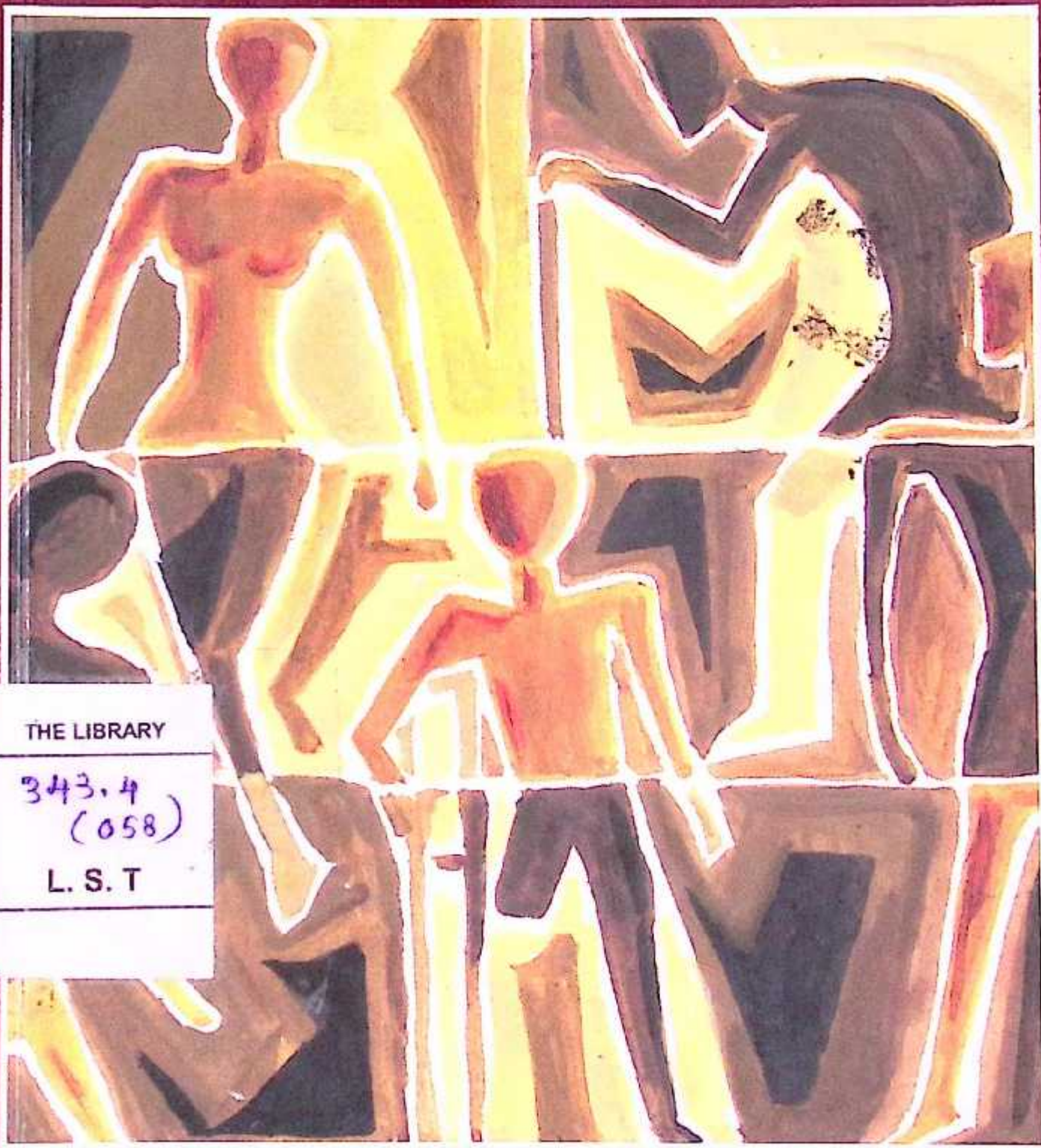


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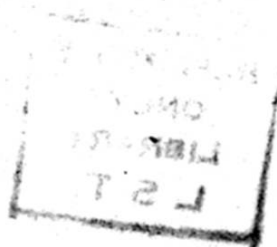
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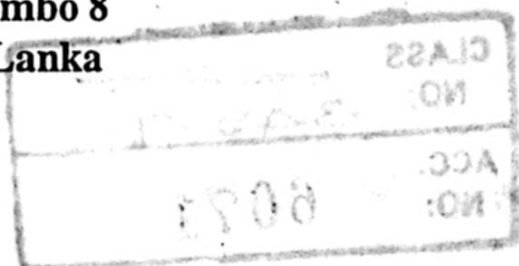
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SRI LANKA: STATE OF HUMAN RIGHTS 2000

**This report covers the period
January to December 1999**

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



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Abbreviations

AIDS	Acquired Immune Deficiency Syndrome
BOI	Board Of Investment
CARE	Co-operatives American Relief Everywhere
CDS	Chief of Defence Staff
CEA	Central Environmental Authority
CEDAW	Convention on Elimination of all Forms of Discrimination Against Women
CEIP	Colombo Environment Improvement Project
CGES	Commissioner General of Essential Services
CID	Criminal Investigations Department
CMEV	Centre for Monitoring Election Violence
CRC	UN Convention on the Rights of the Child
CSA	Civil Administrative Services
CWPB	Children and Women Protection Bureau
CYPO	Children and Young Persons Ordinance
CZOP	Children as Zones of Peace
DDHS	Divisional Director of Health Service
DHF	Dengue haemorrhagic fever
DMO	District Medical Officer
EFL	Environmental Foundation Limited

EIA	Environment Impact Assessment
EMPPR	Emergency (Miscellaneous Provisions and Powers) Regulations
EPDP	Eelam People's Democratic Party
EPRLF	Eelam People's Revolutionary Liberation Front
ESP	Estate Medical Practitioners
ETF	Employee's Trust Fund
EWYPC	Employment of Women, Young Persons and Children Act
FA	Field Assistants
FAO	Food and Agricultural Organisation
FTZ	Free Trade Zone
GAs	Government Agents
GMOA	Government Medical Officers Association
GST	Goods and Services Tax
HIV	Human Immuno Virus
HRC	Human Rights Commission
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic Social and Cultural Rights
ICRC	International Committee of the Red Cross
IDH	Infectious Diseases Hospital

IEE	Initial Environmental Examination
ILO	International Labour Organisation
IMO	International Maritime Organization
IPKF	Indian Peacekeeping Force
IYOP	International Year of Older Persons
LTTE	Liberation Tigers of Tamil Eelam
MFFE	Movement for Free and Fair Elections
MIA	Mineral Investigation Agreement
MPPA	Marine Pollution and Prevention Authority
NEA	National Environmental Act
NGO	Non-Governmental Organisations
NIE	National Institute of Education
NSACP	National STD/AIDS Control Programme
NSPTP	North South Patient Transfer Program
OIC	Officer In Charge
PA	People's Alliance
PAFFREL	People's Action for Free and Fair Elections
PGIM	Postgraduate Institute of Medicine
PLOTE	People's Liberation Organisation of Tamil Eelam
PSD	Presidential Security Division
PSO	Public Security Ordinance

PTA	Prevention of Terrorism Act
REPPIA	Rehabilitation of Persons, Properties and Industries Authority
RRAN	Resettlement and Rehabilitation Authority of the North
RSA	Ranaviru Services Authority
SIA	Spinal Injuries Association
SLBFE	Sri Lankan Bureau of Foreign Employment
SMO	Spray Machine Operators
TELO	Tamil Eelam Liberation Organisation
UDA	Urban Development Authority
UDHR	Universal Declaration of Human Rights
UGC	University Grants Commission
UN	United Nations
UNDP	United Nation Development Programme
UNESCO	United Nations Education, Social and Cultural Organisation
UNFPA	United Nations Population Fund
UNHCR	United Nations High Commissioner for Refugees
UNICEF	United Nations Children's Fund
UNP	United National Party
UNWGEID	UN Working Group on Enforced and Involuntary Disappearances

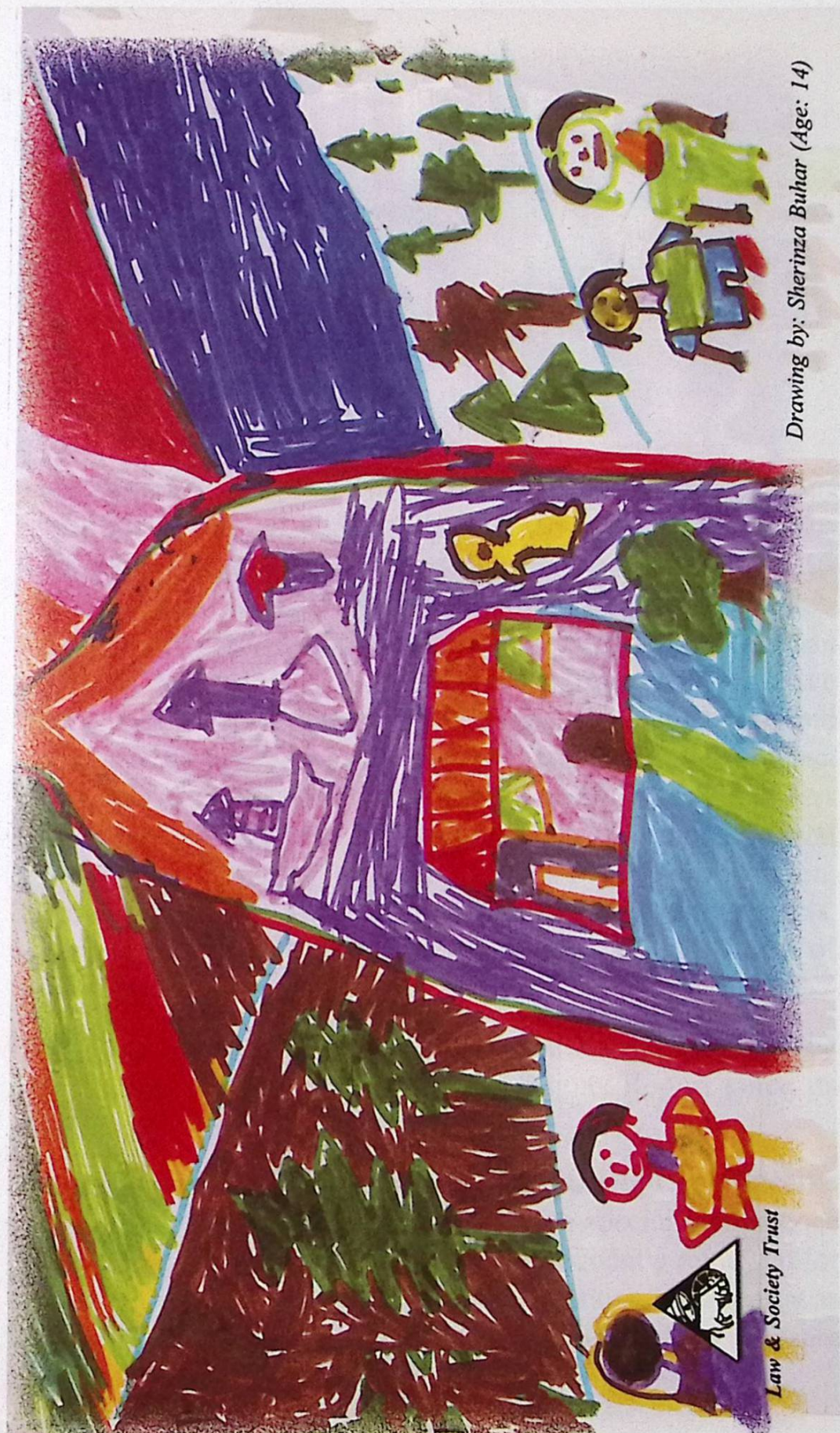
US	United States
VOA	Voice of America
VSSO Act	Voluntary Social Services Organisations (Registration and Supervision) Act No 31 of 1980
WFP	World Food Programme
WHO	World Health Organisation
WWF	Worker's Welfare Fund

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Drawing by: Sherinza Buhar (Age: 14)



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 covers the integrity of the person, freedom of expression, judicial protection of human rights, and emergency rule. In addition, separate chapters are devoted to children's rights, women's rights, environmental rights, rights of the aged as well as rights of disabled people.

This year, an effort was made to provide an update on all the topics covered in a State of Human Rights Report since its inception in 1993.

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 the fundamental rights cases decided by the Supreme Court in 1999.

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.

As a tribute to the late Dr. Neelan Tiruchelvam, founder, director and driving force behind most of the Trusts' work, a desk calender was published by the Trust for 2000. The calender included pictures drawn by children of the Chitra Lane School for the Special Child. Two pictures have been included in this volume.

Law & Society Trust

Colombo

August 2000

I

Overview

*Elizabeth Nissan**

1. Introduction

The assassination of Dr Neelan Tiruchelvam, MP, in July 1999 was a particular tragedy for the Law & Society Trust, which lost its dynamic and visionary founder and director. It was also a grave loss to the legal and human rights communities within Sri Lanka and internationally. For Dr Tiruchelvam was an internationally respected lawyer and academic, an authority on constitutionalism and human rights protection. His deep concern to promote law and constitutionalism as a means of effecting social transformation and justice was ultimately to cost him his life.

Dr Tiruchelvam's killing by an LTTE suicide bomber in Colombo encapsulated many of the tragedies and contradictions of the Sri

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2 *Overview*

Lankan conflict, all of which have wide human rights and social implications. He was a peacemaker, a human rights defender and a civilian, committed to developing a new constitutional framework for Sri Lanka which he hoped would foster the development of a pluralist, democratic society, and which he hoped would offer a genuine response to the grievances of minority communities. An ardent spokesman in Parliament on behalf of Tamil civilians most grievously affected by the conflict, as well as on a broad spectrum of other human rights issues, he was killed by the organisation which claims to pursue its war in order to secure Tamil rights. His death in Colombo – like the deaths of many other people during the year in suicide bomb attacks in the capital – also brought home yet again that this conflict cannot be contained within the North and East; it affects each and every person throughout the country.

The conflict, which continues to exact an enormous toll on human rights protection throughout the country, remains the most significant factor in understanding Sri Lanka's human rights performance. It is imperative for a means to be found to create a just and sustainable peace; without such a solution, the lives of Sri Lankans throughout the island will continue to be blighted by grave abuses of human rights.

The Law & Society Trust's annual reports on the state of human rights in Sri Lanka were much enriched by Dr Tiruchelvam's critical, but always constructive, inputs and suggestions. This volume again reflects many of his particular interests and concerns. As in previous years, it contains chapters on emergency rule during 1999, integrity of the person, judicial protection of human rights, the situation of internally displaced persons, freedom of expression, women's rights and children's rights. For the first time, however, it critically examines the work of some of the key institutions charged with the protection and promotion

of human rights within the country: the Human Rights Commission, the Ombudsman, the Official Languages Commission and the Commission on Bribery and Corruption. Too often, human rights institutions are created that have neither the powers nor the resources to fulfil their important roles. One important way in which civil society organisations can assist in strengthening the institutional framework for human rights protection is to scrutinise and comment constructively on the performance of such institutions; to raise for debate issues of public accountability, effectiveness, resourcing and political will. These chapters make an important start in this direction, pointing to important areas which need to be strengthened.

Another issue which Dr Tiruchelvam believed to be of great importance was equality of opportunity. As described in the chapter on that subject, the government's attempts to introduce legislation on this important issue in October met with such vociferous resistance that the Bill was swiftly dropped. Within the statutory seven day time limit allowed for challenge, 42 parties had submitted petitions to the Supreme Court, arguing that the Bill was unconstitutional. Although the main intention had been to equalise opportunities for employment and education, especially for women, and to create obligations that the private sector would have to honour, most of the public debate concentrated on ethnic and religious issues, particularly as they applied to education, and it is possible that many of these objections would not have withstood the scrutiny of the Supreme Court. In the event, however, as the government undertook not to proceed with the Bill, the Supreme Court did not reach a determination on the issues raised in the petitions. A significant opportunity for the government to introduce legislation with the potential to gradually increase opportunity for all – creating greater equity in diversity – had been lost.

Law & Society Trust has always endeavoured to reflect on the human rights implications of a broad range of social issues. In this volume, the chapter on the implications of an aging population for Sri Lanka's legislators and policy makers continues this trend. This is the first time that this topic has been addressed in a *Sri Lanka: State of Human Rights* volume.

2. Attacks on Democratic Practice

Elections to provincial governments and to the presidency were held in 1999 amid violence and intimidation. Attacks on the democratic process in Sri Lanka emanated from the LTTE, the government and political parties contesting elections. In addition to concerns about violence and intimidation affecting the extent to which these elections were free and fair, there was also considerable concern about the extent to which the ruling party misused the state media to promote its own cause.

LTTE suicide bombers attacked election rallies held by both the ruling People's Alliance (PA) and the opposition United National Party (UNP) on 18th December, just days before the presidential election of 21st December. President Chandrika Bandaranaike Kumaratunga, who subsequently won the election, and four government ministers escaped with injuries; others were less fortunate: at least 25 civilians were killed at the two rallies. The LTTE also continued to threaten and attack local councillors in Jaffna who had not resigned from their posts: the total number killed rose to 11. Elections to local councils in Jaffna had been held in January 1998 in an attempt by the Government to re-establish at least the beginnings of a democratically elected civil administration in the area. The LTTE's continuing campaign against these councils continued to severely handicap their functioning. The LTTE also threatened elected Members of

Parliament from the East for part of the year, requiring them to stay away from their constituencies and suspend political activities. The LTTE's power to intimidate – reinforced by a long history of assassinations of elected representatives, including that of Dr Tiruchelvam in July – continues to severely constrain prospects for democratic practice, and for democratic approaches to conflict resolution, in areas where it has influence.

Considerable concern was generated by the very high levels of political intimidation, violence, blatant ballot-rigging and abuse of the state media that were evident during the election to the Northwest Provincial Council in January. The Centre for Monitoring Election Violence (CMEV) reported over 800 violent incidents, including two murders and 11 attempted murders, and numerous instances of assault and intimidation. Other election monitoring organisations – the Movement for Free and Fair Elections (MFFE) and the People's Action for Free and Fair Elections (PAFFREL) – also expressed their grave concern, as did representatives of various religious and human rights organisations. Although complaints were made against members of a number of political parties, by far the greatest number of complaints were against members of the ruling PA, including Members of Parliament and government Ministers. President Kumaratunga expressed her disquiet about the conduct of this election, but she subsequently appointed several PA members who had been implicated in the violence as Ministers in the provincial administration.

Five people died during the election campaigns for five further provincial councils in April. The elections to Southern Provincial Council in June was conducted more peacefully. The reduction in levels of violence in provincial council elections testified to the crucial role that can be played by civil society organisations in monitoring election practices, publicising their findings, and

serving as impartial advocates for the public interest. Their ability to do so, however, depends upon respect for a range of rights, including freedom of association and expression. Any attempts to curtail these rights and to curtail the ability of such organisations to fulfil their mandates needs to be viewed with concern. Attempts to discredit election monitoring organisations – such as the attacks on CMEV in the state media in April by two government ministers – were worrying examples of such action. In the event, however, the election monitoring organisations were all able to function with little hindrance.

With Parliamentary elections due in 2000, it is clear that decisive action needs to be taken to prevent a repetition of the violence and intimidation that has become a hall-mark of Sri Lankan elections. Every effort must be made to ensure that people are free to exercise the franchise without fear, and according to their conscience.

3. The Conflict and Human Rights

The Sri Lankan conflict has been described as a “no mercy war”. On the battlefield, very few combatants are taken prisoner – far fewer than would be expected in comparable conflicts, given the scale of casualties. It can only be assumed that potential prisoners of war are routinely killed or left to die, in violation of the most basic principles of humanitarian law.

People living in large areas of the North and East remained particularly vulnerable to abuse and to violation of a broad range of their rights as a result of the conflict. As military activity intensified during the year, yet more people were displaced from their homes, limiting their access to food, shelter, education and health services, as described in the chapter on internally displaced

persons. Both sides to the conflict imposed restrictions on the movement of civilians in areas under their control, and also controlled their access to food, medical supplies and other resources.

Although humanitarian law requires that all necessary measures be taken to prevent civilian casualties, civilians in the conflict areas remained vulnerable to direct attacks. In September some 23 civilians died when the Air Force bombed an area of Mullaitivu district; although the government at first said the attack had targeted an LTTE camp, it subsequently admitted that it had made a mistake. In November, 40 displaced civilians who had sought refuge at the Catholic shrine of Madhu were killed in a mortar attack; while the perpetrators were not conclusively identified, it was clear that neither the LTTE nor the government had taken the measures necessary to ensure the protection of this displaced and highly vulnerable group of civilians.

Further blatant abuses of humanitarian law were also evident in the LTTE attack on three border villages in Ampara District, in apparent reprisal for the air raid referred to above. Over 50 civilians were killed in this attack, which marked a most worrying return to the tactic of large-scale killing of civilians in border areas by the LTTE. Although such attacks had once been frequent, they had not taken place for about three years.

Another humanitarian issue of particular concern relating to LTTE practices was their continuing use of child soldiers, despite their undertaking in May 1998 to the UN Secretary General's Special Representative for Children and Armed Conflict that no child under 18 years of age would be used in combat, and that no child under 17 would be recruited. Instead, as described in the chapter on children's rights, their recruitment of children and their use of child combatants appeared to have *increased* in 1999.

The chapter on integrity of the person makes clear that torture, disappearances and arbitrary arrests and detentions are by no means phenomena of the past in Sri Lanka. While by no means all cases of torture and arbitrary arrest are linked to the conflict, it certainly provides the context for many such violations. As we have reiterated in earlier years, there is an urgent need for a thorough review of legislation on detention and for compliance with legal safeguards against abuse; for complaints of torture to be investigated by a body independent of the police; for remedies available to victims to be strengthened; and for perpetrators of such violations to be brought to justice.

The continuing conflict also provided the pretext for the continuation of censorship throughout 1999 under emergency law. The regulations governing the censorship were amended in November, as discussed in the chapter on emergency rule, but continued to exceed the legitimate limits for restricting free expression envisaged in international human rights law. The enforcement of censorship meant that in the run-up to the presidential election in November and December, there was relatively little attention paid to the huge military set-backs that government troops were suffering in the North. In this period, the LTTE regained control of most of the territory that the government had captured and controlled in the previous two years, at massive human cost.

4. Impunity

Human rights advocates have long called for impunity for human rights violations to end in Sri Lanka, and this remained a major issue through 1999 despite some positive developments. The conviction in February of a school principal and six soldiers in

connection with the disappearances of young men from Embilipitiya in late 1989 and early 1990 was an important judgment, which was under appeal at the end of the year. However, numerous other cases from this period – and from earlier years in the North and East – remain to be properly investigated.

In addition, there were reports of follow-up action by the Criminal Investigation Department and the Attorney General's Department in cases recommended for investigation and prosecution by the three presidential commissions of inquiry into involuntary removals and disappearances that were reported in 1998. By the end of 1999, 213 cases had reportedly been filed in High Courts. Details of the charges are not known. Another development relating to impunity was reports that various police officers had been charged under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Act of November 1994. These cases were said to involve officers who had been found responsible for torture by the Supreme Court in its judgements on fundamental rights petitions alleging torture. Again, no further details were known at the time of writing.

As noted last year, the revelations about a mass grave at Chemmani on the Jaffna peninsula, where the remains of hundreds of people who disappeared in 1996 were believed to be buried, brought the issue of forensic excavations to the fore. During 1999, there were significant developments in this regard. During June and September, excavations were conducted which recovered the bodies of 15 people from shallow graves. International observers from Amnesty International, Physicians for Human Rights and the Asia Foundation were permitted to attend, but were not permitted to assist with the exhumations in any way. Criminal investigations into these deaths were still under way at the end of the year. However, the discovery of another mass grave site at Duriappa Stadium in Jaffna did not result in another excavation and

investigation. The grave was thought to contain the remains of people who may have disappeared during the period that the Indian Peace Keeping Force (IPKF) administered the peninsula.

In October, the UN Working Group on Enforced or Involuntary Disappearances (UNWGEID) visited Sri Lanka to examine the extent to which the government had implemented its previous recommendations for the prevention of disappearances. This was the Working Group's third visit to the country since 1991. The Working Group was concerned that no independent inquiry had been held into the approximately 540 disappearances in Jaffna in 1996, during the term of the current government, and recommended that an independent inquiry be held.

5. Gender Discrimination

In the first half of 1999, the Supreme Court gave a landmark directive about the guidelines adopted by the Department of Immigration and Emigration when issuing residence visas to foreign male spouses. In this case, *Bernard Maximillian Fitcher v. Controller of Immigration and Emigration*, a German male and his Sri Lankan wife filed a fundamental rights case in the Supreme Court on the ground that the guidelines violated the equality clause guaranteed in Article 12(1) of the Constitution.¹

The practice in issuing residence visas to foreign spouses had been that all male persons married to Sri Lankan females needed to apply annually for a residence visa, unless they were covered by some other provision of the law. However, male and female spouses had to follow different procedures. Foreign female spouses only had to demonstrate the fact of the marriage in order to be granted a

¹ S.C. Application No. 436/99 (F/R), S.C. Minutes 28.5.1999.

residence visa, whereas foreign male spouses were required to establish their ability to support themselves and their wives.²

To satisfy the eligibility criteria, foreign male spouses had to show the authorities that they received an inward remittance of US\$ 9000 *per annum*. They also had to deposit US\$ 25,000 in a bank, which could not be removed without the recommendation of the Controller of Immigration and Emigration. In addition, foreign male spouses were debarred from seeking employment in Sri Lanka.³

The petitioners in the above case argued that the additional conditions applied to foreign male spouses were totally arbitrary, unfair and without any legal basis and irrational and hence contrary to Articles 12(1) and 12(2) of the Constitution.⁴

The petitioners further argued that the failure to grant a residence visa to the applicant was in violation of Sri Lanka's obligations under the Universal Declaration of Human Rights (UDHR) of 1948, the International Covenant on Civil and Political Rights (ICCPR) of 1996, and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). Sri Lanka is a party to all these instruments, which have guaranteed equality between women and men.⁵

The matter was settled after the Controller of Immigration and Emigration agreed to issue the petitioner, Bernard Maximillian Fischer, a residence visa under similar terms and conditions applied when issuing residence visas to foreign female spouses.⁶

² *Sri Lanka: State of Human Rights 1997* (Law & Society Trust, Colombo, 1997) p 267.

³ *Supra* n. 1.

⁴ *Ibid.*

⁵ *Ibid.*

⁶ *Supra* n. 2.

The Supreme Court directed the Controller to make and publish guidelines and procedures conforming to the equality clause in Article 12 of the Constitution for the grant of residence visas to foreign spouses.⁷ Following the Supreme Court Directive, the Department of Immigration and Emigration withdrew the existing regulations, until a new set of procedures was finalised. Until a new system becomes operative, foreign male spouses will have to reside in Sri Lanka on holiday visas.⁸

6. Conclusion

This volume is intended to provide an overview of the state of human rights in Sri Lanka, whilst also stimulating debate on key human rights issues and – it is to be hoped – helping to promote positive reforms. It is a significant contribution to the human rights debate within Sri Lanka, demonstrating the continued vitality and commitment of civil society organisations and actors to documentation, reporting and advocacy on a broad range of social and policy issues.

The chapters in this volume show all too clearly that the creation of institutions and the enactment of laws do not, in themselves, lead to effective human rights protection. Far more is needed in terms of political will and determination, resources and enforcement. The fate of the Equal Opportunity Bill demonstrated all too clearly the immense difficulties that can be involved in trying to introduce forward-looking, reformist legislation in such a highly charged, politicised climate as exists in Sri Lanka. Yet, means of addressing varied and conflicting interest groups must be found if genuine reform is ever to be achieved, whether in the sphere of equal opportunity or – even more fundamentally – constitutional reform.

⁷ *Ibid.*

⁸ Department of Immigration and Emigration.

II

Integrity of the Person

*Sumudu Atapattu**

1. Introduction

The last year of the second millennium saw no improvements in the human rights record of Sri Lanka. It held a particular tragedy for civil society and for Law & Society Trust in particular. Little did we think that we would have to report on the assassination of our own Director, Dr. Neelan Tiruchelvam, in this chapter.¹

During 1999, there were numerous instances of election violence² and other human rights abuses by agents of both the government and other groups. Within the conflict zones, the plight of the internally displaced continued to deteriorate;³ outside those areas there were several suicide bomb attacks, including in the city of Colombo.

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¹ See the discussion, *infra*.

² This is discussed in a separate chapter.

³ This is discussed in a separate chapter.

2. Background to the Conflict and its Impact on Civilians

The censorship of military news, which was imposed in mid-1998, continued throughout 1999. Together with the denial of access by journalists to the conflict zones, this aggravated the problems of getting accurate information on issues concerning the conflict.

Intensive military operations continued to have a serious effect on the lives of civilians both within and outside the conflict zones. Within those areas, hundreds of thousands of people were displaced; their freedom of movement and their access to food and medicine were constrained by both the government and the LTTE, depending upon where they were. Both adults and children were also vulnerable to injury and death from shelling, land-mines, bomb-attacks, cross-fire and indiscriminate attacks. It was reported in August that some 6000 people were stranded in Trincomalee, with no shipping to take them to Kankesanthurai. This situation had resulted because there was no permanent shipping service between Trincomalee and Kankesanthurai.⁴

Other civilians, including children, died or received injuries as a result of 'accidents'. For example, in August two boys aged 16 and 4 years were injured at Kalpitiya when members of the Air Force engaged in training accidentally shot them. In another similar incident, two children aged 7 and 2 years were killed on 18th August.⁵

Outside the conflict areas, Tamil civilians in particular remained vulnerable to arbitrary arrest, and numerous civilians were victims

⁴ INFORM Situation Report, August 1999, p 9.

⁵ *Ibid.*

of bomb attacks attributed to the LTTE, especially in the city of Colombo.

Neither party to the conflict seems to take prisoners on the battle field; instead, potential prisoners appear to be deliberately killed, in contravention of international humanitarian law.

3. Indiscriminate Attacks on Civilians

Scores of civilians died in attacks which raised concerns about the failure of both parties to the conflict to take adequate precautions to prevent harm to civilians, as required under international humanitarian law. In June, for example, five civilians were killed and almost 60 wounded in shelling by the army at Thallady. In another incident, the army handed 37 bodies over to Mannar hospital after the attack at Pappamoddai on June 26th which it claimed were of LTTE members.⁶ However, other reports indicated that these were bodies of civilians murdered by the army at Pappamoddai. An inquiry into the incident was announced, but the outcome is not known.⁷

On 20th November, at about 10.00 pm, one of the most sacred Catholic shrines in the country, at Madhu, came under fire from artillery. Three shells hit the church, killing about 38 displaced civilians, including children, who were sheltering there, and injuring about 70 more. At the time, about 300 soldiers and several hundred refugees were in the shrine premises. The attack took place in the context of escalating fighting between the LTTE and government forces in the area, but responsibility for the attack remained unclear. The LTTE from its London office accused the army of attacking

⁶ INFORM Situation Report, June 1999, p 7.

⁷ *Ibid.*

the shrine, and also of using civilians as a shield. However, a statement issued by the Bishop of Jaffna, Joseph Rayappu, and Malcolm Ranjith of the Bishop's Conference, contained no suggestion that the army had fired the shells. It confirmed that the army had been on the premises at the time, and seemed to imply that the army had been the target of the attack.

Following the attack, the President, expressing shock and grief at the incident, ordered the army to withdraw from the church premises to ensure the safety of civilians. The Bishop of Mannar called upon all combatants to leave the church and its environs.

The truth behind the attack is not known with certainty. What is clear, however, is that both sides knew that civilians had taken refuge at the church, and that neither side took the necessary measures to ensure civilian safety that are required under international humanitarian law. It was reported that the Bishop of Mannar had received three telephone calls from the LTTE asking him to get the army removed from the church premises. He had tried to contact political leaders in Colombo to pass this message on, but failed to get through. According to this report, the Bishop and other church officials had no doubt that it was the LTTE who had attacked the shrine. A proper investigation, however, has not been held.⁸

4. Extra-judicial Killings and Deaths in Custody

Several incidents of extra-judicial killings were reported, although the true number of such killings is not known, partly because the censorship restricts the investigation and reporting of such incidents.

⁸ This information was obtained from the UTHR (J), Information Bulletin

In one incident on 31st March, Sellathurai Jegan was killed in retaliatory fire by the army at Urumpirai.⁹ In May, a 23 year old Tamil youth, Kanthalingam Jeyarajah was allegedly shot by army personnel at the cemetery checkpoint in Valaichchenai town. It was alleged that the victim had been wrongly accused of throwing a grenade at the army when he was shot. A verdict of homicide was returned at the inquest.¹⁰ No further details were, however, available.

Some civilians appeared to have been killed in retaliatory attacks either by the armed forces or police or the LTTE. For example, on 26th April, three civilians were reported killed and 17 injured when the police launched an indiscriminate retaliatory attack on villages in Eravur, following an attack by the LTTE on four security posts in the area.¹¹

A young Tamil woman, Ida Carmelita, was gang-raped and murdered in Pallimunai in Mannar on 11th July. Two soldiers were arrested in this connection,¹² although the US State Department Report stated that she had been raped by five soldiers.

Two fishermen who were fishing in the Gurunagar sea on 12th August were shot dead by the Navy. They were identified as Sebestianpillai Jeyakumar and Antonypillai Krishthurasa. Their bodies were handed over to the Jaffna General Hospital.

On 25th September, 22 civilians, including school children and women, were killed and 41 were injured in an air attack on the

⁹ INFORM Situation Report, March 1999, p 7.

¹⁰ INFORM Situation Report, May 1999, p 7.

¹¹ INFORM Situation Report, April 1999, p 10.

¹² INFORM Situation Report, July 1999, p 9.

Puthukkudiyiruppu market area in the Mullaitivu district. The Ministry of Defence at first claimed that it had hit an LTTE camp, not a civilian target, but the International Committee of the Red Cross (ICRC) confirmed that the victims were all civilians. The government subsequently admitted that the attack had been a mistake. The Ministry of Defence initiated an inquiry, and said it would pay compensation to the relatives of the victims when the inquiry report was ready.¹³

There were reports that the relatives of people killed by security forces personnel were asked to sign papers saying that the victims had been members of the LTTE. For example, on the night of 15th October, the army fired on seven persons, including a woman from the Meesalai area, as they tried to cross the Jaffna lagoon from Thenmarachchi to Pooneryn. They were killed. Although it was claimed that they had been caught in cross-fire between the army and the LTTE, relatives who went to collect the bodies were asked by police to sign papers of this kind.¹⁴

There was also evidence suggesting that the police attempted to mask possible extrajudicial killings of prisoners by concocting false stories about their deaths. For example, S. Sanjeevan, a 19 year old student of Wesley College, Kalmunai, was detained by the police on 13th October. He died two days later. The police maintained that he had been caught in cross-fire between the police and the LTTE, but an autopsy report revealed that he had been tortured and shot at close range. The autopsy was performed after the body had been exhumed on the orders of the Kalmunai courts. The outcome of further investigations into the case is not known.¹⁵

¹³ INFORM Situation Report, October 1999, p 7.

¹⁴ *Id*, p 6.

¹⁵ *Id*, p 13.

5. Torture

As pointed out in the chapter on judicial protection of human rights, torture is by no means a thing of the past. Several cases decided by the Supreme Court related to torture at the hands of the police. Yet despite pronouncements on this matter by the Court, and despite the award of compensation to victims, torture at the hands of law enforcement authorities continues year after year. This is a cause for grave concern. Does this mean that the Court's judgments and directives do not have the desired effect?

In June 1999, Amnesty International issued a report on torture in custody in Sri Lanka.¹⁶ The report commences by stating that "for years, torture has been among the most common human rights violations reported in Sri Lanka"¹⁷ and points out that torture is also linked to other human rights violations such as disappearances. While Amnesty notes several positive steps taken by the government to eradicate torture – including ratification of the Convention against Torture and enacting enabling legislation, and the establishment of the Human Rights Commission – it points out with concern that torture remains a serious problem in the country. Of the total of 154 complaints received from July to December 1998 by the Committee to Inquire into Unlawful Arrests and Harassment (hereinafter the Anti-Harassment Committee) which was established in 1998,¹⁸ 47 related to torture (about 3 per cent).¹⁹

¹⁶ See Amnesty International, "Sri Lanka: Torture in Custody," AI Index: p 2. ASA 37/10/99 (June 1999). Although some incidents do not fall within the year under review, this report has a wealth of material on torture in Sri Lanka. Readers are referred to this report which documents issues ranging from torture of political prisoners to family rivals.

¹⁷ *Id.* p 1.

¹⁸ See *Sri Lanka: State of Human Rights 1999* (Law & Society Trust, Colombo, 1999) p 34.

¹⁹ AI, "Sri Lanka: Torture in Custody,"

Torture continues with impunity, despite the trial and conviction of some security forces personnel for various human rights violations, the Krishanthi Kumaraswamy case being the first to be decided. Although after a long lapse of five years, indictments have been filed in the High Court in cases of alleged torture,²⁰ so far no criminal convictions have been made in relation to torture. Seven such indictments were pending before the High Court at the end of 1999. In contrast, the Supreme Court has awarded compensation in relation to the violation of Article 11 (on torture) on many occasions.²¹ Given the delays in the legal system, it is unlikely that these criminal cases will be concluded for years. These cases have arisen from fundamental rights decisions of the Supreme Court during 1997 and 1998 against security officers who were held responsible for acts of torture.

The Amnesty International report identifies several reasons for the continuing incidence of torture in Sri Lanka:

- ☐ the wide powers given to the security forces under the emergency regulations and the Prevention of Terrorism Act (PTA) which allow long periods of detention without being produced before a Magistrate, contrary to the requirements of the normal law;
- ☐ the failure to enforce legal safeguards, such as the requirement to hold detainees in authorised places of detention;

²⁰ *Sri Lanka: State of Human Rights 1999* (Law & Society Trust, Colombo, 1999) p 28.

²¹ See chapters on Judicial Protection on Human Rights, *infra* and *Sri Lanka: State of Human Rights Reports* (Law & Society Trust, Colombo), 1994 -1999

- ☐ the fact that “confessions” made to police officers above a certain rank are admissible under the PTA²² encourages the interrogating officers to obtain such confessions by any means.

The report contains several recommendations to reduce the prevalence of torture in the country:

- ☐ Establishing an independent authority to investigate instances of torture;
- ☐ Reviewing national security legislation;
- ☐ Non-use of unauthorised places of detention;
- ☐ Official condemnation;
- ☐ Amending the Torture Act and other relevant laws to bring them in conformity with international provisions;
- ☐ Establishing minimum detention conditions;
- ☐ Ensuring strict adherence to current safeguards;
- ☐ Prosecution of perpetrators;
- ☐ Establishing individual responsibility;
- ☐ Providing adequate compensation to victims of torture and their dependants, and appropriate medical care or rehabilitation;
- ☐ Strengthening existing remedies, including the HRC.²³

²² Under the normal law, confessions made to police officers and those made while in the custody of a police officer are totally inadmissible, *vide* sections 25 and 26 of the Evidence Ordinance.

²³ These recommendations are from the UN Committee Against Torture which have been reproduced in the AI document, *supra* n 16.

In addition, the Amnesty International report looks at issues such as the effectiveness of the fundamental rights jurisdiction and the HRC; the role of the medical profession in relation to torture; the role of the Anti-Harassment Committee; civil remedies and international remedies.

Amnesty International issued a press statement regarding the alleged torture of Kandasamy Sri Ram, who was detained at the Mirihana police station following his arrest on 25th August. It also expressed concern about the security of Anthonipillai Binoth Vimalraj and of Sivagnanasundaram Sri Kanthan. The latter had alleged torture while being detained at the Crime Detection Bureau and filed a fundamental rights petition in the Supreme Court.²⁴

At least one person died in police custody after being tortured.²⁵ Although the police maintained that he died in the cross-fire, the autopsy revealed that he had been tortured and shot at close range (see above).

Pro-government Tamil militants also engage in torture. According to the US State Department report, the PLOTE is widely known to engage in torture and the security forces have done little to stop this practice. Amnesty International's report documents a raid by army personnel in March 1999 of several illegal camps run by PLOTE, EPRLF and TELO in Vavuniya, which had failed to find any prisoners. The report seems to indicate that the possibility that the leaders of these groups being tipped off about the raid by "sympathetic army personnel" cannot be ruled out.²⁶

²⁴ INFORM Situation Report, November 1999, p 16.

²⁵ US State Department Report, 25th February 2000.

²⁶ AI, "Sri Lanka: Torture in Custody," p 13.

6. Disappearances

Disappearances continued during 1999, albeit to a lesser extent than in previous years. It is, however, impossible to ascertain the exact number of disappearances both because of curbs on the free flow of information from the conflict areas, and because of the hidden nature of this grave human rights violation. Information on some cases is available, however.

The Vanni Citizens' Committee petitioned the ICRC and the Bishop of Mannar regarding 14 civilians who disappeared after being arrested at Ilanthiamoddai by security forces in March. Rajadurai Kenganesan of Killinochchi was also alleged to have disappeared following his arrest by the security forces. It is not clear exactly when he was arrested. His relatives petitioned the ICRC for information on his whereabouts.²⁷

Five youths from Thadchanaamaruthamadu, aged between 21 and 26 years, disappeared after their arrest by the army in April. Their parents appealed to the Bishop of Mannar to help trace their whereabouts.²⁸

Amnesty International reported the disappearance of five out of seven persons detained at a camp maintained in Vavuniya. The other two prisoners – S. Tamilchelvam and S. Atpudarasa – had been released.²⁹

In April, there were reports that the remains of 10-12 burnt tyres, together with the remains of burnt bodies, had been found about

²⁷ INFORM Situation Report, April 1999, p 9.

²⁸ *Ibid.*

²⁹ AI Index: ASA 37/08/99, "Urgent Action", 12th April 1999.

four kilometers south of Vavuniya by the Air Force. There were also reports that more than 25 skeletons had been found in the Killinochchi area, believed to be of people who had disappeared when Killinochchi was under the control of the armed forces.³⁰ These allegations were not investigated.³¹

Three Tamil civilians reportedly disappeared after being taken into custody on 8th September. The three – S. Sathasivam, S. Pancheddaram and S. Velayuthan – were from Sinnawati, a border village in the Batticaloa district.³² In October, three Tamil people who were detained by home guards were later found decapitated.³³

Disappearances were also reported from the custody of Tamil groups allied with the government. For example, Amnesty International reported that Sivam Ashokumar, Arumugam Pakkiri and two other men (names unknown) had been detained by PLOTE. When their relatives inquired about their whereabouts, however, PLOTE members denied that the men were in their custody.³⁴ PLOTE reportedly holds prisoners in unauthorised places of detention.

³⁰ INFORM Situation Report, April 1999, p 9.

³¹ In September, there were several complaints of “disappearances” from the Vanni region, but it was not clear who was responsible. From Mannar, it was reported that eight youth had disappeared. Among them were Selvachandiran Sathiskumar, who disappeared on 11th August; Nadarajah Sureshkumar of Killinochchi, who was kidnapped on 22nd August; and Kathikamam Ramanan, who had “disappeared” in Vavuniya (INFORM, Situation Report September, 1999 p 9). It is not, however, clear whether they had actually “disappeared” after being taken into custody.

³² INFORM Situation Report, October 1999 p 12.

³³ US State Department Report, 25th February 2000.

³⁴ AI Index: ASA 37/06/99, “Fear of Torture/Disappearance”, 23rd February 1999

Amnesty International received reports of disappearances from Batticaloa, Vavuniya, Killinochchi, Colombo and Mannar Districts during 1999.³⁵ The US State Department reported that there were at least 15 disappearances from Vavuniya and Batticaloa alone of people who were last known to be in the custody of the security forces. The report points out that, as with the case of extrajudicial killings, the exact number of disappearances was impossible to ascertain.

Members of the Jaffna District Organisation of Parents and Relatives of Disappeared Persons organised a fast in Jaffna to protest against the government's failure to take any concrete action to find out the whereabouts of those who disappeared during the Riviresa Operation in Jaffna district in 1996.³⁶ Over 450 relatives of those who disappeared at that time participated on 6th December, in front of the Human Rights Commission Office in Jaffna.³⁷

The fourth Commission of Inquiry into Disappearances under the previous government, chaired by Ms Manouri Muttetuwegama, submitted an interim report to the government during the year. The report was not made available to the public.

6.1 The Visit of the UN Working Group on Enforced and Involuntary Disappearances

In October, a delegation from UN Working Group on Enforced and Involuntary Disappearances (UNWGEID) arrived in Sri Lanka. They investigated the current situation with regard to

³⁵ Amnesty International Report 2000, p 222.

³⁶ INFORM Situation Report, November 1999 p 13.

³⁷ INFORM Situation Report, December 1999 p 12.

disappearances in Sri Lanka, and the extent to which the UNWGEID's previous recommendations relating to disappearances had been implemented. During their visit, the team met the Minister of Foreign Affairs, the Attorney-General, as well as members of various human rights groups. Their report was presented to the UN Commission on Human Rights at its 56th session.³⁸

In its report, the Working Group outlined developments since its last visit, and gave the following figures for the number of reports of enforced disappearance it had received from 1995 to 1999:

1995	78
1996	23
1997	92
1998	4
1999	2

The figure of 92 disappearances reported in 1997 was the highest number of disappearances reported to the Working Group from any country that year.

The report pointed out that no presidential commission of inquiry had been established to inquire into disappearances which took place during the term of the present government, with the exception of the Board of Investigation appointed by the Ministry

³⁸ Economic and Social Council, Report of the Working Group on Enforced and Involuntary Disappearances, "Report on the Visit to Sri Lanka by a Member of the Working Group on Enforced and Involuntary Disappearances" (25-29 October 1999), E/CN.4/2000/64/Add.1, 21st December 1999.

of Defence. This investigation, however, did not result in the publication of its findings.

The report commended the various steps the government had taken with regard to disappearances such as the establishment of various commissions of inquiry and the establishment of the HRC. However, it noted with concern the continued incidence of disappearances in the country:

Notwithstanding all these encouraging facts, the Working Group wishes to stress that Sri Lanka remains the country with the second largest number of non-clarified cases of disappearances on its list. Many of the missing persons allegedly traced by the Human Rights Commission or other authorities seem not to correspond to the disappeared persons submitted to the Group. Although a considerable number of criminal investigations have been initiated in relation to disappearances which occurred some ten years ago, only very few of the suspected perpetrators have actually been convicted, and some of them have even been promoted. Many families, therefore, rightly feel that justice has not yet been done to them.³⁹

With regard to the role that the HRC could play in relation to the prevention and investigation of disappearances, the Working Group seemed to consider that this body lacked the necessary authority, as well as the necessary political and financial support, to carry out this task effectively. The report also noted that many of the earlier recommendations made by the Working Group for the prevention of disappearances had not been implemented.

³⁹ *Id.*, p 16.

The recommendations made by the Working Group to the Government of Sri Lanka included the following:

- ☐ Establishing an independent body to investigate all cases of disappearances since 1995;
- ☐ Bringing the perpetrators – whether under the former or present government – to justice in a speedy manner; the Attorney General or any other independent body should be empowered to investigate and indict suspected perpetrators, independently of the investigations by the police;
- ☐ Causing enforced disappearance should be made a criminal offence and punishable by appropriate penalties as stipulated in Article 4 of the UN Declaration on the Protection of All Persons from Enforced Disappearance;
- ☐ Repealing the PTA and emergency regulations, or bringing them in line with international standards;
- ☐ Holding all persons deprived of liberty in authorised places of detention. All unauthorised places of detention should be dissolved;
- ☐ Maintaining a central register of detainees, perhaps at the HRC headquarters;
- ☐ Providing all families of disappeared persons with the same amount of compensation;
- ☐ Applying the procedure for issuing death certificates in cases of disappearances in an equal manner;
- ☐ Including the prohibition of enforced disappearance as a fundamental right in the Constitution; and
- ☐ Instructing the special unit in Rehabilitation of Persons, Properties and Industries Authority (REPPIA) to respond to

the cases submitted by the Working Group on a case-by-case basis.

It is hoped that the government will take the provisions of the report seriously and take immediate steps to implement the above recommendations.

7. Arbitrary Arrests and Detention

Large scale arrests of Tamil people continued during 1999, particularly after LTTE bombings. According to the US State Department Report, more than 1,970 persons were detained by the government under the emergency regulations and the PTA. While the majority were generally released within a period of days or months after their arrest, others were kept in detention for longer. The total number of prisoners held under the PTA and the emergency regulations at any given time during the year was approximately 2000. Some of these prisoners had been held for up to five years without trial. According to the Attorney General, approximately 1000 cases under the PTA and ER were pending before the High Court.⁴⁰

The US State Department Report also noted that secret detention centres were still being used, particularly on the Jaffna peninsula, in Vavuniya and the East, despite the government's promise to close such places down.⁴¹ There were reports that PLOTE held prisoners in unauthorised places of detention in Vavuniya.

The government continued to give the ICRC unhindered access to approximately 250 detention centres throughout the country,

⁴⁰ US State Department Report, 25th February 2000.

⁴¹ *Ibid.*

which enabled it to monitor the human rights practices of the security forces. The HRC also continued to visit places of detention.

8. Investigations into Alleged Violations and Trials of Perpetrators

A notorious case which had been pending before the Courts for nearly 10 years was finally concluded in 1999, marking a new step in the long journey towards ending impunity. In February, judgment was delivered in the Embilipitiya abduction and murder case. A school principal and ten soldiers were sentenced to ten years of imprisonment by the Ratnapura High Court. They were convicted for the abduction and murder of 32 students in August 1989 during the period of the JVP insurrection.⁴²

Another much publicised human rights case did not end in any convictions, however. The suspects in the "Bolgoda Lake case" were discharged by the Colombo Additional Magistrate for lack of evidence. Eighteen police officers from the Intelligence Unit of the Special Task Force and a civilian had been accused of the murder of 17 people whose bodies were found in the Bolgoda Lake, Diyawanna Oya and Alawwa in 1995.⁴³

Proceedings began early in 1999 against an army major and a former sub-inspector of police in relation to the disappearance of 31 youth after they had been arrested in Divulapitiya in 1989.

⁴² US State Department Report. See also "The Sri Lanka Monitor," February 1999, p 4.

