appointments had been delayed as a threat to Justice Gunewardena. It may well be that the appointments were delayed in order to preserve the seniority in promotion which Justice Gunawardena, as the senior High Court judge would have expected; but even so, it is unfortunate that the vacancies were left open for so long..... The problems and the suspicion could have been avoided if (as is the case in some other countries), judges were permitted, on promotion, to complete hearing the case on which they were currently engaged.*[40]

As far as judicial independence was concerned, there was specific and positive comment by members of the Mission that:

> *. ..there is a high degree of independence among the current judiciary in Sri Lanka. The Supreme Court, in particular, is vigorously independent. While it took some time for it to get used to the exercise of its fundamental rights jurisdiction under the 1978 Constitution, it now exercises that jurisdiction freely and effectively...*[41]

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[40] *Ibid* at p 45.

[41] *Ibid* at p 52.

7. Conclusions and Recommendations

That institutional perfection is no antidote for human imperfections and perversities was a point made very tellingly by Dr N.M. Perera in his critique of the provisions relating to the independence of the judiciary in the 1978 Constitution.[42] On the flip side of the coin, it could well be added that to preserve one's independence in judicial office in spite of very grave institutional imperfections is to reach the very heights of judicial integrity. Regardless of whether the proposed constitutional reforms are implemented or not, 1998 saw the Sri Lankan judiciary stubbornly holding its own as far as its independence is concerned. In doing so, it was aided both by a growing appreciation among the public of the crucial role played by the judiciary in safeguarding their rights and by a legal profession that strongly articulated the importance of an independent Bench.

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[42] See *supra* n 15.

IX

Mental Health

*E.K. Rodrigo**

1. Introduction

"There are no mentally ill people in my electorate. I know my voters individually. Please do not talk about this problem of western countries. We have people with physical disabilities but not those with mental disability." This was what Mr. D.B.Wijetunge a former President of the country said to two psychiatrists from the Faculty of Medicine, Peradeniya, during a discussion on the development of mental health services in the country. On another occasion, soon after a meeting of the National Health Council which had discussed mental health services under the chairmanship of the then Prime Minister, Mr. Ranil Wickremasinghe, a Health Ministry official asked the Deputy Director of Health Services "Who informed the Prime Minister about these mad fellows?"

* Head, Department of Psychiatry, Faculty of Medicine, University of Peradeniya, Sri Lanka.

Although not all politicians and health administrators subscribe to these views, it is fair to say that until recently many, if not most, politicians and health administrators held rather narrow and negative views about mental health and mental health care. Their views reflected those of the general public about mental health, mental illness and mental health care: to most, "mental illness" means madness. The popular belief is that such patients should be treated at the Mental Hospitals in Angoda and Mulleriyawa. Few realise that the most common mental illnesses are dependence on tobacco, alcohol and other drugs, depression, anxiety, childhood problems, sexual dysfunction and sleeping and eating disorders rather than psychoses, which are the more conspicuous illnesses.

A suicide rate of nearly 50 per 100,000 clearly indicates the high prevalence of depression in Sri Lanka and its inadequate treatment. An estimated 70,000 people, mostly young, have committed suicide since 1983. Large numbers of persons have been displaced and exposed to the armed conflict and other types of trauma over the last two decades and many have suffered psychological consequences. An already over-burdened and inadequate mental health service system is clearly unable to meet the mental health needs of these special categories of people. Clinical evidence and experience suggest that many in the country still believe that mental illnesses are caused by evil influences and are incurable.

The patients are often looked on as possibly dangerous persons, or at best as people who need to be isolated from the rest. Even among health care workers, there is a reluctance to work in psychiatric units; some appear to believe that mental illnesses are contagious.

This chapter will outline the history of the development of mental health services, the services which are currently available, mental health legislation, the status of patient rights in Sri Lanka and proposed reforms.

1.1 Development of mental health services

The first institution for the care of the mentally ill in the western tradition was built in a suburb of Colombo in 1844 and was officially designated as the "Lunatic Asylum." In 1876 a bigger asylum was built in Colombo, but the demand for more space prompted the Government to build a third. Hence the Lunatic Asylum of Angoda was established in 1926. It is reported that it cost the Government 5 million rupees and that the asylum resembled more a prison than a hospital.[1] Professor Edward Mapother from the Maudsley Hospital, London, U.K., who was commissioned by the Government in 1937, recommended the establishment of a neuropsychiatric clinic at the General Hospital of Colombo (now the National Hospital of Colombo), a "psychopathic" hospital (300 beds), a separate house of observation and an institution for the "criminally insane." He recommended that Angoda be used to care for chronically mentally ill patients. He also observed that if the existing adverse circumstances were corrected, the country could become a model for the "whole East." Sadly this was not to be. As in many other fields, Sri Lanka squandered the opportunity of developing a model mental health care service.[2]

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[1] Dr. M.A.A.Rodrigo, Head, Department of Psychiatry, Peradeniya, "A Note on the Development of the Psychiatric Services up to 1978," an internal communication.

[2] Professor Edward Mapother, "Mapother Report, Sessional Paper XIII," Government of Ceylon Publications (1938).

As a belated response to the Mapother recommendations a 750 bedded hospital (Mulleriyawa) was commissioned in the mid-1950s near the main mental hospital in Angoda. In 1966 the then Minister of Health appointed a committee of inquiry on mental health services. Dr. W.G.Wickremasinghe, a former Director of Health Services, chaired this committee. This committee reportedly thought the need urgent enough to persuade the Minister of Health to open psychiatric units at the general hospitals of Kandy (Central Province) and Jaffna (Northern Province) in 1966, even before the publication of the committee report. However, as with the Mapother report, most of the recommendations of the Wickremasinghe report were not implemented.[3] Nevertheless, psychiatric services continued to be decentralised and five further provincial psychiatric units were opened. These had bed strengths varying from about 30 to sixty.

2. Mental Health Services

According to the *Annual National Health Bulletin 1997*, the Mental Health Services are managed by a Director who is directly responsible to the Deputy Director General of Health Services (Medical Services). However, the Director of Mental Health Services does not have nation-wide responsibility. He is responsible only for the large mental hospitals at Angoda and Mulleriyawa in Colombo and a couple of other institutions, which are also in the Western Province.

In fact, the *Bulletin* has no specific section on mental health services. Information about mental health is found scattered in various places. In contrast, areas like dental health, malaria and quarantine services

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[3] Dr.G.W. Wickremasinghe, "The Report of the Committee on the Mental Health Services of Ceylon," Government of Ceylon Publications (1966).

(port health services) are described in greater detail. Thus, the priorities of the Ministry of Health are clear.

Out of a total of Rs 1,661,315 spent on medical supplies, mental health services received only Rs 7,834 and there is no specified budget or vote for mental health. Out of a total bed strength of 51,866 beds, there are 2,840 beds for psychiatric patients. The *Annual Health Bulletin* also notes a significant recent increase in the duration of stay of patients in mental hospitals: the average duration of stay reduced from a high of 151 days in 1965 to 44 days in 1975 and 43 days in 1985. However, in 1990 the duration rose to 62 days, and by 1996 it was 74 days. The *Bulletin* does not provide any explanation for this significant increase.

2.1 Adult general psychiatric services

These services are limited to acute care services, which are provided by the two large mental hospitals in Colombo (Angoda and Mulleriyawa) and a few provincial hospital general psychiatric units. These units provide acute care services to those suffering from major psychiatric illnesses, and are often overcrowded and poorly resourced. Out-patient care is usually limited to dispensing drugs through very busy psychiatric clinics. Literally hundreds of people attend these clinics and most patients only get to see a doctor for a couple of minutes. There is no systematic follow up or supportive care given through a community care service. A few NGOs offer such services on an experimental basis while organisations like NEST have well established islandwide network of community services. However, the sustainability of these programmes is not certain.

Rehabilitation services are at best rudimentary. These general hospital units are limited by law to the care of voluntary patients. However,

they accept involuntary patients when their families bring them to the hospital. Such patients are admitted informally. The correct legal procedure is to submit such a patient to a Magistrate with a psychiatrist report recommending treatment and for the Magistrate to grant a treatment order. However, since such an order can only be executed at the Angoda Mental Hospital, following the correct legal procedure would greatly inconvenience many families. If such a procedure is insisted upon the most likely result would be the non-treatment of many such patients. The problem with the current extra legal procedure, however, is that it does not ensure the rights of patients and is open to abuse. Patients have no provision for appeal against such involuntary admissions to psychiatric units. Clearly the current Mental Diseases Ordinance needs to be changed to permit a more efficient system of formal or involuntary admission which would also safeguard the rights of patients.

2.2 Services for alcohol and drug dependent persons

In 1990, prompted by the epidemic of heroin use in the previous decade, the National Dangerous Drugs Control Board established four residential treatment centres for heroin dependent persons. It is estimated that Sri Lanka has about 50-75,000 heroin dependents, while cannabis remains the most commonly used illicit drug.

The State does not provide any services to Sri Lanka's more numerous alcohol and tobacco dependent persons. Several studies have indicated that 20-40% of male patients admitted to State hospitals suffer from alcohol and tobacco related problems and that one in two male adults smokes regularly. A significant minority of people still chew betel and are dependent on the habit.

Treatment services for alcohol dependent persons are provided by a few NGOs, which are based mostly in the major urban areas. The best known of these is a residential service for alcohol dependent persons provided by *Sumithrayo*, Colombo (a good samaritan organisation).

There are several NGOs which have been actively involved in the prevention of drug related problems. Alcohol and Drug Information Centre (ADIC), Sri Lanka Anti Narcotics Association (SLANA), Sober Sri Lanka, Federation of Non Governmental Organisations Against Drug Abuse (FONGOADA) and LIFE are some of the better known. These organisations have contributed significantly to raising public awareness about drug use and its consequent problems and have, to some extent, activated many other groups to become engaged in drug prevention work.

More recently, the Government formulated a national policy on drugs, alcohol and tobacco.[4] A national authority in alcohol and tobacco has also been proposed, to be established under the auspices of the Presidential Secretariat. In an attempt to reduce consumption the Government also proposed that the promotion of alcohol and tobacco should be prohibited. This proposal met with a lot of criticism and is yet to be implemented. Particularly worrying in relation to alcohol consumption is the production and consumption of illicit alcohol, which is widely available, particularly in rural areas. Clinical evidence suggests that many people, and particularly those from lower income groups, consume more illicit than licit alcohol. Sri Lanka clearly needs more treatment services for these dependent drinkers.

[4] "National Policy on Alcohol, Tobacco, and Illicit Drugs for the Government of Sri Lanka," Report of the Presidential Committee for Developing a Policy and a National Plan on Alcohol, Tobacco and Illicit Drugs (12 November 1997).

2.3 Child and adolescent psychiatric services

A few psychiatric units provide out-patient clinic services for children with psychiatric problems. Though each psychiatrist is required by a Ministry of Health circular to conduct a child psychiatric clinic every Saturday, not all psychiatrists do so. The Department of Psychological Medicine, University of Colombo, provides an in-patient service for a handful of patients in the Colombo children's hospital.

Since 1989, the Department of Psychiatry of the Faculty of Medicine, University of Peradeniya, along with a psychiatrist from the Department of Psychological Medicine in Colombo, have conducted a training programme for Primary Health Workers in the North Central and Southern Provinces, to promote child mental health. These primary health care workers are also trained to detect and manage common childhood disorders. The UNICEF funds this activity.

There are no mental heath services specifically for adolescents. In 1998, at the request of President Kumaratunga, two psychiatrists from the Department of Psychiatry, University of Peradeniya, investigated youth needs and submitted a report to the Family Health Bureau of the Ministry of Health. This included several recommendations targeting the emotional health of children and adolescents (see Annexe).[5]

2.4 Community psychiatric services

These services are not provided by the State-run psychiatric units. A few non-governmental organizations have been involved in developing

[5] Dr. Ranil Abeyasinghe & Dr. Priyani U. Ratnayake, "Youth Needs and Their Health Problems in Sri Lanka," Report commissioned by the Family Health Bureau and the UNFPA (1996).

such services, including *Sahanaya*, NEST in Colombo, *Nivahana* in Kandy and *Shantiham* in Jaffna. In early 1999 the WHO initiated a project to develop community-based rehabilitation in three areas of the country.

3. Manpower and Training of Mental Health Workers

There are no more than 25 qualified psychiatrists in service in Sri Lanka, giving a ratio of just over one psychiatrist per one million people. However, there are over 125 Sri Lankan born psychiatrists in the United Kingdom, an equal number in the United States of America and about 25 in Australia and New Zealand. There are four clinical psychologists in the university psychiatric units. Not one of the Ministry of Health psychiatric units has a clinical psychologist and there are only a handful of occupational therapists and social workers. Sri Lanka has no designated psychiatric nurses. The nursing of the mentally ill is usually provided by untrained, inexperienced and often poorly motivated persons. General nurses are more frequently transferred out of these units. Inadequate and inappropriate care is the norm; violations of patients rights and cruel treatment of patients are not uncommon.

The six faculties of medicine provide medical undergraduates a basic training in psychiatry. The Faculty of Medicine in Colombo has now introduced psychological medicine as a separate subject in the fifth and final year of its undergraduate programme. The only other training programme in mental health is the Doctor of Medicine (MD) Psychiatry training programme for trainee psychiatrists. This is conducted by the Postgraduate Institute of Medicine and is administered by a Board of Study in Psychiatry. The training is done in recognised centres and lasts a total of five years, one of which is at a recognised centre abroad.

Although the nurses training schools provide a short training programme in mental health for general nurses, there is no programme to train psychiatric nurses. The Ministry of Health trains occupational therapists and social workers for general health work. None of Sri Lanka's universities provides training in clinical psychology, although an undergraduate general psychology course has commenced at the University of Peradeniya. Several NGOs provide training for voluntary mental health workers.

4. Mental Health Legislation

The inadequacies of the Mental Diseases Ordinance of 1873 were well documented in *Sri Lanka: State of Human Rights 1995*.[6] Although a group of psychiatrists who had been appointed by the then Minister of Health drafted a new Act as far back as 1973, this has not seen the light of day.[7] This draft legislation proposed definitions for mental disorders, procedures for informal admissions, community care, and suggested guidelines for compulsory admission to hospital and guardianship.

The draft Act also proposed minimum standards of care in psychiatric facilities, the establishment of mental health review tribunals and special procedures to be followed in the management of patients involved in criminal proceedings. Unlike the nineteenth century Mental Diseases Ordinance, the Draft emphasised humane care for the mentally ill and the protection of their human rights. If this draft had been enacted and implemented, it would have been hailed as one of the most progressive mental health law enacted anywhere in the world, and it would have

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[6] (Law & Society Trust, Colombo, 1996), chapter IX.

[7] Draft New Mental Health Act 1973, prepared by the Advisory Committee appointed by the Minister of Health, 30 March 1973.

preceded the Mental Health Act of Great Britain in 1983. Another missed opportunity.

When two psychiatrists interviewed the present Minister of Justice, G.L. Pieris, in 1994 about the need to revise the country's mental health legislation, he replied that he had more pressing priorities, particularly relating to the conflict in the North East. However, it is encouraging to note that the Ministry of Health has now obtained assistance from the WHO to draft a new Mental Health Act based on the 25 principles enunciated by the UN in 1992 to ensure protection of the rights of mentally ill patients.[8] It is to be hoped that the new Mental Health Act will give priority to patients' rights rather than to their custody and that it will define mental disorder in keeping with contemporary international norms.