⁴³ INFORM Situation Report, May 1999, p 12. For a discussion of the Bolgoda and Diyawanna Oya cases, see *Sri Lanka: State of Human Rights 1995* (Law & Society Trust, Colombo, 1996) p 21.

The army major died after proceedings were instituted, but the case against the former police officer was scheduled to continue in March 2000.⁴⁴

Following on from the reports of the three regional commissions of inquiry which investigated disappearances which took place from 1988 to 1994, it was reported that the Attorney General's office had opened over 900 files and referred over 290 indictments to the courts involving 489 members of the security forces on abduction and murder charges.⁴⁵ By the end of 1999, the courts had initiated proceedings into at least 25 of these cases. In December, an abduction case dating from the late 1980s was concluded, and a police officer was sentenced to five years' imprisonment.⁴⁶

No progress was made in bringing to justice those responsible for numerous other killings, disappearances and acts of torture, however, even in cases where credible evidence to identify the perpetrators was available. For example, no charges have been brought in relation to the disappearance of 158 Tamil people from a refugee camp at Vantharamulle in Batticaloa district in 1990. Numerous witnesses saw these people being taken from the camp by soldiers, but no charges have been brought.⁴⁷

⁴⁴ *Ibid.*

⁴⁵ US State Department Report, 25th February 2000.

⁴⁶ *Ibid.*

⁴⁷ US State Department Report, 25th February 2000.

8.1 Chemmani Investigation⁴⁸

The 1999 volume of the *Sri Lanka: State of Human Rights* discussed the alleged mass-burial site at Chemmani. The background to this is as follows: During the trial of those suspected of the rape and murder of Krishanthi Kumaraswamy, two accused, one of whom was Corporal Rajapakse, divulged information of a mass grave site at Chemmani. According to them, several hundred bodies were buried there.⁴⁹

After a lethargic start and much foot-dragging, investigations began with the participation of international observers on June 16th. The exhumation took place amidst a large gathering, including the media, relatives of the disappeared and a few human rights groups. The head of the exhumation team was Dr. Chandrasiri Niriella, Professor of Forensic Medicine at Ruhuna University. Other members were Additional Government Analyst, Mr M.A.J. Mendis and soil analyst, Dr. K.A. Nandasena. Dr. William Haglund, from the Boston based NGO, Physicians for Human Rights, was also present. Amnesty International was also represented, by Ms. Ingrid Massage and Dr. Kevin Lee. The Forum for Human Dignity, a national NGO, was also present.

Although the government allowed NGOs to be present at the exhumation, as Amnesty International pointed out, the

⁴⁸ For a comprehensive discussion of the Chemmani investigation, see Weeraratne, "The Chemmani Mass Graves: Accountability and Transparency under the Kumaratunga Administration" (unpublished)

⁴⁹ *Sri Lanka: State of Human Rights 1999*, (Law & Society Trust, Colombo, (1999). This section is based on this report. See also *Sri Lanka: State of Human Rights 1999*, (Law & Society Trust, Colombo, 1999) pp 20 ff.

government defined the status of "observer" in a way which differed significantly from accepted UN terminology.

The preliminary investigation was conducted in two phases: phase one was an evaluation of the credibility of Corporal Rajapakse's evidence; phase two was to assess and evaluate what resources would be necessary to carry out a further investigation. Two skeletons were unearthed during phase one and were identified as 29 year old Rasiah Sathiskumar and 23 year old Mahendran Babu. It transpired that these two people had worked in a repair shop close by.⁵⁰ The hands of one skeleton were tied together with nylon yarn and the other had been blindfolded, indicating clearly that they were prisoners at the time of their deaths.

According to the report submitted by Mr. Yasantha Kodagoda, State Counsel, one of the deceased had died of severe brain injury resulting from a blow or blows to his head inflicted with a heavy club. Although the cause of death of the other deceased could not be determined exactly, Professor Niriella believed it could have been caused by a blow on the left side of the face.⁵¹ The CID appointed a special team to inquire into allegations made against several officials by Corporal Rajapakse.

Six more sites were identified by Rajapakse at Chemmani when the investigation re-opened on 30th August. Mr. Yasantha Kodagoda, Professor Niriella, Professor Nandasena, Mr. Ananda Mendis, Director of CID Nandasena Munasinghe and Jaffna Police OIC Ratnayake were present for the investigation. No foreign correspondents were, however, present.⁵²

⁵⁰ INFORM Situation Report, June 1999, p 12.

⁵¹ INFORM Situation Report, July 1999, p 7.

⁵² INFORM Situation Report, August 1999, p 9.

The exhumation of 25 gravesites identified by Rajapakse began on 6th September in the presence of the District Judge, M. Illancheliyan. Dr. Hugland was also present. On the 7th September, two human skeletons were exhumed; three human skulls and other skeletal remains were recovered on the 9th. Another skeleton was unearthed on the 11th. A total of 19 graves were excavated from the 6th to the 18th September, and 15 skeletons were discovered. Another site in the saltern area was abandoned after no remains were found there. Giving evidence before the Additional District Judge, Rajapakse stated that he had identified all the burial sites known to him and that further information could be obtained from the 20 army officers named by him as having been involved in the killings and burials.⁵³ DNA tests were due to be carried out on the remains by foreign experts and 13 skeletons remained to be identified at the end of the year.

Although the number of bodies found was not as high as had been anticipated, the discovery of 15 bodies in an area controlled by the army is itself cause for grave concern. The fact that Corporal Rajapakse knew the precise location of the gravesites points to the involvement of the armed forces in the disappearance of the victims. It was the first instance of the discovery of a gravesite containing remains of people who had disappeared during the tenure of the present government.

Meanwhile, the discovery of a mass grave site at the Duraiappa Stadium in Jaffna also caused concern, and excavation of the site commenced on 7th April. Due to the pre-occupation with the Chemmani investigation, however, the Additional Magistrate of Jaffna, Mr. Ekanathan, postponed the hearing on this gravesite to June. The police were ordered to provide security to the site as

⁵³ INFORM Situation Report, September 1999, pp 11-12.

well as to submit the photos taken from the site to the courts before June 29th. It is estimated that the remains of about 25 bodies were found here including those of two children. According to the US State Department report, the forensic reports have indicated that these bodies were about 10 years old which seemed to implicate the Indian Peacekeeping Force (IPKF) which was in Jaffna at that time.

9. Arbitrary Killings and Other Abuses by the LTTE

The LTTE continued to attack civilians both in the North and East and in the South.⁵⁴ Of particular concern was the large-scale, apparently retaliatory attack on Sinhalese civilians in the border areas in September, as well as the suicide bombings and assassinations.

Several suicide bomb attacks took place in the City of Colombo during the year. On 29th July, Dr Neelan Tiruchelvam, MP, was assassinated by a suicide bomber while on his way to work. His assassination sent shock waves through the community and condolences poured in from all around the world, including from heads of state. A world-renowned constitutional lawyer and human rights activist, Dr Tiruchelvam was committed to finding a peaceful solution to the ethnic conflict in Sri Lanka. He was one of the architects of the draft Constitution proposed by the People's Alliance and his close involvement with the government is thought to have cost him his life. His death left a huge void in academia, the legal profession and civil society. It was a particular blow to the Law & Society Trust, which lost its founding Director and the driving force behind much of its work.

⁵⁴ South denotes areas outside the North and the East.

Another suicide bomb on the 18th of December narrowly missed killing President Kumaratunga at her final election rally. She survived the attack with injuries. Twenty four people, including many civilians, died in the attack and several others, including members of the media, were injured. In another attack by a suicide bomber on the same day at a United National Party rally, General Algama and seven other people were killed and several more were injured.

The LTTE continued indiscriminate attacks on civilians in the conflict areas. Its possible role in the Madhu killings is discussed above. Before that incident, however, three civilians were killed when the LTTE shelled a northern suburb of Vavuniya town, and in December, civilians were killed in similar shelling in the Jaffna peninsula.⁵⁵ LTTE shelling of coastal areas of Jaffna from mid-December is believed to have killed up to 15 civilians.⁵⁶ On 27th July, a passenger ferry plying between Mutur and Trincomalee was blasted while moored in the harbour. One member of the crew was killed and the ferry was destroyed. On 10th August the LTTE attacked Sungavila in the East. A house was set on fire and a Muslim youth abducted from the village. On 17th August, a group of farmers was attacked in their fields by the LTTE. The LTTE attacked a Chinese merchant vessel on 25th September in the high seas off Mullaitivu. One crew member was injured by shrapnel in the attack.

The LTTE also continued its campaign to eliminate members of the EPDP and other Tamil groups allied with the government. Mutulingam Ganeshkumar (better known as Razik), formerly of the EPRLF, was assassinated by a suicide bomber on 29th May.⁵⁷

⁵⁵ UTHR (J), Information Bulletin No 23 p 6.

⁵⁶ *Id*, P 8.

⁵⁷ INFORM Situation Report, May 1999, p 4.

On 6th August, the PLOTE leader of Vavuniya, Arumugam Uthayankumar and his body guard, Nadarajah Gopalakrishnan were shot dead in Vavuniya. On 12th August, Tharmalingam Sothaharan, a member of the Razik group was shot dead in Batticaloa.⁵⁸

Attacks attributed to the LTTE on elected representatives of the people, both at parliamentary and local levels, also continued in 1999. The EPDP member of the Valikamam East Pradeshiya Sabha, Murugan Poobalasingham, was shot dead by an unidentified gunman at Urumpirai on 13th May. He was the fourth such member to be killed.⁵⁹ On 1st June, the Vice-Chairman of the Nallur Pradeshiya Sabha, T. Rajkumar, and his cousin were shot dead by two unidentified gunmen.

Apparently in retaliation for the air attack on civilians at Puthukkudiyiruppu, described above, the LTTE launched a large scale attack on Sinhalese villagers living in the Gonagala area of Amparai District on 15th September. Over 100 LTTE members were reported to have been involved, and they hacked to death 48 people, including many women and children.⁶⁰ Although common in the past, the LTTE had not committed attacks of this kind against civilians in the border areas for about three years.⁶¹ The return to such gross abuses renewed fears about the safety of civilians living in the border villages.

Several bombs attributed to the LTTE exploded on public transport, killing and injuring passengers. On 22nd September, a

⁵⁸ INFORM Situation Report, August 1999, p 6.

⁵⁹ INFORM Situation Report, May 1999, p 6.

⁶⁰ *Id.*, p 10.

⁶¹ *Amnesty International Report 2000*, p 222.

bomb exploded in a bus travelling from Negombo to Kuliyaipitiya, seriously injuring 22 passengers. Another bomb exploded on the same day in a bus parked at the Negombo bus stand; fortunately, nobody was injured. On 26th September, one passenger was killed and 31 injured when a bomb exploded in a private bus travelling from Badulla to Moneragala. A powerful bomb was discovered by the police close to the Hingurakgoda railway station.⁶²

On 28th October, the LTTE mounted an artillery attack on the Elephant Pass army hospital, killing two people and injuring many more.⁶³ This was a clear violation of the Geneva Conventions which prohibit attacks, *inter alia*, on hospitals.⁶⁴

The LTTE is alleged to have shot dead Vaithilingam Mathiyaparanam, whom it claimed to have been having close links with the army. It is reported that he had been warned several times to sever these links.⁶⁵ In another incident, Subas Pero was shot dead in front of the CWE office in Jaffna by two youth on a bicycle.⁶⁶

On 3rd October, two civilians were killed when a group of LTTE members attacked the village police post at Sungavila, 12 miles from Polonnaruwa.⁶⁷ On 9th October, 12 persons were injured,

⁶² *Id*, p 13.

⁶³ INFORM Situation Report, October 1999, p 6.

⁶⁴ According to Article 12 of the 1st Protocol Additional to the Geneva Conventions, medical units shall be respected and protected at all times shall not be the object of attack. "Medical units" include military and civilian hospitals.

⁶⁵ *Ibid*.

⁶⁶ *Ibid*.

⁶⁷ *Id*, p 7.

mostly civilians, when a bomb exploded at a bus stand in Vavuniya town.⁶⁸

On 13th December, EPDP member Nimalan Nimaladas was shot dead at Nintavur in the Amparai district, when he was leaving the EPDP office at Karativu. It is believed that the LTTE carried out this attack.⁶⁹

According to the US State Department Report, the LTTE is reported to have killed nearly 100 civilians during the year. At least 14 people were publicly executed by the LTTE after being found guilty of offences by the LTTE's "courts."⁷⁰

The LTTE also reportedly used torture on a regular basis. The security force prisoners released by the LTTE said that they had been subjected to various forms of torture, including being hung upside down and beaten, having pins inserted under their fingernails, and being burnt with hot rods.⁷¹

The LTTE continued to detain civilians, often for ransom. According to the US State Department Report, in September the LTTE held three businessmen for a ransom of 40 million rupees. The Report further stated that according to unconfirmed reports, the LTTE was holding more than 2000 civilians in custody, including 12 civilian crew members of the three vessels it had hijacked in 1995. The LTTE did not permit the ICRC or any other humanitarian organisation access to its places of detention, except to visit the crew members and 15 security forces personnel.⁷²

⁶⁸ *Ibid.*

⁶⁹ INFORM Situation Report, December 1999, p 10.

⁷⁰ US State Department Report, 25th February 2000.

⁷¹ *Ibid.*

⁷² *Ibid.*

Reports that the LTTE used child combatants were confirmed when 25 such children surrendered to government troops in September 1998. One child was 13 years old, while the others were aged between 15 and 17 years.

10. The Work of the Human Rights Commission⁷³

The Human Rights Commission (HRC) continued to function with little impact. According to its own statistics, during the period January to December 1999, a total of 2015 arrests were reported to the HRC. A total number of 3497 people had been detained during this period and 1728 complaints had been made against the police and armed forces alleging fundamental rights violations. Of these, a total of 1139 complaints had been disposed of. It was not, however, clear what "disposed of" means. The number of complaints alleging human rights violations was 2183; of these, 601 had been disposed of by the Commission. A total of 827 complaints had been made regarding missing persons. Of these, 498 had been traced. Of these, the highest number of disappearances⁷⁴ had been recorded from Vavuniya (355 complaints), followed by Batticaloa (225) and Jaffna (132). Similarly, the highest number of arrests had been from Vavuniya (923) followed by Jaffna (260). The Commission carried out a total of 3038 visits to police and detention camps during the year.⁷⁵

⁷³ The HRC is discussed in detail in a separate chapter. The aim here is to discuss its work in relation to the integrity of the person.

⁷⁴ It is not clear whether the word "disappeared" means "missing persons" or those who had disappeared after being taken into custody. It is also not clear whether these complaints relate to those incidents which took place previously in 1999 or whether they were reports of those who had gone missing.

⁷⁵ Statistics provided by the Human Rights Commission for the period 1st January to 31st December 1999.

REPORT FOR THE PERIOD FROM 1ST JANUARY 1999 TO 31ST DECEMBER 1999
HUMAN RIGHTS COMMISSION OF SRI LANKA

Integrity of the Person 41

Visits to police and detention camps										Missing Persons						
Centre	Police Station	Detention-Camp	Sin	Tam	Mus.	Total	Number Detained during this period	Arrests Reported to HRC During this period	No. Reported	Traced	No. of Complaints Against the Police & Armed Forces	No. Disposed of	Complaints against other Authorities	No. Disposed of		
Jaffra	41	42	-	738	-	738	540	260	132	71	328	297	Nil	Nil		
Batt	50	41	-	248	19	267	171	101	225	202	17	13	9	7		
Matara	187	Nil	21	1	-	22	16	6	Nil	Nil	64	31	132	49		
Kandy	227	1	16	171	3	190	243	177	27	Nil	384	171	790	287		
A'pura	88	21	-	574	-	574	6	24	5	3	18	4	81	33		
Trinco	105	8	6	222	14	242	107	214	26	4	11	6	9	6		
Vavun	10	16	33	505	19	557	923	923	355	202	223	190	28	20		
Badulla	137	7	6	25	3	34	1272	41	1	Nil	33	21	167	128		
Ampara	95	11	2	51	-	53	7	7	Nil	Nil	46	22	152	20		
Kalmu	298	349	-	136	-	136	104	154	28	9	50	28	57	40		
H. Office	102	5	41	177	19	237	108	108	28	7	554	356	758	11		
TOTAL	1340	501	125	2848	77	3050	3497	2015	827	498	1728	1139	2183	601		

11. New Measures taken to Protect Human Rights

No new measures were taken to protect human rights during the year, apart from the Equal Opportunity Bill which was presented in Parliament last August. This Bill sought to hold the private sector accountable for discriminatory practices in relation to employment and also sought to outlaw discrimination based on ethnicity, religion, language, gender, disability and age. The main areas covered by the Bill were employment, education, access to goods and services and access to transportation and accommodation. It also contained provisions on sexual harassment.

The Bill was politicised to such an extent that 42 petitions were filed in the Supreme Court against the Bill challenging its constitutionality (the objections mainly being in relation to the provisions on education) and the government, bowing down to pressure, gave an assurance through the Attorney General that the Bill would be removed from the order paper of parliament. This Bill is more fully discussed in a later chapter.

12. Anti-Harassment Committee

The Committee on Unlawful Arrests and Harassment, generally referred to as the Anti-Harassment Committee, was established by the President in July 1998 and continued to function throughout 1999. Although an annual report is not available, the Committee took several steps to ameliorate the situation of Tamil people in the country, particularly, outside the conflict area. These measures included the issuing of guidelines to the police regarding the registration of temporary visitors by residents and the need to record statements at police stations in the mother tongue. It also intervened directly to secure the release of people detained illegally.⁷⁶

⁷⁶ See in this regard the annual report of the Forum for Human Dignity for 1999, pp 49-53

While some argue that the Anti-harassment Committee has been effective, the police claimed that the guidelines issued by the Committee facilitated the infiltration of LTTE cadres into the city.⁷⁷ Under the directives issued by the Committee, visitors from the North and the East do not have to visit police stations personally to obtain clearance.⁷⁸

The Committee is required to send weekly reports to the President. It operates a 24-hour complaints desk, and accepts complaints orally or in writing.

The annual report of the Forum for Human Dignity gives several examples of the intervention of the Committee in obtaining relief for complainants. In one instance, the Committee located two children who had been separated from their mother in early 1998. In another, the Forum had complained to the Committee about the torture by police of a girl named Mooththambi Vanitha, and as a result of the Committee's intervention, her torture stopped. Another appeal by the Forum brought a stop to the long-standing practice of forced labour at the police station and STF camps in Batticaloa.

⁷⁷ "Anti-Harassment Committee Directives Help LTTE to Infiltrate Colombo, Says Police," *Island*, 18th March 1999.

⁷⁸ *Ibid.*

13. Landmine Clearing

The UNDP's programme to clear landmines from the Jaffna peninsula progressed very slowly. It was estimated that it would take more than thirty months for the area to be declared a mine-free zone. Between August and November, a total of 620 mines were removed and destroyed.⁷⁹ The majority were taken from the premises of Jaffna Technical College and from around Alaveddy Anunodhaya College.⁸⁰

14. Re-Introduction of the Death Penalty

In March a press release from the Presidential Secretariat indicated that the government was re-introducing the death penalty. Although the death penalty has remained in the statute books, it has not been used since 1976. The government said re-introduction would help combat the alarming rise in crime. Amnesty International called on the government to re-think its decision. Although the death penalty was imposed in a number of recent cases, including the cases of the rapes and murders of Krishanthi Kumaraswamy and Rita John, it had not been implemented by the end of the year.

The public debate on the issue was mixed: some felt that the death penalty is a barbaric form of punishment and should be removed from the statute books. Others, however, felt strongly

⁷⁹ INFORM Situation Report, November 1999, p 13.

⁸⁰ INFORM Situation Report, December 1999, p 11.

that non-implementation of the death penalty had led to the present upsurge in the crime rate.⁸¹ There is no evidence, however, to show that the implementation of the death penalty actually leads to a reduction in the crime rate. What is apparent is that a comprehensive policy is needed to address the underlying causes of crime in Sri Lanka, and its rising incidence.

15. Conclusion and Recommendations

Prospects for peace remained bleak in 1999. Yet, a lasting resolution to the conflict would have a dramatic and positive impact on the Sri Lanka's human rights practices. The armed conflict has an enormous impact on all Sri Lankans, whether within or without the conflict zone. Almost every family in the country has experienced death, disability and other trauma related to the conflict.

Those civilians who are perhaps most directly affected are the internally displaced, whose situation has deteriorated, and who have become increasingly vulnerable to attack. Civilians in the conflict zone also undergo other untold hardship due to lack of access to adequate food, water, shelter, education and medical care.

Although the security forces are generally believed to be more restrained in their conduct than was the case in the past, civilian casualties, torture and disappearances are by no means things of the past. In addition, the LTTE is responsible for numerous gross

⁸¹ See the chapter on Crimes for a discussion of the issue. See also AI Index: ASA 37/09/99, 15th April 1999.

abuses against civilians. Neither side adheres fully to the requirements of international humanitarian law.

We reiterate, yet again, the recommendations made in our previous reports. These include:

- ☐ the strict adherence by both parties to at least the standards of basic humanitarian and human rights principles;
- ☐ the need for both parties to take all necessary precautions to avoid harming civilians, and to refrain from indiscriminate attacks;
- ☐ eliminating a culture of impunity and prosecuting those responsible for human rights violations, whenever they were committed;
- ☐ eliminating the prevailing culture and tolerance of torture;
- ☐ strengthening the legal safeguards with regard to arrest, detention and interrogation, and ensuring that the armed forces and the police comply with them fully, for the protection of prisoners.

III

Emergency Rule

*Suriya Wickremasinghe**

1. Introduction

Few changes of note were made to the emergency regulations during 1999. The year was, however, memorable for an important judicial ruling arising from the resort to emergency powers to postpone Provincial Council elections the previous year.

1.1 Areas under emergency rule

It will be recalled that in the middle of 1998 emergency rule, which had been confined to certain parts of the country, was extended to cover the whole of Sri Lanka. This situation continued for the entirety of 1999.

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1.2 Arrest and detention

The provisions relating to arrest and detention under the emergency regulations remained unchanged in 1999. However, at the end of the year eight new places were added to the list of authorised places of detention, bringing the total number of authorised places of detention listed in the Gazettes to 394. Seven of these were police stations in the North, and the eighth was the Terrorist Investigation Division, No 101 Chaitiya Road, Colombo 1.¹

2. Successful Judicial Challenges to the Misuse of Emergency Powers

2.1 The postponement of Provincial Council elections

We noted last year the resort to emergency powers to postpone the elections to five Provincial Councils; a measure which was under legal challenge at the end of 1998.² The outcome of this challenge was a landmark ruling by the Supreme Court which is of significance to several aspects of the law, namely to emergency rule, to fair and free elections, to the role of the Commissioner of Elections, and to the fundamental rights jurisdiction of the Supreme Court with special reference to freedom of expression and equality before the law. A full account of this case would need to deal adequately with all these aspects, which is not attempted in this chapter. Here, we highlight those elements

¹ Notification under Regulation 19(4) of the Emergency (Miscellaneous Provisions and Powers) Regulations No 4 of 1994 published in Gazette Extraordinary No 1110/11 of 15 December 1999.

² S.C. Application No 509/98 S.C. Minutes 27.1.1999.

relevant to emergency rule under the Public Security Ordinance (PSO), with brief reference to the other aspects where necessary.³

To recapitulate the background: elections to five Provincial Councils were due in the second half of 1998. As they approached, however, speculation became rife - fuelled by statements by members of the ruling People's Alliance - that they would be postponed by resort to emergency regulations.

The government was faced with a legal difficulty in that the Thirteenth 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 found was to allow the Councils to stand dissolved, to let the dates for the elections be gazetted by the Commissioner of Elections as required by the Provincial Councils Elections Act, and then to intervene by means of an emergency regulation.

For this to be done, however, the Government had to first ensure that emergency rule prevailed over all the areas concerned. It will be recalled that at that time Part II of the Public Security Ordinance (i.e. emergency rule) had been brought into operation only in respect of certain areas, basically Colombo and surrounding areas and the North and East and "border" areas. This excluded most of the areas where elections were due. By Proclamation dated 4 August 1998, emergency rule was brought into operation throughout Sri Lanka. At one and the same time, in the same gazette notification, an emergency regulation was made by which the President purported to suspend the operation

³ This case is also discussed in the chapter on 'Judicial Protection of Human Rights.

of the date for elections fixed by the Commissioner. This did not require tinkering with any constitutional provision, but 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

A fundamental rights case, challenging both the Proclamation (bringing Part II of the PSO into operation islandwide) and the Regulation (suspending the date fixed for elections to the five Provincial Councils) was filed by two journalists, Waruna Karunatileke and Sunanda Deshapriya. The case was filed against the Commissioner of Elections and the Returning Officers of the relevant electoral areas and (as required by law) the Attorney General. The petitioners complained of interference with the franchise, the independence of the Commissioner of Elections, and with the rights to free expression and to equality before the law. They contested the validity of the Proclamation and the Regulation, and also charged that the conduct of the Commissioner of Elections and the Returning Officers in not holding elections to the five Provincial Councils was unlawful.

2.2 The challenge to the Proclamation

This challenge was of the most fundamental nature, involving the very basis of emergency rule. The PSO provides that "*where in view of the existence or imminence of a state of public emergency the President is of opinion that it is expedient so to do in the interests of public security and the preservation of public order or for the maintenance of supplies and services essential to the community*" he may by Proclamation bring the provisions of Part II of the Ordinance into operation. This is commonly referred to as a declaration of a state of emergency. Part II then goes on to confer the power on the President to make emergency regulations, bypassing the normal legislative process. (Such regulations may override the operation of any law other than the provisions of the Constitution.) The initial Proclamation is thus crucial to the whole operation.

It was vigorously argued for the petitioners that the Proclamation of a state of emergency throughout the country was *ultra vires*. Counsel urged that it had been made for the sole purpose of postponing elections. No other emergency regulation had been made pursuant to it other than the one relating to the elections. Both were part of one scheme, to postpone these five elections, which was confirmed by the failure of the respondents to produce any material suggesting that they had been made for any lawful purpose connected with considerations of national security or public order.

The position of the Solicitor General, who represented the Attorney General, was that since the President could not be made a party to the proceedings by virtue of presidential immunity conferred by Article 35⁴ of the Constitution, and since the petitioners had not cited any other person who could answer the allegations regarding the Proclamation, the Court should not make any pronouncement regarding its validity. In any event, he argued, the holding of elections could have affected national security.

The Court rejected the Solicitor General's contention. Interpreting Article 35 of the Constitution restrictively, the Court took the view that the immunity granted by those provisions relate to the person (whilst in office) and not to the act. Therefore, the Court was of the opinion that Article 35 does not exclude judicial review of an impugned act or omission in appropriate proceedings against some other person, who does not enjoy immunity from suit. For example, it would not protect a defendant or respondent who relies on an act of the President in order to justify his own conduct. In the instant case, the Court pointed out that it was the

⁴ Article 35 *inter alia*, prevents the institution or continuation of any proceeding against the President, whilst in office, in respect of anything done or omitted to be done by him in his official or private capacity.

respondents who were relying on the Proclamation, and therefore, the review of the Proclamation by the Court cannot be in any way inconsistent with the prohibition on the institution of proceedings against the President provided by Article 35 of the Constitution.

The Court next dealt with the Solicitor General's argument about the failure to join responsible officers (of the 'Defence establishment') who alone could produce the necessary material on the basis of which the Proclamation was made. The Court explained that in fundamental rights applications, the proper respondents are the Attorney General and those persons who are alleged to have infringed the petitioners' rights, and not persons who may be able to give relevant evidence. In fact, the Court was of the view that it would be improper to join persons who are no more than witnesses. The Court further pointed out that the Proclamation was relevant to the respondents for their defence of justification for the failure to hold elections, and, therefore, the burden was on them to provide evidence from the 'Defence establishment' in support of the need for the Proclamation.

While agreeing that in theory it is possible for the holding of elections to affect national security, the Court pointed out that the Inspector General of Police had not thought that these elections would compromise national security on 26 June, when he attended a meeting of all recognised political parties convened by the first respondent (the Commissioner of Elections) to discuss arrangements for the elections. In addition, the Commissioner had not in his affidavit in the present proceedings said he had any material suggesting any change had taken place thereafter.

The Court accordingly took the view that neither Article 35 nor the failure to join officers from the "Defence establishment" was a bar to considering the legality of the Proclamation. This

pronouncement is a significant advance as it was previously thought that the Proclamation of a state of emergency could not be questioned on any grounds.⁵

The Court proceeded, however, to hold that it was not necessary to make a finding on this issue in the instant case in view of its decision on the Regulation. It was reluctant to rule on the Proclamation as it felt there had not been sufficient argument on two other aspects. The first was whether Article 154J(2)⁶ (of the chapter of the Constitution relating to the establishment of Provincial Councils) ousted the jurisdiction of the Court. The second arose from Counsel's submission that he was not challenging the Proclamation in its entirety but only in regard to additional areas; this raised the further question of whether the Proclamation was severable.

2.3 The challenge to the Regulation

The Court held with the petitioners and struck down the impugned Regulation on the basis that it violated their constitutional guarantees to equality before the law and freedom of expression. The exercise of the franchise was, the Court held, an important instance of the freedom of expression. The following aspects of

⁵ *Yasapala v. Wickramasinghe and Others* FRD(1) pp 154-155.

⁶ This Article of the Constitution purports to oust the jurisdiction of the Courts to call in question a Proclamation or any direction made under Article 151(J)(1) of the Constitution by the President. Article 154(J)(1) basically empowers the President to issue a Proclamation, including under the Public Security Ordinance, in certain specified circumstances, and then to give directions to any Governor of a Province regarding the manner in which the executive power of the Governor is to be exercised.

the judgment are of relevance to the law relating to emergency rule under the PSO.

2.4 The "Section 8" objection

The State relied on Section 8 of the PSO which provides that "no emergency regulation.... shall be called in question in any court," as ousting jurisdiction to review the impugned regulation. The Court rejected this argument on the following reasoning:

If Section 8 of the PSO ousts the jurisdiction of the Court to review emergency regulations, then the constitutional limitations⁷ placed upon the power of emergency regulations prohibiting them from overriding, amending or suspending any provision of the Constitution would become nugatory. On the other hand, if Parliament sought to enact similar legislation, that would be subject to review of the Supreme Court under Article 121 of the Constitution. Therefore, if Section 8 of the PSO ousts the jurisdiction of the Court to review an emergency regulation, it would mean that what Parliament cannot do, can nevertheless be done in the exercise of delegated legislative power! The Court pointed out that Article 168(1) of the Constitution did not keep in force prior enactments where the Constitution had expressly provided otherwise, and that Article 126 of the Constitution⁸ is one such express provision. On this reasoning, the Court concluded that it had jurisdiction under Article 126 of the

⁷ Article 155(2) of the Constitution.

⁸ Article 126 provides *inter alia*, for the review of 'executive or action' in relation to fundamental rights provisions contained administrative in Chapter III of the Constitution.

Constitution (the provision under which this case was being heard) to pronounce upon the validity of the impugned regulation.

2.5 Was there a “regulation” at all?

The Court also considered the strange formulation of the “regulation” which is, after all, supposed to be a form of legislation. The Court explained that an emergency regulation must be a rule rather than an order or a decision. If it was considered necessary to suspend the notices which fixed the date for holding the elections, then there first should have been enacted a regulation, conferring power in general terms, on some authority to suspend the date fixed for the elections. Further, that regulation should not have been absolute and unfettered, but with relevant criteria laid out. This regulation would then have been subject to review at two stages: first, whether the regulation was *intra vires*, and second, whether the act of an official was a proper exercise of that power in keeping with the criteria or guidelines, and whether it was for valid reasons.

In the instant case, the impugned regulation did not purport to confer any power on an official (to suspend the notices fixing the date for elections); nor did it specify the criteria for the exercise of the power. It simply purported to suspend the date of elections without any stated reason. In the circumstances, the Court was of the view that the impugned regulation was invalid on the basis that it had the character of an executive order rather than a rule made in the exercise of delegated legislation.

2.6 “Arbitrary and unreasonable”

Furthermore, the Court held that even treating the impugned regulation as an order made under a valid regulation, the suspension of the notices issued for the holding of the election could be sustained only if this was for one of the purposes specified in the PSO. Section 5 of the PSO authorises the making of emergency regulations as appear to the President expedient “in the interests of public security and the preservation of public order and the suppression of mutiny, riot or civil commotion, or for the maintenance of supplies and services essential to the life of the community.”

The petitioners had established *prima facie* that from about the end of June to end of July 1998 there had been no known threat to national security, public order, etc. On the other hand, the respondents had failed to produce any material which suggested that there was such a threat in August 1998, the month in which the impugned regulation was made. In these circumstances, the Court concluded that the impugned regulation suspending the date fixed for holding of the provincial council elections was arbitrary and unreasonable.

2.7 Did the Commissioner act properly?

The Court appreciated that the making of the impugned regulation had placed the Commissioner of Elections in a difficult situation. However, the Court was of the opinion that the Constitution assures him independence⁹ so that he can fearlessly insist upon due compliance in regard to all aspects of elections, even to the extent of obtaining judicial orders for this purpose. But the

⁹ Article 103 of the Constitution.

material available to the Court indicated that he had made no effort to ascertain the legal position, or to have recourse to legal remedies.

This aspect of the judgment is significant for emphasising the need for public officers to scrutinise emergency regulations or orders made under them that affect the fundamental rights of the people, and not simply to implement them blindly.

3. The Red Cross Society Driver's Case

It will be recalled that in 1998, the government had, by emergency regulation, banned the Liberation Tigers of Tamil Eelam (LTTE). In the present case, the authorities sought to justify an arrest and detention by relying on this new regulation.

The petitioner was a driver employed by a branch office of the Sri Lanka Red Cross Society. He had been arrested under the Prevention of Terrorism Act¹⁰ (PTA) and detained under this Act by executive order. He had subsequently been remanded to fiscal custody by a Magistrate for an indefinite period (until the conclusion of the trial).

The Court held on the facts that the arrest as well as the executive detention purportedly made under the PTA was illegal. The Court made no finding in respect of the magisterial remand order on the basis that it had no jurisdiction to review a judicial act under Article 126 proceedings.¹¹

¹⁰ Prevention of Terrorism (Temporary Provisions) Act, No. 48 of 1979.

¹¹ Article 126 of the Constitution *inter alia* limits the jurisdiction of the Supreme Court to infringement or imminent infringement of fundamental rights by executive or administrative action.

State Counsel, however, attempted to justify the arrest and detention on an alternate ground, and cited the Emergency (Proscribing of Liberation Tigers of Tamil Eelam) Regulations No 1 of 1998, which makes it an offence to attend meetings and have contacts with the LTTE.

The Court pointed out that the regulation banning contact with the LTTE specifically safeguarded the right of any international organisation which had entered into an agreement with the government "to engage in any activity connected with the rendering of humanitarian assistance." In dismissing the argument of State Counsel the Court said:

Even if the activities of the Sri Lanka Red Cross Vavuniya District Branch did not strictly fall within this provision, yet it was engaged in humanitarian activities on behalf of the Government and people of Sri Lanka. The petitioner was just a small cog in that machine. He was entrusted with seemingly insignificant duties, which most people would find less than congenial, and which had to be performed amid anxiety, tension and hostility. The human resources available to the State to detect, investigate and prosecute crime are scarce, and they should have been devoted to that purpose rather than to the harassment of the petitioner.

The petitioner was granted Rs 200,000 as compensation and costs.

4. Health Services

An island-wide strike called by the Government Medical Officers Association (GMOA) started on 17 June 1999. The government promptly made orders under the emergency regulations declaring all work in connection with the health service as both an "essential

service" and a "specified service."¹² The provision in the emergency regulations for the declaration of essential services had been introduced into the Emergency (Miscellaneous Provisions and Powers) Regulations (EMPPR) in 1996, and stipulates harsh consequences for contravention, including vacation of office, the banning of organisations, and the forfeiture of property.¹³ On 2 July the GMOA accepted certain proposals made by the President, and the orders were rescinded.¹⁴

5. Censorship

In November a change was made to the regulations relating to censorship. The Emergency (Prohibition on Publication of Sensitive Military Information) Regulations No 1 of 1998, promulgated in June 1998, were changed by the substitution of a new regulation 2. The changes are indicated below, ADDITIONS BEING INDICATED IN CAPITALS and *deletions in italics*.

No editor or publisher of a newspaper or any person authorised by or under law to establish and operate a Broadcasting Station or a Television Station shall, *whether in or outside Sri Lanka* EXCEPT WITH THE PERMISSION OF THE COMPETENT AUTHORITY, print, publish, distribute or transmit whether by means of electronic devices or otherwise or cause to be printed, published, distributed or transmitted *whether by means of electronic devices or otherwise* any material (INCLUSIVE OF DOCUMENTS, PICTORIAL REPRESENTATIONS, PHOTOGRAPHS OR CINEMATOGRAPHIC FILMS)

¹² Order published in Gazettes Extraordinary 1084/27 of 17 June 1999 and 1085/5 of 21 June 1999.

¹³ *Sri Lanka: State of Human Rights 1997*, (Law & Society Trust, Colombo, 1997), pp 54 -56.

¹⁴ Gazette Extraordinary 1086/31 of 3 July 1999.

containing any matter *which pertains to* PERTAINING TO MILITARY operations IN THE NORTHERN AND EASTERN PROVINCE INCLUDING ANY OPERATION carried out or BEING CARRIED OUT or proposed to be carried out by the Armed Forces or by 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, MORAL (sic) or the performance of the Head or OF any member of *any of* the Armed Forces or the Police Force OR OF ANY PERSON AUTHORISED BY THE COMMANDER-IN-CHIEF OF THE ARMED FORCES FOR THE PURPOSE OF RENDERING ASSISTANCE IN THE PRESERVATION OF NATIONAL SECURITY.

The substantive changes are (a) censorship no longer purports to extend outside Sri Lanka; (b) what was earlier a blanket prohibition on publication is now changed to a prohibition on publication without the permission of the Competent Authority. This change reflects the anomalous practice which existed earlier, when material was submitted to the Competent Authority even though there was no provision for him to vet it;¹⁵ (c) as regards information relating to military operations at least, this is limited to such operations in the North and East (it is arguable that the limitation extends to the rest of the provision including that relating to the conduct of security personnel); (d) statements about the conduct of any person authorised by the Commander in Chief of the armed forces assisting in the preservation of national security are also subject to censorship; (e) forbidden topics include

¹⁵ *Sri Lanka: State of Human Rights 1995*, (Law & Society Trust, Colombo, 1996,) "Emergency Rule," sub-head *Oddities and Illogicalities in the Regulations on Censorship*.

the “moral” of the security forces (an obvious error for “morale”; the Sinhala and Tamil texts bear this out).

At the end of the year this regulation was under legal challenge by a human rights activist, Sunila Abeysekera.¹⁶

6. The National Security Council and the Joint Operations Headquarters

In May and June some emergency regulations were made and then changed. The background to these changes - going on their wording alone - appeared to be conflict or confusion as to the chain of command, and the control of and responsibility for security affairs. A National Security Council was created on 27 May,¹⁷ but on 9 June the regulation was rescinded by a new one which created a Joint Operations Headquarters.¹⁸

The first body was “*charged with the maintenance of national security with authority to direct security operations and matters incidental to it.*” It was headed by the President; its members included one or more Ministers appointed by the President, the Deputy Minister of Defence, the Secretary to the President, the Defence Secretary, the Commanders of the Army, Navy and Air Force, the Inspector General of Police and the Director General Internal Intelligence. Another member of the Council was the Chief of Defence Staff, Joint Operations (CDS), to be appointed by and responsible to the President. A crucial provision appears

¹⁶ S.C. Application 509/98, S.C. Minutes 27.01.99.

¹⁷ The Emergency (National Security Council) Regulations No 1 of 1999 published in Gazette Extraordinary No 1081/19 of 27 May 1999.

¹⁸ The Emergency (Joint Operations Headquarters) Regulations No 1 of 1999 published in Gazette Extraordinary No 1083/23 of 9 June 1999.

to be that the armed forces and such police officers as are engaged in anti-terrorist operations would be *under the command of the CDS and for this purpose the Commanders of the armed forces and the IGP would act under his command.*

The second body, the Joint Operations Headquarters, differed both in composition and function. In fact, the regulation did not assign it any specific function at all. In composition it excluded the non-security personnel (President, Minister/s, their Secretaries) and added a couple more Intelligence personnel. It created the post of General Officer Commanding - Joint Operations Headquarters, but his powers and functions were nowhere comparable to that of the CDS. He would preside over meetings of the Joint Operations Headquarters, implement directions of the President and Defence Minister, advise them on matters relating to national defence, etc., "when called upon to do so," advise on the preparedness of the forces to engage in anti-terrorist operations, and maintain a database regarding defence and military operations. Notably, the heads of the armed forces and the IGP were not placed under his command.

In both instances General R.de S. Daluwatte was appointed to the key position.

7. Advisory Council for the Northern and Eastern Provinces

In November, the Government made fairly elaborate provision for the creation of an *Advisory Council for the Northern and Eastern Provinces*.¹⁹ In a welcome departure, the regulations

¹⁹ The Advisory Council for the Northern and Eastern Provinces Regulations No 1 of 1999 published in Gazette Extraordinary 1104/9 of 2 November 1999.

contain a prefatory recital explaining the reason for this measure; human rights activists have long urged that an explanatory preamble should be provided in all emergency laws. The recital sets out the dissolution of the elected Provincial Council in 1987, and the subsequent postponement of election of a new Council.²⁰ The Advisory Council now created, it is explained, is to provide for the "due discharge of the executive and administrative functions by the appropriate authorities within the said Provinces." The regulations specifically provide that the Council will stand dissolved on the constitution of a Provincial Council or Councils for the Northern and Eastern Provinces.

The Council is to consist of eleven to seventeen members appointed by the President, and shall be constituted so as to give adequate representation to every administrative district in the Northern and Eastern Provinces. One or more members shall be assigned by the President to each of these administrative districts, and their duty is to bring to the attention of the Council, the Governor, and other appropriate authorities, the needs of the district, and to co-ordinate the executive and administrative functions of the administration. "It shall be lawful" for the Governor to consult the Council in the discharge of his functions under the Constitution and other laws; however, this is not mandatory.

The functions of the Council are to advise the Governor with regard to the restoration of civil administration and the maintenance of law and order; to make proposals for the development of the Provinces and to the areas to which priority should be given and the allocation of resources for development; to advise as to ways and means of raising revenue, and generally to liaise between the people and the Governor.

²⁰ This resulted in the continued existence of a Governor, but no Council.

The President shall, on the recommendation of the Council, appoint a Board of Management consisting of five members of the Council to assist the Governor. Each such member shall be assigned one of the following topics: (a) law and order, public administration and local government; (b) finance, industry, infrastructure development, transport and highways; (c) education, culture, youth affairs and sports; (d) environment, agriculture and lands, fisheries and co-operatives; and (e) health, housing, women's affairs, social services and rural development. The Council may add to these subjects.

The term of office of members is one year, unless a shorter time is specified in the letter of appointment. The term may be extended; there is also provision for the President to remove a member at any time.

Noteworthy features of this provision are that the functions of the Council will be advisory only in nature, that appointments are solely by the President with no criteria or guidelines provided and no provision for consultation, and that tenure of office is short and subject to termination at any time.

No appointments to the Council had been made by the end of 1999.

8. Curfew Orders

Curfew was imposed in Kurunegala and Puttalam on 25, 26, 27 January 1999 in connection with the Provincial Council elections of the North Western Province ("Wayamba"); in 12 administrative districts in April 1999 in connection with the elections to the Western, Central, North Central, Uva and Sabaragamuwa Provincial Councils; and in Galle, Matara and Hambantota in June 1999 in connection with the elections to the Southern

Provincial Council. Curfew was imposed again in the Colombo and Gampaha districts on 18 December 1999 following the suicide bomber attacks on the President at the election rally at the Colombo Town Hall and on the UNP rally earlier the same day at Ja-Ela. Finally, curfew was declared throughout the country as a precautionary measure after close of the poll at the Presidential election on 21 December and again on the evening of 22 December 1999.

9. Other Regulations and Orders

Other regulations promulgated during the year or orders made under them related to the following topics:

- ☐ The extension of terms of office of certain local authorities;²¹
- ☐ Vesting in specified Divisional Secretaries the power to administer the affairs of certain local authorities;
- ☐ The Appointment of Coordinating Officers under the EMPPR;²²
- ☐ The appointment of Civil Affairs Officers.²³

²¹ The Emergency (Extension of terms of Local Authorities) Regulations No 1 of 1999.

²² Appointment of Coordinating Officers under para 1 of regulation 9 of the EMPPR and appointment of Coordinators-in-Chief under para 1 of regulation 9, published in Gazette Extraordinary 1084/17 of 17 June 99. - Appointment of Coordinators-in-Chief under para 3 of regulation 9 of EMPPR published in Gazette Extraordinary 1108/21 of 2 December 99 - Appointment of Coordinating Officers under para 1 of regulation 9 of EMPPR published in Gazette Extraordinary 1108/21 of 2 December 99.

²³ The Emergency (Civil Affairs Officers) Regulations No 1 of 1999 published in Gazette Extraordinary 1108/22 of 2 December 99. This was, however, rescinded in January 2000.

10. Continuing Concerns/Conclusion

Although the Court in the Provincial Councils case did not find it necessary to decide on the issue, the tenor of the judgment suggested that subjecting the whole country to emergency rule could not be justified. It was clear that the extension of emergency rule to the whole country in 1998 was motivated by the desire to postpone Provincial Council elections; an attempt which the Supreme Court held invalid, directing that elections due to the five Councils be held within three months from 27 January 1999. Despite this, the government continued to keep Part II of the Public Security Ordinance in force throughout the country for the whole of 1999.

Longstanding concerns remained unaddressed. Difficulties in accessing and keeping track of emergency regulations and orders made thereunder continued. No review of emergency regulations was undertaken by the government; their wording frequently remained convoluted, and their content in many instances was arbitrary, unreasonable and oppressive.

IV

Judicial Protection of Human Rights

Sumudu Atapattu*

1. Introduction

This chapter discusses the jurisprudence of the Supreme Court¹ in relation to fundamental rights, surveying the important decisions delivered by the Court during 1999.

The jurisdiction of the Court derives from the Constitution itself, which provides in Articles 17 and 126 that the Supreme Court has the sole and exclusive jurisdiction in relation to fundamental rights. As the sole arbiter it has an important role to fulfil in society, particularly because it is the only court of adjudication for fundamental rights cases and also because it sets precedents on questions of law.

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¹ Hereinafter "the Court."

As in previous years, cases under Article 12 (concerning equality) greatly outnumbered cases under Articles 11 and 13 (concerning torture and arbitrary arrest and detention respectively). While the number of cases under the latter articles has decreased, concern remains that violations under these articles still continue. Torture is by no means a thing of the past. Furthermore, the number of such cases that eventually come before the Supreme Court represents only the tip of the iceberg; very many more probably do not even proceed to the police station for fear of repercussions. It is clear that the Supreme Court's judgments on these matters in the past have not had a great impact in reducing the incidence of torture; it is, therefore, necessary to foster a culture of human rights in society at large to minimise the number of such violations. Illegal arrests and detentions have also continued, although the number of such cases may have gone down.

2. Cases under Articles 11,² 13(1)³ and 13(2)⁴

Several cases involved assault at the hand of the police. It is ironical, and also a cause for grave concern, that those who are supposed to enforce the law do so in an unlawful manner. *W. Rupasinghe v. OIC Middeniya Police Station and three others*⁵ involved the merciless assault of the petitioner by the 1st respondent (the OIC of the Middeniya Police Station) and the 2nd respondent (Reserve Sub Inspector, Middeniya Police Station).

² This article deals with freedom from torture, cruel, inhuman or degrading treatment or punishment.

³ This article deals with freedom from arbitrary arrest and detention.

⁴ This article 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.

⁵ S.C. (Special) Application No 33/97, S.C. Minutes 28.1. 1999

The petitioner, a farmer, was believed to have been involved in several robberies and thefts in his area. The Court held that the petitioner's fundamental rights under Articles 11, 13(1) and 13(2) had been violated by the actions of the 1st and 2nd respondents and awarded compensation and costs.

*A.L. Dharmasiri v. H. Amerasinghe, OIC, Police Station, Middeniya and four others*⁶ laid down an important principle. In this case, the petitioner alleged that he was taken to the Middeniya police station for questioning and was beaten on the way to the police station as well as in the police station. When the case was pending (after leave to proceed had been given by the Court) the petitioner was shot dead. At the time of the death, the pleadings were closed and the case was ready for hearing and the respondents did not object to the case being proceeded with. The Court, therefore, held that in the particular circumstances of this case, with the death of the petitioner the application does not abate.

Since the medical evidence did not corroborate the petitioner's version of events that he was severely beaten, the Court held that there was no violation of Article 11. The Court, however, held that there was a violation of Articles 13(1) and (2) and awarded Rs 15,000/- as compensation out of which Rs 8,000/- was to be paid by the State and the balance to be paid by the 1st respondent personally. The Court also directed the Registrar of the Court to open two accounts at the National Savings Bank close to the petitioner's residence in the names of the petitioner's widow and child. The costs were to be paid to the Human Rights Centre of the Bar Association.

The case of *Abdul Razak and another v. M.A. Dharmadasa, Chief Inspector, Police Station Katugastota and four others*,⁷ involved

⁶ S.C. (Special) Application No 34/97, S.C. Minutes 28.1. 1999

⁷ S.C. Application No 877/96 (F/R), S.C. Minutes 23.2. 1999.

the arbitrary arrest and detention of the petitioners. The Court said that if the petitioners had committed an offence under section 332 of the Penal Code,⁸ then the conduct of the respondents should not be faulted for acting under the provisions of section 32(1)(b) of the Code of Criminal Procedure.⁹ Since, however, on the evidence it was not proved that the petitioners had committed an offence punishable under section 332, the Court held that their arrest and detention violated their fundamental rights under Articles 13(1) and (2). The Court further stated that having regard to the facts of the case, there was very little doubt that the 1st and 2nd respondents arrested and detained the petitioners at the instigation of the 3rd respondent (an Attorney-at-Law living in Kandy). Following its decision in *Faiz v. AG*,¹⁰ the Court held that a person who induced or instigated the unlawful arrest or detention of a person would himself be liable for the violation of that person's fundamental rights. The Court stated that it had no hesitation in awarding substantial compensation personally against the 3rd respondent. Since, however, the petitioners had specifically stated that no relief was claimed from him, no award was made against him.

The 1st and 2nd respondents were held liable and each respondent was ordered to pay a sum of Rs 15,000/- to each petitioner; a sum of Rs 2,500/- as costs to the petitioners to be paid within

⁸ Section 330 lays down the offence of wrongful restraint and section 332 lays down the punishment for same.

⁹ Section 32(1) empowers any peace officer to arrest any person without an order from a Magistrate and without a warrant in certain instances. Section 32(1)(b) provides that such arrest could be done with regard to any person who has been concerned in any cognizable offence or against whom (i) a reasonable complaint has been made or (ii) credible information has been received or (iii) a reasonable suspicion exists.

¹⁰ [1995] 1 SLR p. 372.

three months of the date of the judgment; and the State was ordered to pay a sum of Rs 50,000/- to the petitioners.

In *Duraisamy Padmanathan v. Sub-Inspector Paranagama, OIC, National Intelligence Bureau, Vavuniya and four others*,¹¹ the Court clarified the relationship between Article 13(2) of the Constitution and section 7(1) of the PTA.¹² In this case, the petitioner was a driver employed by the Vavuniya district branch of the Sri Lanka Red Cross Society. He had been questioned by the CID in relation to a possible connection with the LTTE. He was subsequently arrested by the 1st respondent (OIC, NIB, Vavuniya) in June 1998. He had been produced before a Magistrate only three days later who remanded him indefinitely. Six months later the Attorney-General informed the police that there was no evidence to institute proceedings against the petitioner. He was released only a fortnight later.

The Court had no difficulty in deciding that the 1st and 2nd respondents acted in violation of Article 13(1) of the Constitution by failing to inform the petitioner of any valid reasons for arrest; that they did not suspect that he was connected with any unlawful activity or offence under the PTA; therefore, his arrest was arbitrary and capricious.

¹¹ S.C. Application No 361/98, S.C. Minutes 4.3. 1999.

¹² Section 7(1) of the PTA reads as follows: "Any person arrested under subsection (1) of section 6 may be kept in custody for a period not exceeding 2 hours and shall unless a detention order under section 9 has been made in respect of such person, be produced before a Magistrate before the expiry of such period and the Magistrate shall, on an application made in writing in that behalf by a police officer not below the rank of superintendent make order that such person be remanded until the conclusion of the trial of such person: provided that, where the Attorney General consents to the release of such persons from custody before the conclusion of the trial, the Magistrate shall release such person from custody."

The Court then proceeded to examine the legality of the petitioner's detention. In accordance with Article 13(2), the petitioner should have been produced before a Magistrate in Vavuniya the very day of his detention. The respondents relied on section 7(1) of the PTA to justify the detention for three full days. The Court held that had the petitioner been detained in conformity with section 7(1), there would be no violation of Article 13(2). Thus, the question was whether the petitioner was detained in accordance with the provisions of section 7(1) of the PTA.

In this regard the Court stated that Article 13(2) applies to **every person arrested** (or held in custody) and not only to persons lawfully arrested or arrested in conformity with Article 13(1). Section 7(1) of the PTA applies only to those duly arrested under section 6(1) of the PTA which means that those purportedly arrested under that section or arrested contrary to that section cannot be included. The Court held that the petitioner had not been arrested under section 6(1) and, therefore, could not be held in custody under section 7(1). The respondents had, therefore, been obliged to comply with Article 13(2). The Court held that Article 13(2) had been infringed in two respects: non-production before the nearest Magistrate and detention for three days.

This case also raised an interesting issue about the legality of detention upon a magisterial remand order under the PTA. The Court had to decide whether making such a remand order was a judicial act or whether it was an administrative or executive act. The Court stated that the Magistrate had discretion over whether to remand the petitioner or not in two respects: (a) he had to consider whether the person in question was connected with any unlawful activity or offence under the PTA; and (b) he could remand a person only until the conclusion of the trial. Thus, if a trial was not in contemplation, the Magistrate had no power to order remand. A remand order in such a situation would amount to indefinite

detention. Article 13(3) provides that detention pending trial is not punishment. It, therefore, follows that detention when no trial is contemplated would amount to punishment without trial and conviction. Here, too, the Magistrate had a discretion: if at any time the material on record suggested that a trial was not in contemplation, he had the power and, indeed, the duty to review the order. The Court held that as the Magistrate could exercise discretion in these respects, the detention was a judicial act and could not be considered executive or administrative action.

With regard to the case under discussion, the Court noted that from a very early stage it was clear that there would not be any trial and that the police were aware of this. An act includes an omission and, likewise, executive or administrative action includes an omission to act, at least where there is a duty to act. The Court said that when it had become clear that no trial was possible, the police should have notified the Magistrate of this event. The Court held that the petitioner's fundamental rights under Articles 13(1) and (2) had been violated.

*Mahanama Tilakaratne v. Bandula Wickremasinghe, Senior Superintendent of Police, Police Headquarters and five others*¹³ raised several issues with regard to criminal procedure and, as the Court itself pointed out, was wrought with "several unusual and strange features." Not only did the case involve a high judicial officer, but it also involved the Attorney General **in his personal capacity**. In this case, the petitioner was a sitting High Court Judge of Colombo. He had been arrested by the 1st respondent over an alleged assault involving the petitioner's son and which the petitioner himself was alleged to have instigated. One of the allegations against the Attorney General was that by his inaction he facilitated the unlawful arrest. It was alleged that the 2nd and

¹³ S.C. Application No 595/98, S.C. Minutes 21.7.1999

3rd respondents had acted in concert and collusion with the 1st respondent in taking the petitioner into custody.

The facts of the case are as follows: on 11th June 1998, the OIC of the Kahathuduwa police station had filed a report at the Kesbewa Magistrate's Court, about an investigation upon a complaint made by a particular person involving the petitioner. The complainant is alleged to have been assaulted by the petitioner's son and a domestic aid of their household and another. A few shots were also alleged to have been fired from the direction of the petitioner's house. A second report had been filed by Sub Inspector Rodrigo of the CID making the petitioner the first suspect of the alleged incidents of causing grievous hurt to the complainant. This report further stated that on the advice obtained from the Attorney General, SI Rodrigo was moving the court to issue a search warrant to search the petitioner's residence and to issue a warrant to arrest the suspects (which included the petitioner).

In order to effect the arrest, a magisterial warrant was necessary. Although a warrant was issued, the Magistrate was apparently troubled by the unusual circumstances of this case and ordered that the petitioner and others involved in the Kesbewa court case No BR 653/98 (the case dealing with the alleged assault referred to above in which the prime "suspect" was alleged to be the petitioner) be produced before him without delay.

Delivering the judgment of the Court, Justice Dheeraratne said that although the manner in which warrants had been issued for the arrest of the petitioner and others had not been raised, it was his duty to express his view on the matter so as to prevent any abuse of process in the future. The Court pointed out that issuing a warrant is a judicial act involving the liberty of an individual and such warrants should not be issued lightly simply because the investigator thinks it necessary:

It must be issued as the law requires, when a Magistrate is satisfied that he should do so, on the evidence taken before him on oath. It must not be issued by a Magistrate to satisfy the sardonic pleasure of an opinionated investigator or a prosecutor.

He further stated that recording of evidence is a prerequisite to issuing a warrant for arrest of a suspect, unless that warrant is issued for the failure to obey summons. He pointed out that there was no evidence to indicate that the 1st respondent had given his independent mind to bear on the arrest of the petitioner. He had simply executed the orders given by his superior, the 3rd respondent. Justice Dheeraratne was of the view that the 1st and 3rd respondents had stated falsely that they obtained the permission of the 4th respondent (the Attorney General) to arrest the petitioner; the latter seems to have been informed of the arrest only after the event.

The Court held that the arrest of the petitioner had not been in accordance with the law and that he had been unnecessarily and unreasonably detained at the CID office. Therefore, the petitioner's fundamental rights under Articles 13(1) and (2) had been violated by the 1st and 3rd respondents; however, there was no complicity of the 4th and 2nd respondents in the illegal arrest.

In *Dhammika D. Yapa, Attorney-at-Law appearing on behalf of Karuppiah Vappu Balan v. C.I. Kumarasinghe, CID, Police Headquarters and four others*¹⁴ the Court reiterated the principle that there must be reasonable grounds for suspecting that the detainee was "connected with or concerned in or reasonably suspected of being connected with or concerned in any unlawful activity." Justice Ismail, delivering the judgment of the Court,

¹⁴ S.C. Application No 284/98 (F/R), S.C. Minutes 31.8.1999

pointed out that “where the power to arrest without a warrant is couched in very wide terms in section 6(1) of the PTA, it is well settled that the validity of the arrest is determined by applying an objective test.” He pointed, however, that it is not the duty of the Court to decide whether or not the arrest should have been made. The question that must be determined by the Court is whether there was material for a reasonable officer to effect the arrest.¹⁵ Holding that the petitioner’s fundamental rights under Articles 13(1) and (2) had been violated the Court stated that:

In dealing (sic) whether the arrest was in accordance with “procedure established by law” the matter in (sic) issue is not what subsequent investigations may have revealed, but whether at the time of the arrest, the person arrested was concerned in or had committed an offence. A fervent hope that something might eventually turn up to provide a reasonable ground for arrest will not suffice.

*N. V. Wijenayake and two others v. P.G.A. Amarasena, Sub-Inspector of Police, Matara and ten others*¹⁶ involved the alleged assault of the 2nd petitioner (J.C.S. Wijenayake, the wife of the 1st petitioner) by the 1st respondent, 2nd respondent (a female constable) and two others in civvies when they came to search the premises of the guest house run by the first and second petitioners. The 2nd petitioner has been brutally assaulted, kicked and dragged out. She had been whipped with the leather belt by the 2nd respondent while being dragged to the police jeep. When the 1st respondent had tried to inform the Weligama police station of this incident, he had been assaulted by two persons in civvies

¹⁵ Cases relied on by the Court are: *Dissanayake v. Superintendent, Mahara Prison and others*, (1991) 2 SLR 247 at 256, *Elasinghe v. Wijewickrama and others*, (1993) 1 SRL p 163 at p 168 and *Channa Pieris* (1994) 1 SLR p 1.

¹⁶ S.C. Application No 290/98 (F/R), S.C. Minutes 29.11.1999

who had later turned out to be policemen. The petitioners were taken to the Matara police station and in the course of this journey they were subjected to assault and abuse at the hands of the 1st, 2nd and 5th respondents (a police constable attached to the Matara police station). The injuries received by the petitioners are corroborated by the medical reports.

The alleged assault took place following an illegal search of the petitioners' guest house on a previous occasion at which the petitioners had complained of a lack of a search warrant. The respondents' version was that they had heard that this particular guest house was a house of ill fame and produced various notes and documents to support their version of events. The Court, however, was totally unconvinced. It stated that "on a perusal of these notes, I am, though reluctantly compelled, to make the observation that the contents of these notes are most unconvincing, artificial, and if I may say so, self-serving."

The Court held that the petitioners' fundamental rights guaranteed under Article 11, 13(1) and 13(2) were violated and awarded compensation and costs to the petitioners amounting to Rs 175000/-.

3. Cases under Article 12¹⁷

As in the previous years, the cases under Article 12 dealt mainly with administrative matters. One case, however, stands out for its landmark decision and involved the alleged violation of Articles 12(1) and 14(1)(a).¹⁸ Given the importance of the judgment, it will be discussed in considerable detail.

3.1 The Provincial Councils case

In *Karunathilaka and Deshapriya v. Dissanayake, Commissioner of Elections and thirteen others*,¹⁹ the petitioners (two voters) challenged the legality of the postponement of elections to five Provincial Councils under emergency regulations. The petitioners alleged that the failure of the 1st respondent (the Commissioner of Elections) and the 2nd to 13th respondents (the returning officers of the twelve districts) to hold elections to the five Provincial Councils (the Central, Uva, North-Central, Western and Sabaragamuwa) was a violation of their fundamental rights under Articles 12(1) on equality and 14(1)(a) on freedom of expression.

¹⁷ 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 against 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.

¹⁸ This article deals with the freedom of expression and media freedom.

¹⁹ S.C. Application No 509/98, S.C. Minutes 27.1.1999. See also *LST Review* Vol. 9, Issue 136 (Law & Society Trust, Colombo, February 1999) and the chapter in this volume on Emergency Rule.

3.1 (a) Background to the case

Notices in respect of all districts were published on 15th July 1988, fixing 28th August 1998 as the date of the poll. Preparations were already underway for postal voting, but the returning officers, by telegram dated 3rd August 1998, suspended the postal voting that was fixed for 4th August without giving any reasons.

The Court reprimanded the 1st to 13th respondents for not having explained either to the Court or to the public why the postal voting had been suspended. In a very strong and harsh judgment Justice Fernando delivering the judgment of the Court stated:

Article 103 of the Constitution guarantees to the Commissioner of Elections a high degree of independence in order to ensure that he may duly exercise – efficiently, impartially and without interference – the important functions entrusted to him by Article 104 in regard to the conduct of elections, including Provincial Council elections. But the constitutional guarantee of independence does not authorize arbitrariness. That guarantee is essential for the Rule of Law, and one corollary of independence is accountability. Accordingly, the Commissioner could not withhold the reasons for his conduct – just as the constitutional guarantee of independence of the Judiciary does not dispense with the need to give reasons for judgments.

The very next day, on 4th August, a presidential proclamation was issued under section 2 of the Public Security Ordinance (PSO) bringing the provisions of the PSO into operation throughout Sri Lanka. The President also made the Regulation that for so long as the PSO remained in operation, the notice published in the Gazette relating to the date of poll “shall be deemed, for all purposes, to be of no effect.” The Regulation had, in effect, indefinitely postponed the elections.

Although speedy elections were a matter of great public importance, the 1st respondent did not fix another date for the elections.

3.1 (b) The contentions of the petitioners

The main contentions of the petitioners were as follows:

- ☐ The Proclamation was an unwarranted and unlawful exercise of discretion contrary to the Constitution and was done solely to postpone the elections;
- ☐ The Proclamation and the regulation were an unlawful interference with the functions of the Commissioner of Elections and compromised his independent status;
- ☐ The Regulation was contrary to Article 155(2) of the Constitution because it had the effect of overriding the provisions of the Constitution relating to the continued existence of Provincial Councils, the franchise and Articles 12(1) and 14(1)(a);
- ☐ The conduct of the 1st to 13th respondents was unreasonable and arbitrary and in violation of Articles 12(1) and 14(1)(a).

With regard to section 22(6) of the Provincial Councils Elections Act of 1988, which provides that if elections cannot be held as a result of "any emergency or unforeseen circumstances," the Commissioner has the power to appoint another day, the Court held that all emergency or unforeseen events are included whether such circumstances were the consequences or natural causes or of human conduct or whether it was due to a lawful act or an unlawful act. Moreover, "any emergency or unforeseen circumstances" must be given the widest construction which is

reasonably possible “so as to enable an election to be held, and not a construction which would result in its indefinite postponement or cancellation.”

In the meantime, the term of office of the North-Western Provincial Council came to an end and the date of poll was fixed for 25th January 1999. This meant that even though this Provincial Council was dissolved nearly six months **after** the elections to the other five Provincial Councils had been fixed, elections to the North-Western Provincial Council would take place first, while a new date for the elections to the other five councils had not even been fixed. Thus, citizens in those five provinces were being less favourably treated than those of the North-Western Province with regard to their right to vote.

With regard to the suspension of postal ballot papers even before the regulation in question was made, the Court said that it had been unlawful, arbitrary and not bona fide: “The irresistible inference is that the Respondents had fore knowledge of the impending Proclamation and Regulation.” The suspension virtually ensured that the poll would not take place on 28th August. The respondents were, therefore, indirectly and partially responsible for the failure to hold elections on that day.

3.1 (c) The alleged violation of Article 14(1)(a)

It was contended on behalf of the petitioners that the right to vote is a form of “speech and expression” embodied in Article 14(1)(a). The Solicitor General argued, however, that there is a clear distinction between franchise and fundamental rights and the franchise in Sri Lanka cannot be considered as a fundamental right, unlike in the American Constitution which expressly provides for this.

Rejecting this argument, Justice Fernando stated that Article 14(1)(a) guarantees **all** forms of speech and expression:

Concepts such as “equality before the law,” “the equal protection of the law,” and “freedom of speech and expression, including publication,” occurring in a statement of Constitutionally entrenched fundamental rights, have to be broadly interpreted in the light of fundamental principles of democracy and the Rule of Law which is the bedrock of the Constitution.

Moreover, he was of the opinion that speech and expression can take many forms other than the verbal:

The silent and secret expression of a citizen's preference as between one candidate and another by casting his vote is no less an exercise of the freedom of speech and expression, than the most eloquent speech from a political platform. To hold otherwise is to undermine the very foundations of the Constitution.

The Court held that the 1st respondent's conduct resulted in “a grossly unjustified delay” in the exercise by the petitioners of the right to vote, in violation of Article 14(1)(a).

3.1 (d) The alleged violation of Article 12(1)

With regard to the alleged violation of Article 12(1), two distinct issues were involved: (a) the validity of the Regulation and whether the 1st respondent acted properly; (b) whether the 1st respondent's conduct, in permitting the suspension of postal voting and failing to fix a new date, was a violation of Article 12(1). The Court held that the suspension of the issue of postal voting had been arbitrary and not bona fide and done with the knowledge that the Proclamation and Regulation would be made the next day. After the impugned regulation had been made, the

1st respondent did not exercise his power to act under section 22(6) of the Act, to fix a new date for the polls. The failure on the part of the 1st respondent to discharge his duties under the Constitution and the Act resulted in a violation of Article 12(1), as the voters in the five provinces had been less favourably treated than the voters in the North-Western Province.

Moreover, the Court pointed out that the conduct in question was not justified by any legal provision falling within the ambit of the restrictions provided in Article 15 of the Constitution. As the 1st respondent's act had not been authorised by any "law," the restrictions contained in Article 15(2) were inapplicable, and because it had not been authorised by any emergency regulation, the restrictions in Article 15(7) were inapplicable.

3.1 (e) The validity of the Proclamation and the Regulation and the immunity of the President

It was contended on behalf of the petitioners that the Proclamation in question as well as the Regulation were *ultra vires* the Constitution and the PSO since the sole purpose of the Proclamation was to postpone the elections.

Since the Proclamation and the Regulation amount to executive action, the Court would normally have jurisdiction under Article 126 of the Constitution; the question, however, was whether, as contended on behalf of the respondents, jurisdiction was ousted as a result of Article 35 – which deals with the immunity of the President – or the failure to join the necessary parties.

Justice Fernando pointed out in this regard that "the immunity conferred by Article 35 is neither absolute nor perpetual" and drew an important distinction between the immunity of the person and the immunity of their actions, stressing that "immunity is a

shield for the doer, not for the act.” On the issue of the plea that officers from the defence establishment were not joined as parties to the case, the Court pointed out that in fundamental rights cases, the proper respondent is the person who is alleged to have infringed the petitioner’s rights, not persons who may be able to give relevant evidence. The joining of officers from the defence establishment was thus not necessary.

Furthermore, the Court pointed out that the Regulation was not a valid exercise of power under section 5 of the PSO as it had the character of an **order**, purporting to suspend notices lawfully issued under the Act. Moreover, the suspension of the notices by the Regulation was arbitrary and unreasonable, and resulted in the violation of petitioners’ fundamental rights under Articles 12(1) and 14(1)(a). The Court did not, however, pronounce on the validity of the Proclamation.

3.1 (f) Relief

By way of relief, the Court granted a declaration that the petitioners’ fundamental rights under the aforesaid articles had been infringed, and directed the 1st respondent to take immediate action to fix, within two weeks from the date of the judgment, a new date for the election. The 1st respondent complied fully with the Court’s directive.

3.2 Other cases under Article 12

In *Anura Bandaranaike v. Inspector General of Police and four others*,²⁰ the Court said that “the liberty of one citizen is no less and no more important than [sic] of any other.” This case involved the searching of the petitioner’s premises for the prime suspect

²⁰ S.C. Application No 239/97, S.C. Minutes 19.2. 1999.

in Nalanda Ellawala's murder. Nalanda Ellawala, a young politician from the ruling PA party from the Ratnapura district was allegedly shot dead by an MP of the opposition party, UNP, Mr Susantha Punchinilame. It was alleged that the petitioner was harbouring Mr Punchinilame – hence the search of the petitioner's premises.

The search was carried out in the early hours of the morning by two men in civilian clothes. The contention of the respondent was that he was informed by a reliable informant that the suspect was seen entering the petitioner's house through the rear entrance and that the petitioner was harbouring him. The Court said that:

When it comes to a question of violation of fundamental rights, it would be highly dangerous from the view-point of the liberty of the citizen, for us to permit officials to conveniently hedge behind section 125 of the Evidence Ordinance²¹ and proclaim that they had "reason to believe" that matters on material particulars provided by persons whose identity cannot be disclosed, must be taken as true.

The Court further pointed out that the burden is on the respondents to prove the legality of the search and held that the 1st to the 3rd respondents had violated the petitioner's fundamental rights guaranteed under Article 12(1).

In the *Videshiya Chitrapata Anayanaya Karannange Sangamaya v. The National Film Corporation of Sri Lanka and five others*²² the Court reiterated the principle that any public body vested with some power must exercise that power for the benefit of the public.

²¹ According to this section, no Magistrate or police officer shall be compelled to divulge the source of information with regard to the commission of an offence.

²² S.C. Application No 991/97, S.C. Minutes 24.2.1999.

The Court said that the monopolistic power of the 1st respondent (the National Film Corporation) over the importation, distribution and exhibition of foreign films, is held in trust and must be exercised for the benefit of the public. The Court held that the 1st respondent had violated that trust. Prospective importers and suppliers of films were told by the Corporation that only brand new prints could be imported, and this requirement was incorporated into the statutory and contractual documents pertaining to importation and distribution. Prospective importers and suppliers were entitled to expect that this declared policy would be adhered to by the 1st respondent, and that it would not be relaxed secretly in favour of a few. This principle is expressed in various idioms: "ensuring a level playing field;" "rules of the game must be observed;" and "no shifting of the goalposts". The Court referred to a long series of cases in which the need to ensure conformity with duly declared policy and criteria had been emphasised.²³

Holding that the 1st respondent had violated the petitioner's fundamental rights under Article 12(1), the Court stated that the members of the petitioner association were entitled to vindicate their rights under Article 12(1) through the petitioner. The Court further directed the 1st respondent, within six months from the date of the judgment, to define and publish its criteria for the importation, supply and distribution of films after giving registered suppliers, cinema owners and **members of the public** an opportunity to make written representations. It also directed that this procedure should be followed whenever such criteria are amended.

²³ These cases include *Wijesuriya v. Lal Ranjith* (1994) 3 Sri LR 276 – in public employment in relation to recruitment; *Piyasena v. People's Bank* (1994) 2 Sri LR 65; *Samarasinghe v. Air Lanka* (1996) 1 Sri LR 259, in relation to promotion; *Bandara v. Ratwatte* S.C. 128/96, S.C. Minutes 26.9.97 and 21.5. 1998 in relation to transfers; *Amirtharajah v. CGIR* SC 64/95 S.C.Minutes 20.9.1996 in relation to retirement, etc.

*Dr Abaya Aryasinghe v. The Returning Officer, Mawanella Pradeshiya Sabha and two others*²⁴ involved the rejection of the petitioner's nomination papers by the 1st respondent for the local government elections, thereby violating the petitioner's right to stand for election. The Returning Officer is required to ensure that the person handing over the nomination papers is the person properly authorised to do so. The Court held that the 1st respondent had not followed the proper procedure in this case. The Court held that the petitioner had in fact handed over the nomination papers to the 1st respondent, who should have accepted them, in terms of the rules, and allowed the petitioner's party (The Sinhalaye Mahasammatha Bhoomiputra Pakshaya) to contest the elections. The petitioner's fundamental right to contest elections under Article 12(1) had thus been violated.

In *Dr (Mrs) Lilani Weerasekera v. Director-General, Health Services and seven others*,²⁵ the petitioner argued that she had not been afforded equal treatment when she applied for the post of consultant rheumatologist of the Colombo South Teaching Hospital, Kalubowila. Although the petitioner had received the highest number of points, the 7th respondent (one Dr L.S. Wijayaratne) was appointed instead on the ground that the petitioner had not obtained Board Certification²⁶ by the closing date for the applications and was, therefore, ineligible to apply for the post.

²⁴ S.C. Application No 218/97 (F/R), S.C. Minutes 23.3.1999

²⁵ S.C. Application No 816/97 (F/R), S.C. Minutes 26.4.1999

²⁶ This involves the passing of the relevant postgraduate degree and completing a period of foreign and/or local training. See *Dr. Y. de Silva v. Professor W.D. Lakshman and 17 others*, S.C. Application No 648/96, discussed in *Sri Lanka State of Human Rights 1999* (Law & Society Trust, Colombo, 1999), p 80.

The Court stated that “eligibility” lay at the heart of the matter. Citing the SmithKline Beecham case,²⁷ counsel for the respondents stated that eligibility must be determined by reference to the closing date. The Court, however, stated that the present case was on an entirely different footing to the SmithKline case. The SmithKline case had involved an unknown or untested product and registration of the product was an expressly stipulated condition of the bid. In the present case, however, although Board Certification was a requirement for the post of consultant, in practice this requirement had not always been strictly adhered to. The Court held that the Consultants’ Transfer Board misled itself in supposing that the petitioner did not have Board Certification at all, when in fact she had received it on a subsequent date. In the circumstances, the Court held that the petitioner had not been afforded equal treatment and, therefore, her rights under Article 12(1) had been violated. The Court further declared that the appointment of the 7th respondent to the said post was null and void.

In *K.D.D.H. Dayarathna and 16 others v. The Honourable Minister of Health and Indigenous Medicine and three others*,²⁸ the Court reiterated, yet again, that:

It is both a Constitutional requirement and a cardinal principle of good public administration that all persons in a similar position should be treated similarly... . There must be certainty and predictability if the rule of law is to prevail which Article 12 of the Constitution, among other things, intended to safeguard. Article 12 of the Constitution requires substantive as well as formal equality: laws, regulations and executive or

²⁷ S.C. Application, 89/97, discussed in *Sri Lanka : State of Human Rights 1999* (Law & Society Trust, Colombo 1999) p 94.

²⁸ S.C. Application Nos 513-528/98, S.C. Minutes 04.05.1999.

administrative rules, procedures and schemes must not discriminate between individuals on invidious or irrational grounds; and officials are required to apply those laws, rules, procedures and schemes consistently and even-handedly unless a deviation can be objectively and reasonably justified on the grounds that a legitimate end is being pursued and that the means to achieve that end are proportionate.

Several important principles are embodied in this:

- ☐ All persons in a similar position should be treated similarly;
- ☐ Certainty and predictability are necessary for rule of law to prevail;
- ☐ Article 12 requires substantive as well as procedural equality;
- ☐ Officials are required to apply rules, regulations and schemes consistently;
- ☐ A deviation from such rules and regulations is justified only to achieve a legitimate end;
- ☐ Measures taken to pursue that end must be proportionate.

The petitioners in this case – those who had applied for a course leading to the qualification of Assistant Medical Practitioner pursuant to a gazette notification – contended that their legitimate expectations had been disappointed. The facts leading up to this case are as follows. The Secretary, Ministry of Health and Indigenous Medicine issued a Gazette notification calling for applications from citizens of Sri Lanka to follow the course of training leading to the award of the certificate of competency as Assistant Medical Officers. Instead of proceeding with the advertised course of training, the applicants who had successfully completed the qualifying examination were, by circular dated 20th August 1998, invited to apply for training as Pharmacists, Medical

Laboratory Technologists and Public Health Inspectors. There are significant distinctions between these categories on the one hand, and Assistant Medical Officers, on the other, as the latter can be registered as medical doctors after the successful completion of a stipulated period of service. The petitioners contended that the conduct of the 2nd and 3rd respondents denying the petitioners the chance to follow the course that they applied for and were qualified to follow was manifestly unreasonable and unfair. They also contended that they were discriminated against, vis-à-vis earlier applicants for the same course.

The Court had to consider whether there was a legitimate expectation that was worthy of protection – one that has consequences to which effect will be given in public law. The Court pointed out that while the executive ought not, in the exercise of its discretion, be restricted so as to hamper the change of policy, it is not entirely free to overlook the existence of a legitimate expectation. While each case must depend on the circumstances, eventually the Court's "delicate and sensitive task" is to weigh genuine public interest against private interests and to decide on the legitimacy of expectation taking into account the weight it carried in relation to the need to change policy.

The Court in this case referred to the reluctance of some courts to accord legitimate expectations substantive protection on the ground that it may amount to interference with administrative decisions on the merits. The Court also pointed out the danger wherein the Court may indirectly substitute its judgment on the merits for that of the administrative agency: "This is however a general problem with the review of administrative discretion which is not rendered more or less difficult by the fact that the origin of the applicant's standing is the concept of legitimate expectations."

The Court held that no opportunity had been given to the petitioners to argue why the change of policy should not affect them. The change of policy had been made without their knowledge. The Court stressed that "when a change of policy is likely to frustrate the legitimate expectations of individuals, they must be given an opportunity of stating why the change of policy should not affect them unfavourably." The Court pointed out that such procedural rights have an important bearing on the protection afforded by Article 12 against unequal treatment.

In addition to the above procedural right, there is a substantive requirement that there must be an overriding public interest if a change of policy were to negate an individual's prior expectation. No such interest had been claimed by the respondent in this case. It was held by the Court that, while the policy change would affect the future, the legitimate expectations of the petitioner with regard to the scheme of training described in the Gazette notification survived the policy change that had taken place. The Court declared that the fundamental rights of the petitioners under Article 12(1) had been violated.

In *Dr (Mrs) K.H.T.R.L. de Silva v. Dr J.B. Peiris, Director, Postgraduate Institute of Medicine and thirty three others*,²⁹ the petitioner's claim that she had been unfairly treated by the Postgraduate Institute of Medicine (PGIM) was dismissed. The petitioner, a qualified dental surgeon, had unsuccessfully sat the MS (Dental Surgery) Part I examination conducted by the PGIM. The petitioner, who joined her husband in England, successfully completed the primary fellowship examination conducted by the Royal College of Surgeons. Upon her return to Sri Lanka she requested an exemption from MS Part I examination as she had successfully completed the primary fellowship examination.

²⁹ S.C. Application No 219/98 (F/R), S.C. Minutes 22.7.1999.

At issue was whether the PGIM could have exempted the petitioner from Part I of a particular course, as she had passed a similar examination conducted by the Royal College of Surgeons in England. The petitioner argued that in two previous cases such exemption had been granted, and challenged the PGIM's decision not to grant exemption to her. Justice Amerasinghe stated in this case that:

Although academic institutions like the PGIM ought, in my view, to have a wide discretion in making the sensitive judgments as to who should be admitted to courses of study or upon whom an academical rank may be conferred as a mark of proficiency in scholarship, yet constitutional limitations protecting individual rights may not be disregarded.

The Court held that the Board of Study in Dentistry of the PGIM is bound to follow the existing rules and regulations. Citing the case of *Jayawickreme v. Lakshman and others*,³⁰ the Court reiterated that regulations can only be amended expressly; they cannot be amended through past practice which deviates from the regulations. The Court dismissed the petitioner's claim that she should have been granted an exemption because such exemptions had been granted twice previously; it reiterated the principle that previous wrongful acts cannot be invoked to justify yet another wrong:

Previous wrongful acts DO NOT entitle a citizen to complain that he or she has been deprived of the equal protection of the law because the authority concerned refrains from acting illegally or unlawfully in dealing with such person; being a proposition that commends itself to general acceptance, it is a well-established and universally conceded principle that the

³⁰ S.C. Application No 648/96, S.C. Minutes 25.9.1998.

constitutional right to equal treatment is based on conduct, behaviour or action that is not only even-handed, but also legal, legitimate and lawful. That is settled law.

It is interesting to compare this decision with the decision in Dr Lilani Weerasekera's case, discussed above. In the latter case, past practice which deviated from the stipulated conditions in relation to Board Certification was referred to and upheld, whereas in Dr de Silva's case, past practice which deviated from the regulations was considered as illegal. There seems to be a contradiction here with regard to the principle applied, although in Weerasekera's case, Board Certification had actually been obtained at a subsequent date.

*T.D.R.. Deshapriya v. M.P.E. Rukmani, Divisional Secretary, Divisional Secretariat, Dodangoda and three others*³¹ involved the suspension of the petitioner as a Samurdhi Niyamaka.³² He alleged the violation of Articles 12(1), (2) and 14(1)(g).

Justice Fernando in delivering the judgment of the Court stated that not only had no reasons been given for the suspension of the petitioner's services, but the circumstances showed that the suspension had been arbitrary and capricious.

With regard to the 2nd and 3rd respondents (The Commissioner General of Samurdhi and Mr Anil Moonasinghe, the Deputy Speaker respectively), the Court pointed out that they knew the suspension was for a wholly bad reason and that it was both unlawful and a gross abuse of power. The 1st respondent (the Divisional Secretary) had acted upon the direction of the 2nd respondent, and although that did not absolve her from personal

³¹ S.C. Application No 118/97, S.C. Minutes 29.9.1999.

³² Samurdhi Niyamakas are those appointed by the government to implement its poverty alleviation programme, Samurdhi.

responsibility, the evidence did not suggest that she knew the real reason for the suspension. It was the 3rd respondent who was primarily responsible for the suspension. Referring to the Court's decision in *Faiz v. Attorney-General*,³³ the Court decided that was sufficient to make him liable in these proceedings. The Court held that the petitioner's fundamental right under Article 12(1) had been violated by the 1st, 2nd and 3rd respondents and that his fundamental right under Article 12(2) had been violated by the 2nd and 3rd respondents and declared that the suspension of the petitioner's services was null and void.

With regard to the possible violation of Article 12(2), the Court pointed out that the 2nd and 3rd respondents knew that the suspension was unlawful because it was motivated by political considerations: the petitioner had declined to support the candidates of the 3rd respondent's choice and supported a rival political party. Thus, the Court held that the petitioner's fundamental right under Article 12(2) had been violated.

Furthermore, the Court pointed out that there were aggravating circumstances: 300 Samurdhi Niyamakass, who were paid out of public funds to render services to the public, had been diverted to serve partisan political purposes. The Court raised the question as to whether those who are paid out of public funds can be used to advance the interests of one political party alone:

If public funds are paid to one political party while being denied to others, beyond doubt that would be both a denial of equal treatment and discrimination on the ground of political opinion... . I hold that the use of the resources of the State – including human resources – for the benefit of one political party or group, constitutes unequal treatment and political

³³ *Supra* n. 10.

discrimination because thereby an advantage is conferred on one political party or group which is denied to its rivals.

Justice Fernando also pointed out that it is immaterial whether the funds were given to the political party directly or indirectly. Pointing out that the dispute at issue arose in the context of a Pradeshia Sabha election, and although Articles 4(e) and 93³⁴ of the Constitution are not applicable, he stressed that "in a democracy elections must always be free, fair and equal, and Articles 12(1) and (2) give constitutional force to those requirements of fairness, equality and non-discrimination."

In addition, he pointed out that:

Democracy without dissent is a delusion. Democracy can never prohibit lawful dissent. Indeed, a fundamental characteristic of true democracy is that it not only protects dissent, and tolerates it, but genuinely cherishes dissent – recognising that it is only through a peaceful contest among competing opinions that the ordinary citizen will perceive the truth.

With regard to the alleged violation of Article 14(1)(g), the Court pointed out that while the petitioner's lawful occupation was affected by the suspension of his services, this was entirely the consequence of acts resulting from the violation of Article 12. It was, therefore, unnecessary to consider whether the suspension was a violation of Article 14(1)(g) as well.

³⁴ These articles reads as follows: Article 4(e) The franchise shall be exercisable at the election of the President of the Republic and of the Members of Parliament, and at every Referendum by every citizen who has attained the age of eighteen years, and who, being qualified to be an elector as hereinafter provided, has his name entered in the register of electors. Article 93- The voting for the election of the President of the Republic and of the Members of Parliament and at any Referendum shall be free, equal and by a secret ballot.

In *P. W. de Silva v. The University Grants Commission and fifteen others*³⁵ Justice Ismail in delivering the judgment of the Court reprimanded the action of the 2nd, 8th and 11th respondents (Professor S. Tilakaratne, Chairman, UGC, Mr M.A. Munidasa, Acting Secretary, UGC, and Mr C. Abyegunawardene, Additional Secretary, Ministry of Education and Higher Education respectively):

It is a matter of deep concern and regret that the 2nd, 8th and 11th respondents though entrusted with the planning, co-ordination, apportionment of funds to Institutes of Higher Education, the maintenance of academic standards, the regulation of administration and admission to Higher Educational Institutions have blatantly transgressed the basic tenets of Natural Justice and thereby acted in a highly capricious, arbitrary and unfair manner.

The petitioner – the Senior Assistant Registrar of the Institute of Aesthetic Studies affiliated to the University of Kelaniya – contended that the transfer of the petitioner with immediate effect was unjustified; and that the interview and the scheme of recruitment and the procedure adopted were unreasonable and contrary to rules of natural justice. The petitioner was suspected of complicity with a students' protest over a particular issue as he had authorised, with the consent of his superior, the release of the public address system which had been utilised by the students for their protest. The petitioner was immediately transferred to a similar institution in the Southern Province. He also alleged that the promotion and appointment of the 14th and 15th respondents over him was contrary to established procedure and was in violation of the principles of natural justice.

³⁵ S.C. Application No 544/96 (F/R), S.C. Minutes 7.10.1999.

3.3 Gender discrimination

*Bernard Fischer and Ronik Fischer v. The Controller of Immigration and Emigration and two others*³⁶ involved a challenge of the regulations relating to the grant of residence visas to foreign male spouses of Sri Lankan women on the ground they violated the non-discrimination provision in Article 12(2). This was the first case to be decided on the basis of gender equality, but an important opportunity was lost when the case was settled on the undertaking by the 1st respondent that the rules that are applicable to foreign female spouses of Sri Lankan males would be applied to the 1st petitioner. However, the Court, directed the 1st respondent to formulate and publish guidelines and procedures conforming to Article 12 for the grant of visas to foreign spouses. While the petitioners obtained the relief they sought, juris-prudentially yet another opportunity was lost to discuss the issue of gender discrimination.³⁷

4. Cases under Article 14(1)

In the elections petitions case, discussed above, the Court elevated the right to vote to the status of a fundamental right when it held that the right to vote is a form of expression, protected by Article 14(1) of the Constitution.

*M.V. L. Peiris v. Niel Rupasinghe MP and six others*³⁸ involved the alleged violation of Articles 14(1)(a), (b) and (c). The petitioner was the Chairman of a community-based NGO called Janodhaya Sajeewana Kendraya. One of the main achievements

³⁶ S.C. Application No 436/99, S.C. Minutes 24.5.1999.

³⁷ See also the chapter on Women's Rights.

³⁸ S.C. Application No 126/99 (F/R), S.C. Minutes 8.12. 1999. See also the discussion in the chapter on Freedom of Association.

of this centre had been the establishment of the Muthurajawela People's Organisation with the objective of implementing the Muthurajawela Master Plan for the sustainable development of the Muthurajawela area.

The petitioner's complaint was that the respondents had prevented him from attending a workshop at the Central Environmental Authority, to which he had been invited by Authority's Chairman. He had been assaulted by the 1st to 5th respondents and intimidated into leaving the premises. He had, therefore, been unable to participate at the workshop, and had been prevented from exercising the freedoms of speech, expression, peaceful assembly and association guaranteed by Article 14(1). Justice Amerasinghe, while pointing out that these freedoms were not absolute rights, said that they may only be curtailed in the extraordinary circumstances set out in Article 15 of the Constitution:

The theory of freedom of expression, as Thomas Emerson observed, "is a sophisticated and even complex one. It does not come naturally to the ordinary citizen but needs to be learned. It must be restated and reiterated not only for each generation, but for each new situation."

Justice Amerasinghe pointed out that as elected representatives of the people, the respondents had failed to uphold the provisions in the Constitution:

As "elected representatives of the people," they ought, in my view, to have appreciated the fact that the continued vitality of free speech is essential if democracy is to flourish and indeed if democratic institutions like Parliament and Pradeshiya Sabhavas of which, with justification, they proudly announced themselves to be members, were to survive.

Justice Amerasinghe pointed out that the powers of the State must be exercised within a framework of constitutional restraints which are designed to guarantee certain fundamental rights to citizens. These rights not only benefit the individual, but also bring aggregate benefits to society. Moreover, "freedom of thought and expression is an indispensable condition if Sri Lanka is to be more than a nominally representative society. Speech, in the sense of expression by words or deeds, is the way in which thoughts are made known to others. Speech concerning public affairs is more than self-expression: it is the essence of self-government. The 1st to the 5th respondents it seems failed to notice that the right of free speech enhances the contribution to social welfare, which enlarged the prospect for individual self-fulfilment."

The Court held that not only did the actions of the 1st to the 5th respondents prevent the petitioner from exercising his freedom of speech, but they also violated his associational rights: "The effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association.... Indeed, freedom of association is an indispensable means of preserving their individual liberties like free speech. It has been described as the matrix, the indispensable condition of nearly every other form of freedom."

5. Referring Fundamental Rights Applications to the Human Rights Commission

In October 1997, the Supreme Court referred three fundamental rights cases to the Human Rights Commission (HRC) for inquiry and report. These were: *Sugathadasa Jayasinghe and two others v. R.S Jayaratne, Secretary, Ministry of Public Administration, Home Affairs and Plantations and three others*;³⁹ *Government*

³⁹ S.C. Application No 770/97, S.C. Minutes 24.9.1999.

*ECG Recordists Union and five others v. R.S. Jayaratne, Secretary, Ministry of Public Administration, Home Affairs and Plantations and three others;*⁴⁰ and *Govinnage Sangadasa and three others v. Secretary, Ministry of Public Administration, Home Affairs and Plantations and three others.*⁴¹ At the time of the referral, leave to proceed had not been granted. Although the HRC submitted a report to the Court in October 1998, its findings and recommendations were not clear and the matter was referred back to the HRC for clarification.

In January 1999, the Court again called for the HRC's findings and recommendations. The Chairman of the HRC, by letter dated 23rd February 1999, requested clarification from the Court on two issues:

- ☐ Section 12(1) of the HRC Act confers the power on the Court to make a reference "in the course of hearing an application;" did that mean that a reference can be made only after leave to proceed had been granted?
- ☐ Section 12(2) casts a duty on the HRC to "inquire and report." Can the HRC also express its views with regard to relief?

Having carefully perused the HRC Act, Justice Fernando was of the opinion that "hearing" means at anytime that the Court is inquiring into a fundamental rights application. The Sinhala text does not make a distinction between "hearing" and "inquiry" and the Court held that it is empowered to make a reference to the HRC under section 12(1) even before leave to proceed is granted.

⁴⁰ S.C. Application No 772/97, S.C. Minutes 24.9.1999.

⁴¹ S.C. Application No 798/97, S.C. Minutes 24.9.1999.

With regard to the second issue, the Court said that while the Court cannot delegate its powers and jurisdiction to the Commission, and will not be bound by its findings and views, the Court can request the Commission to submit its views and recommendations. The Court also pointed out that the Commission must act through **all** its members because the Act neither contains a provision on a quorum nor for the delegation of powers of the Commission to one or more of the members: "The purpose of a reference under section 12 was thus to enable this Court to obtain the benefit of the collective wisdom of all the members of the Commission, and not just its notes of investigation."

The Court directed the HRC to forward its findings and recommendations in relation to the three cases on or before 30th November 1999. The HRC complied with this directive and the cases have been argued before court. Judgments were pending at the end of the year.

6. Relief

The Court continued to grant relief to victims of fundamental rights violations, in addition to contributing to the jurisprudence on the subject. In addition to a declaration that fundamental rights had been infringed, it ordered compensation and costs to be paid, and sometimes nullified arbitrary decisions. It also sometime gave orders compelling the respondents to take a particular course of action within a specified period of time, as in the Provincial Councils case.

7. Conclusion

It is a cause for concern that, despite pronouncements by the Court, violations of fundamental rights continued, particularly under Article 11, relating to torture. Several cases decided during the year involved violations of Article 11 as well as of Articles 13(1) and (2) relating to illegal arrest and detention.

The Court's attempts to involve the HRC in the process of settling fundamental rights cases have not been successful so far. For example, it took a year for the Commission to report back to the Court on the three cases referred to it in 1997, and even then the Commission's report was not clear. The cases were referred back to the Commission, and the Commission was directed to report to the Court by 30 November 1999. This whole exercise took more than two years and in the meantime, the petitioners remained without a remedy. This is a wholly unsatisfactory state of affairs.

Judicial activism displayed by the Court in advancing fundamental rights protection in Sri Lanka is a promising sign. In particular, the elevation of the right to vote to the status of a fundamental right through judicial activism is very commendable. It is hoped that the Court would continue to work creatively and imaginatively in widening the scope of fundamental rights jurisprudence in the country and that the HRC would assist the Court in this exercise.

V

Freedom of Expression and the Media

*Maduranga Rathnayake**

1. Introduction

Freedom of expression and information are an essential foundation of democracy and provide the basis for the enjoyment of other human rights and fundamental freedoms. The media serves as a watchdog over the many different agents of society, exposing their actions to public scrutiny and ensuring more transparency and accountability. However, freedom of expression and information have frequently been attacked and the People's Alliance (PA) 1994 election pledge to create a free media environment has not been fulfilled. Nevertheless, civil society organisations nationally and internationally have continued their efforts to secure legal and institutional reforms to facilitate the development of a media culture based on freedom of expression.

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This chapter discusses various issues relating to freedom of expression, information, and the media, which assumed significance during 1999.

2. Censorship

Censorship remained a critical issue in 1999. Censorship on media, which was imposed in June 1998 under emergency regulations,¹ prevailed throughout the year 1999 as well. However, these regulations were strictly enforced only after a military setback. The government again brought the regulations concerning censorship into force in November with the intention of strictly regulating the media.² These regulations precluded the publication, broadcast, or transmission of any matter pertaining to military operations. The government however, used these regulations to prohibit the publication and broadcasting of information unrelated to national defence, in most of the times simply to protect politicians from embarrassment or to stop exposure of wrong doings of the government.

International human rights organisations strongly voiced against the imposition of censorship. At home, journalists' organisations and other free media activists campaigned for the lifting of the censorship.

The practice of not allowing journalists to go to war torn areas without clearance from the Ministry of Defence continued throughout the year. Journalists have often found it difficult to get the approval from the Ministry. This was, in fact, an indirect

¹ Emergency (Prohibition on Publication and Transmission of Sensitive Military Information) Regulations No 1 of 1998.

² Gazette Extraordinary 6.11.1999.

censorship on reporting on what was happening in these areas. In addition, the media was denied access by the LTTE to areas held by them.

3. The Government and the Media

The relationship between the government and the private media became confrontational during 1999.

The government launched an intense campaign since the very beginning of the year to intimidate the independent media. Deterioration of the relationship between the government and the media was intensified by the fact that the private media exposed a number of episodes of election rigging by the PA in the North Western Provincial Council election held in January. The President and a group of Ministers were seen using the state media and state functions to abuse journalists, owners of media institutions as well as media activists. The government has repeatedly referred to journalists as "Scavengers", "Blackmailers" and "Mafiosi."³

4. Freedom of Information

Although there was lobbying for the introduction of an Act to secure the freedom of information, nothing notable took place at year's end. The Leader of the Opposition called several times in Parliament for a debate on the need for a Freedom of Information Act.⁴ However, although a draft Bill is available, this never found its way into the order paper of the parliament.⁵

³ Lobby Document on Freedom of Expression in Sri Lanka – Free Media Movement and INFORM 1999.

⁴ United National Party Media Unit.

⁵ *Sri Lanka: State of Human Rights 1999* (Law and Society Trust, Colombo, 1999) p. 155.

5. The Right to Vote and Free Expression

In a landmark judgment⁶ in which the suspension of the elections to five provincial councils in 1998 was challenged, the Supreme Court held that the right to vote is implied in Article 14(1) (a) of the Constitution that guarantees the freedom of speech and expression. Justice Mark Fernando observed that “the silent and secret expression of a citizen’s preference as between one candidate and another by casting his vote is no less an exercise of the freedom of speech and expression, than the most eloquent speech from a political platform.” The judgment was hailed as a landmark judgment and was instrumental in elevating the right to vote to the status of a fundamental right.

6. Criminal Defamation

The PA government resorted to several criminal defamation actions against editors of newspapers since it came to power in 1994.

These cases were viewed by many as intended only to intimidate journalists. However, in 1999 no cases of criminal defamation were filed by the government against editors. The editor of one of the leading English newspapers who was found guilty of criminal defamation by the Colombo High Court appealed against the decision and the case is pending. Four other cases filed by the President in 1995 and 1997 were still pending and unresolved.⁷

⁶ *V C Karunathilake and W M Sunanda Deshapriya v. Dayananda Dissanayake, Commissioner of Elections and others*, S.C. Application No 509/98, S.C. Minutes 27. 1. 1999. For a detailed discussion, see the chapter on Judicial Protection of Human Rights.

⁷ *Supra* n. 3.

The media community was strongly opposed to the idea of criminal defamation and lobbied for the repeal of the relevant provision in the Penal Code.

Article 19, the International Centre Against Censorship and the Commonwealth Press Union in collaboration with the Centre for Policy Alternatives, Colombo, held an International Colloquium on Freedom of Expression and Defamation in Colombo in September,⁸ where recent developments in the use of the defamation law, both criminal and civil, were discussed. The use of defamation as a means of curtailing press freedom and restricting the ability of the media to perform its key role as a "watchdog" of the public interest against possible abuses of power were also discussed.

7. Attacks on the Media

On 4th March the Lakbima journalist, Sri Lal Priyantha, was abducted and badly assaulted. Sri Lal was writing a series of exposés on corruption in the armed forces. Instead of investigating his abduction, the government took him into custody charging him with involvement in the JVP uprising in 1987-89.⁹

On 15th July, media personnel who were covering a political rally by the Opposition United National Party (UNP), were assaulted by the members of the Presidential Security Division (PSD).¹⁰ Valuable equipment was damaged in the assault. The Minister of Media subsequently admitted that members of the PSD had been involved in the attack. The authorities had not taken action against those who were responsible for the attack.