5. NGOs and Mental Health

The non governmental sector is perhaps the most promising and optimistic arena in mental health care in the country. Communication Centre on Mental Health (CCMH), Federation of NGOs, Sahanaya, NEST, *Nivahana, Shantiham* (Jaffna), Family Rehabilitation Centre are some of the better known organisations which have played a significant role in raising public awareness, mobilising resources, lobbying policy makers and administrators to bring about changes in mental health care.[9] Some of these organisations publish and circulate newsletters on a regular basis.

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[8] "The Protection of Persons with Mental Illness and the Improvement of Mental Health Care," UN General Assembly Resolution A/RES/46/119, 18 February 1992.

[9] *Directory of Services in the Field of Mental Health and Well-being*, published by the Communication Centre for Mental Health, Colombo.

6. Provincial Mental Health Services

The two large mental hospitals and the units in the three general hospitals in Colombo provide the mental health services for Western Province. Small units in the base hospitals in Kalutara, Gampaha and Negombo (Western Province) provide out-patient services. The Central, Southern and Northern Provinces have been able to provide at least a minimal service on a continuous basis, but services in the other provinces have depended on the availability of a consultant psychiatrist to man the provincial hospital psychiatric unit. The psychiatric services in the North Western, North Central, Uva and Sabaragamuwa Provinces during the past decade have been very erratic; the Eastern Province has never had a psychiatric service, except for a very brief period when a trainee psychiatrist was posted there.

The Central Province comes second to Western Province in the development of its mental health services. Its Ministry of Health has renovated an old District Hospital (Deltota) at a cost of over one million Rupees. This unit provides medium to long term care for 16 residents and was commissioned in August 1995 by the Chief Minister of the Central Province, Mr. W.P.B. Dissanyake. A grant of over Rs 400,000 from the Australian Embassy provided funds to purchase equipment and conduct training programmes for staff, and also provided training allowances for a senior occupational therapist from Australia and for a clinical psychologist from Sri Lanka. This unit, which was until recently the only State run rehabilitation facility, now provides residential care for 18 patients. In 1999 its capacity will be raised to 48. A similar unit was commissioned in the North Central Province in late 1998.

The Department of Psychiatry of the Faculty of Medicine in Peradeniya has started a special school for mentally retarded children to train

teachers and parents to help these children lead as independent a life as possible. This has been done in collaboration with the Ministry of Education of the Central Province. Plan International, an international NGO, has part funded the project.

The National Dangerous Drugs Control Board provides a residential treatment service for heroin dependent persons. The Department of Psychiatry, University of Peradeniya, provides a consultant service to this unit.

7. Mental Health Service Planning

Following the initial attempts in 1938 and 1966, more recent efforts to develop mental health service planning in Sri Lanka were initiated through three national workshops, sponsored by the Ministry of Health, and held in 1978, 1982 and 1988. A national document on mental health service planing was published following the 1988 workshop.[10] Present-day provision of mental health services is grossly inadequate for a population of 18 million people, but probably differs little from that in most developing countries, with little prospect of providing additional specialist mental health workers in the near future.

The Sri Lankan mental health planners based the development of their plans on the following general principles, drawn from a WHO Expert Committee technical report[11] which saw little difference in the range or prevalence of mental disorders in various developing countries:

[10] Dr E.K. Rodrigo* & Dr. Wolfgang Kiernan+ (1988), "National Mental Health Plan Upto the Year 2000," Report of the 3rd National Workshop on Mental Health Planning held in March 1988, Ministry of Health (* Department of Psychiatry, University of Peradeniya, + WHO Consultant)

[11] WHO, "Organization of Mental Health Services in Developing Countries," 16th Report of the WHO Expert Committee on Mental Health, Technical Report Series, 564 (1975).

- Ensuring at least minimal mental health care, which is accessible to all, and particularly to the underprivileged;
- Integrating mental health care into the general health care system, particularly in the primary care situation; and
- Increasing community participation in the promotion of mental health, to complement the state health sector.

In retrospect it is now felt that even a brief situational analysis would have been of assistance in implementing the plan. Although in countries like India the number of psychiatrists has increased, there has usually not been any increase in the number of other mental health workers, such as clinical psychologists, psychiatric social workers and psychiatric nurses.[12] In Sri Lanka, even the number of psychiatrists has remained more or less static, and in some years has decreased as some obtained employment abroad. Two psychiatrists who returned to the island in 1998 had left within a year. They were both offered consultant psychiatrists posts in two developed countries. They were both Sinhala speaking psychiatrists which makes the continuing ethnic conflict an unlikely reason. The most likely reasons for their departure are better pay in the adopted country and a more certain future for themselves and their families.

This lack of essential personnel in the country allowed the planners to consider only one option in the provision of mental health care: to provide a minimal service island-wide, to those suffering from conspicuous psychiatric illnesses (i.e. psychosis and other major psychiatric illnesses) through the mental hospitals and existing general hospital psychiatric units. An extension of these services was suggested by training of medical officers and other health personnel, including

[12] Wig & R. Sirinivasa Murthy, *From Mental Illness toMental Health: Health for Millions* (1994), pp 2-4.

volunteers working in primary care in the management of those with major psychiatric illnesses already identified by psychiatrists. The plan also suggested a more comprehensive training of medical undergraduates, postgraduates and other personnel to enable them to detect and manage inconspicuous psychiatric illnesses and other emotional and psychological problems encountered in the primary care situation.

Four basic instruments were proposed to implement the national plan: a legal framework; a broad based independent mental health advisory board; a mental health information system; and an effective administrative plan of control. A new legal framework was clearly necessary to replace the Mental Diseases Ordinance enacted over a hundred years ago, when legislators were more concerned with custodial care of patients than their human rights and standards of care. A new Mental Health Bill, which had been drafted in 1973 with a few amendments, was to be presented to the parliament for approval.

The National Advisory Board on Mental Health, which had been formed following the first national workshop in 1978, was thought to be ineffective in implementing the mental health reform proposals. The 1987 workshop, therefore, proposed that this body should be made more broadly representative of all those involved in the delivery of services and more independent of the Ministry of Health. It was felt that it should advocate the needs and rights of the mentally ill and acquire the responsibility to promote mental health through a wide range of governmental and non-governmental action. It could also co-ordinate and evaluate various other steps to improve mental health services. In addition, the need for systematic recording of basic demographic and clinical information was identified as being essential for the adequate planning of services and effective monitoring. It was

also proposed that a mental health information system be established to obtain such data. An effective, integrated administrative structure was clearly necessary to implement such a vigorous and forward looking plan for mental health services. Finally, the fourth main instrument proposed was a better-resourced Directorate of Mental Health Services with a national brief.

By 1993, six years after their presentation, not one of the national mental health proposals had been implemented. A less ambitious action plan was submitted in 1993 at the intervention of the then Prime Minister, Mr. Ranil Wickremasinghe. However, this too failed, as after the change of government in 1994 the mental health action plan was given little or no priority. Although the National Advisory Board on Mental Health met the new Ministers of Health in 1994 and 1998, the plan remained dormant; no specific funds were identified and the Advisory Board and the Directorate of Mental Health remained ineffective in the Ministry of Health.

Several general measures were proposed in addition to the development of the basic instruments. These were:

- strengthening mental health services;
- developing health manpower;
- prevention and promotion of mental health;
- identifying special programme areas; and
- conducting research.

An amended plan of 1994 proposed the formation of task forces to implement the plan and identified the following areas of action:

- acute care unit development;
- medium and long-term rehabilitation services;
- drug and alcohol services;
- primary health care worker training;
- mental health promotion in schools;
- adoption of the Mental Health Act and forensic psychiatry;
- mental retardation;
- research;
- prevention of suicides; and
- public education.

The change of government in 1994 resulted in mental health reforms losing priority as the medical administrators dropped the mental health service development proposals from the agenda of the National Health Council agenda. The new government then replaced this Council with a Presidential Task Force on Health Reform, which has subsequently given higher priority to mental health service development. This illustrates how political changes can drastically delay or retard the development of mental health services, particularly in countries with poorly developed service structures and low priority for mental health service development. This is in contrast to German's observation[13] that psychiatrists in developing countries have the major advantage of not needing to "dismantle an inert and cumbersome administrative infrastructure." This would only be true if administrators and policy makers perceive a need for such service development and recognise

[13] A. German, "Trends in Psychiatry in Black Africa," in Arieti S, and Chrzanowski G. (eds) *New Dimensions in Psychiatry: A World View* (Wiley, New York,1975).

the need to prioritise these needs. In the absence of such a commitment it is almost impossible to move. Agents of change within the ministries of health and legislative bodies are essential to initiate reforms.

One of the major reasons for the plans not being implemented was the absence of a budget allocation for the projects. The report of a WHO Study Group in 1984 observed that adequate financial provision is an essential element in the implementation of national plans of action.[14] Yet the Ministry of Health has still to specify a mental health vote in its annual expenditure statement. Although targets were set, no specific dates were identified for monitoring and evaluation to measure progress. Furthermore, no named persons were identified as being responsible for implementing specific projects.

A comment of the WHO Expert Committee in 1975 is very pertinent in this context:

> *Psychiatrists and other mental health workers cannot expect to realize their plans for improving mental health services unless these plans are recognized as valid by their governments, and given financial and administrative support. It is however, only very seldom those medical or lay administrators in national ministries are either well informed about mental health problems or motivated to do anything about them. In order to ensure action is taken to deal with these problems, there must be within each country's health ministry, a unit especially concerned with mental health service planning and administration.*

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[14] WHO, "Mental Health Care in Developing Countries: A Critical Appraisal of Research Findings," Report of a WHO Study Group, Technical Report Series, 698 (1984).

Although resources were difficult to obtain at the national Ministry of Health, one of the Provincial Ministries of Health - the Central Province - was willing to consider the development of a comprehensive mental health service system in the province. This was made possible because the Chief Minister of the province was lobbied by psychiatrists and family members of patients and he agreed to hold a conference at the Provincial Ministry of Health to discuss a plan of action to develop mental health services in the province. Although the initial resource allocated was an old set of buildings, this was accepted to develop a long stay rehabilitation centre for chronically mentally ill persons, and to establish the principle that providing such care was the responsibility of the Ministry of Health. The buildings were renovated and staff allocated to commission a small unit for 18 residents.

This commitment from the Provincial Government enabled the attraction of a grant from the Australian High Commission to further develop the centre. Two Australian volunteers, who were sponsored by the Overseas Service Bureau of Australia, arrived to assist. Although the establishment of a rehabilitation facility was not a high priority activity, it gave an impetus to the development of further mental health services in the province. The centre was followed by the development of a training facility for mentally retarded persons, a project which was jointly developed by the Ministries of Health and Education.

Another factor which helped develop the long stay facility for rehabilitation was the recruitment of volunteers from abroad. This was made possible by demonstrating to foreign funders that the local government had made a commitment to the centre and that the continuity of the service was ensured. More often than not, external funders (whether local or foreign) are reluctant to fund programmes which are not perceived as sustainable.

Although little could be done at the national level to promote child mental health, a request from a Presidential Commission to help children exposed to armed conflict initiated a UNICEF funded programme to train primary health care workers to promote child mental health. This is an example of the opportunistic development of a mental health service arising out of an emergency need. This programme was initiated in 1989 to train medical practitioners and family health workers. Several manuals have been developed and a training programme has been piloted in several provinces. The Family Health Bureau of the Ministry of Health agreed in 1998 to include this training for all midwives at the national level to promote child mental health. Although the initial project was directed at children and families exposed to armed conflict situations, experience of the project workers and other national evidence showed that children are exposed to many types of traumatic experiences such as domestic violence, sexual abuse, alcoholism of fathers and resulting trauma and separation from parents, particularly from mothers who seek employment away from home. Thus, training all midwives was seen as a necessary and essential activity to equip families to prevent such traumatic experiences as far as possible and to enable them to cope adequately with such trauma.

8. Conclusions and Recommendations

There are indications to suggest that the pessimistic picture given in this chapter is changing. Despite some confusion in the Ministry of Health regarding policy making, it is likely that mental health services will see some changes in the near future. The actions of NGOs and individual psychiatrists have contributed significantly to bring about this change of attitude among policy makers and health administrators.

Although previous mental health service planning proposals have fallen on deaf and indifferent ears, there is now scope for greater optimism. At the national level, in addition to the National Advisory Body on Mental Health, a Mental Health Reform Commission established under the Presidential Task Force on Health may be able to implement the proposals more efficiently. It is relevant to state that many have questioned the ability of the National Advisory Board on Mental Health to implement the proposed mental health service reforms. So far it has been able to do little or nothing. This body or another equivalent committee or commission will need to be recognised and provided with adequate recognition and resources to ensure mental health service reforms. The existence of two parallel bodies on mental health policy planning may generate some confusion and friction, but it is the hope of all concerned that these will not be major impediments to the future development of mental health services in the country.

The recommendations made by the WHO in 1984 in its report titled "Mental Health Care in Developing Countries: A Critical Appraisal for Research Findings" are still valid and relevant for Sri Lanka. They are briefly to formulate a national mental health policy; the State to take all necessary steps to improve mental health care at every organizational level, particularly at the community level; provide appropriate mental health training for health personnel; provide essential drugs to primary health care workers to treat priority mental disorders; develop an information and evaluation systems; and develop research activites to assess the effectiveness of different types of services in relation to various types of mental disorders.

ANNEX

Selected recommendations from *Youth Needs and Their Health Problems in Sri Lanka*, a report commissioned by the Family Health Bureau and the UNFPA:

Suicide

The objective of these recommendations is to reduce the suicide rate by 25% over the next five years.

1. Make counselling more widely available at the level of the community and school.
2. Include problem solving skills in the national school curriculum.
3. Educate parents and teachers about emotional needs of children.
4. Education of the public, particularly the need to recognise depression among family members.
5. Media to adopt a code of conduct with regard to suicide news.
6. Discourage selling pesticides to young people.
7. Dilute pesticides at the point of sale.
8. Establish poison centres at every base hospital.
9. Provide continuing education to doctors on depression and poisoning.
10. Upgrade the role of public health inspectors to that of a counsellor.

Drug, alcohol and tobacco use

The recommendations included the introduction of preventative education at primary school level; encouraging students to become activists in prevention work; making schools tobacco free; increasing the compulsory schooling period (up to GCE O/L examination); preventing sponsorship of sports activities by the tobacco and alcohol industry; providing more recreational activities for young people; limiting sale times of alcohol; limiting sale to adults; strict enforcement of those who infringe these laws; and providing prevention, treatment and rehabilitation facilities at the district level.

Reproductive health

The recommendations included age appropriate sex education in schools; introduction of safe and responsible sexual activity concepts in GCE O/L and A/L classes; realistic contraceptive education; providing explicit information about sexually transmitted diseases to students; and commissioning recognised authorities to develop educational material.