⁸ Held in Hotel Galadari in Colombo from 15th-17th September 1999.

⁹ *Supra* n. 3.

¹⁰ Sunday Times 12th September 1999.

The editor of the *Sunday Leader*, Lasantha Wickramatunga, was questioned by the CID several times as to the source of a cassette which was said to contain a conversation between Sanath Gunatilake, the Media Advisor to the President and several businessmen about the licensing of a new television network called Channel 9.¹¹

Rohana Kumara the editor of the Sinhala tabloid *Satana* was shot and killed in Nugegoda,¹² a Colombo suburb, by an unidentified assassin. The media pointed the finger at the Presidential Security Division (PSD) for the assassination. No arrests have so far been made amid allegations by the media that the police team investigating the case was dismantled on higher orders.

Some journalists received death threats from anonymous sources during 1999, which were clearly intended to intimidate and silence them. The BBC correspondent in Sri Lanka complained in August that she had received such death threats.¹³

8. Presidential Election and the Freedom of Expression

The government's attempt to prevent the private media from covering the Presidential Election of 21st December 1999 failed. In the run-up to the elections, representatives of the private media were called to a meeting with the Minister of Media and were told not to air programmes relating to the election. This demand provoked strong criticism from media personnel and organisations. The government appointed a committee to monitor the private television stations, but the broadcasters defied the

¹¹ *Supra* n. 3.

¹² The Island 8th September 1999.

¹³ Daily News 1st October 1999.

government instructions on the ground that it had no legal basis. The matter was referred to the Acting Commissioner of Elections and he decided that he would not enforce restrictions on electioneering over the private electronic media.

A few days after the statement of the Acting Commissioner of Election, however, independent presidential candidate Hudson Samarasinghe complained to the Minister of Media that some private TV channels had violated the presidential election laws by broadcasting advertisements from other candidates, which was unfair to his candidature. The Ministry immediately instructed the representatives of those TV channels to be present at the Ministry the next day. None of them attended, however. They informed the Minister that he had no power to regulate the media during an election and that only the Commissioner of Elections can do so. Unable to impose their own regulation over the broadcast media, the People's Alliance itself began to use the same private media to mount their advertisement campaign. In fact, the PA contracted with one of the country's largest private television channels to promote its presidential candidate.

A number of incidents of election violence, mostly assaults and intimidation, had been reported¹⁴ and this was a blow to the exercise of the freedom of expression during the election campaign.

A major attack on freedom of expression during the election period came on 18th December, when President Chandrika Kumaratunga escaped assassination at the hands of an LTTE suicide bomber. The bomb was exploded at her final election

¹⁴ Final Report on Presidential Election 1999 – Centre for Monitoring Election Violence.

rally at the Town Hall in Colombo. The President was injured and many people were killed including two camera assistants of two main television stations who were covering the rally.¹⁵

9. Conclusion

It is pertinent to note here what the Supreme Court said in the case of *Vincent Peirs v. Neil Rupasinghe*.¹⁶ There it was observed that "freedom of expression is an indispensable condition, if Sri Lanka is to be more than a nominally representative democracy...it is only through free debate and exchange of ideas that the elected majority can be made responsive and reflect the will of the people..."¹⁷

No progress was made during 1999 on reforming the legislative framework relating to the freedom of expression. The PA's election pledge in this regard remains unfulfilled. The existing laws contain numerous constraints on free expression, as detailed in the Report by the Committee to advise on the Reform of Law Affecting Media Freedom and Freedom of Expression, which was presented to the government in May 1996. Among the laws, which need to be repealed or amended, are;

- * Sections 118, 120 and 479 of the Penal Code
- * Officials Secrets Act No 32 of 1995
- * Sri Lanka Press Council Law No 5 of 1979
- * Profane Publications Act No 41 of 1958
- * Obscene Publications Ordinance No 4 of 1927

¹⁵ *Supra* n. 3.

¹⁶ S.C. Application No 126/99, S.C. Minutes 8.12.1999.

- * Public Performance Ordinance No 7 of 1912
- * Public Security Ordinance No 25 of 1947
- * Prevention of Terrorism Act No 48 of 1979.

The year 1999 saw a heavy attack on free media including intimidation, assaults, and killings of journalists. It is, therefore, the duty of the government to start investigations into these incidents immediately and bring the perpetrators to justice.

There is a greater need to update Sri Lanka's media laws to bring them in line with international standards. Freeing of the existing media from various governmental controls is extremely important. So are the creation of new media institutions aimed at guaranteeing media freedom as well as raising the standards and quality of free media. It is submitted that although there have been a few achievements over the past decade, there is still room for development and only determination and courage could add the necessary impetus to take society to a new era of democracy.

VI

Rights of the Child

*Sreemali Herath**

1. Introduction

This chapter focuses on developments during 1999 in the sphere of child rights. On the one hand, the year saw greater recognition of the rights of the child with the repeal of laws on maintenance and child labour. On the other, however, the LTTE continued to use child combatants – despite the undertaking it made in 1998 to the UN Secretary General for Children Affected by Armed Conflict that it would end this practice. The chapter also discusses the failure of the law to protect children from child abusers, the sexual exploitation of children by both local and foreign paedophiles, and new initiatives taken by governmental organizations to protect children from violence.

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2. Child Rights and the ongoing War

The armed conflict provides the context for a wide range of violations of child rights. Approximately 900,000 children in the North and the East of Sri Lanka are directly affected by the conflict, and millions more are affected indirectly. Children remain victims of violence as the conflict continues in the North and East. The conflict has displaced an estimated 380,000 children; many repeatedly, and up to 250,000 remain displaced as of 1999.¹ A contingent problem associated with long-term conflict and displacement is the breakdown of family units, leading to the deprivation of a child's right to childhood itself.

2.1 Children directly involved in the armed conflict

In 1998, Olara Otunnu, the Special Representative of the UN Secretary General for Children Affected by Armed Conflict, visited the Jaffna Peninsula and the Vanni region for discussions with both the LTTE and the Sri Lankan government regarding child combatants.² After these discussions, the LTTE pledged to refrain from using children under 18 years of age in combat, and from recruiting children younger than 17,³ and further pledged to educate its cadres on the principles of the UN Convention on the Rights of the Child (CRC).

However, the LTTE has reneged on these promises and has continued to recruit underage children. Amnesty International

¹ Children: Zones of Peace, "A Call for Action," Report Summary 1999.

² *Sri Lanka: State of Human Rights 1999*, (Law & Society Trust, Colombo, 1999), p. 92.

³ Olara Otunnu, Report of the Special Representative of the Secretary General for Children and the Armed Conflict, in accordance with UN General Assembly Resolution 51/77 (October 1998).

reported "the LTTE continued to recruit children as combatants throughout the year". It also cited a pamphlet, dated 3rd June 1999, which had been circulated by LTTE leaders to school principals in Batticaloa District, which appealed for people to "join in thousands" but contained no reference to any age limit on recruitment.⁴ The number of children, both male and female, taking part in the war increased tremendously in 1999. In 1998, an estimated 60% of LTTE fighters were younger than 18.⁵ By 1999, according to some estimates, this percentage had risen another 10%: "About 70% of the LTTE's fighting cadres are women and children. The ages of these children, of both sexes, ranges between 9 and 18 years."⁶ These children carry out most terrorist attacks.

There has been no follow-up to Mr. Otunnu's visit, and far from ceasing to use children as combatants, the number of child combatants utilized by the LTTE has increased at an alarming rate.

2.2 Children indirectly affected by the armed conflict

Every right of children is violated by war. Regarding education and growth, many children are removed from their families and their familiar environment, and many are left to fend for themselves. Most schools in the war-affected areas have closed, and those that remain are overcrowded, with inadequate staffing levels and resources. These problems deprive children of their right to education and the right to develop their personality.

Further, in LTTE-controlled areas the school system has been co-opted into the war effort. The LTTE leadership has ordered

⁴ Amnesty International Report 2000.

⁵ *Supra* n.2.

⁶ Sunday Times, 16th May 1999.

that all children older than 13 must undergo compulsory physical training for one hour a day during school hours. The trainers are LTTE cadres, or teachers who have already undergone training. Physical training is followed by two weeks of weapons training, during which children are taught how to handle different types of guns and grenades. They are also given extensive training on how to take positions and move undercover during an attack.⁷

Regarding health and nutrition, health services are disrupted in most conflict areas, and diseases such as malaria spread easily due to the poor health conditions. The food supply to these areas is restricted for security reasons.

Direct exposure to violence is another area of rights violation. Women and children are exposed to gender-based violence, such as forced prostitution and rape. Children in war-afflicted areas have never witnessed a world outside war. They never get the opportunity to experience a carefree, normal childhood.

Civilians in the conflict areas are threatened both by the army and the LTTE. Soldiers have killed children during their training exercises with live ammunition, as happened at Bomba Pitiya in Sagaragama on the 5th and 18th of August. Even though 800 acres of land there has been demarcated for bomb experimentation and firing, children continued to use these sandy areas as playgrounds.

Families living close to these boundaries become the innocent victims. A five-year-old girl shot during one of these exercises could not be taken to hospital because the firing continued for two hours. A 16-year-old boy was injured during this battle. The Mudalaippali School was hit by what the school authorities assume to be a mortar shell. Fortunately, no children were present

⁷ UTHR (J) May 1999, Compulsory training for the people militia.

when this incident took place; otherwise the human toll could have been immense.⁸

Given these experiences, it is essential for the army to take effective precautions to guards against injuring civilians and children at its artillery ranges. People living in the area should be informed in advance that live-firing events will take place, and ensure that the areas involved are clear of children.

2.3 Children as Zones of Peace (CZOP)

In 1996, the UN received the Machel Report, a study made on the impact of war on children. Through the report, a universal appeal was made to both state and non-state actors to protect children from war; an appeal given legitimacy by the General Assembly's endorsement of the report.

The central position of the Machel Report, expressed in the term "Children as Zones of Peace" (CZOP), was that policy towards children should aim to exclude them from participation in war and from its effects. Key principles emergent from this are:

- ☐ That children have the right to be protected from the effects of conflict.
- ☐ That children have the right not to be used in conflict in any way.
- ☐ That children have the right to be helped to recover from the effects of conflict.

In Sri Lanka, the initiative for CZOP was launched by an informal "Contact Group" consisting of the government, concerned

⁸ Sunday Times, 5th September 1999.

individuals, NGOs and UN agencies, such as the Consortium of Humanitarian Agencies, the International Committee of the Red Cross, the United Nations Children's Fund and the United Nations Resident Coordinator.

During 1999, CZOP's programs in Sri Lanka focused on raising awareness about the plight of children in the armed conflict, and disseminating the "principles and best practices" embodied in Machel Report. CZOP held workshops involving both member and non-member organizations, and in October 2000 will begin a large-scale, public information campaign on the principles and recommendations of the Machel Report.

3. Sexual Exploitation

Children continue to be sexually exploited despite Sri Lanka's adoption of extensive domestic and international legislation, due to what is at best a marginal commitment from local law enforcement agencies. This section discusses the nature of the sexual exploitation of children in Sri Lanka; the domestic and international legislation that Sri Lanka is party to; and the failing areas of the enforcement apparatus that have allowed sexual exploitation to continue.

3.1 The nature of sexual exploitation of children

Commercial sex is the main form of child sexual exploitation in Sri Lanka, in terms of prostitution and bonded child slavery. The victims of child prostitution are mostly male, who come from fishing villages in coastal, tourist regions; they operate in gangs. These children are driven to prostitution by the poverty of their homes and the perks of easy money, drugs and travel. A second category consists of individuals rather than group workers; they

are school drop-outs, homosexual, and between eight and sixteen years of age. This latter group has been especially victimised by foreign paedophiles. Child prostitutes are an especially high risk group for sexually transmitted diseases because of their lack of awareness and because their abusers take few precautions.

Bonded child slavery is the second major area of child commercial sex. These children can be found at "safe houses" in coastal, tourist regions. These "safe houses" are foreign funded, operated by locals, and fit into highly organised, international networks. Bonded children are typically between six and eight years of age. They are used for both pornography and prostitution and some are subjected to sadism. On being discarded, these children tend towards lives of crime. Probably the most disturbing aspect of bonded child slavery is that in the neighbourhoods where "safe houses" can be found, their existence and function is common knowledge to residents, who, for whatever reason, choose to take no action against them.

3.2 Domestic measures and international obligations

In Sri Lanka, children's rights are protected by various local laws and international conventions. The 1978 Constitution stipulates in Article 27(13) that children shall be protected and in Article (12)4 that affirmative action shall be taken to afford this protection. The Penal Code was amended by the 1995 Penal Code (Amendment) Act No. 22, widening the definition of sexual exploitation in sections 360B and 365B. Most recently, the 1998 National Child Protection Authority Act established a body to support the development and monitor the enforcement of child protection legislation.

In 1992, Sri Lanka adopted the Children's Charter, under which a National Monitoring Committee was established to report on

the protection of child rights under the terms of the Children's Charter.

In 1991, Sri Lanka ratified the United Nations Convention on the Rights of the Child, Articles 25, 34, and 39 of which stipulate state obligations to provide protection and rehabilitation regarding sexual abuse.

3.3 Failings

Despite such extensive domestic legislation, and despite ratifying international conventions, sexual abuse continues on a large scale. Thus, the core problem seems not to be a lack of comprehensive legal protection; it is lack of law enforcement and political will.

The problems associated with the juvenile court demonstrate this lack of will. Juvenile courts throughout the country were mandated by the Children and Young Persons Ordinance (1939). However, there is only one such Juvenile court in existence. Instead, Magistrate courts sit as Juvenile courts and attempt to discharge this function. Further, even the existing Juvenile court is not suited to its mandate. The bearing of the court is formal and cold, hardly providing the child-friendly atmosphere that was intended. Further, the court's probationary officers are not adequately trained social welfare workers.

Further, the Children and Young Persons Ordinance (CYPO) stipulates that children "in need of care or protection" should be turned over to a guardian, to a probation officer, or to a "certified school." Unfortunately, there has been an over-reliance on the traumatic option of a "certified school." Rule 19.1 of the Beijing Rules recognises the negative effects of such detention on children and so stipulates that "the placement of a juvenile in an institution shall always be a disposition of last resort and for the minimum

necessary period.” However, Sri Lanka has failed to respect this international agreement.

Further, the Sri Lankan legal system treats child victims as if they were suspects. This is a side-effect of the initial documentation that must be filled out when a juvenile case is documented, which treats children either as “suspects” or “prisoners.” In one incident, the child victim as well as the paedophile suspect were both brought into the court handcuffed.

Under Section 13 of the CYPO, children in custody are to be kept separate from adults for their own protection. However, in practice they are usually kept in cells with adults. Confining juveniles with adult offenders places them at risk of further abuse, and is in violation of the Rule 13.4 of the Beijing Rules, which states “juveniles under detention pending trial shall be kept separate from adults.”

These inadequacies of the child protection infrastructure create a void between the legislation protecting children and the reality of their abuse and post-abuse suffering. Ms. Shanali Sivasupramaniam wrote of this:

The failure of the part of the government to establish a firm linkage between enforcement and implementation has resulted in the existing law being ineffective in curbing the incidence of exploitation and affording real protection to children exposed to such dangers.

4 Are Child Rights Protected in Sri Lanka?

Nineteen ninety nine marked the 10th anniversary of the adoption of the Convention of the Rights of the Child (CRC) by the United Nations General Assembly. Various governmental and non-governmental organisations implemented numerous programmes to commemorate the anniversary. Further, a national plan of action, the Children's Charter, has been adopted, entailing the establishment of National and Provincial Monitoring Committees. However, the question remains whether Sri Lanka has taken adequate steps to safeguard and promote child rights, and whether these conventions have been effective in protecting child rights.

There was a larger number of reported offences against women and children in 1999 than in 1998. Such offences are reported to the Children and Women Protection Bureau (CWBP), which has 32 branches island-wide. Its primary aim is to take complaints relating to violation of human rights and to take necessary action against the perpetrators.

During the first nine months in 1999, 4100 offences were reported to the CWBP. Of these, 613 cases were related to sexual exploitation of children and 525 related to exploitation of child labour. During this period 32 children were killed and 402 were raped. Two hundred and fourteen kidnappings were reported.⁹

Despite initiatives by the government and various non-governmental organisations to bring down child-related crimes, the number of child victims continues to increase. Incidents relating to the violation of child rights are discussed, but legal action is rarely taken against the violators. Most cases remain unreported.

⁹ The Island, 23rd November 1999.

Children are vulnerable and can be abused very easily. They are unaware of their rights. Most often their parents, too, are unaware of the legal remedies available. There are also incidents where child abuse cases are not reported to the police, because the parties involved are afraid of adverse publicity. An international school in Colombo dismissed a male teacher for molestation of a 12-year-old girl. Immediate action was taken after an internal inquiry.¹⁰ The school authorities did not announce when the inquiry was carried out, possibly averse to an open inquiry, which would have tarnished the school's image. When the police were informed of this later, the schoolteacher was not available for questioning. No legal action was taken against the teacher.

5. Child Labour

According to an ILO report, there are 500,000 child labourers in Sri Lanka. About 10,000 of them live permanently on the streets. Other than this, there are no reliable statistics available in Sri Lanka on the extent of child labour. The most accurate survey, the 1999 Child Activity Survey by the Department of Census and Statistics, does not include the North and East.

The number of child labourers aged between 10-14 years has decreased since 1985/86. However, in Sri Lanka children in this age category are rarely employed in the formal sector; they are usually employed in the non-formal sector as domestic servants, even though such employment is illegal in Sri Lanka for those under the age of 14. They constitute an 'invisible' workforce, on which there is little statistical data.

¹⁰ The Sunday Times, 7th February 1999.

6. Laws Relating to Child Labour

6.1 ILO Conventions

The ILO Conventions and the United Nations Convention on the Rights of the Child (CRC), are the two international instruments relevant to child labour in Sri Lanka. In 1973, the ILO adopted Convention No.138 on Minimum Age for Admission to Employment. This convention applies to minimum age, hazardous work, light work, and effective enforcement of obligations under the Convention. In 1999, the Sri Lankan government identified the need to ratify this Convention.¹¹

The 1999 session of the ILO Conference adopted the Convention on Worse or Extreme Forms of Child Labour. The Sri Lankan government had not decided whether it would ratify this convention by the end of 1999. The Convention defines "extreme forms" as:

- ☐ All forms of slavery.
- ☐ Engaging children in illegal activities, for prostitution, production of pornography or pornographic performances.
- ☐ Any other type of work or activity which is likely to jeopardize the health, safety or morals of children.

¹¹ *ILO Standards and Sri Lankan laws regulating Child Labour.*
By Lalani. S. Perera.

6.2 Amendment to Employment of Women, Young Persons and Children Act of 1956 (EWYPC)

This Act sets a minimum age for the employment of children and sets out the precautions that should be taken when employing young persons. Prior to 1999, children between 12 and 14 years of age could get "employment in undertakings other than industrial undertakings," and children aged 10 years could be employed as estate workers. However, with the amendment of this law in 1999, employment of children under 12 years of age in all spheres is prohibited, and estate workers must be at least 14 years old.¹²

7. Initiatives to Establish Child Rights

7.1 The Maintenance Act (No 37 of 1999)

In 1999, the new Maintenance Act was passed. This Act applies to the maintenance of a spouse, child, adult offspring (children between the ages of 18 and 25 years), or disabled offspring. In accordance with this Act, parents who neglect their children, yet have sufficient means to provide for them, would be made to pay a monthly allowance. The Act reads "...the Magistrate may upon an application being made for maintenance and upon proof such neglect or refusal, order such parent to make a monthly allowance for the maintenance of such child ...".¹³ This allowance would depend on the parents' income and the circumstance of the child.

These provisions also apply to adult offspring and disabled offspring who are unable to support themselves. However, if the offspring is a non-marital offspring (born out of wedlock) this order will not apply: "...unless parentage is established by cogent

¹² *Ibid.*

¹³ The Maintenance Act No 37 of 1999, Section 2 (1)

evidence to the satisfaction of the Magistrate.”¹⁴ Once the Magistrate has decided that the allowance should be made to the offspring, the allowance will be paid from the date the application for maintenance was made (unless the Magistrate decides on another day).¹⁵

If the application for maintenance for an offspring or a disabled offspring cannot be made by the party themselves, any person who has them in their custody can apply on the offspring’s behalf. In the case of an adult offspring, any other person can make the application if the offspring is incapable of making the application.

If the respondent has failed to make the payment properly for a period over two months, the Magistrate may carry out an inquiry and by an order (herein after referred as an “attachment of salary order”) can order the respondents employer to debit that amount from the respondent’s salary.¹⁶ However, such measures will not be taken if the Magistrate is of the view that the failure of the respondent is not “willful refusal or culpable neglect.” If the employer is in pursuance of a salary order, they will give the respondent a written statement of the amount of money deducted from their salary.¹⁷

Section 11(1) of the Act requires an application to be made in order to enforce an order for maintenance. This should include an affidavit supporting the application. On the basis of the affidavit, the Magistrate can hold an inquiry, which would decide whether an order for maintenance should be accepted or refused.

¹⁴ *Id.*, Section 2(2)

¹⁵ *Id.*, Section 5

¹⁶ *Id.*, Section 6 (1)

¹⁷ *Id.*, Section 10

If any party is not satisfied with the court order they have the right to appeal in the relevant High Court;¹⁸ a further appeal can then be made to the Supreme Court under the provisions of Section 14(2).

8. Conclusion and Recommendations

During 1999, the Sri Lankan government took several initiatives to improve the rights of the child. While a legal framework now exists in Sri Lanka to protect children's rights, these laws still need to be implemented effectively.

Children affected by the armed conflict are particularly vulnerable to violations of their rights. The LTTE continues to use children under 18 years as combatants, despite their claim to desist from doing so; indeed, the number of children participating in armed conflict seems to have risen.

Given the false assurance that the LTTE gave to Mr. Olara Otunnu, it seems unlikely that the LTTE is either interested in giving up 60% of its manpower, or in making any genuine commitments on the matter.

Of children who suffer sexual exploitation, more are abused by close relatives and friends than by any other category of person. Furthermore, local paedophiles outnumber their foreign counterparts in Sri Lanka. Yet public attention is often focused on strangers and foreigners as child abusers, rather than known, local people. The media has an important role to play in publicising these issues. The government and NGOs need to ensure that the necessary action is taken against perpetrators.

¹⁸ *Id*, Section 14(1)

To reduce the number of foreign paedophiles who visit Sri Lanka, visas should not be issued to people with a known criminal record for sexual offences. Currently there are no provisions under the Sri Lankan law prohibiting the entrance of people to the country; this should be reviewed.

It is essential to provide proper rehabilitation, supported by specially trained personnel, for children who have been sexually abused. Such children have undergone traumatic psychological experiences and need special care and attention. They should not be made to go back to their own homes if their abusers are parents or close relatives.

With regard to child labour, the existing laws are inconsistent, and are inadequate to protect children from exploitation. A large number of children are employed as domestic servants in Sri Lanka. The Domestic Servants Ordinance was last amended in 1936, and needs to be reviewed. There should be a consistent minimum age for the employment of children, irrespective of the type of labour that they do.

The judicial process in Sri Lanka is slow and needs to be reformed to make it more efficient, and more sensitive to the needs of children. An abused child should not be made to re-live his or her experiences in court; the juvenile justice system needs to be reformed to bring it in line with international standards and to make it more efficient.

VII

The Rights of Women

*Iresha Ratnayaka Buthgamuwa **

During 1999, there were no major policy or societal changes relating to women's rights. This chapter thus provides a summary of the situation relating to several important aspects of women's rights during 1999: women and the economy; violence against women; women and health; the political participation of women; and women in armed conflict areas.

1. Women and the Economy

1.1 Women income earners

In the last two decades, there has been a significant increase in the labour force participation of women. However, the inability of the labour market to absorb educated women has caused a

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high incidence of unemployment among women. Thus, in 1998 there were 16.59% unemployed women as against 7.1% unemployed men.¹ Figures on employment status in 1997 showed that of all working women, only 1.5% were employers, 61.8% were employees, 20.5% were self-employed and 16.8% were unpaid family workers.²

Of women employed in 1997 by major occupational groups, 0.9% were senior officers and managers, 10% were professionals, 3.6% were technicians and associate professionals, 6.3% were clerks, 7.9% were sales and service workers, 21.7% were skilled agricultural and fisheries workers, 17.5% were involved in craft and related fields, 2.6% were paint and machine operators and assemblers; and 28.5% were in elementary occupation.³

In 1998, of women in decision making positions, 15.7% were in the Sri Lanka Administrative Service, 2.4% were Ambassadors and 18.3% were judges.⁴

In the university sector, 38.2% of heads of departments were women, 13.6% of deans were women, and 10% of chancellors were women. There were no women registrars. In 1999, the first appointment of a woman to the post of Vice Chancellor in Sri Lanka was made when Professor Savitri Goonesekere was appointed as the Vice Chancellor of the University of Colombo. In July 1999 another woman made history, when Mrs. Indrani Wijeratne was promoted to the rank of Brigadier, the first woman Brigadier in the Sri Lanka Army.⁵

¹ "Labour Force Survey," Department of Census and Statistics, 1st quarter 1998.

² "Labour Force Survey," 1997 Department of Census and Statistics.

³ *Ibid.*

⁴ Changing Role of Women, Department of Census and Statistics (1997).

⁵ Daily News, 6th July 1999.

Although women are active participants in the economy and receive more recognition than in past decades, harassment at work takes place sometimes. The extent of harassment is under-reported, perhaps because some women are unaware of their rights or fear serious repercussions if they do make a complaint. Nevertheless, a few cases of harassment were reported during 1999. For example, a group of women police constables in the Central Province complained to President Kumaratunga about being sexually harassed by a senior police officer,⁶ and a trainee executive filed a fundamental rights case complaining of sexual harassment, but the case was withdrawn after leave to appeal was granted.⁷

The Women's Rights Watch reported that women are treated unequally when applying for jobs at the decision making level or in fields dominated by males. For example, eight women who were selected to be trained as air force pilots later found out that their appointments had been cancelled by the Air Force Commander without reasons being given. They were told by another officer that the appointments were cancelled on the basis of considerations of their marital status and possible need for maternity leave. However, this decision was not challenged in court.

1.2 Women in employment and the Equal Opportunity Bill

In September 1999, the Equal Opportunity Bill was placed on the Order Paper of Parliament, but – as discussed in the Chapter on Equal Opportunity – 42 parties challenged the constitutionality of the Bill in the Supreme Court and the government decided not to

⁶ Women's Rights Watch, 1st quarter 1999.

⁷ S.C. Application No 344/99 (F/R). See discussion, *infra*.

proceed with it. The Bill sought to provide protection against unequal treatment based on race, religion, language, caste, gender, political opinion, age or disability in employment, education, access to public places and means of transportation, and in the provision of accommodation, goods and services. The Bill also dealt with the issue of sexual harassment, which was a welcome development for women, particularly. The Bill said in Section 3(1): "It shall be unlawful for a person to sexually harass another person or by use of word or actions, to cause sexual annoyance to such other person". Section 3(4) defines sexual harassment as including:

- ☐ physical contact and physical advance;
- ☐ a demand or request for sexual favours;
- ☐ the making of sexually coloured jokes or comments;
- ☐ the showing of pornography;
- ☐ any other unwelcome conduct, physical or verbal, of a sexual nature.

The remedies that would have become available, had the Bill become law, would have enabled women (and others) to avoid lengthy court procedures and seek redress more readily. However, the negative aspect of the Bill is that it does not cover the women working in the informal sector, where enterprises overall have less than 100 workers overall.

1.3 Women in agriculture

There has been a marked decline in the proportion of women participating in the agricultural sector. In 1992, it was reported that 51.9% of workers in the agricultural sector were women.⁸

⁸ *Sri Lanka: State of Human Rights 1999* (Law & Society Trust, Colombo 1999) p 199.

By 1995, however, this had reduced to 49%,⁹ and by 1997 it had declined to 40 per cent.¹⁰ Studies have revealed that those engaged in the agricultural sector are poorer than those in other areas of economic activity.¹¹ The reason is that unlike in any other area of the economy, women are treated differently upon their gender. "Women's contribution to agriculture is neither recognised nor recorded, and they are considered to be unpaid family workers in the census data." They lack access to land, credit, technology and skills, as most of these resources are provided to males as the heads of households.

1.4 Women in the Free Trade Zones

In 1999, no major changes affected the lives of the Free Trade Zone (FTZ) workers. Numerous incidents continued to be reported involving violation of their rights, such as denial of a better working environment, lack of facilities, non payment of Employee's Trust Fund (ETF) and refusal to grant leave. It was reported that in some boarding houses, 10 –12 girls lived in a room which had space for only 4-5 persons, so they had inadequate space to sleep, keep their clothes, sit or relax. Some boarding houses provided an unhealthy environment with inadequate access to water, sanitary facilities and electricity.¹²

However, some steps were taken to improve the welfare of FTZ workers, on the basis of the recommendations made by a Special Committee appointed by the Presidential Secretariat in 1998 to study safety and welfare measures for FTZ workers. The Committee recommended the following:¹³

⁹ Six-year Plan 1999-2004, Ministry of Women's Affairs 1999-2004.

¹⁰ *Supra* n. 4.

¹¹ *Supra* n.9.

¹² "Nivedini", Vol.6, June 1999, "Dabindu".

¹³ *Sri Lanka: State of Human Rights 1999* (Law & Society Trust, Colombo, 1999), p. 121.

- ☐ Boarding houses for workers should be registered;
- ☐ Transport should be provided for workers in line with their duty shifts;
- ☐ Streetlights should be provided;
- ☐ Police should provide security for workers; and
- ☐ A loan scheme for workers should be established.

In September, it was reported that the BOI had built 22 bathing wells in the Biyagama FTZ area. The BOI had also constructed roads and provided electricity to the whole area at a cost of Rs. 126 million.¹⁴

Factory workers suffered ill health from poor facilities at work: several cases of food poisoning were reported, including in July, when 400 factory girls were taken ill due to water poisoning. Some were hospitalised with stomach aches, vomiting and diarrhoea.¹⁵

1.5 Migrant women workers

The situation of migrant women workers in 1999 remained similar to previous years. Of particular concern was that the death rate among migrant women workers increased in the year. However, some steps were taken in the year to implement the five-year plan recommended in 1995 by a Presidential Task Force on Policy Formation for Migrant Workers.

¹⁴ Daily News, 9th September 1999.

¹⁵ "Dabindu", July 1999

The policies recommended by the Task Force were as follows:

- ☐ Introduction of contract registration scheme for migrant women workers in the domestic sector and garment factory sector;
- ☐ Imposing of conditions on airlines when issuing air tickets to migrant workers.;
- ☐ Commencing of a special airport monitoring unit to curb illegal migration;
- ☐ Enhancing of training programmes in keeping with guidelines given by the Presidential Task Force.
- ☐ Facilitating final registration process by opening additional centres at Kurunegala, Bank of Ceylon building York Street, Colombo 1 and People's Bank building, D. R. Wijewardena Mawatha, Colombo 10;
- ☐ Raising salary levels of overseas garment factory workers and housemaids up to \$130;
- ☐ Provision of free air tickets to housemaids and garment factory workers made compulsory (Middle East);
- ☐ Initiating low interest housing loans schemes (9%) for migrant workers through the People's Bank (Videsika and Siyatha);
- ☐ Initiating a low interest (8%) self-employment loan for migrant workers through the Bank of Ceylon;
- ☐ Establishment of a Worker's Welfare Fund (WWF) generated through the contract registration scheme;
- ☐ Distribution of funds under WWF to overseas missions for the welfare of migrant workers;

- ☐ Visit labour-receiving countries and enhance bilateral relationships;
- ☐ Implementation of a pilot programme for students of migrant families by increasing the value of award from Rs. 10,000 to Rs. 20,000;
- ☐ Implementation of a pilot programme of safety network projects for the family members of migrant workers in Mawathagama, Weligama and Borella;
- ☐ Increase the rate of maximum awards under Suraksha Insurance scheme from Rs. 190,000 to 275,000.¹⁶

Some of these recommendations were implemented during 1999. Thus, two million rupees from the Workers' Welfare Fund were allocated for the welfare of foreign employees by the Sri Lankan Bureau of Foreign Employees (SLBFE). The money was given to embassies in 10 countries to use for such things as providing shelter to displaced workers and air tickets to return to Sri Lanka.

The SLBFE also launched the "Ransaviya" Loan scheme, as recommended by the Presidential Task Force. In addition, the Ministry of Youth Affairs and Samurdhi commenced a project to train returnees from foreign employment to help them become self-employed.¹⁷ Further, medical clinics were reportedly set up in Divisional Secretaries divisions by the SLBFE to provide medical treatment free of charge to the spouses, children and dependants of Sri Lankan expatriate workers.¹⁸

¹⁶ SLBFE, Research Division.

¹⁷ *Supra* n. 6.

¹⁸ Daily News, 17th August 1999.

At the Bandaranaike International Airport, Katunayake, a new security scheme to protect women returning from employment in West Asian countries was established, as recommended by the Task Force. The scheme which was recommended by the Presidential Task Force on Safety and Rights of Sri Lankan Women, was intended to protect these women from unscrupulous persons operating at the airport.¹⁹

An increase in the death rate of migrant workers in 1999 provided cause for alarm. There were 116 deaths during the year, as compared to 102 deaths in 1998. Also, 1811 harassment cases were reported. The figures for deaths and harassment include both men and women.²⁰

During the first three months of the year, a number of illegal job agencies and agents were brought before the law. During January, ten such cases were reported, and in February and March, three and eight further cases were reported respectively. In April and May, seven cases each were reported while in June three were reported.²¹

Non-payment of wages remained a significant problem for migrant workers. In March, 18 women migrant workers were returned to Sri Lanka without receiving wages for eight months. Their agent had reportedly absconded. By the end of the year, 2262 cases of non-payment of wages had been reported.²²

¹⁹ INFORM Situation Report, September 1999.

²⁰ Source: Sri Lanka Bureau of Foreign Employment (SLBFE).

²¹ Women's Rights Watch, 1st and 2nd Quarters, 1999.

²² SLFEB Research Division.

²³ Women's Rights Watch, 2nd Quarter, 1999.

Housemaids who ran away from their employers suffered hardship. Five hundred such housemaids had reportedly taken refuge in the old embassy building in Kuwait. Their problems were compounded by allegations of corruption among embassy officials.²³

We should not forget that migrant workers, a large number of whom are women, collectively earn about Rs. 50 billion a year in foreign exchange.²⁴ They ease the unemployment problem in the country and provide income to poor households to relieve poverty,²⁵ despite their encounters with sexual harassment, abuse, physical harassment or death.

2. Violence Against Women

During 1999, violence against women continued. However, according to the Minister of Women's Affairs, Mrs. Hema Rathnayake, there was a decline in violence against women when compared to 1993, when 213 women were killed due to violence, as compared to 43 in the first half of 1999.²⁶

Nevertheless, violent attacks on women remain at a high level. As the tables below show, although there was a decline in the total number of cases, the number of rape and attempted murder cases actually increased.

²⁴ Female Migration: Policy and Gaps in Implimentation - A Digest by Marga Institute and CIDA. September 1999.

²⁵ *Ibid.*

²⁶ *Supra* n. 14.

**Complaints of gender-related violence made to the police
(January-September)**

	1997	1998	1999
Minor Offences	50,893	52,408	38,467
Grave Offences	1,019	1,027	1,037
Total	51,912	53,435	39,498

*Source: The Police Bureau for the Protection of Women and Children,
Castle Street, Colombo [October 1999]²⁷*

**A selection of 'Grave Offences' of gender-related violence
reported to the police [January – September]**

	1997	1998	1999
Rape	144	221	307
Murder	120	104	92
Sexual Harassment	268	236	56
Attempted murder with a weapon	118	195	252

*Source: The Police Bureau for the Protection of Women and Children,
Castle Street, Colombo [October 1999]²⁸*

²⁷ Shyamala Gomez and Mario Gomez, *From Rights and Shame to Remedies and Change* (1999).

²⁸ *Ibid.*

2.1 Domestic violence

Instances of domestic violence continued to be reported throughout the year. According to one newspaper report, Sri Lankan women have been harassed by their husbands at least once in their married lives and 60% of such instances are from lower income groups.²⁹

According to the Women's Right Watch, 31 domestic assaults on women were reported during the first six months of 1999.³⁰ In most of the cases, the perpetrator was the husband. Three instances of assault were by the son and one was by the mother-in-law, one was by the stepmother and two cases by other relatives. On one occasion, a husband had killed a child while assaulting his wife. In many cases, they had used iron bars or knives.

Fifty-seven deaths as a result of domestic violence were reported between January and June. Thirty eight of these were committed by husbands and one was by an ex-husband. All other murders were committed by close relatives such as son, brother or uncle. In a number of cases, husbands first murdered their wives and then committed suicide.³¹

Currently, there is no specific legislation on domestic violence in Sri Lanka. A victim of domestic violence would have to use provisions of the criminal law which deal with violence generally. The provisions of the Penal Code on hurt, grievous hurt, assault etc. can be resorted to while civil law and injunctive remedy could also be sought.³² The UN Special Rapporteur on Violence Against Women has also released a model legislation which recommends

²⁹ *Supra* n. 14.

³⁰ *Supra* n. 21.

³¹ *Ibid.*

³² *Supra* n. 25.

an all embracing legislation for victims of domestic violence. Sri Lanka would need to look at the experiences of other countries and the framework suggested by the Special Rapporteur prior to framing its own legislation.

There was in 1999 an on-going discussion among women's groups such as Sri Lanka Women's Forum, Women and Media Collective, Women In Need and The Legal Aid Commission on lobbying for separate laws for domestic violence.

2.2 Rape

During the first six months of 1999, 183 cases of rape committed on women were reported. Of these, only 66 were committed on adult women; the remaining 117 incidents involved children. In many cases, the father or a close relative was the perpetrator, highlighting the insecurity children can face within their own families. Most disturbingly, 1999 reportedly saw the highest rate of rape and attempted rape against the girl child.

According to reports, of the 66 adult rape cases, only 40 went to the Magistrates courts. Twelve incidents involved gang rape, including four young FTZ workers who were raped by four domestic helpers. Ten fathers were alleged to have raped their daughters.³³

In February at Hokandara, a whole family was killed by a gang. One girl was repeatedly raped by the gang members before being killed. At the end of the year, the case was pending in the Colombo High Court.³⁴ In a significant development for prosecuting crimes of this kind, DNA testing was used for the first time in Sri Lanka to prove rape and murder.

³³ *Supra* n. 21.

³⁴ See the chapter on Crime.

The trial of the accused in the Rita John rape and murder case was concluded in June. All three accused were sentenced to death. The case was heard by a specially constituted Trial-at-Bar, in order to speed up the procedure. Rita John had been raped and murdered on 11th October 1998.³⁵ It is noteworthy that this case was tried and decided within a period of seven months.³⁶

2.3 Sexual harassment

Sexual harassment was recognised as an offence under the Penal Code in 1995. In 1999, a young trainee executive complained to the Supreme Court about the conduct of the Director General of the Commission she worked for. In her fundamental rights application, she complained that the Director General had interdicted her from service because she resented his embarrassing conduct towards her. She said that he frequented her cubicle, and used various suggestive words. He became vindictive when she made her resentment clear, which resulted in her interdiction. Her letter of interdiction alleged that she had made derogatory and irresponsible statements about the management of the Commission, which the petitioner denied. She claimed Rs. 500,000 as compensation for wrongful, illegal and unreasonable interdiction. Although the Supreme Court granted leave to proceed, the case was withdrawn because it was felt by the counsel for the petitioner that any adverse order, which was the likely outcome, would have been detrimental to the petitioner.³⁷

³⁵ See *Sri Lanka: State of Human Rights 1998* (Law & Society Trust, Colombo, 1998) p 128.

³⁶ *Supra* n. 32.

³⁷ S.C. Application No 344/99 (F/R). Also reported in *The Island* 11th May 1999.

In another incident a group of women police constables in the Central province complained to President Kumaratunga about being sexually harassed by a senior police officer.³⁸

In August (from 1st - 3rd) there was a national workshop on "Sexual Harassment in the Workplace" which was organised by Sakshi (New Delhi, India) together with the American Centre for International Solidarity. The aim was to use the trained participants to conduct awareness raising programmes in different workplaces.

3. Health

Although women in Sri Lanka are healthier overall than women in other SAARC countries, they still face health problems that need to be addressed. The following statistics were reported in "Real Lives."

Population (millions)	18.9
Maternal mortality (deaths per 100,000 live births)	140
Total fertility rate (children per woman)	2.2
Teenage pregnancy (% births to girls < 20)	3
Contraceptive provenance (% of married women aged 15-49)	66
Birth attended by health personnel (%)	94
Adult literacy (%)	
Men	93
Women	87

Source: "Real Lives", issue 3, January 1999.

³⁸ Women's Right Watch, 1st quarter 1999.

Article 12(1) of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) requires the adoption of appropriate measures to reduce discrimination against women in the field of health care. More specifically, Article 12(2) provides that "States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation."

3.1 Reproductive health

When discussing women's health, reproductive health prevails over other issues. Currently, abortion remains illegal except when done in good faith for the protection of the mother's life. Throughout 1999; women's rights activists lobbied for the right to have an abortion under the slogan "her body her right". They argue that at least when a woman becomes pregnant as a result of sexual abuse or contraceptive failure, the law should permit abortion. Legalisation of abortion has been discussed at policy level, but no steps were taken to change the existing laws.

Between 500 and 700 illegal abortions are estimated to take place daily in Sri Lanka.³⁹ Thus, for every birth in Sri Lanka, an abortion is also performed. Most abortions are carried out under very unhygienic conditions. Poor women are at greatest risk of developing septicaemia, and with some even dying as a result.

In one incident, it was reported that a mother of two had died after being admitted to Walasmulla Hospital with wounds and bleeding caused by an abortion.⁴⁰ Since abortion is illegal, it is

³⁹ UNFPA Population Report 1999.

⁴⁰ *Supra* n.6.

difficult to obtain accurate statistics, but it is believed that around 250 deaths each year result from illegal abortions and that of these, 33% are due to excessive bleeding.

3.2 Mental health

Two issues arose during 1999 relating to women in the Mulleriyawa Mental Hospital. The first concerned the overcrowding which results from patients being abandoned by their relatives, and the hospital being unable to discharge such patients. About 900 women were reported to be in the second unit of Mulleriyawa Hospital, which has only 500 beds.⁴¹ According to the medical officials there, many of them do not require treatment, but due to legal barriers they cannot be discharged. Under the hospital rules, patients can only be released to the custody of the person who admitted them. If the person who admitted the patient gave a false address and abandoned the patient, they cannot be discharged and anyway had nowhere to go. NEST, an NGO which works in the area of mental health, argues that patients should be treated more humanely.

In addition, people living adjacent to the hospital were reportedly allowed to enter the hospital premises without permission. There were reports of sexual abuse of patients by these unauthorised visitors as well as by some minor hospital staff. One patient reportedly became pregnant as a result. According to Ms. Harini Amarasooriya of NEST, "there should be a better plan and programme to look after these women."⁴²

⁴¹ Sunday Times, 31st January 1999.

⁴² *Ibid.*

4. Participation in the Political Process

Both Provincial Council elections and Presidential elections were held during 1999. Provincial Council elections were held in several stages during the first half of the year. Two women were appointed as Chief Ministers; there had previously been only one such appointment, when Mrs. Chandrika Kumaratunga was elected as Chief Minister of the Western Province in 1993. In 1999, Mrs. Jayangani Dissanayake and Mrs. Samaraweera Weerawanni were elected as Chief Ministers of the North Central and Uva Provinces respectively. However, both women subsequently resigned in order that their husbands could be appointed as Chief Ministers in their places. In December 1999, Mrs. Chandrika Kumaratunga was elected for a second term as the President of Sri Lanka.

The elections to the North Western Provincial Council (Wayamba) were particularly violent and was strongly criticised by independent election monitoring bodies such as the MFFE, PAFFREL and CMEV. Elections of political representatives at local, provincial and national level have continued to be fraught with increasing violence which has prevented women from seeking office. However, women have continued to canvass for political parties and have been active as voters. Political violence shifted to a newer phase during the run up to the Wayamba poll when a woman canvassing votes for the United National Party was made to strip in public by a local politician and his acolytes armed with guns and clubs on the 10th of January 1999. Both party and non party women's groups protested against this act of violence by picketing and demonstrating in Colombo.

During the election campaigns many cases of violence against women were reported. In one instance, the wife of the Vice President of the Weligama UNP Branch Office, was assaulted by

three Samurdhi Niyamakas.⁴³ Further similar cases were reported during the election period. The Sri Lanka Women's NGO Forum complained about violence against women in the run-up to the Wayamba Provincial Council held in January 1999. It said: "We find that targeting women entering the field of politics is a violation of the principles enshrined in the Constitution of the Government of Sri Lanka, the Convention on the Elimination of Discrimination Against Women (CEDAW) to which Sri Lanka is a signatory and the Women's Charter of Sri Lanka. Verbal and physical intimidation of women is totally unacceptable and deplorable and is an indictment on Sri Lankan society in general."⁴⁴

In July, during a protest campaign organised by the UNP, security personnel had allegedly assaulted many women. Among them were former Ministers and Members of Parliament. This attack was condemned by many women's rights activists.

After nominations closed for the Presidential election, many incidents of violence against women were reported from all over the country. President Chandrika Kumaratunga was attacked by a woman suicide bomber at her last rally before the election. The President and 82 people were injured, 24 people died.⁴⁵

In another incident, supporters of the PA, stripped the wife and sister-in-law of a UNP organiser. They had come to the victims' home in search of vehicles, had attacked the house and then stripped the women. The victims were admitted to the Minuwangoda and Gampaha hospitals.⁴⁶

⁴³ Divaina, 18th December 1999.

⁴⁴ Daily News, 25th January 1999.

⁴⁵ Lankadeepa, 20th December 1999.

⁴⁶ The Island, 17th December 1999.

It was also reported that some of the film stars who campaigned for the UNP were harassed, especially the actresses, who were stripped and beaten. Some of them were hospitalised due to the injuries they suffered.⁴⁷

Despite such incidence of violence and terror which were also levelled against women, women continued to be active in election campaigning, monitoring of elections and voting at elections. Unfortunately, political parties showed little will or interest in increasing the nomination of women as contestants at the six Provincial Council elections held in 1999. Neither did political parties attempt to create a conducive, safe and enabling environment for women candidates or support them with the allocation of resources. No proactive measures have been taken by any political party to increase women's representation at local or provincial government level which continues to be abysmal.

5. Women in Armed Conflict Areas

The lives of the people in the war zones remained to a large extent unchanged because the ethnic conflict continued unabated throughout 1999. Women in these areas faced problems in relation to civil and political rights violations, such as detentions and torture as well as particular problems because of their gender. There were a number of cases of rape and sexual violence reported in the year. There were also health related problems especially connected with reproductive health, psycho-social problems of living in conflict affected areas and socio-economic problems such as those caused by the death, disappearance or detention of males which has resulted in female headed households and the shift of economic responsibility on to the shoulders of women.

⁴⁷ Lankadeepa, 18th December 1999.

In June 1999, the Batticaloa High Court judge discharged Samithamby Tangaratnam, a 30 year old mother of two children who had been held on remand for two years. She had been charged under the Prevention of Terrorism Act (PTA) for providing food and other essential items to the LTTE in 1995. The District Medical Officer reported that the accused woman had been subject to severe torture and that she had suffered loss of memory. Several scars of healed wounds were found on her body. He also reported that she had been badly affected psychologically and physically and needed sustained treatment. The State subsequently moved to withdraw the case.⁴⁸

Another young woman who had been charged under the PTA and tortured in military custody was released on bail by the Batticaloa courts in July. She had been arrested by a paramilitary group, and handed to the custody of the Sri Lanka Army. She alleged severe torture, and the DMO's report said that psychological pressure or damage was probable.⁴⁹

Following allegations that a 21 year old woman had been raped and murdered by the security forces in Palinunai, Mannar, on July 11, the state ordered an inquiry. The body of the woman was exhumed on July 21 on the order of the Mannar Magistrate and taken to Colombo for further investigation.⁵⁰

In another case, the President's Committee for Unlawful Arrest and Harassment reportedly directed the Attorney General's Department to initiate an inquiry into the alleged rape, in the presence of her husband, of a Muslim woman from Batticaloa, by three security forces personnel. According to INFORM, the

⁴⁸ INFORM Situation Report, June 1999.

⁴⁹ INFORM Situation Report, July 1999.

⁵⁰ *Ibid.*

Committee had found a report of the allegation in a Tamil weekly paper, which alleged that the security forces personnel were inebriated, and had entered the victims house on the pretext of checking for LTTE cadres. They had pushed rags into her mouth and then had gang-raped her. The matter was hushed up by awarding compensation to the victim and rendering an apology. The Committee urged that the matter be fully investigated.⁵¹

Special programmes are needed to support women who suffer the effects of armed conflict and violence. The National Youth Council has proposed a programme to rehabilitate widows in the Baticaloa District. According to Mr. Selvaraj, MP for Baticaloa, there are 10,000 widows in the district, the majority of whom are under 29 years of age.⁵² In another initiative, it was reported that a counselling service for war widows was initiated by the Sri Lanka Ex-Servicemen's Association in conjunction with the Association of Retired Flag Rank Officers and the Psychiatric Association of Sri Lanka. The counsellors were trained in batches and provide their services on a voluntary basis.⁵³ The Federation of NGOs for Mental Health and Well-being organised a training course for humanitarian aid workers operating in the border villages, to help people in border villagers to deal with the psychological and social problems arising from living in the conflict zone.⁵⁴

⁵¹ *Ibid.*

⁵² *Supra* n. 6.

⁵³ *Supra* n. 23.

⁵⁴ *Ibid.*

6. Conclusion

There has been little change in the situation of women's rights. Of particular concern was the violence used to control women's participation in the electoral process, and many of the needs of migrant women workers and workers in the FTZ still remain to be addressed. The decision of the government not to proceed with the Equal Opportunity Bill was a serious lost opportunity for improving women's rights in the workplace, as well as in other areas. The situation of women in the conflict zones remains bleak; the armed conflict has a direct impact on women in these areas, and their rights often remain unrecognised at the official level.

VIII

Environmental Rights and Human Rights

*Iresha Ratnayake Buthgamuwa**

1. Introduction

This chapter covers the environmental issues that arose past 1999 and also provides an update on the issues covered in editions of *Sri Lanka: State of Human Rights*. During the year, the government introduced no effective plans or regulations to tackle environmental issues.

2. Air Pollution

Air pollution is caused mainly by vehicular and industrial emissions, the main pollutants being carbon monoxide, sulphur

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dioxide, lead and nitrogen oxide. These pollutants can damage the human nervous system. However, despite recommendations having been made by environmentalists to tackle air pollution, no effective action has been taken.

An initiative to introduce smoke metres by the Central Environmental Authority (CEA) was reportedly a failure. About 65 machines were imported from Sweden to measure smoke emissions from vehicles. The "Smoke meters" which were imported at a cost of about Rs. 350,000 each, have hardly been used. They were apparently difficult to use and not suitable for Sri Lankan conditions, as emission levels in Sri Lanka are higher than in Europe and the machines needed to be cleaned every time they were used. In addition, there was a lack of trained staff to use the machines. However, the CEA is reportedly planning to use them in the future.¹

In November, the Supreme Court delivered a significant judgment concerning air pollution. A lawyer had filed a fundamental rights violation plea arguing that the failure of the Minister of Forestry and Environment to enact regulations to control air quality in Colombo city had violated his rights under Articles 3, 4 and 11 of the Constitution. These articles cover sovereignty of the people, the exercise of sovereignty and freedom from torture.² The Supreme Court ordered the Minister to finalise the specifications on mobile air emission, fuel and vehicular specification standards for importation. In order to ensure the equal protection of the law, the Court ordered that the regulations should gazette the above three items, on or before 1st June 2000.³

¹ The Island, 14th October 1999

² See *Sri Lanka: State of Human Rights 1999*, (Law & Society Trust, Colombo, 1999) p 239

³ S.C. Application No. 569/98, S.C. Minutes 02.11.1999

3. Water Pollution

3.1 Inland water pollution

3.1.1 Kandy lake

During 1999, several cases of water pollution were reported from different parts of the country. The historic Kandy lake was reported to have been polluted by raw sewage discharged from houses, hotels and other premises into the lake, contrary to the specifications laid down by the Municipal Council. The pollution was causing algae to spread, decreasing oxygen levels in the lake, and thus killing fish. It also produced a foul stench in the area, causing great problems for residents of the area. Schools around the lake had to be closed for several days.⁴

In addition to the threat to the fish population, these algae produce algal toxins, which are highly poisonous even in low concentration. It was reported that the Mada-Ela carries this toxin to the Mahaweli river. There could be serious health implications from this flow, as there are several water intakes from the Mahaweli river for domestic purposes.⁵

After the pollution of the lake was brought to light, the authorities took several decisions to remedy the situation. The Mayor of Kandy reportedly ordered the householders living around the lake to upgrade their sewerage systems immediately, preventing any further discharge into the lake. Steps were also taken to clean up the algae and repair the lake and its outlets. The Department of

⁴ Kandy News July 1999 –based on the article written by O. L. Illeperuma, Professor of Chemistry University of Peradeniya

⁵ *Ibid.*

Irrigation was subsequently entrusted with a long-term project to protect and preserve the lake.⁶

3.1.2 Le-Ella

In the Dematagoda area of Colombo, the Le-Ella was reported to have been polluted by sewage from Welikada prison and the dumping of waste material from slaughterhouses. This waterway flows through Wanatamulla, emanating a bad smell; it joins with the Dehiwala waterway and discharges its effluence into the sea. It is a health hazard to the local residents, providing a haven for mosquitoes to breed. Although the residents have made representations to the authorities about the waterway, no action was taken.⁷

3.1.3 Bolgoda lake

Bolgoda lake, which covers almost two thirds of the Kalutara District, has reportedly been polluted by the dumping of saw dust and other waste into the lake, despite protests by environmentalists. Dumping of waste, especially saw dust, depletes the oxygen supply in the water. It was also reported that three people had died from unknown causes after bathing in the lake.

The three incidents of water pollution outlined above only represent a few of the total number of instances. The environmental laws need to be strictly implemented throughout the country to end such problems caused by dumping garbage and discharging industrial waste and sewage into the waterways.

⁶ Sunday Times, 11th September 1999

⁷ The Island, 19th March 1999

3.2 Marine pollution

The Marine Pollution Prevention Authority (MPPA) in association with the International Maritime Organization (IMO) organised a workshop in 1999 in Sri Lanka on preserving the marine environment. At the workshop the foundation was laid for the Sri Lanka National Oil Spill Contingency Plan, covering "Oil Pollution Preparedness Response and Co-operation." The programme was targeted at high level representatives of the various ministries, departments and public and private sector institutions connected to the shipping industry; at those who would be affected by any oil spill contingency; and at those who actively participate to prevent oil spill disasters.⁸

On 23rd August 1999, a Turkish ship called the Meliksah, which was carrying fertilizer, was abandoned after being wrecked near the beach between Hambantota and Kirinda. The ship broke into two during a rescue attempt, leaking heavy oil and chemical fertilizers into the sea. The Chairman of the MPPA described the event as a major marine environmental disaster which would cost about 10 millions rupees to clean up.⁹ The MPPA recommended that criminal proceedings be brought against the local company that had tried to tow the ship closer to the coast in order to salvage the cargo and fuel.

However, the local company, which was blamed for the accident, gave a different version of the event. It said that although there were patches of oil and fertilizer in the sea, no marine disaster had been reported by their ship, which had been present when the accident had taken place.¹⁰

⁸ Sunday Observer, 3rd September 1999

⁹ Daily News, 31st August 1999

¹⁰ The Island, 3rd September 1999

4. Phosphate Mining at Eppawala

In 1971, the Geological Survey Department found a significant deposit of high quality apatite or rock phosphate in the Eppawala area. The rock covers approximately 60 square kilometers around the village of Eppawala, to the south of Anuradhapura. Rock phosphate is a non-renewable natural resource, which is mainly used as a raw material for fertilizer.

In 1993, the previous government had started discussions with an American company for the large-scale exploitation of this deposit. Despite huge protests by the villagers, environmentalists and scientists, the government went ahead with formulating the project. It reportedly held three rounds of negotiations with the American company between 1993 and 1996, after which the company submitted a draft Mineral Investigation Agreement (MIA) together with other related documents. It was reported that the draft MIA agreement was initialed by the Secretary to the Ministry of Industrial Development and the representatives of the company, signifying their agreement.¹¹

The prospect of large-scale phosphate mining starting in the area had already provoked widespread public protest on environmental and cultural grounds.¹² During 1999, this protest was taken further when seven public spirited persons filed a fundamental rights application in the Supreme Court to challenge the project.¹³

¹¹ The Sunday Island 31st October 1999

¹² see *Sri Lanka: State of Human Rights 1999*, (Law & Society Trust, Colombo, 1999) pp 240-241

¹³ S.C.Application No. 884/99 (FAR)

They argued that their rights under Articles 14(1)(g), 14(1)(h) and 12(1)¹⁴ of the Constitution had been violated, and also their right to information. The petitioners based their case on two arguments. Firstly, they argued that while forced relocation of people may be permitted for a reasonable public purpose, this project did not fit that description. The government's action in persisting with it in the face of strong criticism was arbitrary and unreasonable. If the project was carried out, it would infringe the petitioners' constitutionally guaranteed rights to pursue their chosen occupations, to freedom of movement and to choose their place of residence.

Secondly, they argued that the National Environmental Act (NEA) and the regulations framed under it require an Environment Impact Assessment (EIA) to be carried out before any such project can be approved. The public are entitled to participate in such an assessment. In this case, however, no such assessment had been made.

The Supreme Court granted leave to proceed in this case. The Court also directed the government to present a copy of the MIA, if signed, to the Court within one week, thereby upholding the petitioners' right to information.¹⁵ The government has complied with the order of the Supreme Court and presented the MIA to the Court. The case had not yet been decided by the end of the year.

¹⁴ Article 14(1)(g) accords every citizen the right to engage in any lawful occupation, profession, trade, business or enterprise; Article 14(1)(h) grants the right of freedom of movement and residence in Sri Lanka; Article 12(1) grants the right to equality before the law and equal protection of the law.

¹⁵ *Supra* n. 11.

5. Coal Power Plant

With the growing demand for energy, Sri Lanka can no longer rely on hydro-power alone. Yet the prospect of new coal power plants being built has caused controversy between the government, environmentalists and residents of the proposed areas. Initially, Trincomalee was selected as a suitable location for a coal power plant, but this suggestion was abandoned for security reasons and because of public protest. The next proposal was for the plant to be built at Mawella, on the South coast. That site, too, had to be abandoned in the face of protests by villagers, academics, politicians and the clergy in the South. As work on Mawella was suspended, a study on the West coast was initiated by the government with the assistance of the Japanese government. This identified several possible locations between Talawila and Mundal as alternative sites, but selected Panniaidi, also known as Norochcholai, as the best option. Around 300 acres was said to be needed for the plant and buffer zone, and this was reported to be an area with little cultivation.¹⁶

As the proposed site is only about 11 km from St. Anne's shrine at Talawila, Christians in the area protested against the development. It was subsequently reported that the Minister of Plan Implementation had said that the power plant would not be built at Norachcholai. However, officials at the Ministry of Power and Energy said they had received no instructions to that effect and that the second stage of the feasibility study was continuing.¹⁷

¹⁶ The Island, 28th July 1999

¹⁷ Sunday Times, 23rd May 1999

In March 1998, the Environment Foundation Ltd (EFL) challenged the decision to build a coal power plant in Norachcholai on several grounds at the Court of Appeal.¹⁸ Their main objection was that three government institutions – namely the CEA, the Department of Coast Conservation and the North Western Provincial Council – had jurisdiction over this project.¹⁹ They also alleged that the authority vested in the North Western Provincial Council by its Environmental Statute was unconstitutional. They sought a writ of mandamus compelling the Director General of the CEA and the Director of Coast Conservation Department to act according to the provisions of the NEA and the Coast Conservation Act regarding the approval of the coal power plant project.²⁰

6. Protection of Wildlife

Conflict between humans and elephants is becoming an increasingly important issue. There were a number of reports of attacks on humans by wild elephants from various parts of the country. Unplanned clearing of elephant habitat for human development has led to a shrinking land area for elephants. With

¹⁸ C.A. Application No. 318/98

¹⁹ According to the averments of the petition the Central Environmental Authority, the 1st respondent is empowered to enforce the provisions of the National Environment Act and regulations made thereunder including those pertaining to the Environmental Impact Assessment Process. The 2nd respondent the Director of Coast Conservation is empowered to enforce the provisions of the Coast Conservation Act within the coastal zone including those pertaining to the Environmental Impact Assessment Process. The petition further stated that the 4th respondent, the Chief Minister of North Western Province, who is in terms of section 61 of the North Western Province Environment Statute empowered to make regulations in respect of the subjects stated therein.

²⁰ C.A. Application No. 318/98.

limited food and water supplies, wild elephants come out of the jungles in search of these resources, damaging property and attacking people in border villages. Some villagers spend nights up trees, fearing elephant attacks, and some try to kill elephants as the number of attacks increases. According to Dr. Nandana Atapattu, the Director of Wildlife and Conservation, out of 400 wild elephants in Sri Lanka, poachers and villagers killed 80 during 1999, mostly in the Polonnaruwa and Anuradhapura areas. He further said that the Department had opened an elephant corridor connecting the Yala National Park, Lunugamvehera and Uda Walawe National Park, along which elephants can migrate. This is hoped to reduce the number of clashes between humans and elephants.²¹

However, some land near the National Parks was allocated to villagers for cultivation and for special projects. One such allocation – to the University of Colombo for a special project – was challenged at the Court of Appeal by the EFL since no Initial Environmental Examination (IEE) or EIA report had been made as required by the NEA.²² It was feared that such projects would aggravate the conflict between elephants and humans.

During 1999, a landmark judgment was given by the Supreme Court with regard to elephants kept in the zoo. An Attorney-at-Law had challenged the decision taken by the Dehiwala Zoo to give a killer elephant to a private person. But a settlement was reached since the person who bought the elephant is known to treat animals well. However, the Court laid down guidelines for any form of removal of elephants from the Zoo in the future.

²¹ The Island, 15th September 2000

²² C.A. Application No. 331/99.

7. Garbage Disposal

As mentioned in *Sri Lanka: State of Human Rights 1999*, garbage disposal is a major environmental problem in Sri Lanka, especially in Colombo and its suburbs. Thousands of tonnes of garbage are disposed at Alupotha, presenting a health hazard to the people who use pipe-borne water in Colombo city. However, in October it was reported that the World Bank had withdrawn funds allocated to a sanitary land fill project in Alupotha because of lack of commitment by the local authorities. This one billion-rupee waste management project had already gone through three years of studies and an EIA.²³

Meanwhile, the Western Provincial Council and the Colombo Environment Improvement Project (CEIP) planned to implement a new method of disposing of 2,205 tonnes of garbage produced by the Colombo city daily. This would involve composting, recycling and incineration. A sanitary land fill site on an area of 60 hectares would receive 1000 tonnes daily. The project will comprise a landfill site and a compost plant with a minimal capacity of 100 tonnes daily, and associated infrastructure. There had been protests against the project on environmental grounds.²⁴

Some local authorities were reportedly guilty of dumping garbage and polluting the environment themselves. For example, EFL filed a case in the Court of Appeal against the CEA and Dehiwala-Mt. Lavinia Municipal Council for dumping garbage at the Attidiya Bird sanctuary. EFL alleged that Dehiwala-Mt. Lavinia Municipal Council was dumping garbage collected from the surrounding areas, including several hospitals, and that over five

²³ The Island, 7th October 1999

²⁴ *Ibid*

acres had been filled in this manner with more than 20 truckloads of garbage being dumped there daily. This had caused a public nuisance and subjected local residents to various health hazards, such as dengue, malaria and cholera. It had also caused contamination of ground water from pollutants. EFL argued that no garbage could be dumped in this area without an IEE or an EIA under the NEA, and the regulations formed under the Act, since such dumping amounted to reclamation of wetlands.²⁵

8. Other Issues

8.1 Hazardous waste

According to the Director, Environment, of the Ministry of Forestry and Environment, the World Bank had estimated that a total of 40,600 tonnes of hazardous waste is generated in Sri Lanka annually. Even though regulations for the internal management of hazardous waste were gazetted in 1996, and regulations were being formulated under the Import and Export Control Act to minimise the transboundary movement of hazardous waste, implementation of these regulations has been delayed due to a lack of proper infrastructure.²⁶

It was alleged that 'Voice of America' (VOA) at Iranawila had disposed of toxic waste in a temple near the VOA premises. The suspected waste material was said to have been sprayed and buried there and suspicions that it was toxic grew after several dogs and cattle that drank water from nearby wells had died. People living close to the site also complained of throat irritation, swelling of

²⁵ C.A. Application No. 642/99

²⁶ The Island, 18th March 1999

joints and watering eyes. Later, VOA reportedly said that the material concerned contained small quantities of arsenic, barium, cadmium, lead, mercury and selenium. Villagers in the area asked the government to institute a full investigation, but it was then reported that VOA had removed the material itself.²⁷

8.2 National Park controversy

Environmentalists expressed fears about land from national parks for being allocated for cultivation and for various other projects, saying that there was a plan to demarcate the Wilambawewa in the Lunugamvehera National Park for cultivation. The Wilamba tank is located on a side of the park, 22 km within the boundary and the area for cultivation is 1,880 acres in extent and located in the catchment area of the tank. A further plan involved allocation of 700-800 acres from Wasgamuwa National Park, although ministerial sources said the project was yet to be confirmed. Conservationists maintain that the Wilambawewa area, which is an important wetland, would lose its significance if the project went ahead. They also warned about aggravating the problems faced by wild elephants.²⁸

In the month of May, EFL filed action against the decisions to grant land adjoining the Bundala national park for a tissue culture research project and to give 350 acres to the University of Colombo for banana cultivation. The site is situated within 100 meters of the boundary of the Embilikala Kalapuwa, which is an environmentally sensitive area as recognised by the Gazette Extraordinary No.772/22 of 24.6.1993 (as amended by Gazette No 859/14 of 23.2.1995). EFL argued that the project should be subjected to IEE/EIA procedures under the Fauna and Flora Protection Ordinance as amended in 1993.

²⁷ Sunday Times, 10th October 1999

²⁸ The Island, 31st October 1999

8.3 Board of Investment Plastic Recycle Project

In the month of May, the BOI approved a project to establish a plant to recycle imported plastic waste in Sri Lanka. According to the environmental officer of EFL, this venture could lead to the infiltration of toxic plastic waste. Furthermore, if medical plastic waste was recycled this could create dangers for living organisms and vegetation. If imported plastic waste was found to be toxic, it would be hard to return it to its place of origin. Such worst case scenarios need to be considered before projects of this kind are implemented.²⁹ It may also need to undergo the EIA process envisaged under the NEA (as amended).

9. Conclusion

During 1999 there was evidence of new environmental problems, and of continuing discussion of issues such as the Eppawala phosphate deposit and the coal power plant. The increasing use of the courts by public interest groups and affected persons has led to some important orders and decisions relating to environmental protection being given by the courts. However, the inaction of the relevant authorities in implementing the laws and regulations, and in taking effective steps to tackle environmental problems, remained obvious and needs to be addressed.

²⁹ Personal interview and—"Would Sri Lanka Resort To the Recycle Imported Plastic Waste" by Chamini Kodituwakku –Biosphere Vol.15 December 1999.

IX

Internally Displaced Persons

*Pubudini Wickramaratna **

1. Introduction

This chapter covers the situation of internally displaced persons (IDPs) in Sri Lanka and related significant events that took place in 1999. It seeks to provide an update of the chapters on IDPs contained in *Sri Lanka: State of Human Rights* reports since 1993. It discusses the situation of IDPs in the Vanni, Eastern and Jaffna regions. The status of the internally displaced children is discussed separately.

Displacement in the North and East has occurred mainly as a result of military operations in those areas. Aerial bombing and artillery shelling by the armed forces have resulted in infrastructure and private property being damaged beyond repair. The military has occupied some buildings for its own use. Many people have moved

* Intern, Law & Society Trust.

to welfare camps to avoid the fighting, although living conditions and facilities in these camps are very poor. The army decides on the areas that can be re-occupied by civilians.

2. Vanni

2.1 Vavuniya

According to the figures of Government Agents (GAs) of Killinochchi and Mullaitivu, the estimated population in LTTE controlled areas in Vanni as at 31st March 1999 was 376,365, out of which 300,000 people were displaced. The statistics show that at the office of the Commissioner General of Essential Services (CGES), 15,756 families comprising 64,558 persons were internally displaced in the Killinochchi District and 23,775 persons in Mullaitivu District.¹ At the end of August, the population of Vavuniya was 136,448 (34,743 families). The following figures include those locally displaced as well as those displaced from other districts.²

	Families	Persons
Vavuniya	26,631	103,618
Vavuniya South	3,777	15,924
Cheddikulam	4,335	16,906

Source : CHA Newsletter, September / October 1999, Volume III

The United Nations High Commissioner for Refugees (UNHCR) ran two sub open relief centres in Palampiddy and Thachchina-maruthamadu and another open relief centre at Madhu, which

¹ INFORM Situation Report, July 1999.

² CHA Newsletter, September / October 1999, Volume III.

housed 30,000 IDPs. At the end of June, there were 21,000 persons in 15 camps in and around Vavuniya.³

By the end of December, 87,098 people had arrived in Vavuniya. Of this number 20,818 were accommodated in welfare centres.⁴ The numbers at the end of September were as follows:⁵

Welfare Centre	Families	Persons
Poonthoddam WC 1	314	1,225
Poonthoddam WC 2	282	1,207
Poonthoddam WC 3	313	1,266
Poonthoddam WC 4	268	1,117
Poonthoddam WC 5	379	1,543
Poonthoddam WC 6	269	1,084
Poonthoddam WC 7	268	1,108
Poonthoddam WC 8	224	955
Veppankulam 1	227	1,045
Veppankulam 2	126	555
Nelukkulam	247	988
Sanasa	19	80
Sithamparapuram	1,821	6,807
Adappankulam	392	1,410
Kovilpuliyanakulam	296	1,142
Total	5,445	21,532

Source : INFORM Situation Report, July 1999, CHA Newsletter, September / October 1999, Volume III, INFORM Situation Report, March 1999, CHA Newsletter, January / February 2000, Volume IV, Issue 1. CHA Newsletter, September / October 1999, Volume III.

³ INFORM Situation Report, March 1999.

⁴ CHA Newsletter, January / February 2000, Volume IV, Issue 1.

⁵ *Supra* n. 2

The district breakdown of people in welfare centres was as follows:

District	Persons
Jaffna	3,855
Kilinochchi	7,304
Mullaitivu	4,220
Mannar	785
Vavuniya	5,089
Other districts	279

Source : INFORM Situation Report, July 1999, CHA Newsletter, September / October 1999, Volume III, INFORM Situation Report, March 1999, CHA Newsletter, January / February 2000, Volume IV, Issue 1, CHA Newsletter, September / October 1999, Volume III.

On 28th July 1999, 2,210 Vanni residents voluntarily tried to return to their homes in 'uncleared' areas of the Vanni. Although the army had assured them that the LTTE had been informed of their trip, once the first bus crossed the army's forward defence line at Moondumarippu, they met with LTTE fire and had to return to Vavuniya.⁶ In November, over 100,000 people left Vavuniya as a result of an order broadcast by the LTTE over their radio station.

2.1.1 Health and medical supplies

Drinking water and sanitation facilities need to be improved in the welfare centres. For bathing and toilet purposes, water is supplied by bowsers and from production wells, but the supply is often disrupted because pumps break down. Half the number of toilets provided could not be used, as they needed renovating.⁷

⁶ *Supra* n. 1.

⁷ *Supra* n. 4.

The government imposed embargo on the transport of "war-related" medical items into the Vanni aggravated the shortage of medical supplies in the area. Such items are not allowed to be taken into the LTTE controlled areas without the permission of local officials and the Ministry of Defence. The shortfall contributed to an already serious deterioration in the quality and quantity of medical care provided to the civilian population.⁸

2.2 Mullaitivu

In the Mullaitivu District, the number of displaced families according to their place of origin as at 31st March 1999 was as follows:⁹

District	Families	Persons
Mullaitivu	8,441	35,310
Jaffna	19,887	79,588
Kilinochchi	3,255	13,859
Vavuniya	2,727	11,269
Mannar	53	215
Trincomalee	2,361	9,199
Batticaloa	348	1,307
Other districts	5	23
Total	37,057	150,770

Source : CHA Newsletter, March / April 1999.

⁸ 1999 Country Report on Human Rights Practices released by the Bureau of Democracy, Human Rights and Labour, U.S. Department of State, February, 2000.

⁹ CHA Newsletter, March / April 1999.

2.3 Madhu¹⁰

Operation Ranagosa III resulted in the occupation of the environs of the Madhu Church by the army. In May 1999, the army announced that the welfare centres around Madhu would be closed and that the IDPs living there would be sent back to where they came from. This resulted in the evacuation of over 10,000 IDPs from the UNHCR Open Relief Camp and other welfare centres around the church.

The IDPs originally from Jaffna were first taken to Trincomalee, and were then given priority berths on ships to Jaffna. Those living in the Vanni were transported by land. Some families were taken to Mannar, Thachchinamaru-thamadu, Chettikulam, Palampiddy, and other newly-cleared parts of Vanni. Those who were unable to go back to their homes were sent to the Palampiddy UNHCR camp or were housed with their relatives or friends.

Some IDPs alleged that they were compelled to settle in certain areas against their will. They were unwilling to return home for security reasons, because of the possibility of unemployment and because their children were due to sit public examinations from schools in Madhu. A petition with 1,000 signatures was submitted to the UNHCR and the GA, Mannar, in which the IDPs recorded their protest.

A mortar attack was launched on the Madhu shrine on 20th November 1999. At the time, over 3,000 refugees were seeking shelter in the church premises. Thirty eight persons were killed and over 70 were injured. Many of the wounded bled to death as

¹⁰ This section is based on 'Sentinel' June-August 1999, published by the Centre for Human Rights and Development and on INFORM Situation Reports, May and November 1999.

they could not be reached for over four hours due to the fighting. The circumstances of the shelling remain unclear. However, both the government security forces and the LTTE were aware that civilians were inside the church at the time. Reports from the site suggest that the LTTE fired mortars into the premises of the church, on the ground that the security forces were taking cover there.¹¹

2.4 Food and other supplies

In September, there was a gradual resumption of food and dry supplies to the Vanni, but living conditions remained extremely precarious. People were unable to engage in any productive economic activities and the cost of living remained high. Malnutrition among children remained a matter of grave concern in the area. People depended on relief measures provided by the State.¹²

In November, heavy fighting prevented regular food convoys from Vavuniya reaching thousands of displaced civilians. The government refused to issue rations to those who had left Vavuniya in response to the LTTE's call for evacuation of the town. Following their return, arrangements were made to grant one week's food provision to those with an income below Rs. 1,500. A sum of Rs. 7.5 million was allocated to the GA Mannar to provide relief measures for two weeks to 15,717 displaced families in the Vavuniya and Mannar districts.¹³

In total, almost 350,000 civilians were stranded without food and other essential supplies throughout the Vanni. In December, the Governor of the Northern and Eastern Provinces held urgent talks

¹¹ For further details see chapter on Integrity of the Person.

¹² INFORM Situation Reports, September, December 1999.

¹³ INFORM Situation Report, November 1999.

with the GAs of Mannar, Vavuniya and Anuradhapura, regarding the situation. Among the displaced persons who were most severely affected by the delays in provision of rations were about 4,000 residents of Poompukar and Kattuppoovarasankulam who had been prevented from leaving their homes by the armed forces, and about 15,000 persons who had fled to Rasendrankulam and Asikulam. Those who had taken refuge at Madhu church also remained in need of food and shelter.¹⁴

The UN joint food assessment mission consisting of the WFP, FAO, WHO, UNICEF and CARE was due to be reactivated in January 2000. The Commissioner General of Essential Services ordered a cut back in food supplies to the Vanni. The CHA reported that this directly affected 1,000 families in the Killinochchi area and 4,600 families in Mullaitivu.¹⁵

2.5 Landmines

Accidents due to landmines increased in the Vanni during 1999. The probability of landmine-related incidents rose as people returned to their homes in areas where landmines had been laid. Those occupied in farming and agricultural activities faced the highest risk of injury by landmines. The CHA reported that the LTTE was helping to clear landmines in the Oddusudan area and had restricted people from returning to their homes until these areas were cleared.¹⁶

¹⁴ *Ibid.*

¹⁵ *Supra* n.. 4.

¹⁶ CHA Newsletter, January / February 1999, Volume III, Issue 1.

3. East

3.1 Trincomalee District

The total number of families residing in the Trincomalee District, as reported by the District Consortium of NGOs, was 4,068.¹⁷

Of these, 1,353 families were in welfare camps and 2,715 were living with friends and relatives.¹⁸

Tamil families	2,038
Muslim families	1,492
Sinhala families	538
Total	4,068

Source : INFORM Situation Report, May 1999

As at February, statistics on displaced families in the Trincomalee District, living in welfare centres or with friends and relations were as follows:¹⁹

DS Division	No. of families in WCC	No. of families outside	Total no. of families
Town and Gravets	988	1,531	2,519
Kuchchaveli	92	228	320
Morawewa	129	35	164
Kinniya	144	921	1,065
Total	1,353	2,715	4,068

Source : CHA Newsletter, January / February 1999, Volume III, Issue 1.

¹⁷ INFORM Situation Report, May 1999

¹⁸ *Ibid.*

¹⁹ *Supra* n. 16.

By August, over 6,000 IDPs remained stranded in Trincomalee awaiting transport by sea to Jaffna. In September 300 persons left Trincomalee by ship to sail to Kankasanthurai where they were re-settled.²⁰

3.2 Ampara District

The number of displaced people in the Ampara District as at 31st March, was as follows²¹:

In WC	No. of families	No. of persons
Sinhalese	1,174	5,983
Tamil	233	840
Muslim	28	843
Total	1,535	7,386

Outside WC	No. of families	No. of persons
Sinhalese	1,645	8,437
Tamil	874	3,667
Muslim	231	1,176
Total	2,750	13,180

Source : CHA Newsletter, March / April 1999.

By the end of September, the number of Tamil persons inside welfare centres increased to 3,693 (922 families).²²

²⁰ INFORM Situation Report, September 1999.

²¹ *Supra* n. 9.

²² *Supra* n. 2.

4. Jaffna

In 1999, the population of the Jaffna peninsula was 493,000 persons, consisting of 147,000 families. More than 600,000 persons were displaced and needed resettlement. Hence, rehabilitation of the infrastructure facilities to reactivate social and economic activities became an urgent priority. The government released millions of rupees through the Resettlement and Rehabilitation Authority of the North (RRAN) to the district administration and other agencies. The quantum of funds channelled for resettlement and rehabilitation activities in Jaffna from the middle of 1996 to the end of 1998 amounted to Rs. 637 million.²³

As of February, about 5,600 people were living in welfare camps; they could not return to their homes either because the buildings had been destroyed or because they were within security zones. About 64,000 people were living with friends or relatives.²⁴ In September, 607 persons were sent to Jaffna.²⁵ However, resettlement of displaced persons in the peninsula remained a matter of concern as some areas were still declared 'uncleared' and the armed forces were occupying the homes of some of those who wished to return.²⁶

In December, the LTTE told over 2,000 people living in areas facing the Jaffna lagoon to vacate their homes. In other areas of the peninsula, 4,027 people comprising 982 families were displaced.²⁷

²³ RRAN Newsletter, July 1999.

²⁴ *Supra* n. 16.

²⁵ *Ibid.*

²⁶ *Supra* n. 12.

²⁷ INFORM Situation Report, December 1999.

Out of about 4,000 persons originally from Jaffna and displaced to Mannar, about 2,000 started moving back to Jaffna in April.²⁸ The CHA reported that 60,070 people returned to Jaffna through Trincomalee and Mannar, by ship, between May 1996 and the end of January 2000.

Prices of essential food items in Jaffna mounted throughout the year due to transport difficulties. Issuing of dry rations to families who were re-settled in the peninsula was suspended in August and resumed in September.²⁹

4.1 Landmines³⁰

In August, the UNDP commenced ground-work on a Mine Action Programme in the Jaffna peninsula. The estimated cost of the project was four million US dollars and the project was to last for two and a half years. The main focus was location of the mines, together with mine awareness education for high risk categories of people, such as farmers and civilians. The UNDP team comprised 10 experts and four sniffer dogs. By August, they had located 500 mines. Irupalai, Neervely, Puthur, Mallakam, Tellipalai, Erlaalai and Chunnakam were some of the areas identified by the UNDP for their work. Lisa Hiller, UNDP's Public Affairs Officer, pointed out that in the Jaffna peninsula with a population of 500,000 there were approximately six landmine victims per month, whereas in Bosnia, with a population of 20 million, there are ten victims per month.

²⁸ Women's Rights Watch, Year Report 1999.

²⁹ *Supra* n. 12.

³⁰ This section is based on the ICRC Newsletter on Sri Lanka, October 1999, Issue No.12.

5. Internally Displaced Children³¹

War and conflict violate every right of the child - the right to be with family, the right to be nurtured and protected, the right to health and most of all, the right to childhood. Approximately 900,000 children in the North and East of Sri Lanka are directly affected by the current conflict. In addition, millions of children in the rest of the country are indirectly affected. An estimated 380,000 children have been displaced and up to 250,000 children remain displaced.

5.1 Health

The outbreak of diseases such as malaria, combined with displacement and disruption of normal food supplies, bring malnutrition. In the North and East, 52% of the children are malnourished and 23% are born underweight. Experts have reported an increase in anemia and lower birth rate, which are both indicators of lower levels of nutrition. Nutrition levels were generally below the national average. Although the government and humanitarian agencies provide food and relief supplies to the displaced, their delivery is often subject to delay or curtailment due to security considerations and logistic constraints.

5.2 Education

Even though schools function in the 'conflict areas', they are over crowded and understaffed. The non-attendance rate is 40% of the children enrolled and surveys have shown that one in five

³¹ This section is based on the joint presentation by Mr. Patrick Vanden Breuane, Humanitarian Advisor, UNDP, and Dr. Gaya Gamhewage of the Save the Children Fund, at the Law & Society Trust on 'Children and the Armed Conflict' on 27.03.2000.

children does not go to school. In Jaffna, only 47.5% of school-aged children have birth certificates, which are mandatory for school admission. Many children have been denied admission as a result. To remedy the situation, a circular was issued by the Government in 1995, requiring school principals to admit children to schools, even though they did not have birth certificates.

5.3 Psycho-social well-being

Children in most areas in the North and East have grown up in a war atmosphere and many are not aware of a world without conflict. Some have become active participants in the conflict and others have often witnessed violence. Statistics show that one in four children who witness violence is severely traumatised and one in 10 children in a conflict society is traumatised. A welfare centre is no match for a home and children living in these centres face many problems such as lack of access to schools, health and sanitation problems, and malnutrition. Girl children are often sexually abused at these centres and some have to succumb to sexual pressures to obtain privileges or favours.

5.4 Child soldiers

Under the Convention on the Rights of the Child, the minimum age for recruitment to armed forces is 18 years. However, the LTTE constantly recruit children who are below 18. At the talks that Mr. Olara Ottunu, the Special Representative of the UN Secretary General for Children and Armed Conflict, had with the LTTE in May 1998, the LTTE agreed not to use children under 18 years of age in combat and not to recruit children under the age of 17. They also accepted a proposal to create a commitment

³² Report of the Special Representative of the UN Secretary General for Children and Armed Conflict, October 1998.

to the policy of not recruiting children under 18 years.³² However, it is questionable whether they have implemented this undertaking. For example, in 1998, a group of LTTE child soldiers surrendered to the government security forces. The youngest of the group was 13 years old.

6. Conclusion

The living conditions of IDPs saw no material improvement during 1999, despite the measures taken by the government and other relief organisations. Most of the problems faced by IDPs related to the security situation in the North and East which affected almost all aspects of their lives: their employment, social life and their rights and freedoms. The government needs to take effective long-term measures to safeguard the rights of this most vulnerable category of people.

X

Workers' Rights

*Maduranga Rathnayake**

1. Introduction

Workers play a significant role in the economy, and unrest among workers can lead to economic difficulties. It is essential therefore for the government to address workers' grievances to ensure that their rights are properly safeguarded and that unrest does not threaten economic growth and stability.

2. National Workers' Charter

The National Workers' Charter was presented to the President in September 1995 by the then Minister of Labour and Vocational Training, in keeping with the 1994 election pledge of the People's

* Intern, Law & Society Trust.

Alliance.¹ However, it had still not been enacted by the end of 1999, largely because of opposition from employers, and particularly from the Employers' Federation of Ceylon.² The Employers' Federation opposed the Bill on the ground that the Charter did not safeguard the public servant's rights and for the reason that it had no balanced approach to employee obligations. Opponents of the Charter see it as being hostile to employers' interests and fear a reduction in the flow of foreign direct investment in the event that the Charter becomes law.

3. Equal Opportunity Bill and Workers' Rights

In 1999, the government attempted to introduce new legislation on equal opportunity, which would have enhanced protection against discrimination in the workplace. At present, constitutional provisions relating to non-discrimination are directed towards providing relief for violations by "executive or administrative action" and thus do not apply to workers in the private sector. One of the primary objectives of the new legislation was to make the private sector accountable for rights violations of this kind.³ As the provisions of the Bill are discussed elsewhere in the Report, this section concentrates only on those aspects concerned with workers' rights.

¹ *Sri Lanka : State of Human Rights 1998* (Law & Society Trust, Colombo, 1998) p 359

² *Sri Lanka : State of Human Rights 1999* (Law & Society Trust, Colombo, 1999) p 272

³ "The Act That Wasn't: Equal Opportunity Legislation In Sri Lanka", Ambika Satkunanathan, *LST Review*, (Law & Society Trust, Colombo, 1999) Vol.10, Issue 144, Oct. 1999 p 44.

Part 1 of the Bill dealt with discrimination against persons and included protection against sexual harassment and discrimination in the work place. Article 3 provided for the protection of workers from sexual harassment in the workplace and under Article 5, discrimination on grounds, *inter alia*, of race, religion, gender in offering employment, promotion, transfer and training were made an offence.

After 42 petitions challenging the Bill had been filed in the Supreme Court, the government withdrew the Bill altogether. However, the objections were mainly directed at the provisions relating to education, and many were without foundation. The withdrawal of the Bill in its totality thus deprived private sector employees of a unique opportunity to go before the proposed Equal Opportunity Commission in case of their rights being violated by their employers. Therefore, it is submitted that the Equal Opportunity Bill should be adopted at least in relation to employment.

4. Migrant Workers

Nearly one million Sri Lankans are estimated to work overseas, over 90% of whom are women. When unemployment and lack of income earning opportunities push families into poverty, women migrate overseas for employment for family survival. Migrant workers continued to face many hardships in 1999. As the statistics from the Sri Lanka Bureau of Foreign Employment (SLBFE) show, many were harassed – including sexually – by employers, and over 100 died in service for various reasons, including from injuries and suicide. The SLBFE received about 750 complaints a month, amounting to complaints from (or about)

some 8% of the overseas workforce. The breakdown of the kinds of complaints it received during 1999 is as follows:

Period: January -December 1999	
Harassment	1811
Non-payment of wages	2266
Breach of contract	1972
Lack of communication	1967
Stranded	67
Death	116
Others	1633
Total	9832⁴

Source: Sri Lanka Bureau of Foreign Employment.

The high incidence of deaths among migrant workers is particularly alarming. According to the SLBFE, nearly 40% more migrant workers died during 1999 than in 1998. Some of the deaths resulted from suicide; others followed incidents of assault and torture by employers. Some workers had died from natural causes, but in other cases, the deaths were attributed to the failure to treat illness promptly and effectively.

Most of the complaints in the "Others" category related to requests from individuals asking the Bureau to get their spouses back to Sri Lanka because of problems within the family.

⁴ Source SLBFE (Information & Technology Division) 1999.

Nearly 145,000 Sri Lankans are employed in Saudi Arabia. Following the reported death of a housemaid there, who had been beaten by her employers, the Minister of Labour directed the Commissioner General of Labour and the Working Director of SLBFE to visit Saudi Arabia to speak to the relevant authorities and employers there to ensure the safety of Sri Lankan migrant workers.⁵ The government of Saudi Arabia offered to set up a training centre in Sri Lanka for housemaids who go to Saudi Arabia for employment.⁶ In Lebanon, the government granted an amnesty in honour of Sri Lankan Independence Day to 250 Sri Lankan workers who had been jailed for various transgressions of Lebanese law. In addition, 48 female domestic workers who had escaped from abusive homes to the Sri Lankan Embassy in Lebanon were repatriated to Colombo.⁷ Various steps were taken in 1999 to implement the five-year plan recommended in 1995 by a Presidential Task Force for the Welfare of Migrant Workers. These developments are discussed in the chapter on Women's Rights.

During the first week of October, the police busted a six-member gang in Dambulla, which was alleged to be behind a spate of robberies, harassment and even rape of returnees from West Asia.⁸

Upon a direction from the President, the Airport Authority initiated a programme to provide returnee migrant workers with security (see the chapter on Women's Rights).⁹

⁵ Daily News, 28th August 1999.

⁶ Daily News, 16th September 1999.

⁷ INFORM Situation Report, February 1999.

⁸ Sunday Times, 10th October 1999.

⁹ Daily News, 30th October 1999.

5. Worker Unrest

Nineteen ninety nine saw a number of strikes by workers in various sectors, including the Government Medical Officers' Association (GMOA), the Nurses Union, non-academic university staff, Bank employees, pilots working for the National Airline and employees of Kiriya Milk Industries of Lanka (Pvt) Ltd.

Repeated strike actions by doctors during the year caused particular hardship to the public, as it sometimes lasted for several weeks at a time. A summary of these strike actions by the doctors is given below.

In January, the GMOA had threatened strike action if 15 demands that were put forward by them were not met. These covered matters such as responsibility for appointments, transfers and disciplinary control of medical officers belonging to the all Island service; interference in Health Ministry administration by a particular individual; and the regularisation of private practice.¹⁰

On 6th February, staff at the government hospital in Kurunegala went on a lightening strike after police failed to act effectively when a doctor was assaulted by two men linked to a key politician of the area.¹¹ On 17th February, hospital staff throughout the Central Province struck work in protest against the abduction and assault of a hospital employee.¹²

During June, doctors belonging to the GMOA launched a strike, which crippled the health service for three weeks, based on the demands they had made in January. However, the key issue was

¹⁰ Sunday Times, 10th January 1999.

¹¹ INFORM Situation Report, February 1999.

¹² *Ibid.*

whether the responsibility should lie at provincial or central government level for appointing the Director of Health Services and the Deputy Director of Health Services of the provincial administration. While the Provincial Council claimed that it had the power to make these appointments, the GMOA maintained that it remained a function of the central government.¹³ The President used emergency powers to declare the health service as an essential service. However, doctors continued their strike action, despite the risk of losing their jobs. The GMOA, however, ensured that emergency services in government hospitals were maintained.

On 25th June, the Colombo District Judge issued warrants to arrest several officials of the GMOA for contempt of court because the officials were said to have violated a court enjoining order compelling them to report to work. They were subsequently released on bail. It was argued on behalf of the doctors that the District Court had no jurisdiction to charge the respondents in this instance. However, neither the case against them nor the challenge to the court's jurisdiction had been settled by the end of the year.¹⁴ The strike action ended on 2nd July, when doctors returned to work following discussions between the President and GMOA representatives.¹⁵

During June, several cases of violence against doctors and their property were reported from different parts of the country. The GMOA claimed that politically motivated, organised groups were responsible but the government said that they were the reaction of citizens who had suffered from the strike actions by the GMOA.

¹³ INFORM Situation Report, June 1999.

¹⁴ Daily News, 26th June 1999.

¹⁵ INFORM Situation Report, June 1999.

Further threats of strike action were prompted by a speech given in August by the Minister of Health, at a meeting of the Nurse's Union. He reportedly said that once all vacancies for doctors in the government sector were filled, the government intended to impose a ban on private practice for MBBS qualified doctors and specialists.¹⁶

In September, doctors at the Polonnaruwa hospital began a strike after a mob had attacked several doctors attached to the hospital.¹⁷ The issue of whether their salaries would be cut when they were on strike, and whether the strike period should be deducted from their annual leave – as had been directed by the Health Ministry during the previous strike – became contentious. Action escalated on 21st September, when doctors in North Central Province launched a strike. On 27th September, the issue was resolved, however, when the authorities said they would withdraw the regulation.¹⁸

In November, doctors staged a token strike over an appointment of a new Director of Health Services who was over the retirement age, and who had not worked in the administrative service. They also protested about the delay in presenting the findings of the committee, which had been appointed to report on the status of the all _Island service.¹⁹

On 9th December, the GMOA staged a token strike in protest against the government not declaring the health service an all-island service. On 13th December, however – after discussions with the GMOA – the President directed the Secretary to the Ministry of Health to issue a gazette notification declaring the

¹⁶ INFORM Situation Report, August 1999.

¹⁷ INFORM Situation Report September 1999

¹⁸ *Ibid.*

¹⁹ The Island, 3rd November 1999.

health service as an all-island service. However, the doctors went ahead with the strike as planned, as they had not been officially informed of the President's direction.²⁰

6. Women Workers in the Free Trade Zone

Under the Greater Colombo Economic Commission Law No. 4 of 1978, the first Investment Promotion Zone was set-up in Katunayake. There are five Free Trade Zones (FTZ) —, as such areas are now commonly known in Sri Lanka.

About 90% of workers in FTZs are women; most are aged between 20 and 35 and are unmarried. They are mostly Sinhalese and come from various remote areas of the country. Some earn as little as Rs. 2,500 per month. Accommodation has been a major problem for them, as well as sexual harassment and rape.²¹

7. Industrial Disputes Act of 1950 Amended

On 8th December, the Minister of Labour introduced an amendment to the Industrial Disputes Act of 1950 which extended workers' rights by giving them the right to join a trade union without the consent of their employer, and making it mandatory for all employers to engage in collective bargaining. The Act applies to both state and private sector companies. However, the amendment is not in keeping with ILO Convention No 98 that has recognised voluntarism in collective bargaining.²²

²⁰ Divaina, 14th December 1999.

²¹ Kelly Dent, "The Pathetic Price FTZ Women Workers Have to Pay," *Social Justice* 150, (1999), p 12.

²² Industrial Disputes (Amendment) Act No. 56 of 1999.

8. Unemployment

Unemployment has been a major issue in Sri Lanka for many years. According to the Department of Census and Statistics, nearly 600,000 people were unemployed in the first quarter of 1999, 85% of whom are aged between 15 and 29 years.²³

9. Conclusion

It is essential for the State to ensure social justice to workers and to create a sound legal framework and effective and efficient enforcement mechanisms. However, on the other hand, it must also be realised that trade unionism is not an end in itself, and that rights are balanced by social responsibilities which cannot be ignored.

The repeated strike action by doctors during the year indicated their failure to find a balance between their noble professional duties and their right to defend themselves as professionals.

There is also a need for new methods of dispute resolution. Although there could be other means of solving disputes,²⁴ loss of faith in workers of these methods has pushed them into resorting to trade union action as the first resort. Therefore, it is important that new ways of dispute resolution be explored that are expedient as well as capable of building faith in the working community.

²³ Department of Census and Statistics, 1999.

²⁴ For example, Arbitration, Mediation Boards etc. However, to go for arbitration the parties must have agreed on it. Mediation Boards are available only in limited situations. Having a dialogue with the relevant parties would be the best way, but many do not believe in it for obvious reasons.

XI

The Controversy over the Equal Opportunity Bill

*Ambika Satkunanathan**

"All human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom, dignity, of economic security and equal opportunity."

Declaration of the Aims and Purpose of the International Labour Organisation (Declaration of Philadelphia 1944)

1. Introduction

In October the government placed the Equal Opportunity Bill on the Order Paper of Parliament. However, the government postponed the presentation of the Bill hours before it was due to

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be presented. Within seven days of it being placed on the Order Paper 42 parties petitioned against the Bill on its constitutionality in the Supreme Court. In response the government through the Attorney General gave an undertaking to the Supreme Court that it would not proceed with the Bill and that the Bill would be removed from the Order Paper of Parliament. The Court consequently announced that, in view of the government undertaking, there was no need to proceed with the petitions.

Why did the government fail in its attempt to introduce, which on the face of it, appeared to be a forward thinking piece of legislation? Why would people, i.e. those who were supposed to benefit from it oppose the legislation? Has the Bill roused feelings buried deep in the psyche of people?

Equal opportunity aims to ensure that everyone has the opportunity to access resources and compete on fair terms. It strives to create a level playing field. Equal access does not mean equal results. Non-discrimination therefore is an important element of equal opportunity, as only non-discriminatory principles and practices will lead to the removal of fetters on a person's right to access resources and opportunities. The essence of equal opportunity is that each person has the right to develop his or her capabilities to the utmost, free of restrictions which are based on the person's attributes or qualities that are irrelevant to the person's capabilities.

What is discrimination? Discrimination has been interpreted to imply "any distinction, exclusion, restriction or preference which is based on any ground such as race, gender or other status, and, which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms. The prevention of discrimination has been defined as the... prevention of any action

which denies to individuals or groups of people equality of treatment which they may wish.”¹

Discrimination has been prohibited in a number of international instruments such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and the UNESCO Declaration Against Discrimination in Education. In addition, regional instruments such as the Inter-American Convention on Human Rights have outlawed discrimination.

While the Bill was by no means perfect, it represented a most significant attempt by the government to address the crucial issue of discrimination in Sri Lanka. Had the Bill become law, it would have provided a legislative and institutional framework that might have enabled a new public awareness of these issues to develop, and a gradual change in perceptions and practices to develop. The vehemence of the opposition to the Bill, which sadly led to its demise, was evidence of the great need that exists in Sri Lanka for issues of discrimination to be addressed with determination and vigour.

2. Is There a Need for Equal Opportunity Legislation?

The Constitution of Sri Lanka contains an equality provision² in addition to a non-discrimination provision.³ The Directive Principles of State Policy also say that the “State shall ensure equality of opportunity to citizens, so that no citizen shall suffer

¹ Convention Against Discrimination in Education; Convention Concerning Discrimination in Respect of Employment And Occupation.

² Article 12 (1)

³ Article 12 (2)

any disability on the ground of race, religion, language, caste, sex, political opinion or occupation."⁴ Since these constitutional provisions exist should the government have attempted to introduce additional legislation?

Although there is no restriction on the constitutional provisions which state that they are applicable only to public sector institutions, the mechanisms provided by the Constitution are directed towards providing relief for violations by "executive or administrative action."⁵ Therefore, those in the private sector are left high and dry with no avenue to seek redress. One of the primary objectives of the government in enacting this legislation was to make the private sector accountable for rights violations. In this day and age where the profits of large corporations exceed the annual budgets of many countries, and, where corporations have been found to be guilty of rights violations, as in the case of mining and logging companies in South America, and manufacturing companies in South and South East Asia, countries would be well advised to hold the corporate sector accountable for their actions.

In Sri Lanka the concerns of the private sector with regard to the proposed legislation have been with regard to the stifling of their power to hire and fire persons. They have viewed it as an interference with their private dealings. It has to be stated at the outset that no one is above the law. Even those functioning in the free market have to take laws and regulations into consideration, and be held accountable for their actions. This legislation in no way aims to impose fetters on employers or companies. Instead, the purpose is to ensure that discriminatory practices are eliminated and all persons have equal opportunity to access

⁴ Article 27 (6)

⁵ Article 126 (2)

resources and opportunities. The Bill does not render any "selection or non-selection" questionable. The fact that merit alone should be the basis for employment is not disputed; what the legislation seeks to do is to ensure that a qualified person is not discriminated against due to that person's gender or disability, or any other ascriptive status.