Aggression in youth

The recommendations included the appropriate recognition of aggression as a natural phenomenon; promoting assertiveness without violence; introduction of human rights as a school subject with a specific recommendation that teachers respect the human rights of children and set an example by being assertive without being violent. The report also emphasises the necessity of guarding against organised violence at all times and the need to institute preventative measures to limit if not eliminate such violence.

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Crime, Human Rights and State Responsibility

C.S. Dattathreya[*]

1. Introduction

In including a chapter on crime, this year's *State of Human Rights* report is charting new territory. Crime is seen as a major social issue which provokes considerable public concern, and its public profile increased significantly during 1998. In particular, cases such as the rape and murder of Rita John Manoharan (described below) received considerable public attention and this case was seen as an indicator of the extent to which crime had taken over civic life.

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* Senior Researcher, Law & Society Trust. The author would like to thank Professor S. Hettige of the Department of Sociology, University of Colombo, SSP Raban, Police Headquarters, Colombo, and Ms Lakshi Wijesekera, intern, Law & Society Trust, for their assistance.

This chapter attempts to view crime within a human rights framework. It reviews crime in the context of international human rights standards, discusses the perception that crime is rising, reviews reports of specific kinds of crime and examines certain shortcomings in the criminal justice system. It does not deal specifically with violence against women, human rights cases against the State (such as the Krishanthi Kumaraswamy rape and murder case) or crime in the context of the ethnic conflict.

2. Crime and International Human Rights Standards

Although the area of crime falls within the realm administered by States, it is not difficult to trace a mandate for its satisfactory management in international instruments. Apart from the general mandates provided in the UDHR and the ICCPR, specific reference may be made to Article 2 of the ICCPR which reads:

1. *Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*

2. *Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.*

3. *Each State Party to the present Covenant undertakes:*

   (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

   (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

   (c) To ensure that the competent authorities shall enforce such remedies where granted.

It is clear from the above (especially clause 3) that State Parties undertake the responsibility of protecting the civil and political rights of their populations irrespective of whether they are being violated by private individuals (non-State actors) or by State officials. Since the discourse of human rights tends to focus on the State as violator, the responsibility of the State to prevent abuses by private individuals and to provide remedies where it has failed is sometimes overlooked.

The social contract is premised on the State's role in setting the limits and freedoms of private action. One dimension of this task is to prevent private individuals from violating the human rights of other private individuals. The regime of criminal law protects the civil and political rights of private individuals where the perpetrators are fellow private

individuals. Although State officials are also ideally expected to be prosecuted under the very same criminal law, often accountability for State officials requires extra measures through special legislation etc. For instance, one of the main objectives for the establishment of the Human Rights Commission was to monitor the actions of the police and security forces and to provide an alternative complaints and investigation mechanism to the citizenry (which did not require the filing of fundamental rights petitions in the Supreme Court).

The discourse of human rights is most often invoked in situations where agents of the State violate rights and where there are no effective remedies. This is because the primary realm of accountability for the way in which a State handles crime is its citizenry. When the State is itself the perpetrator, it becomes necessary to appeal to a discourse or regime which purports to transcend the immediate context of the social contract parties. It is this space that the discourse of human rights primarily occupies. But this should not distract us from the role that the human rights discourse can play in addressing issues which are presumed to be part of the social contract itself. In polities where mechanisms of State accountability for handling crime are mature and well established, appeals need seldom be made to the discourse of human rights. In Sri Lanka, the issue of crime has started dominating the daily news over the past year. In such a context, it becomes necessary to locate even 'domestic' issues such as crime within a human rights framework. For crime clearly is, after all, about the violation of human rights.

3. The Legislative Framework for the Administration of Criminal Justice

As in most other commonwealth countries, the framework for the administration of criminal justice in Sri Lanka is primarily covered by the Penal Code No 2 of 1889, the Code of Criminal Procedure Act No 36 of 1979 and the Evidence Ordinance No 14 of 1895. These codes are supplemented by other enactments that create offences or facilitate the management of crime. This supplementary legislation ranges from the protection of children's rights, to drugs and pharmaceuticals, and to the prevention of terrorism. A review of the changes in such a broad range of legislation cannot be undertaken here.

The criminal justice system in Sri Lanka primarily comprises the police (and other investigative bodies), the Attorney General's Department (responsible for indictments to the High Court) and the judiciary. In addition to these there are special agencies which are responsible for monitoring special types of crimes. For instance, the Customs Department deals with the monitoring of violations of provisions of the Customs Ordinance No 17 of 1869 (as amended).

4. A Rise in the Incidence of Crime?

At the time of writing, detailed statistics regarding the various categories of crimes for the full year of 1998 were not available from the police department. Only statistics relating to the first half of 1998 were available.

As compared to the figures for the corresponding period in 1997, the figures for the first half of 1998 register a significant increase of eight

per cent. As against 4622 cases of 'serious crimes'[1] reported in the first half of 1997, 5025 such cases were reported for the corresponding period in 1998. The latter figures reflect an average of 27 cases reported per day. The true figure may well be higher, as these figures cover only those cases that were reported to the police.

The crime figures for the first half of 1998 for certain categories of crimes are given in the tables at the end of this chapter. The final table also provides data on the extent to which the incidence to which the incidence of some grave crimes increased in 1998.

4.1 The rape and murder of Rita John Manoharan

On 14 October 1998 newspapers reported the discovery of the body of Rita John Manoharan, who had been abducted, raped and murdered. The newly married woman had been strolling along the beach with her husband when four men attacked her husband with a cycle chain and forcibly took her away in a three wheeler. Her body was later found dumped in a ditch in a patch of shrub jungle close to Mattakkuliya beach.[2] The case received enormous publicity and

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1 Statistics obtained from the Police use two categories to classify crimes (the two are not mutually exclusive), (a) serious crimes and (b) grave crimes. Serious crimes include homicides, burglaries of over Rs. 5,000/-, thefts of over Rs. 10,000/-, robberies, highway robberies, vehicle thefts and robberies and bank holdups. Grave crimes include abduction, arson and mischief, burglary, cattle and goat thefts, grievous hurt, hurt by knife (sic), homicide, attempted homicide, rape, riot, robbery, unnatural offences, extortion, cheating, misappropriation, criminal breach of trust (over Rs. 1000/-), theft of bicycles, theft of property (over Rs. 100/-), counterfeiting currency, offences against the State, offences under Offensive Weapons Act, and offences under the Exchange Control Act.

2 *The Island*, 14 October 1998.

prompted various women's rights and other human rights organisations to stage protests. Four suspects were subsequently taken into custody and have been charged for the offences.

4.2 More riots

A report in the newspapers on 11 September 1998 stated that the army had been deployed to quell a major riot on three estates in the Ratnapura district which had left at least two persons dead and scores of linerooms torched. Further, the report said, "(T)he riot was sparked off by the killing of two men from the village surrounding Alupola estate, who the police said were engaged in illicit gemming and distilling kasippu (toddy). They were found hacked to death. In retaliation, villagers had gone on the rampage attacking estate workers and setting fire to some linerooms."[3]

4.3 Domestic aids

Burglary and murder in people's houses commonly involved domestic aides employed by the household. In early July 1998, for instance, a 65 year old widow was found murdered at her residence on Ward Place in Colombo. A number of items, including the car, were missing from the house. Police suspected the crimes were committed by a domestic aide who had left the village a week prior to the killing and had not been traced.[4] Presumably recognising this as a pattern, the Crime Detective Bureau (CDB) warned people employing domestics to be more vigilant in view of the increasing number of robberies and murders in the preceding months. The CDB representative

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[3] *The Island*, 11 September 1998.

[4] *Sunday Leader*, 19 July 1998.

complained that, although the Police had maintained a "domestics register" for the past ten years, very few families had shown an interest in it.[5]

4.4 Ragging

Ragging continued to feature in public and media debates in 1998. These debates were sparked off principally by the ragging-related deaths in late 1997 of S. Varapragash and Thushara Kelum Wijetunge, students at the University of Peradeniya and Hardy Advanced Technical Institute, Ampara, respectively. On 6 March 1998, the Government made public a Bill entitled *Prohibition of Ragging and Other Forms of Violence in Educational Institutions*. This Bill was challenged in the Supreme Court by the Inter-University Students' Federation of the University of Sri Jayewardenepura and another student of the same university. The Supreme Court determined that some provisions of the Bill were unconstitutional.[6] An amended Bill was subsequently enacted as law.

4.5 School principals and offences against students

It was particularly disturbing that cases of school principals committing offences against students were reported in 1998. In one incident, a principal of a school in Negombo district was alleged to have committed unnatural sexual offences on two small girl students in the school. This principal was suspended from his post by the Negombo division educational authorities.[7] The Governor of Southern Province

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5 *Sunday Times*, 16 August 1998.

6 *LST Review*, Volume 8, Issue 126 (Law & Society, Colombo, April 1998), pp 1-37. See also chapter II on the Integrity of the Person.

7 *The Island*, 20 February 1998.

also noted at a seminar that a surprising number of school principals and teachers had been charged before the courts for sexual abuse of children and women.[8]

4.6 Treasure hunters

Criminal elements have persistently targeted the country's ancient treasures. The plunder of these treasures was widely reported in 1998. In one incident, treasure hunters dug a thirty feet deep pit at the site of the historic 'Thivanka Pilimage' (Image House) in Polonnaruwa, destroying its foundations in the process. A fortnight earlier, treasure hunters had removed five 'guardstones' from the 2000 year old Watadageya in Medirigiriya.[9] The Archaelogy Department recorded reports of 120 cases of plunder of valuable ancient treasures during the 14 month period from April 1997 to May 1998. The provinces where these incidents were highest were as follows:

Province	Number of incidents
North Western Province	25
North Central Province	32
Uva Province	10
Eastern Province	10

(Source: The Island, 4 September 1998)

Of the total number, the following were considered to be of a 'priceless' nature:[10]

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[8] *Daily News*, 18 May 1998.

[9] *The Island*, 7 September 1998.

[10] *The Island*, 4 September 1998.

- Medirigiriya Watadageya, Polonnaruwa (five guardstones)
- Redeviharaya, Kurunegala (ancient tusk carvings)
- Kaballalena, Kurunegala (artefacts)
- Devanagala, Mawanella (artefacts)
- Dedigama, Kegalle (artefacts)
- Nagollagama, Kurunegala (artefacts)
- Vishnu Devalaya, Hanguranketa (artefacts)
- Budu Patunna, Kotiyagala, Ampara (artefacts)
- Habassa, Monaragala (artefacts)

In September, the President reportedly directed the IGP, Mr. Lucky Kodituwakku, to establish a special unit to investigate the plunder of priceless archaelogical treasures. The Presidential directive followed recommendations made by the Religious and Cultural Affairs Minister, Mr. Lakshman Jayakody, for urgent and immediate action.[11] Within days of this directive, the police arrested a ten member gang including four army personnel at Anuradhapura.[12]

4.7 Elpitiya massacre

In one of the most gruesome incidents reported during the year, sixteen people from four families were hacked, shot and then burnt to death inside their own houses and their houses were set on fire.[13] One report quoted investigators as saying that the victims had been killed in retaliation for giving evidence against the attackers in a murder trial

[11] *The Island*, 2 September 1998.

[12] *The Island*, 9 September 1998.

[13] *The Island*, 31 January 1998.

four years earlier.[14] A massive police hunt involving more than 50 officers was launched and two suspects were shot dead in a confrontation at the Puwaktola forest reserve in Elpitiya.[15]

5. Complaints Against the Police and Politicians

A nexus between the police, criminals and politicians appears to be thriving in Sri Lanka, and accounts of such networks abound in the media. Early in 1998, the Special Investigations Unit (SIU) of the police was reported to have commenced investigations into allegations of corruption against 150 senior police officers made during previous year. In some cases, connections between police officers and known criminals were alleged, and police officers were said to have aided and abetted crime, including murder and other violent acts, negligence, misuse of official vehicles and taking bribes. One DIG was charged with using an official vehicle and police driver for personal business. Two Senior Superintendents of Police (SSPs) were alleged to have used constables posted to operational areas as construction workers at their house building sites while another had built landslide protection for his home using old tyres meant for building bunkers. Another officer in an operational area was alleged to have been rewarded with a herd of goats for tightening security in his area by ordering mortars for the local force's arsenal.[16]

On May Day 1998, some men from the Presidential security division reportedly travelled in vehicles without number plates and "bashed up" the brother of the PA Kotte Deputy Mayor in a pre-dawn shooting frenzy which apparently involved some underworld figures. According

[14] *Sunday Leader*, 1 February 1998.

[15] *Daily News*, 2 February 1998.

[16] *Sunday Island*, 4 January 1998.

to the Deputy Mayor Mahesh Palitha Perera, his brother Rohana Perera and three others were not only beaten up, but one was shot in the knee.[17]

The opposition leader of the Ja-Ela Pradeshiya Sabha was taken into custody by the Special Investigations Unit of the Peliyagoda Police for harbouring a criminal who was later shot dead by the Police.[18] In another incident it was reported that a Deputy Minister and several other politicians in the Udugampola area, Gampaha, had obstructed the police from taking certain suspects into custody.[19]

However, one has to treat reports on this issue with caution as sometimes the media is not neutral, and chooses to uncover some, but not other, networks depending upon their political stance. Furthermore, some reports appear to contain misinformation about certain crimes. For instance, another account of the riot in the tea estates in the Ratnapura district described above[20] stated that "[the riot] began on 8 September 1998 when bodies of two Sinhala (the majority ethnic group in Sri Lanka which comprises 70% of the country's population) were found near a residential area of tea plantation workers (who are Tamils - a minority race in Sri Lanka which comprises 20% of the population). Subsequently, it led to a fire that ended in virtually destroying 800 labour quarters to ashes."[21] This report goes on to claim that the labour quarters were burnt in an organised operation involving some 200 Sinhalese thugs, who had

17 *Sunday Times*, 17 May 1998.

18 *The Island*, 6 February 1998.

19 *The Island*, 26 February 1998.

20 See *supra*.

21 "The Truth of Ratnapura Attack on Tamils," *Human Rights Solidarity: The Newsletter of the Asian Human Rights Commission*, Vol. 8, No. 11, November 1998, pp 21-22.

been let loose by a local politician with police collusion. One policeman was reported to have said to one of the thugs "We have given you four hours, still you haven't finished?"[22] The writer also said plainly: "The reports in the newspapers were not genuine. The State television only showed politicians donating some essential things to the victims. Not a single media shot could see a sight of the 800 burnt houses. However, if the same situation occurs to a Sinhala community or village, the reaction of the media would have been rather different."[23]

6. Perceptions of Shortcomings in the Criminal Justice Administration System

Some newspaper columnists stated that there has been a total breakdown of the rule of law in the country.[24] One columnist claimed after the Rita John Manoharan rape and murder incident that "Despite the gruesome murder shocking a whole nation, residents around the area (where the rape took place) find nothing special about the case." Further, she quoted a resident of the area as saying that "[E]verybody is suddenly talking about this case and are shocked about it while girls are brought here and raped practically (every week). There must be many more bodies of girls dumped all over this island."[25] In the same column, an unnamed Senior DIG was quoted as saying that the rate of crime has reached such heights that the death penalty must be introduced to arrest this trend.