The opponents of the legislation have also stated that discrimination does not exist in Sri Lanka and, therefore, there is absolutely no need for such legislation that only portrays the wrong image to the outside world. To quote one particular news report "it is relevant to ask whether the whole tone of the proposed legislation contains an element of "overkill" which could create an undeserved negative image of this country in international eyes."⁶ At this point in time, when Sri Lanka is embroiled in a civil war, when thousands have been rendered homeless, when children are being used as soldiers, when crime and corruption are on the increase and when particular groups in society are trying to incite communal violence, the introduction of equal opportunity legislation which only aims to create a just and equitable society will in no way tarnish the current image of our country, if at all, it will only enhance the image of the country as one that acknowledges existing problems, and is willing and able to tackle them in a mature and forward thinking manner.

Another argument which should be examined is that certain areas which have been brought under the purview of the legislation, such as the provisions outlawing discrimination in access to public places and means of transportation and the provision of goods and services "are ...redundant in today's context and make Sri Lanka sound like an apartheid state in need of reform."⁷ In all

⁶ "Legal Watch," *The Island*, 3rd October 1999.

⁷ *Ibid.*

fairness to the author of the article it has to be accepted that the provision in relation to access to public places and means of transportation is superfluous, but the section on provision of goods and services seems relevant even in today's context when one realises that the Indian Tamils in the hill country still face such discrimination. It must also be noted that Sri Lanka is in need of urgent reform today, not only in the sectors mentioned in the proposed legislation but also in practically every sphere.

Another common complaint about the Bill has been that the grounds of discrimination are too broad, and that this would in effect jeopardise the effective implementation of the legislation. Still others have argued that this Bill targets too many areas where discrimination is not present, such as access to places and means of transportation, and ignores areas which should have been taken to task, such as personal land laws.

When legislating to eliminate discrimination it is only natural that the framers would wish to cover as many grounds of discrimination as possible. Sometimes this may not be feasible or practical, in that case separate pieces of legislation should be framed for different grounds. On the other hand, this could result in a plethora of laws being in place and might lead to confusion.

3. The Equal Opportunity Bill

Despite the existence of international norms and standards outlawing discrimination, many people around the world do experience some form of discrimination. Many countries have reacted to this by enacting legislation ensuring equal opportunity to all. The Sri Lankan government attempted to introduce similar legislation but encountered many problems that resulted in the abandonment of the Equal Opportunity Bill.

The Equal Opportunity Bill was drafted along similar legislation in other countries such as Australia, Canada, United States of America and South Africa. At first glance one is struck by the fact that all but one of these countries are "developed western countries," and one may wonder how compatible their systems would be with the needs of a developing South Asian country such as Sri Lanka. This issue will be discussed in the following sections of the paper, but first an examination of the relevant provisions of the legislation is in order.

The Bill contains four objectives:

- (a) *the promotion of equality of opportunity, and of the recognition and acceptance within the community, of the equality of all persons regardless of their ethnicity, gender, religious or political opinion, language, caste, age or disability;*
- (b) *the elimination of discrimination, either direct or indirect, against persons on the ground of ethnicity, gender, religious or political opinion, language, caste, age or disability and to take effective measures to protect and advance persons or categories of persons disadvantaged by discrimination on one or more such grounds;*
- (c) *the elimination of sexual harassment in the workplace and in educational institutions and public places and the elimination of sexual harassment related to accommodation;*
- (d) *ensuring the realisation of equality of opportunity in the workplace, in relation to both ethnicity and gender;*

Subsection (c) is aimed at the elimination of sexual harassment, but one could query whether this provision is really necessary

since the Penal Code contains a provision that outlaws sexual harassment. The provision in the Penal Code imposes a fine and or imprisonment for five years, while the Equal Opportunity Bill contains no such sanctions; it merely states that the complaint should be referred to the police. In the absence of sanctions and compensation for the victim is there any necessity to tamper with an area which is already part of the Penal Code?

It could be argued that the definition in the Penal Code is unclear, and that what this Bill attempted to do is to reiterate the Penal Code provision in order to ensure effective compliance. This Bill does contain provisions that impose positive obligations on the employer to take preventive steps to ensure that a conducive work environment that is free of sexual harassment is created. Although it seems as if the framers of the Bill began with the intention of providing a civil remedy the absence of compensation for the victim leaves the public confused.

The Bill outlaws discrimination in five different areas; employment, education, access to places and means of transportation, accommodation and provision of goods and services.

4. Discrimination in Employment

In comparison to the provision on education this is a relatively non-controversial provision. This makes it unlawful to discriminate against anyone on an outlawed ground of discrimination in hiring a person, in determining the terms and conditions of employment, by dismissing that person, or by subjecting that person to any other detriment.

There are of course exceptions to this provision. The section shall not apply to:

- ☐ recruitment for employment as priests or ministers of a religion;
- ☐ employment for purposes of a private household;
- ☐ employment as a teacher in an educational institution referred to in paragraphs (a) and (b) and subsection (2) of section 6;
- ☐ employment for the purposes of a family business, the majority of which are members of one family; and
- ☐ employment where the essential nature of either the employment or the institution in which the employment be performed requires that it be performed by a person having proficiency in a particular language, by a person of a particular ethnicity or gender, or a person of a certain age or a person without a disability or a person holding or not holding a particular religious belief.

The final two exceptions seem to nullify the objectives of this particular provision. This exempts family businesses which employ members of one family, but what constitutes family is not defined in the Bill. In South and South East Asia extended members such as second cousins and even relatives by marriage are deemed to be members of one family. What then of a business that employs 150 people who happen to be part of one family? Are such businesses free to discriminate against persons at their will?

It has to be conceded that certain occupations require that a person be of a certain gender, but it is hard to imagine a job which would

require a person to be a Sinhalese or a Tamil. It is reasonable to require proficiency in a particular language, but as long as the person is proficient in the language the question of ethnicity is not relevant. As most organisations are reluctant to hire persons with disabilities either because they are of the misguided belief that they do not possess the capability to do the job, or because they do not wish to make their organisations "user-friendly" to those with a disability, exempting hiring on the ground of disability does not further the cause of persons with disabilities. Instead, this Bill should have followed the Australian Disability Discrimination Act of 1992 which requires workplaces and other environments to provide facilities of access and use to the extent that these are economically and practically feasible.

In the light of these problems it would have been prudent to design a test to determine an essential occupational requirement. In the absence of such a test, this particular provision undermines the objectives of the legislation.

Another question that continuously kept cropping up, was how would one "prove" discrimination? Especially with regard to employment it can be quite hard to prove that one has been discriminated against purely because of any ascriptive status. How would one gather proof to substantiate a claim of discrimination? With regard to promotions the task will be much easier as one could pinpoint to the other person's lack of requisite qualifications or experience as one would be familiar with the other applicant's capabilities, but in the case of recruitment, where one is quite unaware of the other applicants' qualifications and capabilities, the task becomes near impossible.

5. Discrimination in Education

This is the most controversial provision which raised a hornets nest that ultimately resulted in the demise of the Bill. This provision also brings into focus existing conflicts between a secularist state and a religious state, between individual rights and group rights, between ensuring the enjoyment of rights by all and the protection of minority rights, and, between constitutional guarantees to all people and constitutional limitations on the exercise of rights guaranteed to all people.

It is important to tackle the issue of education, as past discriminatory practices outside the labour market notably in the provision of education contribute to the lack of equity in employment. Such disadvantage also tends to be self-producing, as those with a poor education are often unable to secure sufficient income to provide for the education of their children, who, in turn, are unable to access the labour market.⁸

On the face of it, this provision appears to eliminate discrimination in all schools, but subsection (2) exempts certain schools from the ambit of this legislation. In order to analyse the issues arising from this provision an examination of the educational system in Sri Lanka is essential.

The Sri Lankan educational system is "fraught with inequities which only deepen existing ethnic, economic and regional disparities."⁹ These inequities are exacerbated by the complexity of the system in place. The schools are categorised according to the number of grades taught in each school. Accordingly, there

⁸ Employment Equity, <http://www.polity.org.za/govdocs/commissions/fin8.html>

⁹ *Sri Lanka; State of Human Rights 1998*, (Law & Society Trust, Colombo, 1998), p. 263.

are type 1AB, 1C, Status 2 and Status 3 schools.¹⁰ These are further categorised as government schools, international schools, private fee levying schools that are run by religious bodies and receive no financial assistance from the government, and non-fee levying private denominational schools which receive government assistance in the form of teacher's salaries, and are thereby bound to a certain extent by government regulations. Of these categories, entry to certain government schools and to the private fee levying and non-fee levying schools is very competitive. Although the government schools are meant to be secular, certain schools follow a policy of only admitting children of a particular ethnicity or religious faith.

Due to the standard of education in the above said schools parents clamour to gain entry for their children to these schools. Since the quality of education in most government schools with a few exceptions, leaves a lot to be desired, gaining admission to these prestigious schools has become extremely competitive. In addition these schools are very particular about the "type" of students they admit.¹¹

The legislation on Equal Opportunity, therefore, endeavoured to address this anomaly to a certain extent by decreeing that all educational institutions should admit all students if they are suitably qualified. Yet, if this were the intention of the legislation, it does not appear to be so, since the exceptions to the provision would in effect result in maintaining the status quo.

¹⁰ Id, p. 274.

¹¹ One has to be of a particular faith, or needs to be the child of a past pupil of the institution to gain entry. Where government schools are concerned there is also a rule which states that a student should live within a two mile radius of the school. This has resulted in parents forging documents and letters to obtain admission in these "prestigious" schools.

Subsection (3) vests power in the Minister of Education to determine guidelines in regard to admission of students professing various religions to educational institutions referred to in subsections (a) and (b), which are categorised as government or semi-government schools. This, in effect, would include all schools except those that are fully private and run by religious bodies. This allows the very schools which employ selective admission policies and thereby discriminate against students not of the "correct" faith, ethnicity or social standing to continue to do so, but tampers with the semi-government and government schools which to a certain extent admit children of different ethnicities and religious faiths. What then is the aim of this provision?

It appears that the government began with the intention of eliminating discrimination in all schools and later in order to appease certain sections in society inserted the exceptions that have not been formulated with the realities of the educational system and the social structure in mind.

This provision also raises many other contentious issues. It is indeed important that minorities have the freedom to attend a school where minority language, minority values of history and culture can be cultivated and preserved. International instruments such as the United Nations Declaration on the Rights of Persons Belonging to National, Ethnic, Religious and Linguistic Minorities, states that minorities shall not be denied the right in community with other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language. The Convention on the Prevention of Discrimination in Education contains provisions that give minorities the right to have influence over educational institutions. This then is an internationally acknowledged right, but the strict exercise of this right could also lead to marginalisation and

alienation and deepen the existing divides between the different communities in the country.

One of the petitioners challenging the Bill on its constitutionality claimed that the Bill was discriminatory because section 6(1)(f) of the Bill was in violation of Article 14(1)(e) of the Constitution.¹² Section 6(1)(f) decrees that a student should not be subjected to any detriment, after his or her admission to a particular educational institution. The petitioner claimed that this provision prevented a person exercising control over an educational institution, of a particular religion, from restricting the enjoyment of rituals of another religion within the institution. The petitioner claimed that this would force the principal of a Buddhist school to provide facilities to perform other rituals that may be "in conflict" with the Buddhist religion.

Article 14(1)(e) of the Constitution states as follows:

Every citizen is entitled to the freedom, either by himself or in association with others, and either in public or in private to manifest his religion or belief in worship, observance, practice and teaching.

Section 6(1)(f) in no way restricts the above right enshrined in the Constitution. On the other hand, it attempts to enhance this right by ensuring that each and every student in a school has the right to profess and practice his or her religion.

This provision also brings forth the tension between freedom of religion and the limitations imposed upon that freedom by the Constitution. Although it is the responsibility of the State to

¹² The Island, 15th October 1999.

eliminate socio-economic inequality, in the course of doing so it should not illegitimately infringe constitutional rights.¹³ It is generally acknowledged that any limitation of a constitutionally protected right must be justified not merely in terms of reasons but in terms of reasons of a certain kind.¹⁴ The Constitution of Sri Lanka does impose limitations on Article 14(1)(e).

Article 15(7) states that:

The exercise and operation of all the fundamental rights declared and recognised by articles 12, 13(1), 13(2) and 14 shall be subject to such restrictions as may be prescribed by lawfor the purpose of securing due recognition and respect for the rights and freedoms of others....

It is evident that this section restricts the rights of persons to profess and practice their religion if it results in the infringement of the rights of others to do the same. The only goal of section 6(1)(f) was to guarantee the rights of all students to benefit not only from formal education but also from being able to practise their religion, and culture and speak their language, and at the same time be exposed to the cultures and religions of other communities.

The most vehement, vociferous opposition to the Bill in general and this provision in particular was from religious groups both majority and minority which felt that this would in some way erode their way of life and heritage. The general opinion is that the government meekly withdrew the Bill in its response to this lobby. It is easy to perceive the cross roads the government is at;

¹³ Myerson D, *Rights Limited: Freedom of Expression, Religion and the South African Constitution*, Juta & Co (1997). p.5.

¹⁴ *Id.* p.1

they sought to protect the rights of the minority in some way, which while threatening the majority also to some extent undermined the rights of those it sought to protect, the minorities. As Juregensmyer states "rulers in Sri Lanka face the same dilemma their predecessors did; they need Sinhalese support, but they feel that they cannot go so far as to alienate the Tamils and other minority groups. They would like to achieve what might be an impossibility; a national entity that is both religious and secular."¹⁵

As in other ex-colonies and ex-members of the Soviet Union or States brought into being or separated by war, Sri Lankans too, both the majority and minority yearn to revive their cultures, religions, languages and heritage. This will inevitably lead to conflicts between the different national groups within States, as in the case of Sri Lanka. Jurgensmyer's words in his article written 6 years ago sound almost prophetic. He says that "many observers of the Sri Lankan scene speculate that a revived movement of Sinhalese nationalists will appear again.....If and when the Sinhalese nationalist movement is revived, most likely it will again target the secular government."¹⁶

The minorities too viewed the legislation with skepticism. At the moment the LTTE which claims to be the representative of the largest minority in Sri Lanka, the Tamils, is demanding autonomy, i.e. they are demanding their right as a peoples to a separate nation state. Most of the minority political parties too are demanding recognition of their rights as a group, i.e. they are demanding some form of power sharing with the majority government. Therefore, the opposition of the minorities striving for recognition as groups to legislation on equal opportunity which

¹⁵ *Id.*, p. 38.

¹⁶ *Id.*, p. 109.

is directed at protecting individual rights should not come as a surprise.

6. Equal Opportunity Programmes

Sections 11 and 12 impose obligations on institutions employing 100 or more persons to formulate equal opportunity programmes and, where necessary, affirmative action programmes. These programmes should be designed to identify in a systemic way and remove any discriminatory barriers based on any of the proscribed grounds of discrimination. Concern has been expressed about the ambiguity of the words "affirmative action programmes where necessary." Many interpretations have been put forward about this provision, the most common being that quotas will be imposed to ensure numerical representation in the employment sector to be reflective of the general population. There is no mention of quotas in the legislation, and on the face of it, it appears to be about targets rather than quotas. Once again the peculiarities of Sri Lankan society throw a spanner in the works. The Sri Lankan population is segregated according to ethnicity in certain provinces. The North is largely populated by Tamils and the East mainly by Muslims whereas the Sabaragamuwa and Southern provinces consist mainly of Sinhalese. The Central province and the Western province are multi-ethnic in nature.

This, therefore, makes it difficult to assess the necessity for affirmative action programmes. The difficulty does not immediately nullify the possible benefits of this provision. The rationale of the provision is to ensure that under-represented segments of the population are given the opportunity to access resources and opportunities in society. In assessing the necessity of affirmative action programmes the demography of the particular province should be taken into account, rather than the population

of the whole country. Therefore, the employment of 90% Sinhalese in the public sector in the Southern province would not be contradictory to the objectives and principles of the legislation.

The objective of the legislation is not to change the population distribution of the country but to ensure a person is guaranteed equal opportunity regardless of the place of residence.

Section 13 of the Bill states that every employer in an institution shall furnish to the Equal Opportunity Commission ...within one year of the coming into operation of this Part of the Act, a preliminary report on the composition and diversity of that institution.

In order to furnish a report on the diversity and composition of the institution the employer will have to gather information on, amongst others, the caste of the employee. Although the aim of this Bill and this particular provision is to eliminate discrimination, fears have been expressed that compelling persons to disclose their caste will institutionalise the very system which the state is attempting to eliminate. What then are the options? As public opinion seems to indicate that discrimination on the basis of caste has been all but eradicated, may be it should not have been included in the Bill. Or, only those who wish to disclose their caste should do so and the company in its report should be free to state that a certain percentage of employees did not wish to disclose their caste.

7. Equal Opportunity Commission and Tribunal

In Sri Lanka there is a plethora of commissions, most of which have failed miserably in fulfilling their mandate. At this point in time should the government have attempted to create two more

institutions to be a burden on the already overburdened coffers of the State?

Since the only means available to persons to seek redress in the case of infringement of fundamental rights is the Supreme Court, the Equal Opportunity legislation sought to create a less expensive, more expedient method of obtaining relief. The aim of creating these two institutions was to enable people to go to a less formal, easily accessible forum rather than expend an enormous amount of money to obtain justice. As with the other human rights institutions created by the state, the stated objectives are laudable but, effective functioning would have depended largely on the individuals manning these institutions.

The Equal Opportunity Commission's function was to receive complaints of discrimination, investigate them and attempt to resolve them through conciliation. In the event of a failure the Commission could refer the matter to the Tribunal which is a quasi-judicial body. In addition, the Commission also had to engage in public education and assist institutions set up in-house mechanisms to promote equal opportunity and resolve complaints of discrimination.

The Tribunal, a quasi-judicial body, would give decisions on matters referred to it by the Commission, or hear appeals of complainants dissatisfied with the decision of the Commission not to investigate the complaint. The mandates of the Commission and Tribunal are ambitious, but as stated above their effective functioning would depend on the members, the resources available to the bodies and well-trained staff.

Since governments often tend to stifle human rights institutions through the denial of funding, it is refreshing to note that the bodies envisaged by this legislation were given the right to accept

funds, grants or gifts from local and foreign sources. On the other hand, judging by the reaction to the Bill, this might be construed to be international interference in national affairs. It has to be pointed out at this juncture that as the government of Sri Lanka freely accepts aid from foreign nations, to prevent these institutions from accepting foreign aid sounds hypocritical.

8. Summary of Petitions Against the Bill

This section will examine the most controversial objections raised against the Bill. Most of the arguments were against the education provision. The opposition was by those schools which felt that they would be unfairly brought within the jurisdiction of the Bill – i.e. the government and semi-government schools. Other schools, such as the fully private religious schools, would not be bound by the provisions of the legislation.

One of the arguments put forward by the petitioners was that Vishaka Vidyalaya, a leading government Buddhist school, would be adversely affected if the Bill was enacted while schools run by religious bodies were exempted. However, the petition did not state how or why they would be adversely affected.

It was also claimed that the Act contravened Article 126 of the Constitution, which vests sole and exclusive jurisdiction to hear and determine any question relating to the infringement or imminent infringement by executive and administrative action of any fundamental right in the Supreme Court. The argument stated that because the Bill would make it unlawful to discriminate on the grounds of ethnicity, gender, religious or political opinion, language, caste or disability, and would give the Commission and Tribunal the power to hear and determine questions of infringement or imminent infringement of fundamental rights and

to take preventive action and affirmative action to prevent such discrimination, it infringed upon the Supreme Court's jurisdiction.

This argument effectively stated that the only institution in the whole country that is able to deal with matters relating to fundamental rights is the Supreme Court. The Supreme Court is also the highest court of appeal in the country. According to this argument, then, no other body or institution has the power to deal with fundamental rights, and every person would have to go to the highest court in the land to seek redress. The Constitution states that the Supreme Court has the sole and exclusive jurisdiction, but this does not mean that the sole and exclusive jurisdiction to hear matters relating to human rights lies with the Supreme Court. The rights protected by the Equal Opportunity Bill are not only fundamental rights but are also human rights. This means that the Commission and the Tribunal by dealing with these rights would not contravene the Constitution. It also makes sense to set up bodies which are able to deal with these matters in an inexpensive and less formal manner, which would reduce the number of applications to the Supreme Court and provide speedier access to redress. This Bill in no way detracted from the powers of the Supreme Court; it did not bar any citizen's right to appeal to the Supreme Court. It merely provided another, more accessible, avenue for the public to seek redress.¹⁷

The petitioners also stated the Bill violated Articles 12(1) and 12(2) of the Constitution by requiring that persons disclose such personal details as their caste, religion, ethnicity and age when applying for a job. However, employees prospective and current,

¹⁷ The Human Rights Commission of Sri Lanka however has been given wide powers to investigate violations caused by "executive or administrative action", and at the time of the passing of the Bill no objections were lodged against this particular provision. See Human Rights Commission Act, No.21, ss 18-21 (1996).

would not have been compelled to disclose any information they did not wish. The information was to be used only for the purpose of determining whether any class of persons are discriminated against due to any ascribed characteristic.

It was also argued that the Bill was discriminatory because section 6(1)(f) was in violation of Article 14(1)(e) of the Constitution.¹⁸ Section 6(1)(f) decreed that a student should not be subjected to any detriment after his or her admission to a particular educational institution. The petitioner claimed that this provision prevented a person exercising control over an educational institution of a particular religion, from restricting the enjoyment of rituals of another religion within the institution. The petitioner claimed that this would force the principal of a Buddhist school to provide facilities to perform other rituals that may be "in conflict with the Buddhist religion."¹⁹

Article 14(1)(e) of the Constitution states as follows:

Every citizen is entitled to the freedom, either by himself or in association with others, and either in public or in private, to manifest his religion or belief in worship, observance, practice and teaching.

Section 6(1)(f) would in no way have restricted the above right. It was attempting to enhance this right by ensuring that each and every student in a school would have the right to profess and practice his or her religion.

Petitioners argued that the independence of the public service would be interfered with by provisions relating to the creation of

¹⁸ The Island, 15th October 1999.

¹⁹ S.C. Application No. 14/99

equal opportunity programmes, and by affirmative action programmes which included religious or political opinion as a ground. On the contrary, this provision was aimed at ensuring that persons would not be victimised due to their political opinions and affiliations. It did not mean that every institution would be compelled to create an affirmative action programme on the basis of political opinion. Affirmative action programmes would not have been compulsory. The objective of the provision seemed to lean towards ensuring that victimisation on the basis of political opinion did not take place; it was not aimed at requiring formulation of programmes to hire persons of every possible political opinion.

Perhaps the most ridiculous argument put forward in the petitions against the Bill was the challenge to the provisions that required the members of the Commission and Tribunal to be persons with proven experience in the field of human rights. This requirement was said to contravene the equality clause of the Constitution (Article 12 (1)). The petitioners argued that since the matters that would come before these fora would be human rights issues, or "pro and anti-human rights conflicts" as they put it, the persons coming before these bodies might be deprived of equal protection of the law. The petitioners appeared to believe that to have people with experience of human rights as the members would in itself create problems. They seemed to think that such persons would be "pro" human rights and so would not be able to exercise their judgement impartially and justly. Such a view betrayed serious misconceptions about the nature of the human rights field. Surely people experienced in the field of human rights, who believe in the indivisibility and universality of human rights and who understand the principles of non-discrimination and equality before the law, are precisely the kind of people we would want to be responsible for protecting and promoting the rights of others,

and assisting in the creation of a culture of respect for the human rights of all people.

In fact, this provision in the Equal Opportunity Bill was very similar to one in the Human Rights Commission Act, which requires that its members be chosen from among those "having knowledge of, or practical experience in, matters relating to human rights."²⁰ When the Human Rights Commission Bill was tabled, however, there was no opposition to this clause. Criticism of it in the context of the Equal Opportunity Bill appeared to be opportunistic, rather than based on valid arguments.

Of all the arguments put forward against the Bill, only one had any merit. This concerned the unrestricted power given to the Minister of Education to determine guidelines with regard to admissions of students professing various religions to semi-government and government schools which are conducted by a religious body or conducted by established practice, or conducted solely for the students of one sex. To give such an unrestrained power to a politician is dangerous and would not only lead to the politicisation of schools but would also interfere with the independence and running of the schools. The Supreme Court ruling in the Universities Amendment Bill clearly stated that such intervention is unconstitutional, as it is an interference with academic freedom and autonomy.²¹

Subsection (3) would have vested power in the Minister of Education to determine guidelines in regard to admission of students professing various religions to educational institutions referred to in subsections (a) and (b), which were categorised as

²⁰ Section 3(1), Human Rights Commission Act, No. 21 of 1996. See also the chapter on the Human Rights Commission for critique of this provision.

²¹ SC Application No 6/99-12/99.

government or semi-government schools. This, in effect, would have included all schools except those that are fully private and run by religious bodies. This would have allowed the schools which employ selective admission policies to continue to do so, thereby discriminating against students not of the "correct" faith, ethnicity or social standing. What, then, was the aim of this provision? Had the Bill been passed, it would have enabled the status quo to continue.

9. Conclusion

Legislation similar to the Equal Opportunities Bill has been enacted in other countries, with positive results. In Sri Lanka, however, the Bill led to unexpectedly strong opposition and was dropped. As described in this chapter, many of the arguments put forward against the Bill were invalid or unsupported, but in the event, there was no opportunity for them to be properly refuted as – once the government withdrew the Bill – the Supreme Court did not have to reach a decision on the case.

This case opens up potential for abuse of the opportunity that exists for judicial review of a Bill to assess its constitutionality. This should be a protective mechanism – but in this case, the sheer number and vehemence of the opposition was such that simply filing the petitions was sufficient to get a potentially progressive Bill withdrawn – WITHOUT any judicial scrutiny of the arguments put forward or any scrutiny of the constitutionality of the Bill. There is danger in this kind of precedent. Does it mean that if enough noise is made and enough petitions are filed, there is no need to even make a valid legal case? It, however, does seem to mean that one still can win because the government backs down because of the pressure and the court in response also says 'fine'.

It has also been argued that legislation of this kind cannot be enacted before a country has joined the ranks of developed nations; that economic and social rights must first be realised. This is a misunderstanding. For this Bill represented an attempt to nudge development in the direction of realising precisely these rights, by introducing a culture of equal opportunity which would have provided the framework for the realisation of socio-economic rights. Equitable and sustainable development cannot take place in a society where discrimination thrives; it cannot take place in an environment where equal opportunity is denied.

XII

Freedom of Assembly and Association

*Rukshana Nanayakkara**

1. Introduction

This chapter seeks to discuss the scope of the freedoms of assembly and association in Sri Lanka, which are enumerated under Article 14 (1) (b) and 14 (1)(c) of the Constitution. The Sri Lankan Constitution recognises the freedoms of assembly and association as two separate fundamental rights, whereas in the Universal Declaration of Human Rights, they are linked in one article.¹ The International Covenant on Civil and Political Rights (ICCPR) sets out these two rights in Articles 21 and 22 in a broad way.²

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¹ Article 20 of the UDHR. Every one has the right to freedom of peaceful assembly and association.

These fundamental rights, which are available only to citizens of Sri Lanka under the Constitution and not other persons, can be subjected to certain restrictions. Article 15(3) sets out the grounds on which freedom of assembly can be restricted, and Article 15(4) sets out the grounds on which freedom of association can be restricted.³ Further, Article 15 (7) makes common ground to restrict these rights by means of emergency regulations.⁴ Further, Article 14(1) (b) specifically mentions that freedom of association can be exercised only for peaceful purposes.⁵

² Article 21 recognises the right of peaceful assembly. It specifically says no restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interest of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of the others. Article 22 relates to the freedom of association with others. It is restricted on the grounds prescribed by law and which are necessary in a democratic society in the interest of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of the others. It further states that this article shall not prevent the imposition of lawful restrictions on the members of the armed forces and the police in their exercise of this right.

³ See Article 15 (1), (3) and (4) of the Constitution. The freedom of assembly is restricted on the grounds of racial and religious harmony. In addition to these grounds, the freedom of association is restricted in the interest of national economy.

⁴ The exercise and operation of all the fundamental rights declared and recognised by Article 12, 13(1), 13(2) and 14 shall be subjected to such restrictions as may be prescribed by law in the interest of national security, public order and the protection of public health or morality, or for the purpose of securing due recognition and respect for the rights and freedoms of others, or of meeting the just requirements of the general welfare of a democratic society. For the purpose of this paragraph "law" includes regulations made under the law for the time being relating to public security.

The freedom of association was the first fundamental right to be tested before a court of law in Sri Lanka. The Bill of Rights Chapter of the 1972 Constitution had guaranteed the freedom of association under Article 18(1), but the 1972 Constitution did not specify any enforcement procedure for fundamental rights protection. Remedies for violation of fundamental rights had to be found through the ordinary law of the country at that time. The only case filed under the Bill of Rights Chapter of the 1972 constitution concerned a violation of Article 18(1).⁶ The plaintiff in this case had been requested to resign from membership of a trade union in order to qualify for promotion at the People's Bank. He contended that such a request violated his fundamental rights under Article 18(1) of the Constitution. The Court decided the case in favour of the plaintiff in 1985.

A perusal of Article 14 of the 1978 Constitution reveals that most of the rights enshrined therein are closely connected with freedom of assembly and association⁷. The freedom to form and join a trade union;⁸ the freedom, either by himself or in association with others, and either in public in or private, to manifest his religion or belief in worship, observance, practice and teaching;⁹

⁵ According to Dicey, "the right of assembly is the right to meet so long as the law is not thereby broken"

Dicey, Law of the Constitution, 10th Edition, p. 271, quoted in *Fundamental Rights in Sri Lanka*, Dr. Jayampathy Wickramaratne (Navrang, Book sellers & publishers, New Delhi, 1996), p.361

⁶ *Ariyapala Guneratne v. The Peoples Bank* (1986) 1Sri.L.R.338

⁷ The only two rights which are not directly connected are the freedom of movement and choosing one's residency in Sri Lanka- 14(1)(h) and the freedom to return to Sri Lanka 14(1)(i).

⁸ Article 14 (1)(d)

⁹ Article 14(1)(e)

the freedom by himself or in association with others to enjoy and promote his own culture and to use his own language;¹⁰ and the freedom to engage by himself or in association with others in any lawful occupation, profession, trade, business or enterprise¹¹ are directly connected to the right to freedom of assembly and association.

The freedom of assembly includes the freedom to take part in public meetings, processions, and demonstrations.¹² Freedom of association plays a vital role in civil society. These freedoms contribute to the formation of the policies of the country as well as to the education of the people. They also enable the government to gauge public opinion.

Freedom of association provides the fundamental ground for the formation any kind of organisation with lawful objectives. It is now widely recognised that civil society organisations play a major role in the alleviation of poverty and protection and advancement of human rights, and freedom of association and assembly are particularly important in this context. The recognition of these two rights under the Constitution authorises the formation of NGOs and trade unions under the basic law of the country. Further, the pluralistic nature of the Sri Lankan society urges the respect for these rights.¹³

¹⁰ Article 14(1)(f)

¹¹ Article 14(1)(g)

¹² Dr. Jayampathy Wickramaratne, *Fundamental Rights in Sri Lanka*, *Supra* n .5, p. 362

¹³ This aspect mainly links with Article 14 (1)(f).

2. Freedom of Assembly

During 1999, two elections were held and a large number of rallies were held throughout the country including the North and East. May Day rallies were also held by various political parties and trade unions mainly in Colombo and the outstations. A number of incidents of election related violence were reported throughout the country which undermined the value of freedom of assembly.¹⁴

Two major incidents took place on the last day of the Presidential election. The final Presidential election rally of the People's Alliance, held at municipal grounds in Colombo, was attacked by a suicide bomber belonging to the LTTE. While the President herself escaped with injuries, 24 people lost their lives and 82 others were injured. A similar incident took place at Ja-Ela on the same day, when a suicide bomber blew himself up to assassinate a retired high ranking army official who was extending his support towards the UNP presidential candidate. It was reported that 13 people were killed and 46 were injured in this bomb explosion.

In addition to election rallies, a number of other protests were held in different parts of the country to express public ideas and opinions regarding various issues. A mass rally was organised by the main opposition party, the UNP, in Colombo city on 15th July 1999 to protest against the government's policies. While dispersing the protesters, the police attacked media personnel

¹⁴ Lankadeepa, a leading Sinhala newspaper in the island reported on 11.12.99 that two supporters of the UNP were killed when a suspected PA gang open fire at a UNP meeting at Bibile in Uva province on 10.12.1999. A large number of incidents of violence, such as killings, intimidation, destruction to the property, seizure of polling cards were reported throughout the country.

who were covering the event and a number of journalists sustained injuries. The police action was criticised by national and international human rights organisations, and another mass rally was subsequently held in Colombo in protest.

Other issues that have been the subject of protest have included the criminal justice system and the escalating crime rate,¹⁵ and environmental issues.¹⁶

3. Freedom of Association

In September, the government issued a notice urging all the NGOs to register/re-register with the National Secretariat for NGOs. Such registration is required under the Voluntary Social Services Organisations (Registration and Supervision) Act No. 31 of 1980, (VSSO Act) which was passed to facilitate the operation and regulation of the activities of NGOs.

Section 3 of the Act reads as follows: "Subject to the provisions hereinafter contained every voluntary social service organisation shall be registered under this Act." The interpretation clause of the Act includes all organisations of a non-governmental nature within the meaning of voluntary social service organisations.¹⁷ However, in practice, many NGOs ignored these registration requirements, and only registered with the Registrar of Companies.

¹⁵ A number of protests were held after the murders of Rita John and Sadeepa Lakshan. See the chapter on Crime.

¹⁶ Several protest rallies were held in Colombo and the out stations regarding the Eppawala Phosphate Mining Project and Upper Kotmale Hydro Electric Power Project. See the chapter on Environmental Rights.

¹⁷ Sec.18 of the VSSO Act.

The VSSO Act of 1980 was amended in March 1998. This amendment had been on the Order Paper of Parliament for nearly two and half years before it was unexpectedly passed at a time when the opposition was boycotting Parliament. The amendment authorises the Minister to appoint an Interim Board of Management for voluntary social services organisations in certain circumstances. This can happen when a Board of Inquiry has reported to the Minister that there is evidence to support any allegation of fraud or misappropriation made against a voluntary organisation and the Minister is satisfied that the fraud or misappropriation of such a nature would affect the financial management of the organisation and that public interest would suffer if such organisation is continued to be run by its existing Executive Committee. Where an Interim Board was appointed under this Act, such Board shall exercise, perform and discharge all the powers, duties and functions of the Executive Committee. The Executive Committee shall cease to exercise, perform or discharge any such powers, duties and functions during the period that the Interim Board is appointed. The amendment gave retrospective operational powers to the Interim Board. It provided that where any Interim Board had been appointed prior to the commencement of this Act, such committee is deemed to be validly appointed and all acts validly done, insofar as they are not inconsistent with rules of such voluntary organisation.

The provisions of the amendment provoked considerable criticism from NGOs, which saw the amendment as interfering with their freedom of association and posing a serious threat to their independence. On the grounds that it could be used as an excuse to takeover or to thwart the activities of NGOs, which criticise the government, NGOs called for its immediate repeal.

One NGO and several individuals had filed petitions in the Supreme Court challenging the constitutionality of the Act.¹⁸ Although the facts of the case were not disputed the petition was dismissed due to technical failures.¹⁹

A notice issued by the Presidential Secretariat²⁰ on 2nd September 1999 sought to conduct a registration and re-registration (for those who have already registered) programme for all NGOs in the country. It aimed to rationalise the status, accountability and, ultimately, the public standing of all NGOs in Sri Lanka. According to the notice, all international and national level foreign funded NGOs will be registered at the National Secretariat for NGOs under the Ministry of Social Services after obtaining clearance from the Ministries of Defence, Foreign Affairs, Plan Implementation and Parliamentary Affairs and from the respective line Ministry. It requires NGOs to submit action plans when applying for registration specifying such matters as the identity, location and nature of their intended activities and funding systems. It aimed to create a centralised source of information about the identity and activities of NGOs, requiring accountability and transparency. In order to monitor the activities of NGOs at district level the government will establish a District Coordinating Committee of NGOs for each district. Each Committee will consist of the District Secretary /Government Agent, the Head of the District Planning Secretariat, the Provisional Secretary of Social Services, a representative of the Chief Secretary and a Social Services Officer nominated by the Chief Secretary. The District Secretary and Government Agent will register all other NGOs operating within the respective districts.

¹⁸ S.C. Application No SD1/98, 2/98, 3/98, 4/98, 5/98

¹⁹ See LST Review, Vol. 8, Issue 125, March 1998

²⁰ Analyses, Presidential Secretariat, issued on 2nd September 1999-
Number 13.

The government notice read together with the 1998 amendment created a reasonable doubt about the government's attitude towards NGOs. It specifically mentions that NGOs should remain neutral in regard to sensitive national issues, particularly those which have a bearing on national security. This suggested that the government intends to deploy formal and informal resources against NGOs. In the past, the state has shown itself to be implacably opposed to the activities of NGOs.²¹ The gravity of this interference with the freedom of association clearly undermines the value of the constitutionally guaranteed right of Sri Lankan citizens.

Further, the Emergency Regulations and the PTA of Sri Lanka clearly affect freedom of association. Regulation 68 of the emergency regulations empowers the President to proscribe an organisation if he is of the opinion that there is a danger that action by, or of the utilisation of, such organisation or its members or adherents would be prejudicial to national security, the maintenance of public order or maintenance of essential services or for the purpose of committing offences mentioned in the regulations. The PTA too gives sweeping powers to the executive, including the authority to issue orders that could infringe on freedom of association.

²¹ In December 1990 President Premadasa gazetted the Commission of Inquiry in respect Non Governmental Organisations to conduct a public inquiry into the activities of NGOs. The formal proceedings of the commission included highly questionable practices, notably the manner in which evidence was elicited, its targeting of three NGOs - Sarvodaya, the Eye Donation Society and World Vision - and the investigations and intimidation carried out by the police unit attached to it.

4. Case Law

The only Fundamental Rights case decided by the Supreme Court in 1999 concerning a violation of 14(1) (b) and (c) together with 14 (1) (a) was *Mihundukulasuriya Vincent Peiris v. Neil Rupasinghe*.²²

The petitioner in this case was the chairman of an NGO known as Janodhaaya Sajeewana Kendraya. The petitioner had been invited by the Central Environmental Authority to attend a workshop on 5th January 1999. According to the petitioner, he had proceeded to the meeting place and taken his seat when he was told that the first respondent²³ was waiting outside to meet him. When the petitioner went up to the 1st respondent, who was with the 2nd to 5th respondents, the 1st and 2nd respondents told the petitioner that he should keep out of the meeting. When the petitioner protested and inquired as to what right the 1st to the 5th respondents had to prevent him from participating, he was assaulted by the respondents. Further the 1st and 2nd respondents told the chairperson of the meeting that if the meeting was to continue the petitioner should be asked to leave. As a result of the injuries the petitioner received he could not attend the meeting and he was hospitalised for medical treatment. The petitioner alleged that the respondents had violated his freedom of expression, assembly and association guaranteed by the Constitution. The Supreme Court acknowledged the petition mentioning that the outcome of the incident was that the petitioner had not been able to participate at the workshop and had been

²² S.C. Application No. 126/99 (F/R), S.C. Minutes 08.12.1999.

²³ The first respondent is a Member of Parliament and the 2nd to 5th respondent are members of Wattala Pradeshiya Sabha.

prevented from exercising his fundamental rights of freedom of expression, assembly and association guaranteed under the Constitution.²⁴

5. Conclusion

It is very clear that fundamental rights to freedom of association and assembly play a significant role in Sri Lanka. There should only be minimal State intervention with respect of these rights if they are to be fully realised by the by Sri Lankan citizens, and such intervention should not exceed the limits on legitimate restriction to these rights that are set out in the ICCPR, to which Sri Lanka is a party. The government's notice to civil society organisations to follow a new registration procedure was seen as a red light, threatening the free exercise of these rights. The Constitutional provisions relating these rights should be amended to conform to international human rights standards and to include recognition of a separate and distinct constitutional protection for civil society organisations to associate freely and to choose their own legal forms. Such amendments are essential for the full realisation of these rights in Sri Lanka.

²⁴ In this case leave to proceed had been granted in respect of alleged violation of Article 11. As the counsel for the petitioner did not press the matter, the court made no observation in that regard.

XIII

Rights of the Aged

*Sreemali Herath**

1. Introduction

The demographic changes taking place in the world today have tremendously altered the proportion of elderly people (those aged above 60 years) in the population as a whole. Gradually, the percentage of elderly people is increasing, while the proportion of children and adolescents is decreasing. Currently, 60% of the world's elderly live in the developing countries of the Asia-Pacific region. Sri Lanka is among these countries which face the challenge of a fast-growing aging population, and needs to make provision for this change in its social policies. The elderly face numerous social, economic, and health problems, which the government often finds difficult to address.

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In this chapter, the measures taken by the government, non-governmental organisations, and United Nations special organisations to provide for the fast-growing aging population, will be examined and elaborated upon.

2. Demography of Aging

Humanity is rapidly aging. As the proportion of elderly people in the population increases, it "results in a rise in the median age of the population. Aging occurs when fertility rates decline, while life expectancy remains constant or improves at the older ages."¹ By 2025, nearly 2 out of 5 people will be older persons in the Asia-Pacific region.

In the next three decades, Sri Lanka will experience an unprecedented growth in its aged population. With these demographic changes, Sri Lanka will have the third oldest population in Asia. Currently, the percentage of the population above 60 years of age is 8 percent. This will increase to 20% by 2025.² Simultaneous decline in the birth rate (1.2%) and death rate (6 per 1000 population) has raised life expectancy.

Currently the life expectancy rate is 68 years and 64 years for women and men respectively. This will increase up to 80 years for women and 75 for men by the year 2025.³ Therefore, it is important to improve social services for the aged in future social policies.

¹ "Aging and Pension Study" (Final Report), Institute for Policy Studies, Health Policy Programme, 1999.

² Institute of Policy Studies, Health Policy Programme (1997).

³ Aging Population - Dr Prasanna Gunsekera (Background Material - Workshop on Ageing Population UNFPA)

3. Aging Population and the Law

Sri Lanka is devoid of legislation relating to the rights of the elderly. Neither the 1978 Constitution nor the proposed draft Constitution of October 1997 identifies the elderly as a group that may be subjected to discrimination, and that deserves affirmative action. Article 12(4) of the Constitution recognises women, children or disabled persons as deserving special provisions, "by law, subordinate legislation or executive action for their advancement." No corresponding provision exists in relation to "age."

Although there are not many international conventions protecting the rights of elders, the international community and the Sri Lankan government are increasingly becoming aware of the need for protective measures.

The International Labour Organization Discrimination (Employment and Occupation) Convention of 1958 states that any special measures taken by employers or organisations to meet the particular requirement of "persons who, for such reasons as ...age.. are generally recognised to require special protection or assistance shall not be deemed to discrimination."⁴ This illustrates the fact that the international community is aware that those of a certain age might need special protection.

The draft Constitution (October 1997 version) of Sri Lanka does not consider age to be grounds for discrimination that deserve protection in the non-discrimination clause. Instead, it is included in the affirmative action clause. It states that any special measures taken to further the rights of persons disadvantaged by age among

⁴ Discrimination (Employment and Occupation) Convention, Article 5(2)

other characteristics, shall not be deemed to be violative of the non-discrimination clause.

In 1999, the government of Sri Lanka tried to introduce Equal Opportunity legislation which contained age as one of the grounds in the non-discrimination clause. Unfortunately, this piece of legislation faced opposition from certain sections of the public and was dropped by the government.⁵

The legal requirements of the elderly are addressed in most developed countries.⁶ Under the Indian Constitution, statutory responsibility is given to the siblings to look after their parents.⁷

It is not necessarily practical or desirable to compel children to provide for their parents, but the Government of Sri Lanka is taking steps to try to get maximum support from families to deal with the negative impacts of population aging. This is evident in the draft Protection of the Rights of Elders Bill, which is discussed below. In a context of rapid social and economic change, however, the elderly can no longer depend on their children, since caring for elders is no longer as firmly-supported an obligation as has been historically. For example, a seventy-three-year-old father devoid of any means of livelihood filed a suit against his son in the Colombo District Court. He was dependent on his only son, but was neglected by him and had no means of livelihood. The

⁵ See the chapter on Equal Opportunities in this respect.

⁶ There is legislation aimed specifically at the elderly in the USA. The Japanese Civil Code in item 877 states, "lineal relations, as well as siblings are responsible for the support and care of the elderly".

⁷ Article 41 of the Indian Constitution states, "to make effective provisions for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement." This is supported by the Hindu Adoption and Maintenance Act (1956) which gives children the responsibility to support their elderly.

plaintiff father argued that he had looked after his son since his birth, and had also looked after his daughter-in-law and grandson when his son went to the Middle East for employment.⁸

The existing laws – which include the Widows and Orphans Act, School Teachers Pension Scheme, and Employees' Provident Fund Act – mostly address the retired elderly. These statutes thus cover less than half the aged population.

Presently, attempts are being made to provide old age social security under the Farmers' Insurance Act and Fishermen's Insurance Act. The most recent piece of legislation is the Social Security Board Act No 17 of 1996, which protects self-employed persons after employment.

4. An Outline of the Proposed "Protection of the Rights of Elders" Bill

The aim of this Bill is to provide for the establishment of a National Council for Elders for the protection and promotion of the welfare and the rights of elders. This Council may consist of the Secretary to the Ministry of Social Services, who shall be the Chairman of the Council, and the Additional Secretary of the Ministry will be the Vice-Chairman of the Council. The Director of the Department of Social Services shall be the Secretary of the Council. This Council will also consist of three members to represent the elders in Sri Lanka, five members to represent the voluntary organisations that promote the welfare of older people, and four members from among professionals, members of corporate bodies, and public officers, who would be appointed by the President. These members will hold office for a period of three years.

⁸ The Island, 14th October 1999.

Section 12 of the Bill states, "The principle function of the Council will be promotion and protection of the welfare and the rights of the elders in Sri Lanka and to assist elders to live with respect, independence and dignity."⁹ Section 13 of the Bill sets out the other functions of the Council. The Council would advise the government and other appropriate bodies on measures to strengthen the family unit. The Council would carry out public awareness programmes and provide information about the services available for elders. It would also organise lectures, seminars, and workshops in venues such as schools, for example, to educate the younger generation of their duties towards the elderly.

The Council would be empowered to introduce and implement health insurance benefits for the elderly. It would also assist elders seeking legal advice. Under the provision for the protection of the rights of elders, children would be responsible for and provide care for elders. Destitute elderly people would be provided for by the state. Under this Bill, it is proposed to establish a fund called the National Fund for the Welfare of the Elders.

5. International Awareness

The United Nations declared 1999 as the International Year of Older Persons (IYOP), with the theme 'Towards a society for all ages.' The prime objective was to emphasise the need to improve the quality of life of the elderly in the member countries. The UN works in collaboration with governments, NGOs, the private sector, and agencies like the ILO and the WHO to ensure and secure the rights of the elderly.

⁹ Protection of the Rights of the Elders Bill, section 12

6. Social Problems Relating to Demographic Changes

The socio-economic changes taking place in society have serious implications for the elderly. There has been a transition from the traditional extended family and co-residence, to the rise of a nuclear family unit. With modernisation and urbanisation, societies face new problems and challenges. As the cost of living increases, many families find it difficult to make ends meet and to support their own families as well as their parents.

The reduction in the fertility rate results in a decline in the number of children available to look after elders. Some elders have no children to look after them. The concept of old age support from children is weakening. Many people are forced to settle in cities, with little resources. The migration and separation of family members leaves the elders isolated and depressed.

The on-going ethnic conflict in the country has also contributed to the displacement of many people. Some people are forced to live alone or live in areas they are not familiar with. At present there are 158 elders' homes in the country, which house 5000 elders. Almost all of them are managed by charitable organisations.¹⁰

7. Health Problems

The physical decay of elders is contingent with sicknesses, chronic disabilities and strokes. Mental disorders like depression, delirium and dementia are common with old age. This compels the elderly to become dependant on various medical drugs which present their own side effects. Deterioration or total loss of sight and hearing are a common feature of increasing age. The elderly

¹⁰ The Island, 1st October 1999.

need to be taken for regular medical checkups and have their spectacles and hearing aids changed regularly.

Social marginalisation leaves elders in isolation, and the challenges they have to face could lead to serious psychological problems. Loneliness, aggression, depression and hatred of society are issues which have to be addressed. The numerous medicines prescribed for elders are expensive and often difficult to afford when they receive only a small pension.

8. Post-Retirement Problems

The old age dependency ratio has increased in an unprecedented manner from 5.9% in 1996 to 7.4% in 1997. It is estimated that this will go up to 12.3% by the year 2011 and 17.4% by 2021. This aging problem has been referred to as the 'age crisis', the 'demographic time bomb', and the 'age quake'.

Despite the rise in life expectancy, the retirement age has not been extended. The length of time a person spends in retirement, rather than work, thus increases. The retirement age for government servants in Sri Lanka is 55 years. In 1999 life expectancy increased up to 75 for women and 70 for men. The retirement age has not been correspondingly increased. Indeed, Sri Lanka will have the world's second highest expected duration of retirement.¹¹

The artificial link between age and retirement is not related to biological changes or capacities. Many people could continue to work effectively beyond the age of 60, contributing to the

¹¹ "Aging and Pension Study," Institute of Policy Studies, Health Policy Programme (1999).

country's economy. Therefore, it is essential to increase the retirement age. Early retirement leads to erosion of human capital. With the retirement of experienced workers, the experience and expertise gained after a long period is lost.

9. Economic Implications of Aging

It is estimated that in Sri Lanka the percentage of the elderly will double within the next 25 years. As opposed to European countries, where such a rise in the proportion of the aged took 50-60 years, in Sri Lanka, the percentage of people aged over 65 years will double from 10% in 2000 to 20% in 2025.¹² The elderly dependency ratio corresponding to this will deeply affect the country's economy. However, unlike most other external factors that control the country's social and economic nature, demographic changes can be predicted. Therefore, policy makers need to prepare now to face the possible negative impacts of population aging.

An increase in the elderly dependency ratio would directly affect the country's fiscal burdens. Even after the elderly cease to contribute to the economy, they continue to consume resources. Only a small proportion of the elderly are secured by formal systems of income support such as provident funds for private sector workers. Large segments of the labour force in the rural and informal sectors have no such provision.

It is the government's duty to increase the income support, such as pension schemes, to cover a broader range of the work force. Measures should be taken to minimise the dependence of the elderly on others, and to help the elderly to continue to lead a dignified life.

¹² Ibid.

Successive governments have provided various social security systems providing social and economical support such as food rations, food stamps, Janasaviya and Samurdhi. It is important to make these social security systems more visible to the people. Improvements should be made in the current dispensation of just dry rations and a bar of soap. There should also be concessions on public transport rates, and the cost of medicines should be subsidised.

10. Responsibilities of:

10.1 The family

Traditionally, elders were respected, protected and cared for as precious human beings, and it was the duty of the younger generation to care for their elders. Now these traditions are breaking down. Children find it more difficult to support their parents, but the government is trying to place primary responsibility on families to deal with the problems of the elderly. Such an approach would safeguard bonds of love and affection, and provide for the physical and mental well-being of the elderly, if the family takes on these responsibilities willingly. If the elderly are made to live in elders' homes they would be provided with shelter, food and medical care, but would be cut off from the family environment and would have to live among strangers, lacking support from their children, grandchildren, and the community.

10.2 The State

The government sector has three elders' homes and around 25 cottage homes managed by district administration.¹³ Most of the elders' homes are run by voluntary organisations with the support of the government. Only elders who are destitute without physical ability can seek solace in a government elders' home. This excludes elders who are mentally disabled. When the family does not supporting their elders, it is the duty of the government to provide for them. The social services available to the elderly should be improved. The government should try to promote the need to look after the elderly, among school children.

10.3 NGO Sector

Presently, NGOs play a prominent role in promoting the welfare of older people. The majority of elders' homes in Sri Lanka is run by voluntary organisations. There are around 140 elders' homes and 29 day care centres run by voluntary organisations and religious bodies.¹⁴ But there are many restrictions and artificial barriers in admitting elders to these homes. Some homes admit elders above a certain age and some take elders who are physically disabled; elders only of a particular religious or ethnic identity are admitted to homes run by particular religious bodies.

All NGOs working for the elderly are registered under the Ministry of Social Services. The government, religious bodies, business bodies, and donations from the public or even the elders themselves fund the homes. The government pays a sum of

¹³ Report on the National Workshop on Elderly, An overview Progress of National Programmes in the Area of Aging and the Elderly in Sri Lanka, BMICH. 13th July 1999.

¹⁴ Ibid.

Rs.300 per inmate per month to the organisations that run the elders' homes.

Voluntary Homes/ Cottages/Day Centres	No.	Number of Inmates
Homes	140	1675
Cottages	15	125
Day Centres	42	650
Total	197	2450

Source : Report on the National Workshop on the Elderly, An Overview Progress of National Programmes in the Area of Aging and the Elderly in Sri Lanka, BMICH, 13th July 1999

11. HelpAge Sri Lanka

HelpAge Sri Lanka is the only non-governmental organisation fully dedicated to providing welfare for the elderly, and conducting awareness programmes. It is a member of the Sri Lanka National Committee on Aging, and works in collaboration with other NGOs and grassroot organisations for the welfare of the elderly. HelpAge runs awareness programmes to educate the youth; it also provides facilities for the institutions, and organises fund-raising projects with the participation of the larger community. HelpAge also provides suitable shelter, nutritious diet, water, suitable clothing, access to health care and religious facilities to raise the living standards of the elderly in Sri Lanka.¹⁵

¹⁵ Ibid.

12. Recommendations:

- ☐ Family units need to be strengthened to take care of their elders. The elderly should not be treated as a burden. Children have a moral duty to look after the elderly. Their importance in traditional cultural activities should be appreciated.
- ☐ Low-income families should be provided with an allowance to assist them in caring for their elders.
- ☐ Awareness-raising programmes should be held, targeting the younger generation.
- ☐ Social systems for the elderly should be improved, and restrictions on access to residential facilities should be lifted so that all destitute elders can have access to them.
- ☐ Pensions and other government allowances should be augmented in line with the cost of living. All segments of the elderly community should be covered by income security systems. Special attention should be given to disadvantaged elders and elders with special needs, such as the elderly in the estate sector, conflict areas, among the displaced population in the border areas, in the informal sector, single parents, and those living in slums. These groups are not protected by present government security systems.
- ☐ Medicine should be provided at a subsidised rate for the elderly. Ayurvedic hospitals should be established to promote the importance of indigenous medicines in the treatment of the elderly.
- ☐ Special health units should be established to cater to the health needs of the elderly, with trained personnel to attend to elderly

patients. These specialised personnel should visit the elders at home and see to their needs. They should also offer counselling to the elderly and their families. The importance of exercise should be emphasised.

- ☐ Specific legislation should be introduced to safeguard the rights of the elderly. Elders should be actively involved in the drafting process.
- ☐ The retirement age should be extended, so that workers can remain in the workforce for longer. The low retirement age that exists in Sri Lanka does not correspond with its high life expectancy. It is important to keep experienced and able workers in service for as long as possible.
- ☐ Policy planning should give particular consideration to those who presently work in the Free Trade Zones and the Middle East. Their present economic conditions are quite harsh, and in another 30 to 40 years, they may become destitute. Special measures should be taken to care for them in the future.

XIV

The Rights of Persons with Disabilities

C.S. Dattatreya*

This chapter provides a brief update on developments relating to the rights of persons with disabilities, as the subject was discussed extensively in *Sri Lanka: State of Human Rights 1998*.

1. Gazetting of Registration Regulations under National Legislation

The Parliament of Sri Lanka passed the Protection of the Rights of Persons with Disabilities Act in 1996,¹ which established the National Council for Persons with Disabilities. Since its

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¹ For a discussion of the provisions of the Act see *Sri Lanka: State of Human Rights 1998*, (Law & Society Trust, Colombo 1998) pp.324-327.

establishment, this body has been carrying out national - level policy formulation and implementation functions.

Section 20 of the Act requires all Non-Governmental organisations (NGOs) providing assistance to persons with disabilities to be registered under the Act. Although the Act was passed in 1996, the regulations for the registration of NGOs were gazetted only in January 1999. The Secretariat of the National Council is currently processing applications for registration filed by various NGOs.

2. Work of the National Council for Persons with Disabilities

2.1 Distribution of assistive devices

One of the main functions of the Secretariat of the National Council is the distribution of appropriate assistive devices to persons with disabilities. These devices are distributed on the basis of requests received by the Secretariat. During 1998 the following assistive devices were distributed by the Secretariat of the National Council:

Item	Number	Value in SLR (in millions)
Spectacles	13, 955	1.4
Tricycles	137	0.7
Wheel Chairs	204	1.05
Crutches	74	0.033
Elbows	85	0.82
Total Value	14, 455	3.0

Source: Papers of the National Council for Persons with Disabilities, 1999.

The corresponding figures for the first half of 1999 are as follows:

Item	Number
Spectacles	7,089
Tricycles	36
Wheel Chairs	79
Crutches	12
Elbows	57

The total value of the assistive devices amounts to Rs. 1,333,500.00

Source: *Papers of the National Council for Persons with Disabilities, 1999*

2.2 Regulations relating to accessibility

An important issue for the National Council is its work in preparing regulations on the accessibility of the built environment to disabled people. A Sub-Committee on Regulations worked in 1999 on a full set of regulations to cover access to such facilities as buildings, roads, railways, parking areas and pedestrian crossings. These regulations are to be implemented in a staggered manner.

The Sub-Committee also considered making a request to the Board of Investment, Urban Development Authority (UDA), National Planning Department and other relevant agencies to include a separate section for accessibility facilities in their project formats, at the stage of project preparation. In particular, the UDA could incorporate these regulations into its planning and building requirements. However, these proposals were not subsequently followed-up.

As regards public buildings, the regulations are to cover all buildings built for public purposes. During the first stage, the accessibility regulations should cover all new constructions and major improvements to old structures. During the next stage, within a period of five years all existing buildings that are used for public purposes are to be brought under the regulations.²

The National Council encountered problems in getting these regulations drafted, as the Sub-Committee on Regulations did not have an adequate number of legal drafting specialists. However, during 1999 a preliminary draft of the accessibility regulations was prepared for consideration.

In addition, the National Council also explored possibilities of initiating the provision of accessibility facilities for the disabled in public transport.

2.3 Other issues

The National Council took up three other important issues on behalf of disabled people. The first related to the practice of life insurance companies charging a higher premium for disabled people (based on the nature of the disability and its relationship to the degree of risk of death). While as a general business principle this might be acceptable, in practice even visually handicapped people are charged a higher premium as a matter of course. One insurance company that responded to the enquiries made by the National Council in this matter stated that this was a standard industry practice and that it would not be possible to change it.³

² Papers of the National Council for Persons with Disabilities, 1999.

³ *Ibid.*

The second important issue that the National Council took up was the possibility of visually impaired candidates taking the Sri Lanka Administrative Services (SLAS) examination. The Ministry of Public Administration stated in response that the relevant regulations would not permit this.⁴

The third important issue on which the National Council took action related to the Goods and Services Tax (GST) imposed by the state on the sale of certain products used by disabled people. Presently, GST exemptions are available for hearing aids, wheel chairs and artificial limbs. Responding to a request submitted by the National Council to allow GST exemptions for other devices and goods used by disabled people, a Deputy Commissioner in the Department of Inland Revenue promised to recommend GST exemption for white canes and Braille typewriters.⁵

3. Other Developments

3.1 Ranaviru Services Authority

In September 1999 the President announced the establishment of a special body called the Ranaviru Services Authority (RSA) to look into the personal problems of armed forces and police personnel, and their dependents. The RSA is to streamline the welfare services that are currently available and to address the problems of service personnel and their families, especially the families of personnel who are either killed or disabled in action. One of the welfare measures envisaged is the distribution of land to the families of personnel killed in action. A total of 332 acres belonging to the Land Reform Commission had already been

⁴ *Ibid.*

⁵ *Ibid.*

made available for distribution. A further 575 blocks of land had also been provided by the Mahaweli Authority of Sri Lanka for the same purpose.⁶ The RSA is currently processing the distribution of these lands amongst identified beneficiaries.

3.2 Reintegration of rehabilitated patients

An official of the Ministry of Social Services announced a "reintegration programme" which would allow rehabilitated patients at the Mulleriyawa Hospital to be gradually placed back within their families. At the time of the announcement, the programme had already begun with the identification of rehabilitated patients for reintegration. The programme also included the establishment of a halfway house in Avissawella.⁷ However, by the end of the year this aspect of the programme was stalled due to a lack of financial resources.

3.3 Vocational services for persons with disabilities

The Department of Social Services implemented several services for the benefit of disabled people, including vocational training, supply of special instruments used by disabled people, medical assistance, education and counselling. Under these services, unmarried disabled males and females between the ages of 18 and 35 are eligible for vocational training. This training was offered through thirteen government vocational training centres established at Seeduwa and Amunukumbura in the Gampaha district, Ketawala and Wattegama in the Kandy district, and Thelambuyaya in the Hambantota district. A further six vocational training centres established by the private sector at

⁶ Daily News, 8th September 1999.

⁷ Sunday Times, 29th August 1999.

Horana, Tihariya, Kalutara, Balangoda and Grandpass also provided such training. Vocational training was available in thirty-two fields including electronics and television, air-conditioning and refrigeration, motor mechanics, lathe work, industrial sewing, carpentry, building construction, cane industry, agriculture, dentistry and jewellery making. Trainees were provided with a tool kit and a valued certificate issued by the government.⁸

3.4 Educational problems of disabled children

Under the special education units and special education programmes of the Ministry of Education and Higher Education, established in all educational divisions of the country, direct education is provided to 3,773 children who are either visually handicapped or whose hearing is impaired or are with intellectual (sic) disabilities. In addition to this, there are 23 other schools run by NGOs for disabled children in the country.⁹

However, a study conducted by the Ministry of Social Services in 76 administrative divisions of the country revealed that out of 6,010 disabled children of school-going age, 3,105 did not, or could not, go to school because of difficulties in transportation and the lack of assistive devices.¹⁰

Sri Lanka also faces a shortage of qualified teachers to teach disabled children. In the late eighties, the National Institute of Education (NIE) began training primary teachers to teach disabled children in a bid to solve this problem.¹¹ This programme was implemented for almost ten years but has now been discontinued due to a lack of funding.

⁸ Daily News, 15th October 1999.

⁹ Sunday Observer, 4th July 1999.

¹⁰ *Ibid.*

¹¹ *Ibid.*

4. Conclusion and Recommendations

Three years after its establishment under the Protection of the Rights of Persons with Disabilities Act, the National Council for the Protection of the Disabled is still struggling to find an identity as the spearhead of national policy-making in relation to the protection of the rights of the disabled. Its work has often been very slow (for instance, the gazetting of rules for registration of NGOs working in the area was done more than two years after the Act was passed) and it has faced major problems such as the lack of qualified legal professionals to discharge the drafting tasks that the National Council assigns to the Sub-Committee on Regulations.

These shortcomings have had a profound impact on the expectations of many disabled people. For instance, Priyantha Peiris, the President of the Spinal Injuries Association-Sri Lanka (SIA), a recently-established organisation of wheel chair users at the Ragama Rehabilitation Hospital, explained why the organisation had been established: "Parliament passed a law (on disabilities) in 1996 called the Protection of the Rights of Persons with Disabilities Act. But it's been three years, and we haven't seen anything practical come of it yet."¹²

In the light of these circumstances, the following recommendations are made:

- (a) that necessary changes be made to the procedures of the National Council so that its policy-making processes are expedited; and
- (b) adequate and appropriate human resources be made available to the National Council so that their activities can be carried out smoothly and without undue delays.

¹² Sunday Island, 11th July 1999.

XV

Right to Health

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1. Introduction

Right to health was discussed in *Sri Lanka: State of Human Rights* reports of 1995, 1998 and 1999. This chapter updates these three earlier chapters, covering some new issues and summarising the major events of 1998 and 1999 in the health sector in Sri Lanka.

There are many definitions given for health. One which is universally accepted and adopted is that given by the World Health Organisation (WHO) in 1948, which states that "Health is a state of complete physical, mental and social wellbeing and not merely and absence of disease and infirmity". Added to this definition

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subsequently was "the ability to lead a socially and economically productive life".¹

Jayawardena, in *Sri Lanka: State of Human Rights 1995*, made a comprehensive analysis of the association between health and human rights. Violation of civil and political rights is known to affect the physical and mental health of individuals, and health is now considered a basic social and economic right. A person dying of a disease that is easily preventable or curable as a result of the state denying him basic health facilities could also be considered a violation of human rights.²

When compared to other countries of similar per capita income the health status of Sri Lanka is thought to be better than many.³ Sri Lanka's health indicators appear to be among the best in South Asia (Table 1).

However, the accuracy of these official health status indicators is doubtful.⁴ For example, a study on the extent of maternal death reporting in the Western Province has shown that 24% of maternal deaths are not recorded.⁵ According to studies, the rate of under reporting of deaths in different parts of the country ranged from 27.5 to 53.7%.⁶ The under reporting of infant deaths was very

¹ WHO, Health for All, 1978, Sr. No.1.

² *Sri Lanka: State of Human Rights 1995* (Law & Society Trust, Colombo, 1995) pp 183-222.

³ Ministry of Health and Indigenous Medicine, Progress and Performance Report, 1998.

⁴ Cooray PS, Re-evaluating Mortality Statistics; A Sri Lankan Case Study, The Journal of College of Community Physicians, 2000.

⁵ Banduthilake THC, An Epidemiological study on Maternal Mortality in Sri Lanka, 1996, Post Graduate Institute of Medicine, University of Colombo, MD (Community Medicine) Thesis

high, and ranged between 64 and 90.9%.⁷ Therefore, in reality the true Crude Death Rate and Infant Mortality Rate could be very different to the official figures. These shortcomings, along with the fact that large numbers of persons who disappeared during civil unrest are not recorded in the routine death statistics,⁸ mean that Sri Lankans probably do not in reality have the life expectancy that the figures show.⁹

⁶ Fonseka WAAP, A study on the quality and coverage of death certification in a district of Sri Lanka, 1996, Post Graduate Institute of Medicine, University of Colombo, MD (Community Medicine) Thesis

See also, Sivarajah N, Sivagnasunderam C, Ponnampalam G, Death registration in Jaffna division, Jaffna Medical Journal, XXII, No.s 1 & 2, pp.19-24

⁷ Sivarajah N, Sivagnasunderam C, Ponnampalam G, Death registration in Jaffna division, Jaffna Medical Journal, XXII, No.s 1 & 2, pp.19-24. See also, Sivarajah N, Sivagnasunderam C, Wijayarathnam A, A study of the registration of deaths of infants and pre-school children, Ceylon Medical Journal, 1984, 29: pp. 177-184

⁸ Commission on Human Rights, Report of the Working Group on Enforced or Involuntary Disappearances, January 1992. See also, Amnesty International-Report-ASA 37/04/98, Sri Lanka: Implementations of the Recommendations of the UN Working Group on Enforced or Involuntary Disappearances following their visits to Sri Lanka in 1991 and 1992

⁹ Cooray PS, Re-evaluating Mortality Statistics; A Sri Lankan Case Study, The Journal of College of Community Physicians, 2000.

Table 1

Some Selected Geographic, Demographic and Health Indicators for Countries in the South Asian Region

	Sri Lanka	India	Pakistan	Bangladesh	Nepal	Bhutan	Maldives
Land area (sq.km.)	65,610	3,287,590	803,943	143,998	147,181	47,000	298
Population (Millions) 1998	18.455	982.223	148.166	124.774	22.847	2.004	0.271
Life expectancy (at birth) 1998	73	63	64	58	58	61	65
Crude Death Rate 1998	6	9	8	10	11	10	7
Maternal Mortality Ratio (per 100,000 live births) 1980-98	60	410	NA	440	540	380	350
Infant Mortality (per 1,000 live births) 1998	17	69	95	79	72	84	62

NA- Not Available

Source: UNICEF, State of World's Children, 2000

2. Legislation

Article 25 of the Universal Declaration of Human Rights (UDHR) states that "Everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including

food, clothing, housing and medical care....". However, the Constitution of Sri Lanka does not accept health as a fundamental right for all its citizens. Nevertheless, as a signatory to the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Sri Lankan government is obliged to recognise "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health" (Article 12(1)). In fact, all governments since independence have been committed to providing free health care to the people.

Articles 25(1) (a), (b) and (c) of the Draft Constitution of October 1997 included the right to health for citizens. It states that, "every citizen has the right to have access to health care services including emergency medical treatment, sufficient food and water and appropriate social treatment". If these proposals were adopted, it would be a significant development as it would elevate the right to health care services to the status of a fundamental right.¹⁰

3. Health Policy in Sri Lanka

The broad aim of health policy in Sri Lanka is to increase life expectancy and improve the quality of life of the people. This is to be achieved by controlling preventable diseases and by health promotion. Also, issues such as inequities in health care provision, care of the elderly and disabled, non-communicable diseases, accidents, suicides and substance abuse have been identified as areas of concern by the government.¹¹

¹⁰ *Sri Lanka: State of Human Rights 1998* (Law & Society Trust, Colombo, 1998) pp. 333-349.

¹¹ *Supra* n. 3

The appointment of two Presidential Task Forces in 1992 and 1997 were two important events in relation to health policy formulation in the country.

The Presidential Task Force appointed in March 1992 for the formulation of a National Health Policy identified certain measurable goals and objectives to be achieved by the year 2002, in addition to the major thrusts and strategies it proposed. These included reducing the infant, neonatal and maternal mortality rates; the birth rate; prevalence of low birth weight; anaemia (in pregnant and lactating women); malnutrition and deaths due to diarrhoeal and respiratory diseases in the under fives. It also proposed to eliminate neonatal tetanus and polio from the country and increase life expectancy, use of contraceptives (by eligible couples) and to make safe drinking water and latrine facilities available to all (by 2002).¹²

After the change of government in 1994, another Presidential Task Force was set up in 1997. This Task Force identified five important areas for immediate implementation. These were to:

- (1) Improve one hospital in each district in a planned manner to reduce inequities in the distribution of services and to provide high quality facilities to people living in remote areas.
- (2) Expand services to areas of special needs (eg. elderly, disabled, victims of war and conflict, occupational health, estate health services).
- (3) Develop health promotional programs with special emphasis on revitalising School Health Programs.

¹² Ministry of State for Health, National Health Development Plan, 1994.

- (4) Reform the organisational structure to improve efficiency and effectiveness, especially in the context of devolution.
- (5) Mobilise resources and management, including alternative financing mechanisms, resource-sharing between public and private sectors and rationalised human resources development.¹³

This Presidential Task Force proposed the same indicators that had been identified earlier as the Health Development Targets, to be achieved by the year 2002. (Table 2)

4. Health Service Structure

Sri Lanka's medical pluralism is well known.¹⁴ Different systems of medicine practised in the country include Western, Ayurveda, Traditional, Homeopathy, Sidda, Unani and Acupuncture. Although health authorities in the country are guided by the premise that western medicine is the most popular system¹⁵, social science research has shown that Ayurveda is also quite popular with the people, and especially for certain types of illnesses.¹⁶

¹³ *Supra* n. 3

¹⁴ Nordstorm Caroline R., Exploring Pluralism - Many Faces of Ayurveda, in *Social Science and Medicine*, Vol.27, No.5, pp. 479-489, 1988. See also, Waxler Nancy E., Plural Medicine in Sri Lanka: Do Ayurvedic and Western Medical Practices Differ, in *Social Science and Medicine*, Vol.27, No.2, pp. 531-544, 1988 and Wolfers I., Traditional Practitioners and Western Pharmaceuticals in Sri Lanka, in *Het Spinhuis Publication, The context of Medicine in Developing Countries*, 1988. See also, Liyanage Chandanie, Social Class and Health Seeking Behaviour in Sri Lanka, 1995, university of Colombo, Department of Sociology, M.A. Thesis.

¹⁵ Ministry of Health, Sri Lanka, Annual Health Bulletin, 1998.

¹⁶ Liyanage Chandanie, Social Class and Health Seeking Behaviour in Sri Lanka, 1995, University of Colombo, Department of Sociology, M.A. Thesis.

Table 2

Health Development Targets proposed by the Presidential Task Forces in 1997 to be achieved by 2002.

Indicator	Benchmark	Current	Target for 2002
Infant Mortality Rate (per 1,000 live births)	17.5 (1989)	16.5 (1995)	15.0
Neonatal Mortality Rate (per 1,000 live births)	16.2(1990)	12.5 (1995)	7.5
Maternal Mortality Ratio (per 1,000 live births)	0.6 (1990)	0.3 (1995)	0.3
Life Expectancy at birth (years)	71.1(M) 74.8 (F) (1991)	71.1(M) 74.8 (F)(1991)	73.0 75.0
Percentage of new borns with birth weight less than 2.5Kg	27.0 (1990)	17.5 (1997)	18.0
Crude Birth Rate	21.3 (1990)	18.6 (1996)	16.0
Cases of Neonatal Tetanus (per 100,000 live births)	14.0 (1990)	3.5 (1997)	0
Cases of Poliomyelitis	9 (1990)	0	0
Percentage of malnutrition in under 5s	35 (1990)	23.8 (1993)	17.5
Deaths in under 5s due to diarrhoeal diseases	5% (1991)	2% (1995)	to reduce by 25%
Deaths in under 5s due to acute respiratory infections	9.1% (1990)	5.6% (1995)	6.0%
Percentage of iron defi- ciency anaemia in preg- nant and lactating women	65.0 (1990)	66.0 (1994)	22.0
Percentage of eligible couples using a contraceptive method	60.0 (1987)	66.1(1994)	72.0
Percentage of population with access to safe drinking water	30.0 (Rural) 72.0 (Urban) (1981)	65.0 (Rural) 75.0 (Urban) (1994)	100.0 (Rural) 100.0 (Urban)
Percentage of population with latrine facilities	19.7 (Rural) 63.5 (Urban) (1981)		100.0 (Rural) 100.0 (Urban)

By the end of 1999, there were 14,850 western medical practitioners registered with the Sri Lanka Medical Council, and 15,785 non-western medical practitioners who were registered with the Ayurveda Medical Council. While most of the western medical practitioners are thought to be employed in the public sector, most of the non-western practitioners function in the private sector.

Health care in the country is provided by both public and private sectors. It is estimated that the public sector provides nearly 95 percent of the country's in-patient care through a large network of hospitals. The Ministry of Health and Indigenous Medicine (central government) along with the Ministries of Health of Provincial Councils are responsible for delivering the entire range of preventive, curative and rehabilitative health care in the public sector.¹⁷ However, with regard to number of health care institutions, number of doctors and financial allocations, a definite bias towards the western system exists in the public sector (Table 3). In 1999, only 0.8% of the Health Ministry's annual budget was spent on Ayurveda.

¹⁷ *Supra* n. 15

Table 3

Distributions of Health Care Institutions, Number of Doctors and Financial Allocations in Western and Ayurveda Medical Systems in the Public Sector, 1998.

	Western	Ayurveda
Number of hospitals (with in-patient facilities)	550(3)	47(a)
Number of Central Dispensaries	389(3)	374*(a)
Number of Doctors	6,852(3)	734(a)
Financial Allocation (Rs. Million)	15,942.6(17)	127.4(a)

** includes 255 Free Ayurveda Dispensaries, which function under the Central Government*

Source:- Department of Ayurveda, Ministry of Health and Indigenous Medicine

In Sri Lanka, the private sector is involved mainly in curative care, and is estimated to handle almost 50% of the country's out-patient load.¹⁸ However, private western health care has expanded, largely due to public service doctors going into private practice. This expansion of private practice, and the lack of sufficient legislative power to regulate the private health sector, has led to a distorted health care market. Reforms in the health sector in Sri Lanka, centring around the expansion of the private sector and decentralisation, have been proposed.¹⁹ Further, the western

¹⁸ *Ibid.*

¹⁹ Attanayake N., the Sri Lanka Health Sector: Policy Perspectives and Reforms, in *Economic Review*, June 1997.

system of the private sector is largely concentrated in the urban and suburban areas of the country, which means that the other systems of health care are mainly responsible for health care delivery in rural areas.²⁰

The cost of drugs is another issue that has gained public attention. Although government hospitals are supposed to provide free health care, including medicines, in practice people sometimes have to buy medicines from private pharmacies.²¹ This is due to drug shortages in hospitals and the prescription of drugs that are usually not dispensed by hospital pharmacies. Excessive profit making by some pharmaceutical companies and the sale of unauthorised, outdated drugs is also reported in Sri Lanka.

5. Major Health Events in 1998 and 1999

The Ministry of Health expressed satisfaction about its progress in the health field in 1998. Further, it stated that, "Although a war situation prevailed in certain parts of the country the Ministry was able to provide adequate services to the entire country, thus improving the health status of the people". However, cholera, malaria and malnutrition were identified by the health authorities as the major health problems in the country.²² In addition, dengue, HIV/ AIDS and the deteriorating health situation of people living in areas with civil unrest should also draw the attention of the health authorities as equally important health priorities in the country.

²⁰ Wolfers I., Traditional Practitioners and Western Pharmaceuticals in Sri Lanka, in Het Spinhuis Publication, The Context of Medicine in Developing Countries.

²¹ *Supra* n. 2

²² *Supra* n. 3

National Immunisation Days (NID) aimed at eradication of polio from the country, were implemented island-wide for the fourth and fifth successive years in 1998 and 1999. It is heartening to note that no polio cases have been reported in the country since 1993. A rubella immunisation program (for girls and young women) was also extended to most parts of the country, including the female employees of the Free Trade Zone. A single-dose mass treatment campaign for filariasis was started in 1998 in the Western, Southern and North Western provinces, which are considered the endemic areas for filariasis in the country. This program continued through 1999 in six monthly cycles.²³ According to the Anti Filaria Campaign, the mass treatment campaign has already started to show good results. As shown by their surveillance, the microfilaria rate has decreased from 0.38 in 1997 to 0.22 in 1998. Also, the number of new cases among patients with clinical manifestations of filaria has dropped from 27.5% in 1997 to 15% in 1998.²⁴

6. Morbidity and Mortality Data

In Sri Lanka, morbidity and mortality data is available only on patients who seek treatment in the government hospitals. Morbidity data from the private sector (private hospitals and private clinics of general practitioners and consultants) is not available. In addition, this useful information is not available from the out patient departments of government hospitals. Further, even the data that is available suffers from deficiencies, such as incomplete diagnosis and analysis. Some of the reasons identified for the deficient recording of hospital data include shortage of Medical Record Officers and statistical staff, delays

²³ *Ibid.*

²⁴ *Supra* n. 15

in receiving the records for analysis and destruction of patients' records due to lack of storage facilities.²⁵

6.1 In-patient Morbidity

The latest available Annual Health Bulletin (of 1998) identifies traumatic injuries, diseases of the upper respiratory system and viral diseases as the three leading causes of hospitalisations in the country. While certain types of diseases, for example the vaccine preventable diseases (such as diphtheria, whooping cough and polio) have shown a steady decline over the years, some others have shown an increase. Non-communicable diseases which are known to emerge with demographic transition and increasing life expectancy in a country are on the increase. A dramatic increase in diabetes mellitus is also reported, which is attributed to urbanisation and changing life-style and nutrition habits. Increasing trends in hospitalisations due to injuries and poisoning, diseases related to pregnancy, childbirth and puerperium, some types of infections and parasitic diseases and mental disorders (which include drug and alcohol dependence, chronic mental disorders, sexual disorders, child abuse and suicide) are also reported. While there is a substantial increase noted in hospitalisations for diseases of the liver, almost 83% of these are known to be related to alcoholism.²⁶

6.2 In-patient Mortality

In Sri Lanka, only about 30-40% of deaths are known to occur in government hospitals. Of these ischaemic heart disease, diseases of the gastrointestinal tract and pulmonary heart disease (and diseases of pulmonary circulation) are known to be the three

²⁵ *Ibid.*

²⁶ *Ibid.*

leading causes, in that order. Out of the deaths due to diseases of the gastrointestinal tract, 57% are due to alcoholic liver diseases. Also it is interesting to note that the toxic effects of pesticides (mainly due to pesticide ingestion with suicidal intentions) is the sixth leading cause of mortality in the country, and accounts for 6.7% of all hospital deaths. This form of death shows a higher incidence in the agricultural districts of the country. While in the districts of Anuradapura, Polonnaruwa and Hambantota, pesticide poisoning accounted for the most number of hospital deaths, in the districts of Ampara, Matale and Moneragala it is the second most common cause of deaths.²⁷

7. Major Public Health Problems in Sri Lanka

A few selected diseases are discussed in this section, namely nutritional deficiencies, malaria, dengue haemorrhagic fever, cholera and HIV/ AIDS. These particular diseases are selected because of their relative importance from a public health perspective. Most of these diseases are known to have high morbidity and/or mortality, and are considered important public health problems. These diseases could be prevented through effective control measures. Another important issue is the vulnerability of the economically and socially deprived to these diseases, which are known to spread among under-privileged social groups more readily.

7.1 Nutritional Deficiencies

Malnutrition among children is still quite prevalent. According to the Demographic and Health Survey of 1993 (done on children aged 3-59 months), prevalence of chronic malnutrition was

²⁷ *Ibid.*

23.8%. Prevalence of undernutrition and underweight in this age group were 15.5% and 37.7% respectively.²⁸ According to the 1997 estimates, the percentage of children born with low birth weight (that is, less than 2.5 Kg) was 17.5%.²⁹

Iron deficiency anaemia among pregnant and lactating women is another public health concern. According to 1994 estimates it was 66.0%.³⁰

7.2 Malaria

With regard to important public health problems in Sri Lanka, malaria is a disease that deserves a special mention. This age-old disease is well known for its devastating results, both economically and socially. As malaria is predominantly a rural disease,³¹ it does not affect the entire country equally. However, it is still known to dominate the disease pattern in the country, especially in the rural areas. As given in the Annual Health Bulletin, 1998, malaria is the number one cause of hospitalisation in the districts of Jaffna, Killinochchi and Mullativu. It ranks as the third most common cause of hospitalisation in the districts of Mannar and Vavuniya, and the fifth leading cause in Batticaloa and Moneragala.

During 1998, 1.3 million blood films of fever patients were screened in government medical institutions for malaria, of which 211,691 (15.8%) turned out to be positive. Of these 80% were due to *plasmodium vivax* species and the remainder were due to *plasmodium falciparum*, the species which is known to cause the

²⁸ Department of Census and Statistics, Sri Lanka Demographic and Health Survey, 1993.

²⁹ *Supra* n. 3

³⁰ *Ibid.*

³¹ Park K., Text Book of Preventive and Social Medicine, 14th Edition.

more severe form of the disease. During that year, 115 deaths were reported to the Anti Malaria Campaign, of which 106 (92%) were from the North and Eastern. District-wise distribution of malaria cases in 1998 shows 62.3% of the caseload to be from the North and East. The reasons identified by the Anti Malaria Campaign for the high incidence of malaria in North and East were the practical difficulties in case detection and treatment of malaria patients as well as in carrying out malaria control activities due to prevailing conflict situation.

However, (as it is the case with many other diseases) it is unlikely that the true picture of malaria in the country is reflected in the statistics. Only the cases that turn out to be positive for a malarial species are included in the malarial statistics. Here again, the chance of a patient with malaria being included in the national statistics will depend heavily on such factors as the place (government or private) from which he seeks treatment, whether his blood is tested (for malaria) or not and the availability of a blood film examination facility at the institution where he seeks treatment. In this regard, it is interesting (and perhaps, surprising) to note that malaria is not among the ten leading causes of hospitalisation in the districts of Anuradapura, Polonnaruwa, Hambantota and Kurunegala, which are traditionally known as highly malarial areas in the country. Whether this is due to a real drop in incidence in these areas due to intensified control activities, or is due to other factors such as deficiencies in detection mechanisms, is an important issue to consider.

It is also worthwhile to note that with the decentralisation of the health system in 1989, the role of the Anti Malaria Campaign is mainly limited to an advisory and monitoring capacity. The Divisional Director of Health Service (DDHS) (who was formerly called Medical Officer of Health or MOH) was vested with the primary responsibility for malaria control within his health area.

However, it is questionable whether the intended results of decentralisation were achieved (with regards to malaria control). In reality the DDHS may not possess sufficient resources for malaria control, lacking adequate technical support and expertise. Many DDHS stations in the country do not possess vehicles and some do not even have their own offices nor enough staff. This situation has given rise to many practical problems, including difficulties in carrying out routine day to day activities such as the conduct of clinics and school medical inspections. In such circumstances it is likely that a DDHS may find it difficult to engage in a resource-intensive activity like malaria control.

Following decentralisation, most of the Anti Malaria Campaign staff, like the Field Assistants (FA) and Spray Machine Operators (SMO), were attached to the DDHS offices and hospitals, and are not involved in anti malarial activities anymore. As a result of this, anti malarial activities, and especially the more important ones such as Active Case Detection and spraying, have reduced tremendously in most malarial areas. There is thus likely to be a reduction in the number of cases detected, thus obscuring the true picture of malaria cases on the one hand, while on the other there is increased risk of large outbreaks.

7.3 Dengue Fever/ Dengue Haemorrhagic Fever

This mosquito-borne disease has caused considerable public concern, especially during the last decade or so. Dengue haemorrhagic fever (DHF) is the more serious form of the disease as it can cause death, especially among children. There is no vaccine available to prevent this disease.

During 1998, there were 1,275 DHF cases reported from the government hospitals, and 8 deaths. Both morbidity and mortality

from this disease are known to be highest among children, and children under 14 years of age have accounted for 75% of the total case load. Colombo and Gampaha, the two most urban and populous districts of the country, recorded the highest number of cases and deaths due to DHF.³²

In November 1996, a Presidential Task Force was appointed to strengthen community-based integrated dengue-control activities. Community based mosquito control activities were carried out, with schools being particularly targeted.³³ In spite of the surveillance activities, health education and various other control measures adopted by the health officials, this dreaded disease remains endemic in the country.

7.4 Cholera

The outbreak of cholera that started in Chilaw in September 1997, spread to the entire country, and still continues. Some believe that cholera has now become endemic in the country. This outbreak is supposed to have started after officials at the Infectious Diseases Hospital (IDH), Colombo, released the body of a patient who had died of cholera to the family without the following the necessary safety precautions. The body was then washed in a canal near Chilaw, which resulted in the spread of infection.³⁴ Following this outbreak, public health officials were instructed to use the powers already vested upon them by the Public Health Ordinance to bring the situation under control. There were many incidents of harassment of small scale traders by public health officials (especially by Public Health Inspectors) reported in

³² *Supra* n. 15

³³ *Supra* n. 3

³⁴ *Sri Lanka: State of Human Rights 1998* (Law & Society Trust, Colombo, 1998) pp. 333-349. See also, *The Island*, 14th November 1997.

newspapers from various parts of the country. In 1998, there were 1,535 confirmed cases of cholera reported to the Epidemiological Unit, Ministry of Health, and there were 49 deaths. Puttalam and Polonnaruwa were the most affected districts in 1998. However, there seems to be a downward trend in cholera incidence in 1999, with 110 cases and 7 deaths reported. The main reasons identified for cholera continuing in the country are scarcity of drinking water and sanitary facilities, together with poor personal hygiene.³⁵

7.5 HIV/AIDS

As of July 1999, 280 cumulative HIV infections among Sri Lankans had been reported to the National STD/AIDS Control Programme (NSACP). However, according to the NSACP it is estimated that there are more than 6,000 people with the HIV/AIDS virus in Sri Lanka.

It is likely that as it is the case with many other diseases, the true incidence of HIV/AIDS in the country is not reflected in the national statistics. Certain occupational categories, such as the Middle East migrant workers, are subjected to more testing than others, as mandatory testing is a prerequisite for them before employment. Among the women with HIV/AIDS in Sri Lanka, most of them are returnees from the Middle East, whose HIV/AIDS status was detected at medical examinations prior to their re-departure for further tenures of work in the Gulf. The possibility of a higher chance of detection due to more testing could have created an exaggerated impression that Middle East migrant workers (especially women) are a high-risk group for HIV/AIDS in the country. This perception has created social discrimination against them.

³⁵ *Supra* n. 2

The following table, which was released by the NSACP at the end of July 1999, gives the number of cases that were reported.

Table 4

Cumulative HIV and AIDS cases reported to National STD/AIDS Control Program by end of end of July 1999

Cumulative HIV cases at the end of the month	Cumulative HIV cases by gender		Cumulative AIDS cases at the end of the month	Cumulative AIDS cases by gender	
	Male	Female		Male	Female
280	178	102	98	72	26
<ul style="list-style-type: none"> • Male to Female ratio of reported HIV cases - 1.7: 1 • Cumulative AIDS deaths reported as of end July 1999 - 72 • Number of HIV tests¹ done during 1st & 2nd quarters of 1999 - 73024 • HIV sero-positive rate for 1st & 2nd quarters of 1999 - 1.37/10000 • Cumulative number of foreigners infected by HIV/AIDS reported as of end July 1999- 38 					

Source: National STD/AIDS Control Programme, Ministry of Health and Indigenous Medicine.

8. Urban-Rural Disparity in Health Care in Sri Lanka

In Sri Lanka there is a distinct urban bias in health care, despite the government's efforts to send more doctors to rural areas including, the North and East in the recent past. This bias is particularly towards Colombo and a few other major cities, and exists both in public and private sectors. This disparity is evident in almost all areas, from the number of hospital beds to doctors, nurses, paramedics and other health staff. Some of these are shown in Table 5. The disparity is most striking for specialist doctors. (Table 6)

Table 5

Distribution of hospital beds, doctors and nurses by some selected districts, September 1998

District	Hospital Beds	Beds per 1,000 pop.	Doctors	Doctor per 100,000 pop	Nurses	Nurses per 100,000 pop
Colombo	10,500	4.8	1,864	84.8	3,681	167.4
Gampaha	4,690	2.9	533	32.9	1,129	69.6
Kandy	4,900	3.6	733	53.9	1,662	122.3
NuwaraEliya	1,527	2.7	89	15.7	185	32.6
Galle	3,044	3	432	41.9	996	96.7
Hambantota	1,305	2.3	78	14	190	34.1
Jaffna	1,842	2	143	15.5	307	33.3
Trincomalee	824	2.4	57	16.3	106	30.4
Kurunegala	3,814	2.5	308	20	871	56.5
Anuradhapura	2,618	3.3	195	24.6	517	65.2
Polonnaruwa	1,049	3	89	25.4	159	45.3
Moneragala	1,051	2.7	46	11.8	156	40.1
Sri Lanka	54,265	2.9	6,500	34.6	14,621	77.9

Source: Annual Health Bulletin, 1998

Table 6

Distribution of Medical Specialists in State Sector by some selected districts, September 1998

District	General Physicians	General Surgeons	Obstetricians	Psychiatrists	Paediatricians	E.N.T. Surgeons	Eye Surgeons
Colombo	27	21	23	11	18	4	8
Jaffna	10	9	8	2	7	1	2
Kandy	9	10	11	4	7	2	2
Nuwaraeliya	1	1	1	0	1	0	1
Galle	7	5	8	4	7	1	1
Hambantota	1	0	2	0	1	0	0
Jaffna	3	3	2	1	1	1	1
Trincomalee	1	1	1	0	0	0	0
Kurunegala	3	3	3	1	4	1	2
Anuradhapura	2	2	2	0	2	0	1
Polonnaruwa	1	2	2	0	1	0	0
Moneragala	0	0	1	0	1	0	0
Sri Lanka	83	73	90	26	64	15	25

Source: Annual Health Bulletin, 1998

It is interesting to note that 55% of doctors and 51% of nurses in the public sector are concentrated in four districts in the country, namely Colombo, Gampaha, Kandy and Galle, which also have the main urban centres in the country. Colombo, Kandy and Galle are the only three districts that have doctor : population and nurse : population ratios more than that of the national estimate (which are, 34.6 and 77.9 per 100,000 population respectively). 70% of medical specialists in the curative service are found in the above four districts, which also have the four larger teaching hospitals, although Kurunegala and Jaffna also have teaching hospitals). The Registered and Assistant Medical Practitioners (RMP/ AMP) and Estate Medical Practitioners (EMP) are still largely responsible for curative care in most rural and estate areas of the country.

This urban/rural disparity seems to exist with regard to many categories of health staff in the public sector, including dental surgeons, pharmacists, medical laboratory technologists, radiographers, physiotherapists and ECG recordists. It is also interesting to note that there is a severe dearth of public health midwives in the country. By end of 1998 there were 4,597 public health midwives in the country, at the rate of 24.5 midwives per 100,000 population. This means that the number of public health midwives is even less than the number of doctors. The public health midwife is a key person in the delivery of primary health care. In theory, a public health midwife is expected to serve a community of 3,000 people. A shortage of midwives will undoubtedly have a negative impact on the primary health care system of the country.

9. Health Situation in the North and East of Sri Lanka

With the terrible effects of the civil war over almost two decades, the health situation in the North and East of the country is badly affected. The health situation in the uncleared areas under LTTE control in the Vanni is known to be worse than in the cleared areas, which are under the government security forces (that is the Jaffna peninsular and the areas south of Vanni) and the grey areas (the districts of Trincomalee, Batticaloa and Ampara).³⁶ The government continues to provide health services and send doctors and other health staff to the cleared areas and to the grey districts in the North and East. However, the uncertain security situation in the grey areas has resulted in fear and reluctance among officials to move out of the urban areas, which are more secure. This has led to the destruction of services and infrastructure, especially in the rural areas. In the uncleared areas, displaced people have poor access to health services. Government officials have faced immense difficulties in maintaining health care services in these areas due to severe staff shortages (see tables 5 and 6), which have resulted in complete standstill of services in some of the areas. A number of international agencies and NGOs provide health services to these areas and prevent a total collapse of the services by training and paying paramedical staff.³⁷ In this regard the North South Patient Transfer Program (NSPTP) launched by the ICRC with the help of the Sri Lankan Government and the LTTE in 1994 deserves a special mention. By end of 1998, there were 2,286 seriously ill patients who were brought from the North and East to the South of the country for medical treatment by this program. They were brought in a merchant vessel chartered by the ICRC, and were taken back after treatment.³⁸

³⁶ Lakbima, 23rd January 2000. See also, *Sri Lanka: State of Human Rights 1998* (Law & Society Trust, Colombo, 1998) pp 333-349

³⁷ *Sri Lanka: State of Human Rights 1998* (Law & Society Trust, Colombo, 1998) pp 333-349. See also, Save the Children, Situation Report: Children Affected by Armed Conflict in North and East Sri Lanka, February, 1998

³⁸ The Island, 26th January, 1999.

The deterioration of health services in this part of the country is clearly evident from the health statistics that are available. Notification of major health events is of great importance in identifying the true picture of an area, and to assist in planning for improvements. Notification, however, has been badly affected by the breakdown of the health infrastructure in the conflict areas. For example, it is surprising to note that the infant mortality figures from most of the war stricken districts of the North and East show much lower (that is better) values compared to the districts in the other parts of the country. Except for Jaffna district, which is proclaimed a cleared area, all the other districts in the North and Eastern give values which are much lower than that of the national estimate (17.3 per 1,000 live births), and some unbelievably too low. (Table 7) The most likely explanation for these discrepant statistics would be under-reporting.

Table 7

District-wise Variations in Infant and Maternal Mortality Rates in the North and East, 1996

District	Infant Mortality Rate (per 1,000 live births)	Maternal Mortality Rate (per 1,000 live births)
Trincomalee	1.4	4.1
Ampara	5.4	9.7
Mannar	7.2	9.7
Mullaitivu	7.8	0
Vauniya	8.4	3
Killinochchi	10.8	14.3
Batticaloa	12.6	5.1
Jaffna	17.5	2.8
SRI LANKA	17.3	2.3

Source: Annual Health Bulletin, 1998

However, with regard to maternal mortality an altogether different picture is seen in the North and East. All the districts in this province except Jaffna and Mullaitivu (which record 0), recorded maternal mortality rates higher than the national figure in 1998, and some as high as 14.3 (Killinochchi, the highest recorded in the country) and 9.7 (Ampara and Mannar, the second highest rates for the country). A likely explanation for this kind of statistics is that, compared to infant deaths, the maternal deaths have a greater chance of being reported to the health authorities as there is a routine procedure to follow in such cases. However, zero recording of maternal deaths in Mullaitivu district could well be due to the total failure to report such deaths to health officials.

A careful look at the morbidity and mortality data in the North and East reveals another interesting fact, which is the possibility of defective preventive and curative health systems in the province. Many districts in the province report high morbidity and mortality due to many diseases that are preventable and treatable. For example, as mentioned earlier, malaria is the main cause of hospitalisation in Jaffna, Killinochchi and Mullaitivu districts, and the third leading cause of hospitalisation in Mannar and Vavuniya districts. Intestinal infections are the second commonest cause of hospitalisation in Ampara, and the third commonest cause in Batticaloa and Trincomalee districts. With regard to mortality, malaria and intestinal infections are the two most common causes of hospital deaths (in that order) in Killinochchi and Mullaitivu districts. Zoonotic and other bacterial diseases accounted for most of the hospital deaths in Jaffna district. It is also the second most common cause of death in Mannar and Vavuniya, and the third most common cause in Trincomalee districts. It is also important to note that in Killinochchi and Mullaitivu districts, mental and behavioural disorders and iron deficiency anaemias are among the ten leading causes of hospitalisation. In spite of the deficient reporting that

is likely to take place from districts in the North and East, the high prevalence of morbidity and mortality due to preventable and curable diseases is evidence that health services (both preventive and curative) are far below the desired level.

10. Trade Union Action in the Health Sector

In 1998 and 1999 there were many trade union actions taken by many categories of staff in the health sector, including doctors, nurses, pharmacists and minor employees. From time to time there were pickets, work to rules, sick note campaigns, token and island wide strikes. At times, there were series of strikes by one category after the other, leading to a collapse of hospital and other health services in the public sector for long periods of time. In the latter part of March 1999 there was such a series of strikes involving nurses, doctors and minor employees, which affected the health service for more than two weeks at a stretch. These actions caused immense difficulties to patients, some of whom died, and to the general public, and especially to the poor.

Trade union actions such as strikes pose a dilemma in human rights terms. When on strike, the trade union members are known to exercise their right to strike. However, the exercise of this right may put at risk the right of the public to adequate health care. However, the right to public health is on a higher footing than the right to join trade unions in both international human rights standards and under the Constitution of Sri Lanka.³⁹

However, with regard to the trade union actions in the health sector, the apparent slackness on the part of the health authorities

³⁹ *Sri Lanka: State of Human Rights 1998* (Law & Society Trust, Colombo, 1998) pp 333-349

to resolve the issues before they culminate in strikes also needs to be mentioned. If the government took action to resolve these issues early, it might be able to prevent strike action and the immense difficulties that strikes create for the public.

11. Conclusion and Recommendations

Although Sri Lanka's health statistics appear to be better than that of many other countries in the region, their accuracy is doubtful. A more efficient system of notification and recording is needed. Until the true picture of the country's health situation is known, future planning will be based on inaccurate statistics and may not produce the desired results. There should be further efforts to improve the overall health situation in the country.

Most of the recommendations that were made by Jayawardena for improvement of health in *Sri Lanka: State of Human Rights 1995*, still remain valid. Resource allocation is one area that needs review. While new priority areas in the allocation of resources to special programs is to be considered, the old programs also need to be reviewed where and when necessary. More financial allocations need to be granted to public (or preventive) health programs and indigenous medicine. A co-operative approach between different systems of medicine is most desirable. Deteriorating health conditions in the rural areas of the country, and especially in the war stricken North and East, need to be addressed urgently. As suggested by Jayawardena in 1995, a human rights approach to health policy needs to be introduced with the setting up of a division for Human Rights Assessment in the Ministry of Health.⁴⁰

⁴⁰ *Sri Lanka: State of Human Rights 1995* (Law & Society Trust, Colombo 1995) pp 183-222

XVI

Crimes, Human Rights and State Responsibility

*C.S. Dattatreya**

1. Introduction and General Overview

Crime, human rights and state responsibility were discussed for the first time in *Sri Lanka: State of Human Rights 1999*. This chapter provides a brief update on the situation. Violence against women, human rights violations and crimes arising out of the ethnic conflict are not covered in this chapter. However, a clear divide between political and other crimes cannot always be drawn. For example, until the perpetrator of the murder of *Satana* editor Rohana Kumara is identified, it cannot be said with certainty whether it was politically motivated or not.