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[22] *Ibid.*

[23] *Ibid.*

[24] See, for instance, Mudliyar, "The Disappearance of the Rule of the Law," *Sunday Times*, 26 July 1998.

[25] Shakuntala Perera, "Rape and Murder - Is it due to a Weak Police and the Law?," *The Sunday Island*, 18 October 1998. See also chapter VI on The Rights of Women.

The public outrage evoked by the Rita John Manoharan case was such that even lawyers at the Colombo Chief Magistrate's Court staged a protest demonstration outside the court premises against the lawyers who appeared for the suspects. One of the placards carried by the protesters read "[D]own with lawyers who appear for rapists."[26] One newspaper columnist noted: "A sociologist told me that it was the first time after a long time that the public was so outraged over a crime. The public at their own expense had slogans and graffiti written on their neighbours' walls. Effigies carrying the names of the suspects with tyres around their necks were placed at the scene of the crime."[27] A few days after the incident, DIG Mr. Jagath Jayawardena told a newspaper: "The killing of Indian national Rita John Manoharan would have been avoided if the area police had taken precautionary measures, as several similar incidents had been reported to the Police in the area a few days ago."[28]

A sociologist at the University of Colombo opined that there was a geographical focus to the increase in economic crimes, which tended to be concentrated in the Colombo metropolitan area which had seen a growth and concentration of wealth in the last two decades. The police-underworld nexus is most at the lower levels, perhaps because the majority of police officers are from the lower middle class and often try to make some extra money. The Northwestern (Wayamba) Province is also significant in any assessment of crime as it is notorious for its massive illicit liquor network. In this area, sincere and concerted efforts by a few top police officers and one or two political leaders are frustrated by the illicit liquor network and its politicos. Politicos belonging to this latter group have a confused sense of public interest

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[26] *Daily News*, 28 October 1998.

[27] *Sunday Times*, 13 December 1998.

[28] *Daily News*, 20 October 1998.

as they protect the people involved in the illicit liquor network at the expense of others. This has led to the devastation of thousands of people's lives, with youth and women being particularly vulnerable. While the population of Wayamba has good economic and education levels, the area paradoxically has poor social indicators.[29]

In a newspaper interview, Senior DIG Kotakadeniya said that rapidly escalating violent crime - including murder and rape - is the result of "poor policing" and that the situation was getting beyond control. The DIG went on to claim that even Inspectors and Assistant Superintendents of Police were working in cahoots with organised gangs. President Chandrika Kumaratunga was concerned enough with the situation to give a direction to the police to formulate an action plan to tackle escalating crime. In addition, Defence Ministry officials had also started studying the sudden spurt in violent crimes to identify the major contributory factors.[30]

In another police perspective on the causal and contributory factors of crime, one Assistant Superintendent of Police, Mr. D.A.V. Abeysinghe of Chilaw, claimed that 70% of rapes and murders are committed under the influence of drugs and alcohol.[31]

6.1 Some shortcomings in the police and the judiciary

It can be argued that some of the practices adopted in the administration of the police contribute to its politicisation and compromise its independence, making it a less effective force to combat crime. For instance, police officers have the option of retiring at the age of fifty

[29] Interview with Professor S.T. Hettige, Professor of Sociology at the University of Colombo.

[30] *Sunday Times*, 17 January 1999.

[31] *Daily News*, 24 July 1998.

five. After this age, they may continue to work, but only on the basis of annual contracts which are renewable at the pleasure of the Government. If they fail to please, their contracts need not be renewed. This provides the Government with direct control over almost the entire top brass of the police administration.

An official in the higher judiciary who spoke on conditions of anonymity saw the crux of the crime problem as being the ineffective implementation of existing laws. The official saw the whole law enforcement machinery as being ineffective, from the stage of the investigation of crime to the conviction and sentencing stages. Since the ineffectiveness of the system is endemic there is inevitably delay in the disposal of cases. Some special units like the Bribery Commission and the Narcotics Bureau function well, but the situation in some units has declined. Among the specific problems that the official outlined were the following (relating to both the judiciary and the police):

- Lack of continuity - one court in Colombo has had five judges in five years thus seriously affecting the court's consistent ability to deliver justice.

- Although there are special statutes to deal with aggravated situations of crime, even these are ineffective because of the lack of proper implementation.

- Lack of staff training.

- Lack of discipline.

- Lack of education of judges.

- Lack of proper scientific conduct and record of investigations - for example, DNA testing and video recording of testimonies are still not part of regular procedure.

- Reluctance on the part of judicial officers to pass strictures against the police where appropriate.

- While it is possible for the police to function reasonably effectively even at the present levels of manpower, the diversion of such manpower to other duties, primarily political duties (i.e. security and other duties for political functionaries, political events and functions, etc.), not only results in a loss of policing of crime but is also a waste of investigative talent.

- The supervisory role of the higher judiciary is hampered by the lack of funds and minimum infrastructure.[32]

Of the people who are charged with committing offences in the courts, a substantial number plead guilty and then get inadequate sentences. Of the total number of cases which result in conviction, only a negligible number will stand in appeal.[33] Another important problem is the lack of victim support structures and procedures which are sensitive to victims. This lack leads to a fraying of people's confidence in the system. Consequently, there is no encouragement for people to report crimes.

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[32] Interview with an official in the judiciary.

[33] According to a report in the *Daily News* of 19 February 1999, the Government is planning to make significant changes to the implementation of criminal law and, as an initial and immediate step, a Special Presidential Task Force has recommended that drastic changes be made to the present practice of granting amnesties to prisoners. In March 1999, the Government also announced that it was re-introducing the death penalty to combat the rise in crimes.

6.2 The ethnic conflict and its impact on crime and law enforcement

The ethnic conflict has had a considerable impact on both crime and levels of policing. After the launch of 'operation Jayasikuru,' a substantial police strength was withdrawn from police stations for tasks related to the military offensive. Although the operation has since been called off, the police strength continues to be utilised together with the security forces to hold land that has been recaptured from the LTTE. Added to this has been the deployment of police for counter-terrorism related tasks.[34] As the armed forces recapture territory from the LTTE, more and more police units drawn from other parts of the country are likely to be utilised to hold the captured land. Thus, although the ratio of police officers to the population has steadily improved from 1:873 in 1980 to 1:288 in 1993,[35] these figures do not give a true picture of policing on the ground. If more and more police personnel are deployed for military tasks in the conflict zone, the ratio of police officers to population in the rest of the country might not have changed as significantly as the figures might initially suggest.

Another way in which the ethnic conflict has affected crime was illustrated when police in Dambana arrested five people suspected to have committed a spate of robberies and other criminal activities in the Digamadulla area in the guise of LTTE operatives.[36] It appears that the ethnic conflict is not only causing the diversion of police

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[34] *Sunday Times*, 17 January 1999.

[35] *Administration Report of the Inspector General of Police for the Year 1993*, p. A 81. This report, published in 1995, offers a wealth of information on the police but unfortunately has not been updated.

[36] *Daily News*, 9 January 1998.

resources and personnel from their original task of law enforcement, but is also offering criminals new avenues.

Another impact of the ethnic conflict has been the creation of a new category of criminals - the deserter. There are significant numbers of deserters from the armed forces, a considerable proportion of whom are engaged in criminal activities.[37] An official of the judiciary opined that very often these deserters tend to be bullies who cannot stand the discipline in the armed forces and hence run away.[38] In contrast to this view, Professor Hettige opined that these deserters tend to be 'soft' and 'weak' and so they run away from the armed forces as they are unwilling to fight the war.[39]

7. Conclusions and Recommendations

It is clear that the ills affecting the criminal justice system are deep and serious. The State's obligation to provide its citizens a fair, prompt, just and efficient criminal justice system is clearly not being adequately discharged. The way in which successive governments have been primarily concerned about their own political survival has perhaps contributed to this scenario, as the institutions of law enforcement have become politicised. Certain broad conclusions can be drawn from the situation currently prevailing in Sri Lanka:

- Diversion of resources meant for the administration of criminal justice has eroded the protection offered to citizens.

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[37] No accurate figures are available on the number of deserters, and the number in any case keeps fluctuating.

[38] Personal interview.

[39] Personal interview.

- The prevalence of police-criminal-politician networks has not only corroded the functional capabilities of the police but has also led to a significant loss of its credibility.
- Many of the administrative practices in the management of the police force compromise its independence.
- The response of the judiciary to the rise in crime has been unsatisfactory for reasons listed earlier.

It is perhaps inevitable when dealing with as vast a subject as crime that recommendations have to be framed in very general terms. This also reflects the perception that the problems are primarily systemic and that reviews and reforms have to take place at all levels. As Professor S.T. Hettige opined, the breakdown in law and order is attributable to the breakdown of the moral order of society occasioned by the enormous socio-economic changes taking place in the country. To be sure, socio-economic change is inevitable which must perhaps even be promoted, but there is a need to ensure that such change takes place within a regulated framework. Further, he doubted if the process could be reversed quickly.[40]

Given this scenario, the following recommendations are made:

(i) A review of administrative and management practices in all branches of the criminal justice administration machinery should be undertaken with a view to ensuring its independence and effectiveness.

(ii) A programme to enhance the resource and technical skills and expertise of all manpower deployed in the criminal justice administration machinery should be initiated.

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[40] Personal Interview.

(iii) Sentencing policy needs to be reviewed in order to produce more rational and comprehensive sentencing guidelines.

(iv) The judiciary needs to be encouraged to pass strictures in instances of lapses by the police or other law enforcement authorities.

(v) There is a need to evolve victim assistance mechanisms which address the grievances of the victims of crimes.

(vi) Ultimately, as an official in the judiciary put it, crime costs the Government both in material and other terms. So it has to invest more in streamlining the police and the judiciary in order to ensure that laws are effectively implemented.[41]

[41] Personal interview.

SERIOUS CRIMES REPORTED BETWEEN 1 JANUARY 1998 AND 30 JUNE 1998

UVA:

	Homicides	Burglaries of over Rs.5000/-	Thefts of over Rs.10,000/-	Robberies	Highway robberies	Vehicle Thefts & robberies	Bank Hold-ups	Total
Badulla	8	18	3	1	0	1	0	31
Bandarawela	12	18	5	2	2	2	0	41
Monaragala	23	15	8	14	4	2	0	66
Total	43	51	16	17	6	5	0	138

SABARAGAMUWA:

	Homicides	Burglaries of over Rs.5000/-	Thefts of over Rs.10,000/-	Robberies	Highway robberies	Vehicle Thefts & robberies	Bank Hold-ups	Total
Rathnapura	56	94	14	36	7	21	0	228
Kegalle	43	42	13	15	1	13	1	128
Total	99	136	27	51	8	34	1	356

CENTRAL REGION:

	Homicides	Burglaries of over Rs.5000/-	Thefts of over Rs.10,000/-	Robberies	Highway robberies	Vehicle Thefts & robberies	Bank Hold-ups	Total
Kandy	15	69	31	26	0	21	0	162
Matale	15	34	13	10	3	7	0	82
Gampola	5	9	10	14	1	0	0	39
N'Eliya	11	37	15	22	6	4	0	95
Total	46	149	69	72	10	32	0	378

SOUTHERN REGION:

	Homicides	Burglaries of over Rs.5000/-	Thefts of over Rs.10,000/-	Robberies	Highway robberies	Vehicle Thefts & robberies	Bank Hold-ups	Total
Matara	37	45	28	20	1	11	1	143
Galle	32	48	21	27	11	7	0	146
Tangalle	71	30	22	53	8	13	1	198
Elpitiya	42	44	15	3	8	10	0	122
Total	182	167	86	103	28	41	2	609

WESTERN PROVINCE (NORTH):

	Homicides	Burglaries of over Rs.5000/-	Thefts of over Rs.10,000/-	Robberies	Highway robberies	Vehicle Thefts & robberies	Bank Hold-ups	Total
Kelaniya	20	312	151	28	37	48	0	596
Gampaha	45	99	52	44	19	22	1	282
Negombo	9	101	33	19	5	23	0	190
Total	74	512	236	91	61	93	1	1068

WESTERN PROVINCE (SOUTH):

	Homicides	Burglaries of over Rs.5000/-	Thefts of over Rs.10,000/-	Robberies	Highway robberies	Vehicle Thefts & robberies	Bank Hold-ups	Total
Mt. Lavinia	36	159	55	7	71	35	0	363
Nugegoda	33	253	88	102	56	72	1	605
Panadura	18	51	16	18	10	8	2	123
Kalutara	33	94	29	5	30	14	0	205
Total	120	557	188	132	167	129	3	1296

NORTH WESTERN REGION:

	Homicides	Burglaries of over Rs.5000/-	Thefts of over Rs.10,000/-	Robberies	Highway robberies	Vehicle Thefts & robberies	Bank Hold-ups	Total
Chilaw	36	42	33	12	7	11	0	141
Kurunegala	22	43	19	9	8	17	0	118
Nikawaratiya	14	29	12	7	6	6	0	74
Kuliyapitiya	18	25	19	7	11	12	0	92
Total	90	139	83	35	32	46	0	425

NORTH CENTRAL REGION:

	Homicides	Burglaries of over Rs.5000/-	Thefts of over Rs.10,000/-	Robberies	Highway robberies	Vehicle Thefts & robberies	Bank Hold-ups	Total
Anuradhapura	35	49	30	28	3	9	0	154
Polonnaruwa	30	44	6	23	4	11	0	118
Total	65	93	36	51	7	20	0	272

COLOMBO:

	Homicides	Burglaries of over Rs.5000/-	Thefts of over Rs.10,000/-	Robberies	Highway robberies	Vehicle Thefts & robberies	Bank Hold-ups	Total
Colombo	30	131	202	43	14	63	0	483
Total	30	131	202	43	14	63	0	483

COUNTRY:

	Homicides	Burglaries of over Rs.5000/-	Thefts of over Rs.10,000/-	Robberies	Highway robberies	Vehicle Thefts & robberies	Bank Hold-ups	Total
Grand Total	749	1935	943	595	333	463	7	5025

(Source for all figures above: Statistics obtained from the Police Department)

Select Grave Crimes for the Years 1994, 1995, 1996, 1997 and 1998 (upto 30 June 1998):

	1994	*1995*	*1996*	*1997*	*1998 (upto 30/6/98)*
Abduction	1241	826	989	751	469
Arson and Mischief over Rs.200/-	6345	4544	4166	5003	3041
Burglaries	10211	10675	10613	12297	8832
Grievous Hurt	2035	1972	1993	1946	1269
Homicides	1336	1614	1775	1822	1454
Rapes	518	542	716	898	725
Riots	97	131	101	109	42
Robberies	3618	3698	4064	4260	3317
Unnatural Offences	70	93	89	111	66
Extortion	52	107	78	45	67
Total	25,523	24,202	24,584	27,242	19,282

(Source: Statistics obtained from the Police Department)

XI

Other Developments

*I.K.Zanofer**

This chapter seeks to discuss issues of concern during the year under review which have not been covered in separate chapters in this report. It provides an update of issues covered in previous reports. The topics covered are: Environmental Rights and Human Rights; Freedom of Association; Freedom of Expression and Media Freedom; Internally Displaced Persons; Right to Health and Workers' Rights.

1. Environmental Rights and Human Rights

1.1 Introduction

Due to the increasing degradation of the human environment, defenders of human rights have increasingly become aware of the necessity to work on environmental issues. Although the International Bill of Human Rights does not mention the protection of the environment specifically, nevertheless it is now generally accepted that the enjoyment of a healthy environment is fundamental to the enjoyment of other specific human rights.

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Successive meetings of the Environment Ministers of the SAARC countries have addressed environmental issues in the region and examined the extent to which SAARC countries have made progress. Sri Lanka hosted the 4th SAARC Environment Ministers meeting in 1998. At this meeting, the Ministers were faced with the challenge of finding ways to place the SAARC effort on a sound financial footing and to devise an implementing mechanism to transform SAARC efforts from mere annual declarations of intent to effective action. Further, it is necessary to adopt a treaty to promote co-operation in environment management within the region.

Environmental rights and human rights were discussed comprehensively in *Sri Lanka: State of Human Rights 1997*.[1] This update covers the major environmental issues that arose during 1997 and 1998.

1.2 Major Issues in 1997

The City of Colombo is fast becoming a polluted city. Both health authorities and environmentalists fear that if no immediate remedial steps are taken to control widespread pollution, city dwellers would soon be exposed to a host of life threatening airborne and waterborne diseases.

1.2.1 Air pollution

One of the major contributory causes for air pollution, which has risen dangerously in recent years, is the sharp increase in the number of motor vehicles. As many vehicles are old and unfit to be used on the

[1] See Atapattu, S., "Environmental Rights and Human Rights," in *Sri Lanka: State of Human Rights 1997* (Law & Society Trust, Colombo, 1998), chapter VIII.

roads, urgent steps should be taken to remove these vehicles from the roads and monitor the levels of exhaust fumes, in order to reduce air pollution particularly in the City of Colombo. In addition, emissions from industries are contributing to air pollution.

1.2.2 Etul Kotte diesel power plant project ("Kotte Kids Case")

Despite several protests by the residents of Etul Kotte, the Ceylon Electricity Board (CEB) constructed a 19.4 MW diesel power plant in the highly residential area of Etul Kotte and in close proximity to the parliamentary complex. The site is also within the boundaries of a bird sanctuary. Agitation about the severe health hazards posed by the diesel plant fell on deaf ears.[2]

In a fundamental rights application filed by five minors against the CEB and the others,[3] the minors appearing through their 'next friends'[4] alleged that the noise of the thermal power plant generator far exceeded national noise standards, and would cause hearing loss and other impairments. The case raised several important questions about the right to life and the validity of emergency regulations promulgated in respect of power generation projects. Leave to proceed was granted by the Supreme Court.

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2 *Biosphere*, Vol.14 (3), October 1998.

3 SC Application No. 323/97, SC Minutes, 28th August 1998. See also Wickremasinghe, S, "Emergency Rule" in *Sri Lanka: State of Human Rights 1998* (Law & Society Trust, Colombo, 1998), and chapter III of the present report

4 'Next friends' are the persons who represent the minors during their continuance of the period of minority.

However, when the case came up for argument, the counsel for the respondents stated that the operation of the power plant had ceased on 5 July 1997, and that the first respondent (CEB) had no intention of recommencing operations. The counsel also agreed on behalf of the 6th respondent (Kool Air Ventures Ltd), to pay a sum of Rs. 10,000 *ex gratia* to each of the petitioners without any admission of liability. The counsel for the petitioners stated that the petitioners would accept the *ex gratia* payment without prejudice to their civil rights.[5]

1.3 Major Issues in 1998

1.3.1 Air pollution

At a meeting of South Asia Co-operative Environment Programme (SACEP) held in Male, the Maldives, on 22 April 1998, the South Asian Governments approved a Declaration on Control and Prevention of Air Pollution. The main aim of the Declaration was to achieve inter-governmental co-operation to address the increasing threat of transboundary air pollution and its consequential impacts. In the long-term, the Declaration could be one of the central means for protecting the atmosphere in South Asia.[6]

Air pollution is a serious problem for developing countries such as Sri Lanka, where the industrial sector has grown. Policy makers and scientists have an important role to play to overcome the problem or at least minimise its adverse effects.

A recent study conducted by the National Building Research Organisation and the Metropolitan Environmental Improvement Programme (MEIP) showed that the air quality in key places within

[5] *Ibid.*

[6] *Daily News*, 6 June 1998.

the City of Colombo has at times dropped below the national ambient air quality standards.[7]

The Supreme Court of granted leave to proceed with a fundamental rights application filed by an Attorney-at-Law who alleged that the Minister of Forestry and Environment had failed to enact regulations to control air quality in the City of Colombo, and had thereby violated his, the right to life recognised by Chapters 3 and 4 of the 1978 Constitution, and in particular supported by Article 11[8] of the Constitution. This was the second time that leave to proceed was granted by the Supreme Court on the basis of a violation of the right to life. The first instance was the Kotte Kids Case, discussed above. In his application, the petitioner argued that the right to life is the basis of all other rights and that the right to practise one's own faith, enshrined in Article 10, and the right to personal liberty, enshrined in Article 13(2), are all supportive of the right to life.[9] The Constitution of Sri Lanka does not contain explicit protection of the right to life. The case had not been decided by the end of the year.[10]

1.3.2 Upper Kotmale hydro power project

The Environmental Foundation Ltd. (EFL) filed legal action in the Court of Appeal against the Secretary to the Ministry of Forestry and Environment and the Ceylon Electricity Board (CEB) for having

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7 *Sunday Observer,* 28 June 1998.

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

9 *The Island,* 30 September 1998.

10 In India, the Constitution does guarantee the right to life, but does not guarantee the right to a clean environment. However, the Supreme Court of India has held that the constitutional right to life includes the right to a clean and healthy environment.

granted approval for the 150 MW Upper Kotmale Hydro Power Project in an allegedly arbitrary manner. Legal action was filed under the provisions of the National Environmental Act No. 47 of 1980 (as amended). The EFL claimed that the Ministry and the CEB had violated the provisions of this Act by approving the project without holding a public hearing.[11]

The project had failed to receive the green light from the former Secretary to the Ministry of Environment in 1995, following a decision by a special panel of experts appointed by the Secretary to examine the viability of the project. The panel of experts had rejected the project on several grounds, including its potential threat to the waters of seven of the country's major waterfalls.[12]

1.3.3 Eppawela phosphate mining issue

The proposal for a joint venture with an American multinational company for large-scale phosphate mining in Eppawela was discussed for nearly a year with much publicity and amid protests from various groups.

A solidarity group condemned the Government's proposals to grant the use of rock phosphate in Sri Lanka to a company in the USA as being unfair, unwise, unfavourable and destructive. The group declared that rapid and aggressive excavations, such as those proposed, had led in other countries to the irreparable destruction of both the natural environment and livelihoods in the area surrounding the project, and had also damaged irrigation systems, agricultural infrastructure and places of archaeological, cultural and religious value.[13]

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[11] *The Island,* 13 October 1998.

[12] *Ibid.*

[13] *Human Rights SOLIDARITY,* Vol.8, No.1, January 1998, p.3.

The group also drew attention to the submissions which had been made by the Attorney General's office on 7 May 1997. These had suggested certain amendments to the proposals regarding the rights of the Government of Sri Lanka and of the occupants of the land that would come within the project area, and the protection of the environment and places of archaeological, historical and agricultural value. The Attorney General's office had also raised queries about such matters as the basis on which payments would be made to the Government of Sri Lanka, the responsibility for rehabilitating the area that would come under the project and the control and ownership of infrastructure.[14] By the end of the year, the matter was still under discussion.

1.3.4 Oil pollution

A major oil spill in the Colombo harbour in 1998 opened the eyes of public and the relevant authorities to the dangers of oil pollution. There are fears of further oil spills as the oil pipeline is not maintained properly and no contingency plan has been made to deal with oil spills.

Shortly before the dawn on 2 July 1998, a layer of oil spread around the Colombo harbour. It had leaked from a broken rubber hose which had connected an oil tanker to a mooring buoy located five miles off the Colombo port. The incident demonstrated that no proper system is in place to deal with this type of emergency, and the alleged negligence of the Ceylon Petroleum Corporation (CPC) and the Ports Authority. Although the Marine Pollution Prevention Act[15] contains provisions on pollution of the marine environment, it appears that these are not properly enforced.[16]

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[14] *Ibid* at p.4

[15] Act No. 59 of 1981.

[16] *The Island*, 9 September 1998.

According to the *Daily News*, the costs of this leakage have not been calculated. In response, the Government decided to introduce a comprehensive programme to protect Sri Lanka's maritime waters and the coastline from oils spills and other forms of pollution caused by cargo ships and fishing boats. The monitoring network under this programme was designed to prevent further degradation of the marine environment as well as help the Marine Pollution Prevention Authority in their monitoring activities.[17]

In addition to this programme, advanced response mechanisms need to be created to control oil spills and minimise their impact on human health and the environment.

1.3.5 Water pollution

It was reported that thousands of tonnes of garbage from the Colombo City have been dumped at Alupothawatta bordering Puselioya, a tributary of the Kelani river. Seventy five per cent of residents in the Colombo City use pipe borne water from the Kelani river for drinking purposes, and there were fears that such pollution could create an increased risk of cholera.[18]

In another incident, the Additional Magistrate in Kandy issued an interim injunction ordering a hotel in Kandy to stop releasing waste water into the Niyatambaramulla canal that was used by the people of six villages in the area.[19]

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[17] *Daily News*, 31 July 1998.

[18] *The Island*, 1 September 1998.

[19] *Biosphere*, Vol. 14(3), October 1998.

1.4 Conclusion

Environmental pollution in Sri Lanka is caused primarily by the failure of the authorities to implement the relevant environmental regulations and policies. The Government and the relevant authorities need to take all the necessary steps to protect the environment, in accordance with the recommendations made in *Sri Lanka: State of Human Rights 1997*, and ensuring that environmental policy is insulated with a human rights approach.[20]

2. Freedom of Association

This section seeks to discuss briefly the freedom of association, with particular reference to the amendment to the Voluntary Services Organizations (Registration and Supervision) Act No. 31 of 1980, which was passed by parliament in March 1998. The amendment was passed, along with several other Bills, at a time when the main parliamentary opposition party was boycotting parliamentary sessions.

2.1 Legal Provisions

Freedom of association and assembly are guaranteed to every citizen under the 1978 Constitution. Article 14(1)(c) guarantees the freedom of association subject to Article 15(4), under which restrictions may be imposed as prescribed by law in *the interests of racial and religious harmony or national economy*. Laws which restrict these rights include the PSO[21] and the PTA.[22]

Emergency regulations made under the PSO can override, amend or suspend any general law except the provisions of the Constitution.

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[20] *Supra* n 1.

[21] No. 25 of 1947 (as amended).

[22] No. 48 of 1975 (as amended).

The PTA also gives wide powers to the Executive, including the authority to issue orders that could infringe freedoms of assembly, association and expression.[23]

In forming NGOs, citizens are exercising their fundamental right of freedom of association. This is a right enshrined in the 1978 Constitution as well as in the UDHR and the ICCPR to which Sri Lanka is a signatory. "Freedom of association connotes the freedom of like-minded persons to group themselves together for any lawful purpose and to govern their own affairs in the pursuit of their common interests free of governmental or State intervention. Following from the exercise of this right, it is necessary that the distinct nature of NGOs be understood in formulating their relationship to the state, which should primarily be based on the concept of the autonomy of the NGOs."[24]

The autonomy of NGOs engaged in social service work in Sri Lanka was seriously affected in 1980 by the passage of the Voluntary Social Service Organizations (Registration and Supervision) Act.[25] This Act did not merely compel the registration of social services organisations. It also empowered the Registrar, an official appointed under the Act, or any person authorised by him, to enter and inspect premises of NGOs and even, under certain conditions, to attend any meetings of the Executive Committee of the organisation.[26]

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[23] Samaraweera V., *Promoting Three Basic Freedoms: Towards Greater Freedom of Association, Assembly and Expression in Asia* (Law & Society Trust, Colombo, September 1997), p 12.

[24] INFORM "Statement on Proposed Amendment to the Voluntary Social Service Organizations (Registration and Supervision) Act," *LST Review*, Vol. 8, Issue 125 (Law & Society Trust, Colombo March 1998), p 28.

[25] Act No 31 of 1980.

[26] *A Challenge to the NGO Bill,* Centre for Policy Alternatives, *Moot Point*, Legal Review (1998), Vol.2, Issue 1, p 61.

The Act further authorised the Minister, when there were allegations of fraud or misappropriation, to appoint a Board of Inquiry; the Minister could then refer its report to the appropriate authority for steps to be taken according to the law.[27]

As the Civil Rights Movement (CRM) pointed out, "the freedom of association necessarily involves the right not only to decide with whom one will associate, but also with whom one will not associate. To empower a government official to attend the meetings of an association if authorised by the Minister is the most gross infringement of this right."[28]

> *On 1st September, 1995, the Voluntary Social Services Organisation (Registration and Supervision) (Amendment) Bill, to amend the original Act was published in the Gazette. The Bill inserted a new Section 14A in the principal enactment immediately after Section 14. The new Section 14A conferred on the Minister the power to appoint an Interim Board of Management where a Board of Inquiry constituted under Section 11 of the Act reports "evidence to support any allegation of fraud or misappropriation made against a voluntary organisation" which, in the opinion of the Minister, is of a such nature that it would affect the financial management of the organisation and would adversely affect public interest if such organisation is allowed to continue with the existing Executive Committee.*[29]

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[27] *Supra* n 23, p 61.

[28] *Supra* n 24, p 29.

[29] *Supra* n 26, p 62.

Vigorous representations were made against this Bill, particularly by civil rights organisations and other NGOs on the basis that it violated the freedom of association. Consequently, the Bill was not taken up for its second and third readings for two and a half years, and it was assumed that the amendment had been withdrawn. However, the Bill continued to remain on the Order Paper of Parliament.[30]

On 3 March 1998, two and a half years after its introduction, this Bill was suddenly taken up for its second and third readings respectively. It was passed by a majority vote, without any discussion or debate, while the Opposition was boycotting the sittings and demonstrating outside the parliamentary premises.[31]

Several individuals and one NGO filed petitions in the Supreme Court between 13 and 18 March, challenging the constitutionality of the amendment. However, the Supreme Court rejected these petitions on the ground that they had not been filed within the stipulated time limit. Article 121 of the 1978 Constitution provides that a citizen can invoke the jurisdiction of the Supreme Court to test the constitutionality of a Bill, but only *within a week of the Bill being placed before Parliament.* This very narrow time period for challenges allows the government to manipulate the timing of the introduction of legislation. In the case of the amendment to the VSSO Act, the Court decided that the challenges should have been filed within a week of the amendment being tabled some two and a half years earlier. This case demonstrated the inadequacy of the current constitutional provisions to protect the citizenry from a manipulative government.

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30 *Ibid.*

31 *Ibid.*

2.2 Conclusion

The provisions of the Amendment provoked considerable criticism by NGOs, which argued that it interfered with their freedom of association and was a serious threat to their independence. Claiming that it could be used as an excuse to take over or to thwart the activities of those NGOs which criticise the Government, NGOs called for its immediate repeal.

Constitutional provisions relating to freedom of association need to be amended to conform to international human rights standards. The draft Constitution,[32] if it is ever enacted, would improve upon current constitutional provisions relating to freedom of association by, for example, extending its protection from the present 'citizens' to 'all persons'. However, several problem areas would still remain, including particularly the provision that written and unwritten laws that antedate the new Constitution would remain valid, whether or not they are consistent with the provisions of the Constitution.

3. Freedom of Expression and Media Freedom

3.1 Introduction

In June 1998, censorship on news relating to military issues was imposed under emergency regulations. In a climate where security concerns are often paramount, infringements of rights such as freedom of expression, information, association and movement can be made all too readily. Certainly, under the international human rights standards to which Sri Lanka has subscribed, it is legitimate to impose certain

[32] *The Government's Proposals for Constitutional Reform*, Ministry of Justice, Constitutional Affairs Ethnic Affairs and National Integration (October 1997).

limited restrictions on these rights for reasons of national security, but such restrictions must be contained within specified limits and cannot be over-broad.[33]

Freedom of expression and media freedom have been discussed in *Sri Lanka: State of Human Rights* reports annually since their inception in 1993. This discussion provides an update, covering the major events during 1998 relating to these issues.

3.2 Major Events During 1998

3.2.1 The Banning of the LTTE and Freedom of Expression and Association

"The bombing of the Kandy temple (*Dalada Maligawa*) shortly before the fiftieth anniversary of Independence celebrations provoked a considerable hardening in the government's attitude. On 27 January 1998, a new emergency regulation was promulgated to ban the LTTE."[34] In addition to prohibiting membership or association with the LTTE, and support for or assistance with any of its activities, the regulation also bans the communication (or attempt to communicate) any orders, decisions, declarations or exhortations made by (or purported to have been made by) the LTTE or any member to advance its objectives.[35]

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[33] *Fifty Years On: Censorship, Conflict and Media Reform in Sri Lanka,* Article 19, International Centre Against Censorship (December 1998).

[34] *Ibid at* p 7; Emergency (Proscribing of Liberation Tigers of Tamil Eelam) Regulations No.1 of 1998. See also chapter III on Emergency Rule.

[35] *Ibid.*

There is a provision in the regulation to protect the right of any international organisation which has an agreement with the Government, and which has been 'specified' by the Defence Secretary, to engage in humanitarian assistance. However, there is no similar provision protecting the right of journalists to speak to members or associates of the LTTE and report on LTTE actions or statements... The regulation tries to deny to the Sri Lankan public information that is readily available abroad... Sri Lankans with access to the Internet can readily access such material if they wish to do so; but the majority have no access to such technology and are deliberately denied information on the LTTE's stated position.[36]

3.2.2 Reporting the conflict-before military censorship

According to Article 19:[37]

News reporting of the conflict in northern and eastern Sri Lanka has long been dominated by press statements put out by the Sri Lankan government authorities on the one hand, and the LTTE on the other. Independent reports or depictions of the conflict and its impact on the people in the area remain rare.[38]

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[36] *Supra* n 33, pp.7-8.

[37] Article 19 is the International Centre Against Censorship. It monitors individual countries' compliance with international standards protecting the right to freedom of expression and work at the governmental and inter-governmental level to promote greater respect for this fundamental right.

[38] *Supra* n 33, p 8

Discussing reportage of a major battle in February 1998 the organisation said:

> *The reports emanating from the two sides were directly contradictory - reflecting both sides' use of propaganda and misinformation in the pursuit of their objectives. And as has been the case for so long now in the Sri Lankan conflict, no independent news sources were in the area so there was no non-partisan account of events.*[39]

Whether or not formal censorship was in force under emergency regulations, journalists continued to find it difficult to gain independent access to the conflict zones.[40]

3.2.3 The imposition of military censorship

On 5 June 1998, the President re-imposed direct censorship on reporting of certain security matters under emergency regulations. The Deputy Chief of Staff of the Army was appointed as the 'Competent Authority' under the censorship regulations. This was the first time a military censor had been appointed. Media organisations both in Sri Lanka and abroad expressed dismay at this development.[41]

As discussed by Article 19, the 1998 censorship regulations[42] differed in some respects from those which had been in force in 1995 and 1996. They remained very broadly phrased indeed, extending far

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[39] *Ibid.*

[40] *Ibid* at p 9.

[41] *Ibid* at p 11.

[42] Emergency (Prohibition on Publication and Transmission of Sensitive Military Information) Regulations No.1 of 1998.

beyond the legitimate restrictions that can be imposed under international law to protect national security. They applied both to Sri Lankan and international media, whereas on the two previous occasions the censorship regulations were enforced only in relation to the local media.[43]

On 17 August, the censorship was extended to ban the coverage of news relating to the transfer of officers within the high command of the security forces, apparently on the grounds that such information could assist the LTTE.[44]

3.2.4 Criminal defamation

The Government continued to file charges of criminal defamation against newspaper editors and journalists. The editor of *Lakbima* newspaper, Mr. Bandula Padmakumara, was acquitted on 6 February 1998 of the charge of alleged defamation of President Chandrika Kumaratunga in an article published on 19 February 1995, but the Attorney-General appealed against this judgment. The content of the contested article in *Lakbima* was very similar to that of the *Sunday Times* article which led to Mr. Sinha Ranatunga's conviction in July 1997.[45]

The editor of *Gindara* and eight others, including the newspaper's publisher, were arrested by the Maradana police in January 1998 and remanded by the Maligawatte Magistrate for the alleged defamation of the President.[46]

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[43] *Supra* n 33, p 12.

[44] *Ibid.* See also chapter III on Emergency Rule.

[45] *Ibid* at p.21.

[46] INFORM Situation Report, January 1998, p 11.

3.2.5 Harassment of and physical threats to journalists

On the night of February 12, an armed gang forced their way into the home of Iqbal Athas, the Defence Correspondent and Consultant Editor for the *Sunday Times,* and intimidated him and his family. This was not the first time that he had faced a threat of this nature. The case has been taken up in the High Court. Mr Athas had exposed, *inter alia* corruption in the air force through his columns.

The *Dinamina* correspondent for Aranayake (in the Kegalle District), Predeep Kumara Dharmaratna, was assaulted by several members of the police, including the OIC of the Aranayake Police Station. This followed the publication of an article linking the police to illicit liquor brewing in the area. A large crowd including newspaper journalists demonstrated in Kegalle town against the police assault. Although the Government initially took up this case seriously and transferred all the police officers concerned, some of the police officers were later said to have returned to the area.[47]

However, in a fundamental rights application filed by Mr. Dharmaratna against the OIC of the Aranayake Police Station and other police officers, the Supreme Court ordered the OIC to pay compensation and costs to the journalist, for the violation of his fundamental rights.[48]

In another case concerning the assault of a journalist, on December 17, the Supreme Court found in favour of a fundamental rights application filed by Mr. Sumith Jayantha Dias, a producer of programmes at the semi-state television station, Independent Television

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[47] INFORM Situation Report, March 1998, p 7.

[48] SC Application No. 163/98, SC Minutes 17.12.1998. See the discussion in chapter IV on Judicial Protection of Human Rights.

Network (ITN). He had alleged that the Deputy Minister of Posts and Shipping, Mr. Reggie Ranatunga and some others, had assaulted him for filming a lorry which had been set on fire. The Court found that the petitioner's rights under Articles 11, 13(1) and 14(1)(a) of the 1978 Constitution, had been violated and ordered compensation. Mr. Ranatunga was ordered to pay a portion of the compensation, in his personal capacity.[49]

Other media personnel also faced harassment from the police or armed forces, usually on defence-related matters. The identity of those responsible, however, has not always been discovered. Mr. Lasantha Wickrematunge, the editor of the *Sunday Leader* newspaper, had a narrow escape when gunmen opened fire at his house on 17 June 1998. His vehicles and house were damaged. "Although publicly condemned by the highest level of government, very little has been done in practice, to investigate this potentially murderous attack."[50]

Further, several foreign correspondents were harassed to reveal their sources. On 3 January 1998, a group of some 30 soldiers raided the Colombo home of the Sri Lanka correspondent for the *Indian Express* in order to find out if she was in contact with the LTTE.[51] The Indian High Commission in Colombo protested, as did journalists' organisations. The Media Minister said that in future the security forces would have to inform the Director of Information before searching or arresting a foreign correspondent, and that the search could only be conducted in the presence of officials from the Information Department.[52]

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[49] SC Application No 98/97 SC Minutes 17.12.1998.

[50] *Supra* n 33, p. 30.

[51] *Ibid* at p.31.

[52] *Ibid.*

Despite these assurances, police arrested another foreign journalist - the Colombo correspondent of the Chinese *Xinhua* agency - on the night of 28 February. The Ministry of Defence had ordered his deportation. He was held overnight at the CID headquarters, and then released without charge after the deportation order was withdrawn, reportedly as a result of diplomatic protests.[53]

On 14 August 1998, CID officers questioned the editors of the *Sunday Times* and *Sunday Leader* about the source of stories concerning two Government ministers. The newspapers had published a copy of a letter written by a Minister to the Speaker of Parliament requesting the removal of the Chairman of the Parliamentary Select Committee appointed to examine allegations against officials of the Bribery Commission. The Free Media Movement (FMM) described such action by the CID as 'an act of intimidation' intended to prevent publication of such items in the future.[54]

3.3 Conclusions and Recommendations

Freedom of expression and media freedom remain matters of vital public interest in Sri Lanka. The numerous submissions which individuals and civil society organisations have made to the Parliamentary Select Committee on Media Reform indicated the extent of public concern on this issue. The adoption of the 'Colombo Declaration on Media Freedom and Responsibility' in April 1998 is another.

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[53] *Ibid* at p 32.

[54] *Ibid at* p 31.

The Declaration put forward a wide range of proposals for media reform and recommended that the appropriate bodies should undertake steps to promote their widespread dissemination, acceptance and implementation.[55] The recommendations included: Sri Lanka's Constitutional guarantees of freedom of expression to be brought in line with its international legal obligations, especially the ICCPR; and a better formulation of the words defining freedom of expression, opinion and information in the Constitution, also in keeping with the ICCPR.

While the protection of national security is certainly a legitimate ground for limiting freedom of expression, such limitations must always be very narrowly drawn to ensure that they cannot be abused and used for other purposes.[56] All legislation relating to the freedom of expression and the media should be brought on par with the provisions in the ICCPR, to which Sri Lanka is a signatory.

Shortly after the present Government came to power in 1994, Article 19 made a series of recommendations[57] for the promotion and protection of freedom of expression. Such reforms are vital to future peace in Sri Lanka and integral to the development of a genuinely democratic and pluralistic political culture.[58]

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[55] *Supra* n 33, pp 60-70, and Centre for Policy Alternatives (CPA), Colombo, Sri Lanka.

[56] *Ibid* at p.38.

[57] *Ibid* at pp 40-59, also reproduced in the *LST Review*, Vol. 9 Issue 135 (Law & Society Trust, Colombo, January 1999), pp 21-34.

[58] *Supra* n 33, p.38.

4. Internally Displaced Persons

4.1 Introduction

Each *Sri Lanka: State of Human Rights* report since 1993 has discussed the situation of internally displaced persons and returnees from India. This chapter seeks to provide an update, covering the major events of 1998. The health situation relating to internally displaced persons is discussed in section 5 below.

> *The link between forced displacement and human rights is a crucial one. Human rights violations are a principal root cause of forcible displacement; the human rights of the displaced refugees and internally displaced persons alike are frequently violated and threatened while they are displaced; and respect for fundamental human rights is a key factor in the search for a durable solution to any situation of displacement.*[59]

4.2 Internally displaced persons living in newly cleared, uncleared, and grey areas

4.2.1 Newly cleared areas: Jaffna Peninsula, and border areas south of the Vanni

> *Jaffna peninsula has been the epicentre of the armed conflict and seen the displacement and exodus of populations to other districts and South India. Though it is claimed that most people have returned after the government's take over, the Jaffna Kachcheri estimates that 64.6% of the original pre-1995 population is currently present in the peninsula... Of the 738,800 original inhabitants of Jaffna, before the army*

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[59] Human Rights Watch, *World Report.* (1999), p 481.

took control in 1995, up to 481,728 have now returned including many of those forced to move to the Vanni.[60]

The Consortium of Humanitarian Agencies (CHA) reported that by 30 November 1998, 5,661 displaced families consisting of 19,254 people had arrived in Mannar to proceed to Jaffna, and that 5,257 displaced families consisting of 18,075 persons had been sent to Jaffna district via Talaimannar and Trincomalee.[61]

Recent returnees to Jaffna from the Vanni remain the most vulnerable, often returning in poor health and with very few resources. Meanwhile, in December approximately 11,000 people remained stranded in 11 camps in Vavuniya, having left the Vanni but not been allowed to travel further South. In addition, an estimated 42,000 Tamil-speaking Muslims who had fled Mannar and Jaffna in 1990 still lived in 104 camps in the Puttalam district. Of these, approximately 16,000 were under the age of 18.[62] Many other displaced people live with friends and relatives. According to the Department of the Commissioner General of Essential Services, there were 258,228 such persons (outside welfare centres) as at 1 November 1998.[63]

The Government agreed that the present food stamp distribution could continue with effect from 1 September. The sinking of the Princess Kash by the LTTE and other factors delayed plans for the resettlement

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60 *Save the Children, Situation Report: Children Affected by Armed conflict in North and East,* No.2, August 1998, pp 26 - 27.

61 *Consortium of Humanitarian Agencies Newsletter,* November-December 1998, Vol. II, Issue 11, p 29 (The Consortium of Humanitarian Agencies, Colombo).

62 *Ibid*

63 Commissioner General of Essential Services, Issue of Dry Ration/Cash & WFP Assistance as at 01/11/1998 (unpublished).

of 25,000 families. Between September - October1998, resettlement grants were paid to 600 families in Velanai and 7,256 families resettled in Sandilipay. Of the 4,000 families resettled in Valikamam North, 3,589 have received resettlement grants.[64]

The health status of returnees is a particular cause for concern. Many children and adults suffered from under-nutrition and the incidence of malaria, typhoid and other serious infections was high. The infant mortality and maternal mortality rates increased to well above the island-wide average.

Unemployment among school leavers remained a major concern. In August, Save the Children Fund (SCF) reported that there were 599 graduates and 22,958 persons ranging from those who had studied up to the GCE A/L examination to labourers registered at the job bank, but that these numbers represent only a small percentage of unemployed displaced people. The majority of the displaced have no skills recognised by the job bank.[65]

The Government has been eager to rehabilitate the Jaffna peninsula, but in practice its efforts remained small scale and relatively *ad hoc*. Some areas remain uncleared and were not selected by the Government for resettlement.[66]

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[64] Consortium of Humanitarian Agencies Newsletter, September-October 1998, Vol. II, Issue 10, p.31.

[65] *Supra* n 60, p.28.

[66] *Ibid.*

4.2.2 Uncleared areas: LTTE held areas in the Vanni

These areas – in the four districts of Kilinochchi, Mullaitivu, Mannar and northern Vavuniya – saw heavy fighting in 1998, and contained a population of 457,397 people.[67] An increasing number of people from these areas arrived at welfare centres.

According to the CHA there were 13,186 displaced families consisting of 53,766 people who were in receipt of dry rations at the end of the year, and the number of displaced people increased with each military operation. People who had been displaced by the *Riviresa II*, *Riviresa III* and *Sath Jaya* operations were not provided with dry rations, causing severe food shortages among the displaced population in the uncleared areas.[68]

The Poor Relief Food Stamp scheme, which had provided relief to 4,936 poor families, was suspended during 1996, because the Samurdhi scheme was supposed to replace it. However, Samurdhi was not implemented in the Mannar district, for unknown reasons, and poor people in that district received no assistance from either of these schemes.[69]

A UNICEF survey indicated that conditions for the displaced had deteriorated during 1998, with particularly grave implications for children. Many children suffer psychological stress as they attempt to readjust to their new surroundings, and a sense of uncertainty remained high. Many communities in the Vanni had no clear idea of where they would move next if they were displaced yet again. Many planned to

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[67] *Ibid* at p 8.

[68] *Supra* n 61.

[69] *Ibid.*

move closer to the coast; others planned only to hide in the jungle for a few days and then see if they could return to their homes.[70]

The provision of supplementary food items by UN agencies and NGOs is increasingly appreciated by the displaced community, particularly since signs of malnutrition have appeared in the uncleared areas.

4.2.3 The grey areas: Trincomalee, Batticaloa and Ampara

According to SCF, approximately 11,000 people, of whom around 4,000 were children lived in 22 camps in the Trincomalee, Batticaloa and Ampara districts in August 1998. A further 48,000 people, of whom 18,000 were children, lived with friends and relatives.[71]

According to the CHA, at the end of November 1998, there were 7,366 displaced people living in welfare centres, and a further 13,180 displaced people outside welfare centres in the Ampara district alone. Of these, only 4,130 received dry rations.[72]

In October, the CHA reported that there were 432 refugee families in the four welfare centres in the Batticaloa district.[73] According to the Commissioner General of Essential Services, some 22,425 persons were staying with friends and relatives in the Batticaloa district, as at 1 November1998.[74] Up to the end of July 1998, 5,795 families

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[70] *Supra* n 63, p 9.

[71] *Supra* n 60, p 21.

[72] *Supra* n 61, p 27.

[73] *Consortium of Humanitarian Agencies Newsletter*, September-October 1998, Vol. II, Issue 10, p 29 (The Consortium of Humanitarian Agencies, Colombo).

[74] *Supra* n 63.

were in receipt of food stamps. In August 1998 this number was cut down to 3,628 by the Government.[75]

People living in the grey areas faced considerable difficulties in accessing services, especially health and education.[76]

4.3 Conclusion

The standard of living of Sri Lanka's displaced people remained very poor in 1998. Access to health and educational facilities remained difficult, and services were of a poor quality. Shortages in drugs and essential medical supplies continued to plague these areas. The Government needs to take all possible steps to ensure a better standard of living for these vulnerable people. A permanent political solution needs to be found to the armed conflict to end the repeated experience of displacement which so many people endure. The Government must protect the fundamental rights of displaced people, which have been violated by both the armed forces and the LTTE.

The total economic and human burden of the war has been borne most heavily by the population in the North and East. The exigencies and demands of the war have reduced the capacity for good governance. As the war continues, these damaging effects intensify, affecting generations to come. It has been estimated that 900,00 children in the North and East are affected by the conflict.[77]

Last year's *Sri Lanka: State of Human Rights* Report contained a series of recommendations relating to internally displaced people.[78]

[75] *Supra* n 73.

[76] *Supra* n 60, p 23.

[77] *Supra* n 60, p 4.

[78] See *Sri Lanka: State of Human Rights 1998* (Law & Society Trust, Colombo, 1998) chapter X.

We reiterate the need for these recommendations to be given serious consideration and to be effectively implemented if this most vulnerable category of people is to be protected, and the conditions under which they live are to be ameliorated.

5. The Right to Health

5.1 Introduction

The right to health was discussed in *Sri Lanka: State of Human Rights 1995*[79] and an update was provided in the 1998 report.[80] This chapter provides another update, covering the major health issues of 1998, the Government's response to them, and the status of the health of people in the North and East of the country.

5.2 Major Issues During 1998

5.2.1 Triple vaccine

Sri Lanka called for the support of the World Health Organisation (WHO) to produce the triple vaccine locally (to vaccinate against tetanus, diphtheria and the whooping cough). Allegations that the vaccine used in 1997 was sub-standard and the issues surrounding the DPT consignment were discussed in *State of Human Rights 1998*.[81]

From the 2nd January to 25th December 1998, 151 cases of whooping cough or whooping cough like syndrome, 57 cases of tetanus and

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[79] See *Sri Lanka: State of Human Rights 1995* (Law & Society Trust, Colombo, 1996) chapter IX.

[80] See *Sri Lanka: State of Human Rights 1998* (Law & Society Trust, Colombo, 1998) chapter XIII.

[81] *Ibid* at pp 333-349.

one case of diphtheria were reported, which was a reduction as compared to the number of cases reported to the Epidemiological Unit, Ministry of Health, in the previous year.[82]

The two-member committee[83] which appointed by the President in 1997, to probe allegations of misconduct against the Chairman of State Pharmaceutical Corporation (SPC), in the purchase of a stock of DPT (triple vaccine) from India had cleared him of all allegations. The Committee presented its report in 1998 and stated:

> *"...our consideration was given to all the relevant circumstances, including him having chaired a meeting of a Tender Board which met on May 21, 1996 (at which it was decided to order the 2nd consignment of the relevant DPT vaccine), and to the two official visits made by him along with a delegation of health officials approved by the relevant health authorities (during which the relevant authorities inter alia visited the vaccine manufacturing plant) and to the signing of a Memorandum of Understanding with the State Trading Corporation (with the prior approval of the Attorney-General and the relevant health authorities). Therefore, we are of the opinion that there was no basis to conclude that the Chairman of the State Pharmaceutical Corporation had acted with a conflict of interest, and that he did not act in the best interest of the SPC or the Government....*[84]

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82 *Weekly Epidemiological Report (WER), Sri Lanka,* Vol.26, Nos. 1-52.

83 *Supra* n 80, p 339.

84 *Daily News,* 11 November 1998.

5.2.2 Cholera epidemic

Cholera continued to spread in various parts of Sri Lanka. From the 2nd January to 25th December 1998, 1,479 cases of cholera were confirmed by the Epidemiological Unit.[85] The Public Health Department, Colombo Municipal Council, closed down a few eating places in the city of Colombo. It was said that the monsoonal rains had aggravated the problem.

The Public Health Department took immediate measures to counter the outbreaks by setting up special wards, providing required quantities of medicine, and disinfecting toilets and drains in the affected areas. The Department also carried out health education programmes throughout the city and constantly monitored the city water supply.

5.2.3 HIV/AIDS

As an incurable disease with devastating personal and social impact, HIV/AIDS threatens both the right to health and the right to life. Those infected with HIV/AIDS and their families not only face the physical and emotional anguish of a painful and incurable condition, but also face discrimination in the form of denial of access to health care services and medical treatment.

The Table below provides the number of AIDS and HIV infections in South - East Asia as of 31st December 1998.

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[85] *Supra* n 82.

HIV / AIDS Surveillance - Sri Lanka - Update 31st December 1998

Month	Total positives beginning of Month	No of positives reported during Month	Total positives end of Month	Total HIV cases by gender		Total AIDS cases	AIDS cases by gender	
				M	F		M	F
December 1997	204	3	207	137	70	78	59	19
January	207	1	208	138	70	79	60	19
February	208	2	210	140	70	79	60	19
March	210	8	218	145	73	81	62	19
April	218	1	219	146	73	81	62	19
May	219	3	222	147	75	84	65	19
June	222	6	228	150	78	85	65	20
July	228	2	230	150	80	86	65	21
August	230	8	238	154	84	88	67	21
September	238	7	245	156	88	89	68	21
October	245	11	256	161	95	92	69	23
November	256	3	259	163	96	93	70	23
December	259	3	262	166	96	93	70	23

Source : National STD/AIDS Control Programme Ministry of Health and Indigenous Medicine

In Sri Lanka, rural women may be more vulnerable to HIV/AIDS infection and its impact because they suffer from greater isolation and less access to education, employment opportunities, health care and social benefits.

As of December 1998, a total of 93 AIDS cases had been reported while a total of 262 HIV positive cases have been reported. There have been a total of 69 deaths from AIDS since the disease was first detected in Sri Laka in 1986.[86] Although Sri Lanka has a low prevalence rate in comparison with many other Asian countries, a recent study by the United Nations Development Programme (UNDP) reveals that by the year 2005, the number of cases in the country will have increased more than ten fold, to almost 80,000 HIV infected people. This may cost Sri Lanka US$ 200-230 million by the year 2005.[87]

The threat of AIDS and other sexually transmitted diseases has raised serious concern about adolescent health. The Ministry of Health has refused to make certain drugs for treating HIV positive persons available in the country, because of their high cost.[88]

5.2.4 Tuberculosis

Although more attention is generally paid to AIDS, cholera, malaria and other infectious diseases, tuberculosis (TB) is on the increase and nearly 400 people currently die annually from TB in Sri Lanka.[89]

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[86] *HIV/AIDS Serveillance, Sri Lanka,* National STD/AIDS Control Programme, Ministry of Health and Indigenous Medicine (1998).

[87] *The Island,* 1 December 1998.

[88] *Sunday Observer*, 6 December 1998

[89] *Sunday Observer,* 15 March 1998.

From the 2nd January to 25th December 1998, 6,320 cases of TB were reported.[90]

5.2.5 Health of vulnerable groups

President Chandrika Kumaratunga directed the implementation of a project before the end of 1998 concerning the health care of school children, the elderly, mental health patients and war victims through the Health Sector Reforms Implementation Unit (HSRIU).[91]

The President has urged the following five areas be treated as priorities:

- reforms of the organisational structure to improve efficiency and effectiveness especially in the context of devolution.
- resource mobilisation and management including alternative financing mechanisms.
- improve hospitals in each district.
- expand the services to areas of special needs with priority to the elderly, the disabled etc. and
- to develop health promotional programmes with special emphasis on revitalising school health programmes.

5.3 Professional Negligence

By June 1998, only four deaths resulting from professional negligence had been reported in the newspapers. It is believed that many more such cases remain unreported.

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[90] *Supra* n 82.

[91] *Daily News*, 10 November 1998.

In the case of *Reinzie Arsecularatne* v. *Priyani Soysa,*[92] the Court of Appeal affirmed the judgment of the District Court of Colombo, which had found Professor Priyani Soysa, former Professor of Paediatrics, University of Colombo, guilty of negligence in causing the death of a child. In this case the Plaintiff-Respondent alleged that his child had been entrusted to the care of the Defendant-Appellant and that the Defendant-Appellant had failed to exercise her duty of care towards the said child and had been negligent in her duty to the child. The Defendant-Appellant appealed to the Supreme Court against this judgment.

It was the first case of medical negligence in Sri Lanka in which a doctor - an eminent professor - was found guilty. It provoked speculation about whether the judgment would open the floodgates to further litigation.[93]

In another case of alleged negligence, a retired woman medical specialist became HIV positive after she had received contaminated blood at the Sri Jayewardenepura Kotte General Hospital. A three member committee appointed by the Health Ministry in December 1997 to report on the case recommended that she be paid compensation by the State to enable her to meet her heavy medical expenses. The Committee stated that "all government medical officers are entitled to health care free of charge even after retirement in the paying wards at any government hospital. This right should be extended to cover expenses for medical care outside the State health service when such care is not available within this service....."[94]

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[92] C.A. 173/94(F), Judgment delivered on 24.06.1998.

[93] *Sunday Times,* 26 July 1998.

[94] *Daily News,* 19 May 1998.

5.4 Health situation in the North and East

5.4.1 Uncleared areas[95]

The health situation in uncleared areas during 1998 remained much the same as in the previous year, and government authorities continued to impose restrictions on the passage of various items. Extremely low numbers of health personnel continued to create difficulties within the three districts of Mannar, Kilinochchi and Mullaitivu. The following table summarises the staffing requirements within the uncleared areas:

Table II

Position	Mannar		Kilinochchi		Mullaitivu	
	Cadre	Vacancy	Cadre	Vacancy	Cadre	Vacancy
Medical Officers	6	6(100%)	6	4(67%)	7	4(57%)
Para Medical staff	19	11(58%)	29	17(59%)	37	11(30%)
Nursing Officers	68	58(85%)	39	27(69%)	50	30(60%)
Minor Grades	165	129(78%)	91	65(71%)	118	87(73%)

Source: Save the Children, Situation Report: Children Affected by Armed Conflict in North and East, No.2, August 1998, pp.10-12.

Drug quotas continued to be cut and transport delayed, causing increasing frustration among health workers. For example, almost a third of the drugs which should have been sent to government hospitals in the area in the last quarter of 1997 was not received until March 1998. Although the authorities had given approval, transport was delayed. There remained little, if any, mother and child health care

[95] The area under direct LTTE control, considered to include the districts of Mullaitivu, Kilinochchi and parts of Mannar and Vavuniya.

and no preventive health care centres. Mothers also expressed concern that children's immunisations and vaccinations were getting delayed.[96]

5.4.2 Newly cleared areas[97]

> *The health status of the returnees is a particular cause for concern with many children and adults suffering from under nutrition and the high numbers of malaria cases, typhoid and other serious infections. Malaria also remains the main cause of morbidity in Jaffna, which continues to account for a quarter of all malaria cases in Sri Lanka.*[98]

People find it very difficult to access health facilities especially at night, because of the prevailing curfew. The poor location of delivery rooms and limited resuscitation equipment and skilled staff have aggravated the problem further.[99]

5.4.3 The grey areas[100]

The health situation in these areas remained the same as last year. People in rural areas continued to be denied access to urban facilities, which were anyway poorly resourced. Again, it is the poor and vulnerable, particularly children, who suffer as a result.[101]

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[96] *Supra* n 60, pp 10-12.

[97] The areas of Mannar island and south of the Mannar road, border villages in Anuradhapura and Vavuniya and the Jaffna Peninsula.

[98] *Supra* n 60, p 29.

[99] *Ibid.*

[100] Much of the eastern districts of Trincomalee, Batticaloa and to a lesser extent Ampara, outside the main towns.

[101] *Supra* n 60, p 22.

Since Government officials are not willing to travel to these areas, it is unable to assess and identify the needs of the people living in these areas.

5.5 Conclusion

Due to military operations, the health situation in the conflict zone as is far from satisfactory. While the establishment of the Health Sector Reforms Implementation Unit is welcomed, this Unit must address urgently the health problems of vulnerable groups such as internally displaced persons as well as those living in the conflict zone.

6. Workers' Rights

Workers' rights were discussed comprehensively in *Sri Lanka: State of Human Rights 1995*[102] and an update was provided in the 1998 report. This section provides another update, and covers the major events that took place during 1998 in relation to workers' rights.

6.1 Protection of Workers' Rights

6.1.1 National Workers' Charter

Workers should be given an opportunity to become involved in decision making processes and to adopt appropriate benefit-sharing methods, thus making them active partners in the development process. The State has a crucial role to play in ensuring "social justice" to workers, primarily through providing a sound legal framework and enforcing it effectively and efficiently. However, the National Workers' Charter

[102] See "Workers' Rights," in *Sri Lanka: State of Human Rights 1995* (Law & Society Trust, Colombo 1996) chapter VI.

that was presented by the then Minister of Labour and Vocational Training to the President in September 1995, had still not been enacted by the end of 1998. The Charter was produced during the tenure of Mr Mahinda Rajapakse as Labour and Vocational Training Minister.

The reluctance of employers to co-operate made it difficult for the Minister of Labour to take the Charter further. Finding a balance between employer and trade union expectations in the Charter apparently continued to present difficulties.[103]

The Minister of Labour remained unable to get all parties to reach agreement on the Charter during 1998, despite intensified efforts. Employers maintained the position that the Charter, even in its amended form, would not protect them from irresponsible trade union activity. The Employers' Federation of Ceylon found the draft prepared by the Ministry of Labour to be unsatisfactory and alleged that the recommendations made by a Presidential Task Force, which had been set up to examine the Charter in the context of the Sri Lankan labour situation, had not been considered.[104]

The Employers' Federation proposed that a Productivity Council should be established which would determine wages based on productivity (instead of the National Wages Policy Commission envisaged in the Charter), and that the definition of a trade union in the Trade Union Ordinance should be changed.[105]

Most trade unions, on the other hand, blamed the Government for not keeping its promise to give legal effect to the Charter. Because

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[103] *The Island,* 1 May 1998.

[104] *Ibid.*

[105] *The Island,* 23 May 1998.

the Government itself had previously emphasised the importance of the Charter, the trade unions now accused the Government of trying to hoodwink the working class and to appease industrialists in order to push forward their privatisation programme.[106] A group of trade unions resolved to mobilise a general strike in the country if the Workers' Charter was not presented to Parliament within two months.[107] In response, the Labour Minister of Labour announced that the Charter would be presented to Parliament in October 1998 and that it would not be possible to adopt the amendments recommended by the Employers' Federation in their proposals. He also announced that a committee had been appointed to look into the proposals put forward by the Employers' Federation. However, by the end of 1998, both promises remain unfulfilled.

6.1.2 Disabled workers

The Protection and Rehabilitation of Persons with Disabilities Act[108] gives disabled persons equal opportunity to gain employment. The Social Services Ministry selected a group of people to train as Job Placement Officers (JPOs), who would liaise between trained disabled persons and employers. Although a large number of disabled persons undertake vocational training courses at centres located all over the island, lack of co-ordination between the training centres and employers means that many fail to secure employment.[109]

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[106] *Ibid*

[107] *Sunday Times*, 3 May 1998.

[108] Act No. 28 of 1996. See *Sri Lanka: State of Human Rights 1998* (Law & Society Trust, Colombo, 1998), chapter XII.

[109] *Daily News*, 3 June 1998.

Of the nearly 800,000 disabled persons in the island, nearly 200,000 are able to work. The Cabinet decided that 3% of available employment opportunities both in the government and private sectors, should be offered to disabled persons.[110] However, disabled persons seeking employment face several difficulties, including negative attitudes, often linked to discrimination, low pay and lack of a supportive legal environment. Some employers think that disability is a result of fate and resent employing disabled persons in their establishments. Some think that the disabled persons stigmatise the workplace and avoid employing them. JPOs will, therefore, need to work towards changing such attitudes.[111]

6.2 Major Events During 1998

6.2.1 Strikes in the plantation sector

There were many trade union actions during 1998, especially in the plantation and postal sectors, with an increase in the number of strikes in the estates. A nine day plantation strike ended in March which had reportedly resulted in a loss of Rs. 6 billion to the national economy. Over 600,000 workers employed in 23 plantation management companies including the estates owned by Janatha Estate Development Board and Sri Lanka State Plantations Corporation went on strike demanding an increase in wages by 25 per cent.[112] Timely intervention by the relevant authorities brought about a negotiated settlement, thus defusing industrial unrest.

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[110] *Daily News*, 19 October 1998.

[111] See chapter VI on The Rights of Women's for a discussion on workers in the Free Trade Zones and Migrant Workers.

[112] *The Island*, 3 April 1998.

The Ministry of Plantations announced[113] that estate workers would receive shares of management companies within a short period. Further, the Ministry introduced a 'Personal Accident and Hospitalisation Insurance Scheme' for workers in government-managed tea estates, with no cost to the Government.[114]

However, estate workers continued to suffer tremendous hardships due to the spiralling cost of living. Their Cost of Living Allowance was frozen during 1998 and high prices have hit them especially hard. The wage structure of plantation workers should be in keeping with the Cost of Living Index and should be decided by the Wages Board.

6.2.2 Postal Union strike

Postal workers started their trade union action by refusing to perform extra duties, unless they were paid overtime. However, the two-week postal action escalated to an all-out strike after an unidentified group, escorted by the police, allegedly entered the Central Mail Exchange and took away bags of foreign mail for sorting. The Union of Posts and Telegraph Officers (UPTO) which had led the go-slow campaign in support of demands for overtime payments, reacted angrily when the Minister of Posts accused it of being a political Mafia and warned that the Government would deal with it sternly.[115]

Many public examinations and interviews were postponed, while business transactions and bank dealings were reportedly stalled due to the mail delays. The postal action also disrupted university admissions for the academic year 1997/98. According to the University Grants Commission's information, less than a half of the

[113] *Daily News*, 11 March 1998.

[114] *Daily News*, 4 September 1998.

[115] *Sunday Times*, 5 April 1998.

selected students had attended their respective universities for registration.[116]

The UPTO called off the strike when the Minister of Posts promised to meet some of their important demands.[117] The 178 postal officers who had been issued Vacation of Post letters and those who had been transferred during the strike period were asked to submit appeals through trade unions. The Minister gave assurances that these workers would be reinstated without any inquiry.[118]

Further, the Essential Services Order (ESO) that had been issued on the postal service under Emergency Regulations was lifted, and the army and police personnel who had been posted at the Central Mail Exchange for security purposes were removed.[119]

6.3 Conclusion

The fundamental rights of workers should be protected, and they should be involved in the decision-making process concerning their welfare. It must be noted, however, that while it is important that trade union rights of workers are protected, the workers themselves must ensure that their rights are balanced with duties. The strike by the Postal Union highlighted the hardships that the general public had to endure as pensions and salaries were delayed in the post; examinations had to be postponed and day to day work generally disrupted. Trade union activities by the Government Medical Officers

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[116] *Daily News*, 18 April 1998.

[117] *Ibid.*

[118] *Daily News*, 9 May 1998.

[119] *The Island*, 15 May 1998.

Association (GMOA) and the nurses union have resulted in the suffering of innocent people who are unable to seek alternate treatment at private hospitals due to high costs. Thus, the right to resort to trade union activities should be exercised with a great sense of responsibility that does not jeopardise the rights of the general public.

Schedule I

UN Human Rights Instruments Ratified By Sri Lanka (December 1998)

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

27. International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families 1990

Schedule II

UN Human Rights Instruments Not Ratified By Sri Lanka

1. Second Optional Protocol to the International Covenant on Civil and Political Rights
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 12 August 1949, and relating to the Protection of Victims of Non-international Armed Conflicts (Protocol 11)

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 I937

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 1998

Article 11

A.R.M. Rifaideen v. *S.I. of Police, Wellawatte*
S.C. Application No:71/96

Vinayagamoorthy and K. Gopalapillai v. *The Commandant, Army Camp, Batticaloa and Others*
S.C. Application No: 58/98

Articles 11 & 13(1)

S.B. Dissanayake appearing by his next friend D. M. Premathilake v. *Police Constable Punchibanda and Others*
S.C Application No: 6/97

M. Madigahewa v. *Police Sergeant Senaratne and Others*
S.C. Application No:10/96

Articles 11, 13(1) & 13(2)

Sivasambu Thilavanadan and Others v. *Captain S.H.P. Dhammika and Others*
S.C. Application No: 970/97

Ravindra Marian and Koththugoda Kankanange v. *O.I.C. Police Station, Wellawatta and Others*
S.C. Application No: 495-496/96

D. S. Wimalasena v. *Hemapala and Others*
S.C. Application No:755/97

S. Senathirajah v. *O.I.C. Police Station, Moratuwa*
S.C. Application No:109/97

S.A.A.N.P. Subasinghe v. *O.I.C., Police Station, Dankotuwa*
S.C. Application No: 235/96

N.V. Pathmasiri v. *Police Sergeant, Hikkaduwa and Others*
S.C. Application No: 207/96

J.A. Sudath Nishantha v. *Sub Inspector of Police and Others*
S.C. Application No: 66/97

A.J. Hiran Priyankara v. *Inspector of Police, Puttalam*
S.C. Application No: 214/96

Articles 11, 13(1), 13(2) & 14(a)

P.K. Dharmaratne v. *O.I.C., Police Station, Aranayake*
S.C. Application No: 163/98

Article 12(1)

Udeni Dharmalatha v. *Secretary, Ministry of Irrigation, Power and Energy and Others*
S.C. Application No: 237/96

E. O. B. Rathnayake v. *The Sri Lanka Rupavahini Corporation and Others*
S.C. Application No: 867/96

S.M. Shafeek and Others v. *The Secretary, Public Services Commission and Others*
S.C. Application No: 249/96

A.P.J.B. de Waas v. *The National Savings Bank, and the Attorney-General*
S.C. Application No:408/97

M.J.M. Nasir v. *Post Master General and Others*
S.C. Application No: 251/96

Centre for Manthinda Social Services and Vocational Training and Others v. *National Housing Authority and Others*
S.C. Application No: 850/97

W.A.T. Sriyani v. *The Secretary, Ministry of Public Administration, Home Affairs and Plantations and Others*
S.C. Application No: 168/98

C. M. Kirimudiyanse v. *The Secretary, Ministry of Public Administration, Home Affairs and Others*
S.C. Application No: 631/96

N. Chandrasena v. *The Commander, Sri Lanka Army and Others*
S.C. Application No: 449/98

Collettes Security Services v. *Minister of Health and Others*
S.C. Application No: 282/97

C. Magamamudali v. *Piliyandala Bokundara Multi Purpose Co-operative Society Ltd. and Others*
S.C. Application No: 97/96

Dr. Yasapala de Silva Jayawickrema v. *Prof. W. D. Lakshman, Vice-Chancellor and Others*
S.C. Application No: 648/96

M.J. Abeysuriya v. *Principal, Ananda College, Colombo and Others*
S.C. Application No: 162/98

Lalith Ekanayake v. *Secretary, Ministry of Defence and Others*
S.C. Application No: 1026/97

Professor K.H.G.M. de Silva v. *University of Peradeniya and Others*
S.C. Application No: 41/97

The Finance Company Limited v. *The Monetary Board of The Central Bank and Others*
S.C. Application No: 736/97

D. B. Aldeniya v. *Secretary, Ministry of Education and Others*
S.C. Application No: 85/96

K.D. Alles and Others v. *Secretary, Ministry of Labour and Vocational Training and Others*
S.C. Application No: 387A/96

P.P. Sirisena and Others v. *Monetary Board of the Central Bank and Others*
S.C. Application No: 589/95

A. Bodaragama v. *Director of Education Southern Province and Others*
S.C. Application No: 128/95

L. Sunil Sirilanka and Others v. *Ceylon Steel Corporation Ltd. and Others*
S.C. Application No: 283-295/97

P.B. Ekanayake v. *Chairman, Public Services Commission and Others*
S.C. Application No: 367/96

Captain D.N.L. Abeynayake v. *The Commander of the Army and Others*
S.C. Application No: 412/97

M. Jamaldeen and Others v. *Commissioner General of Labour and Others*
S.C. Application No:865/97

U. G. T. Ariyathilake v. *Inspector General of Police and Others*
S.C. Application No: 680/97

S. M. Senaratne v. *Additional Secretary, Ministry of Education and Higher Education and Others*
S.C. Application No: 126/95

S.M. Seneviratne and J.J. Abeysiriwardene v. *Commissioner-General of Inland Revenue and Others*
S.C. Application No: 848/97

K. M. Dharmadasa v. *Commissioner-General of Inland Revenue and Others*
S.C. Application No: 845/97

S. Suresena v. *Governor, Sabaragamuwa Province and Others*
S.C. Application No: 1025/96

R. Jayasena and Others v. *The National Savings Bank and Others*
S.C. Application No: 732/96

N.A.H. Janaka v. *Priyantha Wickramesinghe and Others*
S.C. Application No: 32/96

Dr (Mrs.) B.N. Jayasooriya v. *The Director, Postgraduate Institute of Medicine*
S.C. Application No: 883/97

R. P. Jayasooriya v. *Secretary, Ministry of Foreign Affairs*
S.C. Application No: 620/97

D.K. de Silva and Others v. *The People's Bank and Others*
S.C. Application No: 649/96

V.D.S. Gunaratne v. *The Homagama Predeshiya Sabha and Others*
S.C. Application No: 210/97

A. H. J. S. Jayasinghe v. *People's Bank*
S.C. Application No: 667/96

Articles 12(1) & 12(2)

S.T.N.P.T. Perera v. *Deputy Post Master General (Uva) and Others*
S.C. Application No: 8/96

A. S. Silva v. *Minister of Irrigation, Power and Energy*
S.C. Application No: 251/95

K. S. Almeida v. *Ceylon Fisheries Corporation and Others*
S.C. Application No: 310/97

Articles 12(1) & 14(1)

Dr. Ranjan Ramasamy v. *Institute of Fundamental Studies and Others*
S.C. Application No: 499/97

K.P. Rajanayagam v. *Commissioner-General of Department of Excise and Others*
S.C. Application No: 389/98

M. K. Victor Ivan v. *The Attorney General*
S.C. Application No: 89/98

Article 12(2)

H. D. Soysa and Others v. *Divisional Secretary, Gampaha and Others*
S.C. Application No: 74/95

Articles 13(1) & 13(2)

I. Jayaratne v. *Secretary, Ministry of Defence and Others*
S.C. Application No: 609/96

Neetha Dissanayake, Attorney-at-Law appearing for K. M. Lal v. *Sub Inspector, Police Station, Meetiyagoda*
S.C. Application No:524/96

K.S.B. Wijeratne, Attorney-at-Law for and on behalf of Ranjith Dahanayeke v. *Deputy Inspector General, Criminal Investigations Department and Others*
S.C. Application No: 643/97

H.M.A. Menike v. *Divisional Superintendent of Post Offices, Balangoda and Others*
S.C. Application No: 478/96

D.M.G. Dissanayake and M. A. Sunethra Dissanayake v. *Inspector of Police, Nuwara Eliya*
S.C. Application No: 117/97, 858/97

Article 13(2)

A..G.R.P. Rajakaruna v. *S.I. of Police, Maradana and Others*
S.C. Application No:878/96

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The report considers civil and political rights in relation to the integrity of the person; emergency rule and judicial protection of human rights. Separate chapters are devoted to children's rights; women's rights, freedom of information, mental health, independence of the judiciary and crime and state responsibility. The report, therefore, represents an important watershed with regard to human rights in Sri Lanka.

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