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The police last year made available to the Trust two sets of statistics: (1) statistics on all types of crimes reported and solved in all the police divisions in the country, and (2) statistics for 'serious crimes' reported during the first half of 1998. Since the second kind of statistics for the full year 1998 were not available when last year's chapter was written, (1) was adapted and presented in last year's report. This year, however, the second kind of statistics is available for both 1998 and 1999 whereas the first kind is not available for 1999. Hence, 'serious crimes' statistics for the two years have been compared. All this has caused some unavoidable inconsistency between the categories and figures included in last year's report and those that are being included in this chapter.

The official crime statistics for the year 1999 show a drop of around 4.5% as compared with the statistics for 1998.¹ The total number of serious crimes² reported for 1999 was 9,056 as against 9,478 for 1998. The most significant drop in the crimes reported has been in the divisions of Nuwara Eliya (34.5%; 128 and 195), Nugegoda (26.5%; 829 and 1127), Kelaniya (21%; 787 and 996), Gampaha (20.5%; 561 and 705) and Moneragala (20.5%; 93 and 117). The most significant increase in crimes reported has been in the divisions of Badulla (445%; 120 and 22), Chilaw (37%; 448 and 327), Kuliyaipitiya (30%; 248 and 191), Panadura (26.5%; 277 and 219), Gampola (22%; 104 and 85) and Kegalle (22%; 291 and 238).

¹ 1998 crime statistics for the divisions of Jaffna, Vavuniya, Ampara, Batticaloa, Kantale and Trincomalee are not available and hence these divisions are not covered by the present comparisons.

² Homicides, burglaries of over Rs. 5,000/-, thefts of over Rs. 10,000/-, robberies, highway robberies, vehicle thefts and bank hold-ups.

Although the figures do not show a significant increase in crime over the year, there is nonetheless a strong public perception that crime is on the increase. This image is reinforced by media reporting on crime, and has a major impact on the government's response to the problem. At times, the response appears to bring positive results as, for example, when a Presidential directive given in June to crack down on crime resulted in the creation of special police teams which were credited with resolving such high profile cases as the abduction of G.C. Wickremesinghe, the massacre at Hokandara and the murder of Rita John-Manoharan.³ At other times, however, it resulted in retrograde steps being taken by the government, such as the announcement in March that the death penalty would again be implemented in Sri Lanka as part of the State's response to crime. No executions have been carried out in Sri Lanka since June 1976.

2. Major Incidents and Developments in 1999

2.1 The Hokandara massacre

The year was again plagued by some serious incidents of crime that were given considerable media coverage. The first was "the Hokandara massacre." On 10th February, assailants hacked six members of one family to death in Hokandara, using axes and knives. Four suspects were tried at a trial at bar constituted for this case at the end of the year. The case generated widespread concern, and demands were made for the government to act decisively to stall the perceived breakdown in security for citizens. The holding of a trial at bar for this case also raises the issue of equality before the law. It was clear that in this case the factor that threatened a just trial by jury was the excessive coverage

³ Daily News, 12th July 1999.

given to the case in the media, which had, arguably, prejudiced the mind of the public. Therefore, "in the interests of justice," a trial at bar by the High Court was held for the case. Does this then mean that the kind of trial that a suspect undergoes is determined in part by the kind of coverage the media happened to give that case?

It was also partly as a response to the concern generated by this incident that Minister of Justice Professor G.L. Peiris announced the government's intention to implement the death penalty and a reduction in the number of amnesties offered.⁴

2.2 The trial of the murder of Rita John-Manoharan

The trial at bar of the accused in the Rita John-Manoharan case⁵ also attracted wide attention. All three accused in the case were found guilty and sentenced to death by the Colombo High Court. All three convicts appealed against the judgement.⁶ Their appeals were pending at the end of the year.

2.3 Crimes against media personnel

Some highly-publicised incidents of crime involved media personnel. In one incident, Rohan Kumara, the editor of the Sinhala newspaper, *Satana* was shot dead on his way home from work on 8th September.⁷ *Satana* had a reputation for running scurrilous campaigns against political leaders. Rohana Kumara had been travelling in a three-wheeler when, near the lane from his home, a person shot him dead from the rear seat of a parked

⁴ See *infra*

⁵ See *State of Human Rights: 1999*, (Law and Society Trust, Colombo, 1999), p. 128

⁶ The Island, 6th June 1999.

⁷ Daily News, 8th September 1999.

car. The killing provoked a powerful response in the media and was also raised on the floor of Parliament, where the opposition blamed the government for the killing and demanded an impartial inquiry.⁸ No major breakthrough in the case had been reported by the end of the year.

In another incident, Sri Lal Priyantha, a journalist from *Lakbima* (a Sinhala newspaper) was abducted by an unidentified gang on 14th March. He was later found tied to a tree, blindfolded, about a mile from his home. He had been severely assaulted. The journalist said the attack had been precipitated by an article he had written about a meeting between a Defence Ministry official and members of PLOTE, at which a plot had been hatched to assassinate Deputy Minister of Defense Anuruddha Ratwatte. The Free Media Movement staged a peaceful demonstration opposite the Colombo Fort Railway Station to protest against Priyantha's abduction.⁹ His abduction was investigated, but the findings are not clear yet.

2.4 Gang warfare in Colombo

Concern grew about the extent of organised crime in Colombo after six people were killed in a shoot-out between rival gangs in Nugegoda on the night of 6th September. These killings had been preceded by reports of various illegal activities, including extortion, kidnapping and murder, being committed by underworld gangs in Colombo.¹⁰

On 12th September, Maligawatte Police raided a "torture chamber" operated by an alleged underworld gang in the area and rescued

⁸ INFORM Situation Report, September 1999, p. 15.

⁹ INFORM Situation Report, March 1999, p. 12.

¹⁰ INFORM Situation Report, September 1999, p. 17.

three youths, who apparently belonged to a rival gang. They had been abducted and tortured by being hung upside down and being injured with sharp weapons.¹¹

Perhaps the most spectacular evidence of organised crime in the heart of Colombo came, however, when the Silver Slipper Casino was burnt down on the night of 22nd December. On that night, the casino on Duplication Road was closed. Not only was it a poya day, but a curfew had been imposed that night. Nevertheless, the casino was raided by a group of armed people who forced their way in, overpowered the security guards, and set the building alight. The entire casino was gutted and a charred T-56 assault weapon, which had apparently been left behind by the attackers, was found in the rubble the next morning. The incident was allegedly linked to an extortion racket.¹² The grave fact that such an incident could take place right in the heart of Colombo during curfew hours went largely unnoticed in the mainstream press. In any case this event was totally overshadowed by the assassination attempt on the President which took place around the same time.

2.5 Kidnapping for ransom

G.C. Wickremesinghe, a Director of the prominent private sector company Aitken Spence Ltd., was abducted on 30th March while travelling by car to the Colombo Golf Club. He was released that night after a ransom of Rs. 20 million had been paid to his abductors. A Police Sub Inspector and a former Airman, who had stopped Wickremesinghe's vehicle in the guise of traffic policemen, were arrested. Subsequently, further suspects – including a former soldier – were also arrested in connection with this crime.¹³ A major factor contributing to these arrests was

¹¹ The Island, 15th September 1999.

¹² Sunday Leader, 2nd January 2000.

believed to be the high level of publicity given to the case. It is not known whether other such ransom deals have been struck without the knowledge of the media or the public, and without leading to arrests.

Another victim of kidnapping – an eight-year old boy – did not escape with his life. On 8th October, Sadeepa Lakshan Silva was kidnapped, and a ransom of Rs. 2.5 million was demanded from his father, a wealthy businessman. He agreed to pay the ransom, and police arrested some of the kidnappers as they were collecting the ransom money from a telephone booth in Aluthgama. They were teenagers, (who included the victim's own uncle,) reputed to be drug addicts, who lived in the same neighbourhood of Kalawilawatte, Moragolla in the Aluthgama police area. However, by this time the boy had already been strangled to death and his body had been dumped in a sewage pit barely 100 metres from his home.¹⁴

2.6 Citizens' justice?

During 1999, the public took the law into its own hands in several incidents, to punish suspected criminals. For example, a suspect in a case of assault and robbery in Kandana was beaten to death by an angry crowd when he was being escorted by the police to recover some jewellery that he had allegedly robbed from a household in the same neighbourhood.¹⁵ In another incident, the house of an ex-soldier was set on fire by residents of his village. The soldier had been dismissed from the army for rape while serving in Jaffna and had subsequently been convicted for raping a 12 year old school girl at Dodangoda in the Kalutara District.¹⁶

¹³ The Island, 9th April 1999.

¹⁴ The Island, 12th October 1999.

¹⁵ Sunday Times, 28th February 1999.

¹⁶ INFORM Situation Report, November 1999, p. 16.

There is no doubt that the reports of crimes of this nature mark a very disturbing trend that not only affects the security available to citizens but also has implications for the rule of law and governance generally. It is precisely for this reason that in such instances the state will have to act decisively and responsibly in re-asserting the authority of the institutions of democratic governance.

2.7 Conviction of paedophile

On 6th October Jan Nilsen, a Norwegian paedophile convicted for abusing a 14 year old boy, was sentenced to 14 years rigorous imprisonment and fined Rs. 100,000 by the Negombo High Court. Nilsen had been arrested with the boy in a hotel room at Ethukala resort in Negombo on 19th April.¹⁷

3. Major Police Issues in 1999

3.1 Transfer of H.M.P.B Kotakadeniya

In November, Senior DIG H.M.P.B. Kotakadeniya, who was in charge of the Crime Investigation Division, was transferred suddenly. The transfer came in the run-up to the Presidential election, and DIG Kotakadeniya was embroiled in controversy over statements he had made which Tamil political parties interpreted as being anti-Tamil. DIG Kotakadeniya had been in charge of a major clamp-down against underworld crime.

¹⁷ Daily News, 7th October 1999.

4. Election Violence

1999 saw elections being held in the country on four different occasions. These were in January (Wayamba Provincial Council), April (Western, Central, North Central, Uva and Sabaragamuwa Provincial Councils), June (Southern Provincial Council) and December (Presidential election). All the civil society groups monitoring the elections reported very serious violations during the Wayamba elections. One report even concluded that this election was "irretrievably flawed."¹⁸ According to another report this election was "proportionately more violent" (in terms of numbers of incidents) and the incidents were "qualitatively more serious" when compared with the Local Government Election of 1997.¹⁹ In terms of number of incidents reported, a total of 895 incidents were recorded in the 48 days of the campaign, while in 1997, a total of 335 incidents were recorded over a period of 44 days in the same geographical area.²⁰

The public outcry against the election violence during the Wayamba election partly contributed to a drop in the levels of violence at the other elections that followed during the course of the year.²¹

¹⁸ Cited in *Final Report on the Presidential Election*, PAFFREL/MFFE, (Colombo), p.1. The two main civil society election monitoring entities, People's Action for Free and Fair Elections/Movement for Free and Fair Elections (PAFFREL/MFFE) and the Centre for Monitoring Election Violence (CMEV) have both published comprehensive accounts of the violence witnessed during these elections. For a detailed account of election violence during the year, please see the reports published by these two entities.

¹⁹ *Final Report on Election-Related Violence: The North-Western Provincial Council Election - 1999*, Centre for Monitoring Election Violence, (Colombo, 1999), at p. 2.

²⁰ *Ibid.*

²¹ For a detailed breakdown of the incidents of election violence at these elections, see the reports published by PAFFREL/MFFE and CMEV.

5. Re-implementation of the Death Penalty

In mid-March, the Presidential Secretariat announced that death sentences imposed by courts in cases of murder and drug trafficking would be carried out in the future. The release further said that death sentences imposed by courts would not be commuted to life imprisonment, if in accordance with the relevant constitutional and statutory procedure, the judge who heard the case, the Attorney General and the Minister of Justice unanimously recommended the execution of such sentence. The rationale behind the decision was explained thus: "The President is of the view that one of the immediate measures to be taken to arrest the present trend in crime is to follow a more stringent policy in the grant of remission of sentences imposed by the Courts."²²

Since June 1976, there have been no judicial executions in Sri Lanka, although the death sentence has continued to be imposed by the courts. The President has the power to grant clemency, which usually takes the form of commutation of the death sentence to 20 years' imprisonment or less.

Justifying the decision to re-implement the death penalty, the Minister of Justice Professor G.L. Peiris said: "Murder is an offence punished by death. Drug trafficking is punished by death or life imprisonment. There are other offences stipulated in the Penal Code that carry the death penalty, like waging war against the state. It sometimes happens in the High Court that with solemnity the death sentence is passed. Fans are switched off and it is a very solemn moment. But everyone including the accused knows that it is not definitely going to be carried out. There is a gulf or a chasm between the law stated in the statute

²² Sunday Observer, 14th March 1999.

book and the reality. If you are convinced that under no circumstances should any person be hanged, then the death penalty should be removed from the statute books."²³

However, despite the announcement, no executions were carried out in 1999. Nonetheless, the announcement caused great uncertainty and anxiety for more than 100 prisoners on death row (most of them convicted for murder) at the Welikada and Bogambara prisons. Prison officials expressed concern that after the reintroduction of the death penalty had been announced, unrest had set in among the prisoners.²⁴ No death sentences had been commuted since May 1998, as the President had not signed the papers. If the death penalty were implemented again, it would affect them all.²⁵

In fact, the procedure announced for re-implementation was similar to one that had been put forward in 1995, after a private member's bill on the death penalty had been passed by Parliament. At that time, Minister of Justice, Professor G.L. Peiris had told a hurriedly convened press conference that the Justice Ministry would seek the advice of the trial judge and the Attorney General about commuting a death sentence, and if one such authority recommended commutation, this would be done.²⁶ No executions were carried out.

The death penalty has been one of the most important themes in the international discourse of human rights. The view that the death penalty violates the right to life and the right not to be subjected to cruel, inhuman or degrading punishments (both of which are recognised in the UDHR, other international human

²³ Sunday Island, 21st March 1999.

²⁴ Sunday Times, 21st March, 1999.

²⁵ *Ibid.*

rights instruments, and many national constitutions) is being increasingly accepted among intergovernmental organisations and in national court judgments. In 1990 the Hungarian Constitutional Court declared that the death penalty violates the "inherent right to life and human dignity" as provided under Article 54 of the country's constitution. In 1995 the South African Constitutional Court declared the death penalty to be incompatible with the prohibition of "cruel, inhuman or degrading treatment or punishment" under the country's interim constitution. Eight of the eleven judges also found that the death penalty violates the right to life.²⁷

Furthermore, in a general comment on Article 6 of the ICCPR, adopted in 1982, the Human Rights Committee established under that treaty has stated that Article 6 "refers generally to abolition [of the death penalty] in terms which strongly suggest ... that abolition is desirable. The Committee concludes that all measures of abolition should be considered as progress in the enjoyment of the right to life..." The Second Optional Protocol to the ICCPR, aiming at the abolition of the death penalty, adopted by the UN General Assembly in 1989, states in its preamble: "... abolition of the death penalty contributes to enhancement of human dignity and progressive development of human rights."²⁸

It is thus clear that the weight of international opinion in the matter of the death penalty is shifting in favour of its abolition. It is unfortunate that at a time when such countries as Hungary and South Africa are taking progressive positions on the issue, Sri Lanka is actually going in the opposite direction.

²⁶ Sunday Island, 14th March, 1999.

²⁷ *International Standards on the Death Penalty*, Amnesty International Report - ACT 50/10/98, December 1998, pp. 1-5.

²⁸ *Ibid.*

6. Conclusions and Recommendations

Certain major incidents of crime – including the Hokandara massacre, the murder of Rita John-Manoharan and the abduction of G.C. Wickremesinghe – were solved within days and the prime suspects duly charged for the offences. In these cases, the State showed that it could respond at times effectively and efficiently to crime. Although official statistics for 1999 do not reveal a major increase in the crime rate as compared to the statistics for 1998, several disturbing trends were evident during the year. Among these were:

- ☐ the tendency for citizens to take the law into their own hands.
- ☐ the announcement that the death penalty would again be implemented.
- ☐ the apparent inability of the law enforcement agencies to tackle underworld crime effectively. Although in mid-July the Police, speaking through IGP Lucky Kodituwakku, congratulated itself on resolving several major cases and arresting several underworld kingpins,²⁹ within a couple of months further underworld crimes were committed, including the killing of six people in a car in Nugegoda in September,³⁰ and the burning of the Silver Slipper Casino in Colombo in December.

²⁹ *Supra*, p 2.

³⁰ *Supra* pp 3-4.

Against this background, the following recommendations are made:

- ☐ A review of administrative and management practices in all branches of the criminal justice system should be undertaken with a view to ensuring its independence and effectiveness.
- ☐ A programme to enhance the resources, technical skills and expertise of all personnel deployed in the criminal justice system should be initiated.
- ☐ The state needs to respond decisively to incidents where citizens take the law into their own hands.
- ☐ The state should not go ahead with its plan to bring back the death penalty. This would mark a major step backwards in Sri Lanka's human rights practice, and should not be enforced.

Serious Crimes Reported from 1.1.99 - 31.12.99

Division	Homicides	Burglary over Rs.5,000	Theft over Rs.10,000/-	Robberies	Highway Robberies	Vehicle Thefts	Bank Hold-ups	Total
Anuradhapura	50	121	76	48	8	14	0	317
Ampara	67	48	29	30	2	19	0	195
Badulla	22	58	10	20	5	4	1	120
Bandarawela	13	44	13	17	0	4	0	91
Batticaloa	119	53	29	37	0	16	0	254
Chilaw	57	139	108	88	14	42	0	448
Colombo	60	186	153	107	50	91	3	650
Elpitiya	46	79	39	12	14	51	0	241
Galle	47	112	43	60	3	9	2	276
Gampaha	57	254	93	43	57	57	0	561
Gampola	13	52	20	11	3	5	0	104
Jaffna	88	77	9	20	1	0	0	195
Kalutara	64	80	56	70	8	34	0	312
Kelaniya	34	349	138	146	33	86	1	787
Kandy	49	183	98	45	7	30	2	414
Kegalle	83	97	35	41	16	19	0	291
Kurunegala	50	114	49	55	7	32	0	307

Contd.

Serious Crimes Reported from 1.1.99 - 31.12.99

Division	Homicides	Burglary over Rs.5,000	Theft over Rs.10,000/-	Robberies	Highway Robberies	Vehicle Thefts	Bank Hold-ups	Total
Kuliyapitiya	47	67	63	41	5	22	3	248
Kantale	24	21	8	4	0	5	0	62
Matale	27	65	43	25	8	13	2	183
Matara	64	117	34	84	10	20	5	334
Mount Lavinia	44	291	62	153	36	81	3	670
Moneragala	27	18	22	22	3	1	0	93
Negombo	84	119	57	30	0	26	0	316
Nugegoda	61	359	129	79	52	147	2	829
Nuwara Eliya	12	69	35	3	7	2	0	128
Nikawaratiya	21	38	33	18	1	9	0	120
Panadura	33	145	28	37	6	28	0	277
Polonnaruwa	31	87	37	34	2	10	1	202
Ratnapura	95	120	78	91	6	30	2	422
Tangalle	73	62	40	91	18	25	6	315
Trincomalee	29	20	12	12	0	5	1	79
Vavuniya	125	22	22	26	2	5	0	202
Grand Total	1716	3666	1701	1600	384	942	34	10043

Source: Police Department

Serious Crimes Reported from 1.1.98 - 31.12.98

Division	Homicides	Burglary over Rs.5,000/-	Theft over Rs.10,000/-	Robberies	Highway Robberies	Vehicle Thefts	Bank Hold-ups	Total
Anuradhapura	67	102	51	28	18	29	0	295
Badulla	6	8	4	4	0	0	0	22
Bandarawela	19	38	24	15	9	6	0	111
Chilaw	65	108	62	36	15	41	0	327
Colombo	60	203	218	63	46	103	0	693
Elpitiya	76	85	36	47	8	17	0	269
Galle	57	109	34	31	18	27	0	276
Gampaha	73	281	137	85	61	65	3	705
Gampola	9	39	15	11	9	2	0	85
Kalutara	57	161	60	67	18	20	0	383
Kelaniya	53	453	234	132	59	64	1	996
Kandy	29	127	133	50	0	42	0	381
Kegalle	80	72	30	22	8	26	0	238
Kurunegala	50	98	44	28	15	29	1	265
Kuliyapitiya	33	42	32	25	18	39	2	191
Matale	34	59	47	22	2	13	0	177
Matara	79	106	46	53	18	14	0	316
Mount Lavinia	59	212	117	124	53	74	0	639

Contd.

Serious Crimes Reported from 1.1.98 - 31.12.98

Division	Homicides	Burglary over Rs.5,000	Theft over Rs.10,000/-	Robberies	Highway Robberies	Vehicle Thefts	Bank Hold-ups	Total
Moneragala	43	26	14	24	4	6	0	117
Negombo	26	159	68	37	9	48	0	347
Nugegoda	55	515	185	139	115	117	1	1127
Nuwara Eliya	27	96	36	14	17	5	0	195
Nikawaratiya	25	32	41	2	7	1	0	108
Panadura	35	104	19	28	11	22	0	219
Polonnaruwa	51	87	26	25	7	14	0	210
Ratnapura	99	157	56	82	37	37	0	468
Tangalle	118	52	30	72	25	20	1	318
Grand Total	1385	3531	1799	1266	607	881	9	9478

Source: Statistics obtained from the Police Department.

Note: Figures for the Ampara, Batticaloa, Jaffna, Kantale, Trincomalee and Vavuniya districts were not included in the police statistics because in these areas "the actual crime situation may not be correctly reflected in view of the on-going armed conflict."

XVII

The Human Rights Commission

*Ambika Satkunanathan**

1. Introduction

The Human Rights Commission of Sri Lanka was established by Act No. 21 of 1996 as a permanent national institution to investigate any infringement of a fundamental right declared and recognised by the Constitution, and to grant appropriate relief. The Commission was created amidst much fanfare, optimism and hope. This mood soon changed due to the fact that the Commission began functioning only in 1997, a year after the legislation establishing it was enacted. It had been hoped that the creation of the Human Rights Commission would herald in a new era in which the human rights of the individual and the community would be protected and promoted. Sadly, this has not been the case.

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An important limitation was imposed on the Commission's work under the Act, which only authorises the Commission to *investigate* infringements of fundamental rights, not human rights. In other words, a distinction has been drawn in the Act between those fundamental rights which are enshrined in the Sri Lankan Constitution, and the much wider range of rights and freedoms guaranteed under international human rights law, which includes the right to life. The use of the term "fundamental right" thus restricts the jurisdiction and mandate of the Commission; it is unable to investigate violations of all human rights.¹

The Act does proceed to define a human right as a "right declared and recognised by the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights." Yet these "human rights" too are narrowly defined which ignores rights enshrined in other international human rights instruments such as the Convention Against Torture and the Convention on the Elimination of All Forms of Discrimination Against Women. It would be prudent to question why there are two different sets of rights set out and defined in the Human Rights Commission Act. The explanation is simple. The investigative and conciliatory powers of the Commission extend only to "fundamental rights" but its education functions encompass a much broader range of rights, "human rights" as defined in the ICCPR and the ICESCR. The Human Rights Commission Act, in keeping with the Constitution, also restricts the Commission's powers to infringement of rights by executive or administrative action.

¹ "National Human Rights Commission: Some Comments on the Bill," *Fortnightly Review*, (Law & Society Trust), Vol VI, Issue No 100, February 1996.

Another provision that is a cause for concern is section 14(b), which empowers the Commission to investigate an infringement of a fundamental right as a result of an act which constitutes an offence under the Prevention of Terrorism Act No.48 of 1979. This provision empowers the Commission to investigate the actions of "criminal groups which have resorted to arms to achieve their political goals." This section appears to target terrorist activities. If exercised by the Commission, this could create the public perception that the Commission is not an independent human rights body. The Commission should at all times not only be, but also be seen to be, independent from the government and the armed forces.

2. The Mandate and Powers of the Human Rights Commission

The Commission under section 10 has the power to:

- (a) inquire into and investigate complaints regarding procedures with a view to ensuring compliance with the provisions of the Constitution relating to fundamental rights, and promote respect for and observance of fundamental rights;
- (b) inquire into and investigate complaints regarding infringement, or imminent infringement, of fundamental rights and to provide for resolution by way of mediation and conciliation;
- (c) advise and assist the government in formulating legislation and administrative directives and procedures in the furtherance of the promotion and protection of fundamental rights;

- (d) make recommendations to the government regarding measures which should be taken to ensure that national laws and administrative practices are in accordance with international human rights norms and standards;
- (e) make recommendations to the government on the need to subscribe or accede to treaties and other international instruments in the field of human rights; and
- (f) promote awareness of, and provide education in relation to, human rights.

As can be seen the Commission has a broad mandate which, if utilised in a creative manner, would enable it to function effectively and efficiently. Yet of the functions allocated to it, the Commission at present performs only subsections (a) and (b); in other words, it only exercises its power to investigate and mediate complaints. The Commission, in its annual report for 1997-1998, stated that its main functions are set out in subsections (a) and (b) and in section 11(d).² As Amnesty International has pointed out, even these functions have not been fulfilled in an effective manner: for example, the powers of the Commission to investigate torture have rarely been utilised³. Amnesty International has also given examples of cases where the Commission did not inform complainants of the outcome or progress of their cases.⁴

² Section 11(d) requires the Commission to monitor the welfare of persons detained either by a judicial order or otherwise, by regular inspection of their places of detention, and to make such recommendations as may be necessary for improving their conditions of detention.

³ *Sri Lanka: Torture in Custody*, Amnesty International, ASA/37/10/99, June 1999, p.30.

⁴ *Ibid.*

The Commission seems to have virtually ignored the other functions allocated to it. When asked whether the Commission performed any of the other very vital functions, the Chairman replied that no action had been taken under subsections (c) and (d) (advising and assisting the government in formulating legislation, and making recommendations to the government regarding measures which should be taken to ensure that national laws are in accordance with international human rights norms and standards). He also stated that no occasion had arisen for the Commission to exercise powers under section 10 (c) and (d).⁵

The Chairman acknowledged that the Commission played no role in assisting the government formulate new legislation, such as the recent equal opportunity law. The Commission thus did not utilise a clear opportunity to get involved in a very important process. When questioned about the equal opportunity law, the Chairman was quite unaware of its aims and contents and said that the board had recently written to the Legal Draftsman requesting copies of impending bills in order to fulfil this particular function. This illustrates the ignorance and apathy that is characteristic of the Commission. Since many of Sri Lanka's legal provisions are discriminatory towards women or other sections of society, and are in dire need of reform, the Commission could examine whether these laws are in accordance with international standards and make recommendations to the government to initiate reform.

The role of advising and assisting the government in formulating legislation is no easy task. As the Commission is already understaffed and lacks resources, it may be that it is not equipped to

⁵ Personal interview with the Chairman, Mr. O.S.M. Seneviratne.

perform this demanding role effectively. It would require expertise in many fields which are probably outside the competence of the Commission's present staff. Indeed, the Commission has acknowledged it in its annual report that its staff members are inexperienced and untrained.⁶

Section 10(d) of the Act – which is concerned with ensuring that Sri Lanka's international law obligations are fulfilled and that national law in no way contravenes international human rights practices and norms – is a section of utmost importance, but has not even earned a glance from the Commission. Given that Sri Lanka's human rights record has not been beyond reproach and that it is yet to ratify several international treaties, it is only to be expected that the Human Rights Commission should advise the state and encourage it to become a party to treaties which have enormous impact on the protection and promotion of human rights.⁷ The Statute of the International Criminal Court is a case in point. If the Commission were to be proactive it could urge the government to ratify this landmark treaty which is an important step in ending impunity with regard to human rights violations, both nationally and internationally.

With regard to whether the Commission had a public education programme or policy, the Chairman replied that at times the members of the Commission are invited to speak at seminars and workshops; he felt that responding to such requests was adequate to fulfil the Commission's function in this respect. The Commission in its annual report for the period 1997-1998 accepted that "there was no possibility of implementing a

⁶ Annual Report of the Human Rights Commission, 1997-1998, p.7.

⁷ Sri Lanka has not ratified the Second Optional Protocol to the ICCPR, the ILO Convention Concerning the Abolition of Forced Labour and the Convention Relating to the Status of Refugees.

programme at the national level this year. The main reason for this was the lack of experienced staff in the Commission for this purpose.”⁸

At the time of the interview with the Chairman in 1999, a national programme was still not in place. The Chairman was of the opinion that there was absolutely no need to conduct public education campaigns, as he felt that people were already too aware of the Commission. This, he said, had lead to the Commission being inundated with complaints, most of which were not even within the ambit of the Commission's mandate. It has to be pointed out that if a concerted public education campaign was conducted which clearly set out the mandate, powers and functions of the Commission, it might help reduce the number of complaints it received which were outside its purview. Public education is essential to any attempt to promote and protect human rights. As it was set up specifically for this task, the Human Rights Commission is duty bound to undertake this function and fulfil its mandate as per section 10(f).

In addition, the Commission was given other powers to enable it to play a proactive role in the promotion and protection of human rights. The Commission has the power to investigate on its own motion an allegation of the infringement or imminent infringement of a fundamental right; it can also refer matters to the Supreme Court under Article 125 of the Constitution for the determination of the Supreme Court. The Chairman stated that no need had arisen to refer any matters to the Supreme Court, and that the Commission had not undertaken any inquiries on its own initiative. In Sri Lanka, where a violent conflict exacerbates the human rights violations faced by people, it cannot be for a

⁸ *Ibid.*

lack of subjects to investigate that this function has not been fulfilled. For example, instead of only interviewing suspects and engaging in documentation the Human Rights Commission should have played a more active role in the investigation into the mass graves in Chemmani.

The Supreme Court can also refer matters to the Human Rights Commission for inquiry and report.⁹ According to the Chairman, the Supreme Court has referred over 40 cases, ranging from illegal detention to discrimination in employment since the establishment of the Commission.¹⁰ The Chairman did not indicate whether all these cases were attended to promptly, but if the case of *Sugathadasa Jayasinghe v. The Attorney-General*¹¹ is an indication of the working methods of the Commission, then the efficiency and effectiveness of the Commission has to be questioned. In this case, the Supreme Court referred three fundamental rights applications to the Commission for inquiry and report in October 1997. The Commission took a year to submit a report (dated 28.10.98), but the findings and recommendations of the Commission were unclear.¹²

The Commission also has other specific duties such as monitoring the welfare of detainees, and making recommendations for improving the conditions of detention.¹³ The infrequency of visits undermines the objective of the provision, which was meant to be a deterrent to torture in custody.

It must be acknowledged that the infrequency of visits should not be attributed to any lack of commitment of the officers of the Commission. The author found that shortage of staff was the

⁹ Section 12(1).

¹⁰ Statistics obtained from the Chairman during a personal interview.

¹¹ S.C. Application No.770/97.

¹² *Sugathadasa v. Attorney-General*, p.4. (unreported).

¹³ Section 11 (d).

main reason, and that several officers were committed and motivated. The Amnesty International report also stated that in ascertaining the welfare of the detainees, the members of the Commission did not utilise any standard minimum rules similar to the Sri Lankan Prison Ordinance or Prison Rules. Instead, they referred only to the presidential directives and other safeguards laid down in the emergency regulations, the Human Rights Commission Act, the Constitution and other legal provisions prohibiting torture. The members were said to realise the need for such rules, but none had been compiled at the time of the author's interview with the Chairman. In addition, important measures to protect the welfare of detainees provided within the framework of the Human Rights Commission Act, such as the maintenance of a register of detainees, including a central register, had not been carried out.¹⁴ The Human Rights Task Force used to carry out this task, but the Human Rights Commission does not fulfil these functions to the extent that the Human Rights Task Force used to.¹⁵

The Commission also has the power to set up provincial offices and create thematic sub-committees.¹⁶ In 1999, regional officers of the Commission were functioning in 10 locations,¹⁷ but no thematic sub committees had been created to examine particular issues. The annual report stated that the Commission intended to

¹⁴ Report of the UN Working Group on Enforced or Involuntary Disappearances, E/CN.4/1999/62, p.49.

¹⁵ *Ibid.*

¹⁶ Section 11 (b), Human Rights Commission Act.

¹⁷ Anuradhapura, Ampara, Badualla, Batticaloa, Kandy, Kalmunai, Trincomalee, Vavuniya, Matara and Jaffna.

establish an office in Mannar during 1998, but by December 1999 the branch had not been established.¹⁸

The Act also restricts the power of the Commission to deliver binding decisions; the Commission only has power to make recommendations. In the event the recommendations are not followed, the Commission can make a full report of the facts to the President who shall cause a copy of the report to be placed before Parliament.¹⁹ It has to be conceded that the effectiveness of this is questionable since this procedure has not been utilised to date.

3. The Appointment and Removal of Members of the Commission

The criteria for the selection of the members of the Commission stipulate only that they must have knowledge of, or experience in, matters relating to human rights. A national human rights commission is the institution entrusted with the promotion and protection of human rights in the country. As such its members should be individuals with "proven expertise and competence in the field of protecting and promoting human rights"²⁰ and should reflect the ethnic and gender diversity of Sri Lanka. It is imperative that the members be persons who will be able to take the initiative and ensure that the Commission functions in a progressive and proactive manner. Therefore, the selection criteria for the members should be specific and should take the stringent demands of the job into account.

¹⁸ *Ibid.*

¹⁹ Section 15 (8), Human Rights Commission Act.

²⁰ "Proposed Standards for National Human Rights Commissions," Amnesty International, January 1993, AI Index: IOR 40/01/93.

The appointment and removal procedures of the members of the Commission also leave a lot to be desired. The members are appointed by the President, on the recommendation of the Constitutional Council (as envisaged in the proposals for constitutional reform. However, until a Constitutional Council is constituted, the members shall be appointed by the President on the recommendation of the Prime Minister in consultation with the Speaker and the Leader of the Opposition. The members can be removed by the President on certain grounds.

This is not a prudent way to select and discharge members, as it vests power in the hands of politicians, and specifically in the hands of one person. Since the Human Rights Commission is a state body which is supposed to investigate state violations of human rights, its position is delicate. Therefore, to leave appointment and removal in the hands of one key political figure risks bringing the impartiality and independence of the Commission into question. It also risks leaving the Commission open to political manoeuvring and tampering.

The Commission consists of five male members of whom two work full-time and three part-time. The Chairman works full-time. Two of the members are retired judges (one from the Supreme Court and the other from the High Court), another is a retired school principal and lawyer, another a professor of surgery and the fifth is the head of Sri Lanka's largest non-governmental organisation. Although the composition is ethnically representative, it is not gender representative. All members are male and over the age of 55, and with the exception of one, all have worked in the government sector, which makes one question their impartiality. The heads of institutions such as this also need to have a good knowledge of international human rights norms and standards, as well as of current developments. It is, therefore, imperative that when appointing members to such institutions extra care is taken

to ensure that the persons are not only qualified for the position, but that they are also individuals committed to the cause of human rights.

Countries with effective human rights commissions, such as Australia, employ full-time members. Sri Lanka, too, should adopt this method, as the members need to be able to commit time and energy to the Commission. If the Commission is to move forward into the twenty first century, it should also become representative of the whole society. New blood should be infused into the Commission in the form of younger appointees who are properly qualified for these posts, to ensure that new thinking and new dynamism is introduced to the Commission.

4. The Structure and Staff of the Commission

It is evident from the annual report of the Commission that it lacks adequate and trained staff to carry out its mandate effectively. It lacks staff to undertake inspection of police stations and detention camps, it lacks trained staff to carry out public education campaigns and it lacks staff to investigate complaints. The Commission has only three legal officers, and they are stationed only at the main office in Colombo.

There are many reasons for the problems experienced by the Commission. It lacks funds to hire additional staff, and also lacks the power to hire its staff. The procedure which has to be followed in hiring new officers is long and tedious and results in delays. The Commission has to follow the procedure relevant to other corporations and has to forward a report of staff to the Salaries and Cadres Commission through the President's Office and obtain approval. The recruitment has to be done according to the rules and regulations relating to the scheme of recruitment.

The minimum qualification required of an officer of the Human Rights Commission is G.C.E. Advanced Level.²¹ Although it is obvious that officers of a national human rights commission – who are expected to undertake investigations of human rights violations and engage in mediation – should receive training to perform their functions effectively, the Commission has not included staff training in its proposals for the future.

It is also a pity that the Commission rejects opportunities for training and interaction with members of other human rights and non-governmental organisations. For example, the Law & Society Trust invited officials of the regional offices of the Human Rights Commission to attend a two day workshop on Human Rights and Equal Opportunity in Colombo, but the Chairman denied them leave to travel to Colombo, despite their desire to attend. It is bewildering that the Commission, which bemoans of the lack trained staff, would reject such an opportunity.

The Commission also is not organised into separate divisions to deal with specific matters, on the model of the Australian Commission, for example. There are no separate departments for investigation, mediation or public education, and there is no evidence of any plans to create such departments in the future. The proposals of the Commission in the annual report do not include this recommendation.

5. Funding of the Commission

Any national human rights commission is in a delicate position: it is a state institution yet it has to investigate violations of human rights by the State. Since it is funded by the State, it cannot be

²¹ Personal interview with the Chairman.

financially independent and it has difficulties in carrying out its functions unhampered by lack of funds. The Human Rights Commission office is a house with desks arranged in the living room area. Few computers were evident in the office, and it looked as if it lacked funds. In a personal interview, the Chairman denied that the Commission had any problems with funding, and in April 1999 the government in its report to the UN Commission on Human Rights pledged that it would allocate Rs. 14.235 million to Rs. 25.1 million to support the planned expansion of the Commission's activities.²² On this basis, the Commission would appear well-funded. However, the office of the Commission, the lack of required staff etc., give the impression that the Commission is not well-funded.

6. The Annual Report of the Commission

The Commission published its first and only annual report for the period 1997-1998 in 1999. An annual report of any commission, especially a human rights commission is of paramount importance, as it reflects the commission's work and working methods. It is, therefore, imperative to examine the contents and structure of the report.

The report is surprisingly short, being only 10 pages, and lacks much vital information, which should have been included. It contains few specific details about the Commission's work, and is generally very vague about its activities. Although it contains the number of police stations, army camps and detention camps the officers visited, it does not state how many times each camp was visited. It merely states that the officers visited the above mentioned

²² *Sri Lanka: Torture in Custody*, Amnesty International, ASA/37/10/99, June 1999, p. 31.

places "often." The report does not contain an organisational chart, the results of investigations, recommendations issued in major cases or a summary of the work of the regional centres. It is important that the public be made more aware of the work of the regional centres, especially since some of them are situated in conflict areas. If they worked more effectively, they could become an important means of assessing the current state of human rights in those areas.

The whole tone of the report reveals a careless attitude which is most worrying given that this is the national human rights institution entrusted with the task of protecting the rights of the citizens of Sri Lanka. For example, the section on "arrest or taking into custody" states that the fulfilment of the requirements to inform the Commission of the arrest or detention or change of place of detention of any person within 48 hours "were mostly done by the armed forces and the police but in certain cases there were instances where it was not done due to certain reasons."²³ No numerical data is given of the number of times that the Commission was informed of arrests and detentions, nor of the number of times that the requirements were not followed. The reasons for non-compliance were also not stated and no information was given of the Commission's response when it discovered cases of non-compliance.

The Human Rights Commission should at all times function in a very transparent manner. It should endeavour to give the public as much information as possible about its activities and any other relevant information relating to the protection and promotion of their rights. It should ensure that it develops systems for maintaining information on its activities in a manner which will enable it to report on them in a detailed and timely manner.

²³ *Id.* p. 5.

7. Working with other Human Rights Institutions, Non-Governmental Organisations and International Human Rights Bodies

While Sri Lanka can boast of a plethora of human rights institutions, there is hardly any co-ordination between them. The Human Rights Commission Act does not contain any provision which specifies or compels co-operation and consultation with other human rights institutions to avoid conflicts of jurisdiction and promote common policies.²⁴ The annual report of the Commission does not state whether it had links with or co-operated in any way with any of the other human rights institutions, such as the Ombudsman or the Official Languages Commission. Principle (f) of the methods of operation in the Principles Relating to the Status and Functioning of National Institutions for the Protection and Promotion of Human Rights (Paris Principles) 1992 states that any national human rights commission shall maintain "consultation with other bodies, whether jurisdictional or otherwise, responsible for the promotion and protection of human rights."

Where co-operation with non-governmental organisations is concerned, at least in theory some progress has been made. The Sri Lanka Human Rights Commission is part of the Asia Pacific Forum of National Human Rights Institutions which conducted a regional workshop on "National Human Rights Institutions and Non-Government Organisations: Working in Partnership" in Kandy in July 1999. This workshop confirmed the vital role that civil society organisations play in the protection and promotion of human rights and aimed to forge partnerships between national human rights institutions and non-governmental organisations.

²⁴ *Sri Lanka: The Human Rights Commission Bill*, Amnesty International, ASA/37/25/95, December 1995, p.3.

The Kandy Programme of Action, which was a check-list of possible areas of co-operation, resulted from this workshop. The Forum Bulletin states that "it will now be for the national institutions and non-governmental organisations to work together at the national level to implement the proposals put forward in the Programme of Action."²⁵ Since the Commission is not known so far for its co-operation with local NGOs, it is not clear how it will put the Programme of Action into effect. Lack of co-operation will not bode well for any future partnerships between state institutions and NGO.

8. Conclusion and Recommendations

One of the objectives of the creation of the Human Rights Commission was to provide the people with a less formal, inexpensive and uncomplicated method of seeking redress for violations of human rights. Yet, the Commission has not evolved as expected. The Commission alone cannot shoulder the blame for this failure. Many factors are involved, including lack of will and action on the part of the government. However, in spite of the hurdles faced by the Commission, it could have progressed under more dynamic and committed leadership.

The following recommendations are proposed:

- A set of guidelines should be developed to identify appropriate cases for reference to the Human Rights Commission from the Supreme Court under section 12. Considerations which should be taken into account include the possibilities of dispute resolution through mediation and conciliation.

²⁵ Program Bulletin, No.2., November 1999, p.1.

- ☐ The government should ensure the financial independence of the Commission through adequate provision of funds from the consolidated fund.
- ☐ The appointment of members to the Commission should not be by the President in consultation with the Prime Minister, the Leader of the Opposition and the Speaker, but should be by another authority. In the event of failure to change the method of appointment, the Act should be amended to state that appointment be by the President with the concurrence of the above stated persons.
- ☐ The Human Rights Commission Act should be amended to: extend the Commission's power to deliver decisions which are binding and to empower them to publicise its decisions and incorporate a fixed time for the investigation and resolution of a complaint.
- ☐ The Act should be amended to introduce stricter and more specific criteria for the selection of members. The members should be full-time appointees.
- ☐ The Human Rights Commission should have the power to recruit its own staff without having to follow long and tedious procedures.
- ☐ The Human Rights Commission should be issued with a copy of the Emergency Regulations as soon as they are passed.

The Human Rights Commission should:

- ☐ play an active role in the drafting stage of law making by Parliament;
- ☐ take its public education function seriously and initiate a national education campaign to raise awareness of human rights issues generally, and of the indivisibility of human rights in particular;
- ☐ explore methods to enable realisation of economic and social rights;
- ☐ ensure that the text of the emergency regulations are published in newspapers in all three languages as soon as they are issued;
- ☐ initiate prosecution of police or other authorities in instances where they have not complied with the regulations regarding reporting of arrests, as a means of ensuring that the practice of non-reporting is stopped;
- ☐ conduct public hearings which would enable interested parties and NGOs to make interventions;
- ☐ conduct in-depth studies on pressing and relevant issues and compile public reports;
- ☐ publish periodic reports on the state of human rights in Sri Lanka;
- ☐ get involved in the preparation of country reports to treaty bodies;

- ☐ make public statements about pressing and topical human rights matters;
- ☐ provide training for its staff members;
- ☐ create separate departments within the Commission to deal with different areas such as mediation, investigation and public education;
- ☐ work with NGOs and international human rights bodies to create a support network and to provide the Commission with current information about developments in the human rights field.

XVIII

Official Languages Commission

*Ambika Satkunanathan**

This chapter examines the role and work of the Official Languages Commission and attempts to assess the extent to which it has fulfilled its mandate. The Official Languages Commission was created by the State in 1991¹ with the sole purpose of ensuring that the fundamental right of persons not to be discriminated against on the ground of language is protected, and that the Constitutional provisions relating to the use of the official languages are implemented.

1. Constitutional Provisions Relating to Official Languages

The Constitution defines Sinhala and Tamil as the official languages and the languages of administration throughout Sri Lanka, and English as the link language.² Sinhala and Tamil are

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¹ The Official Languages Commission Act No.18 of 1991.

² Article 18, the Constitution of the Democratic Socialist Republic of Sri Lanka.

the languages of administration throughout Sri Lanka and Sinhala is the language of administration of all the provinces in Sri Lanka other than the Northern and Eastern provinces where Tamil is also used. This is with the proviso that Sinhala or Tamil may be used in any division of an Assistant Government Agent declared so, depending on the proportion of the Sinhala or Tamil linguistic minority vis-a-vis the total population of that area.³ In any area where Sinhala is the language of administration a person is entitled to receive communications and to communicate and transact business, inspect or obtain copies of any official register, record or other publication or a translation of such in either Tamil or English⁴. Where Tamil is the language of administration a person has the right to request such information in either Sinhala or English.⁵

In all provinces except the North and the East, the language of administration and the language in which public records are maintained and business is transacted is Sinhala. In the North and the East the language of administration, the language in which public records are maintained and the language in which business is transacted is Tamil. This distinction is made due to the fact that Tamil speakers predominate in the Northern and Eastern provinces.

Sinhala is used as the language of the courts situated in all the areas of Sri Lanka except those in any areas where Tamil is the language of administration. The record and the proceedings will be in the language of the court, subject to the proviso that in the event of an appeal the record and proceedings will be in the language in which the latter court operates if the language of the

³ *Ibid*, Article 22 (15).

⁴ *Ibid*, Article 22 (2) (a), (b) & (c).

⁵ *Ibid*, Article 22 (3).

court is other than the language used by the court from which the appeal is referred.⁶ Any person not conversant in the language used in the courts is entitled to an interpreter who shall be provided by the State.⁷

The 1987 amendment to the Constitution which gave equal status as official language to Tamil also regularised the use of English. Although the Constitution decrees that all legislation shall be enacted in Sinhala or Tamil together with a translation in English,⁸ in reality most if not all laws are drafted in English. The language used in the Supreme Court and the Court of Appeal is English.

The Official Languages Commission was established in 1951, and in 1955 it was transformed into a permanent department called the "Department of Official Languages." In 1989 a workshop organised by the International Centre for Ethnic Studies resulted in the establishment of an Official Languages Commission. The Commission was appointed on 21 December 1991 and had wider powers than the previous Commission to implement the language policy of the State.

2. The Mandate and Powers of the Official Languages Commission

The general objectives of the Commission are as follows:⁹

- a) to recommend principles of policy, relating to the use of the Official Languages, and to monitor and supervise compliance

⁶ *Id.*, Article 24 (1)

⁷ *Id.*, Article 24 (3).

⁸ *Id.*, Article 23 (1).

⁹ *Supra* n. 1, section 6.

with the provisions contained in Chapter IV of the Constitution;

- b) to take all such actions and measures as are necessary to ensure the use of the languages referred to in Article 18 of the Constitution in accordance with the spirit and intent of Chapter IV of the Constitution;
- c) to promote the appreciation of the Official Languages and the acceptance, maintenance, and continuance of their status, equality and right of use;
- d) to conduct investigations, both on its own initiative, and in response to any complaints received, and to take remedial action as provided for, by the provisions of the Act.

The Commission has the power to:

- ☐ initiate reviews of any regulation, directives or administrative practices which affect, or may affect the status or use of any of the relevant languages;
- ☐ issue or commission such studies or policy papers on the status or use of the relevant languages as it may deem necessary;
- ☐ undertake such public educational activities, including sponsoring or initiating publications or other media presentations, on the status or use of the relevant languages as it may consider desirable.¹⁰

¹⁰ *Id.*, section 7.

3. Structure and Performance of the Commission

To date the Commission has not effectively fulfilled any of the above duties. It has commissioned one study by the Marga Institute. It has not initiated any reviews and nor has it taken its public education duties seriously. It has printed a few booklets setting out language rights, but it has not developed a concerted, ongoing strategy to conduct a nation-wide public education campaign.

The Commission consists of six members appointed by the President, of whom one is nominated as Chairman of the Commission. Only the Chairman is full-time; the members meet once a month and direct the general policy of the Commission. The Act states that the Commission shall meet "as often as necessary, and in any case, at least once in each month."¹¹ The Official Languages Commission, unlike the Human Rights Commission, has the power to appoint such officers and servants as the Commission may deem necessary for the proper and efficient conduct of its business.¹² When asked whether the Commission had adequate staff to conduct its business, the Chairman stated that the required staff was available. This Commission, like the Human Rights Commission, is dependent on the government for funds, which means that if the government is not committed to the cause of language rights then the efficient functioning of the Commission is put in jeopardy. Yet, the Chairman claims that the Commission has adequate funds to carry out its duties. This is not evident from the work of the Commission, which – despite the importance of the issue it deals

¹¹ *Id.*, section 12 (3).

¹² *Id.*, section 14.

with – does not have a high public profile and does not seem to be effective in protecting and promoting language rights.¹³

The Commission is bound to investigate every complaint submitted to it, but may refuse to investigate or cease to investigate if it is satisfied that the complaint is trivial, vexatious or does not fall within its powers. It should inform the complainant within 14 days of making such a decision and provide a written copy of the reasons for the discontinuance. According to the Chairman of the Commission, the most common complaints they receive relate to the non-issuance of letters and other official documents in Tamil.

Where the Commission finds that an act or omission should be referred to the public institution for action, or that any directive or practice of a public institution should be reconsidered, altered or discontinued, then the Commission shall report that opinion and the reasons to the head of such public institution.¹⁴ The Commission shall make any recommendations it sees fit to the head of such public institution concerned and direct the head to report within a specified time of the action taken to give effect to the recommendations.¹⁵ Where any person has made a complaint to the Commission under this Act and the Commission has not informed the person of the results of the investigation within 120 days of the complaint being made, or informed the person of the decision to refuse to investigate or informed the person that the complaint is not made out to the satisfaction of the Commission, the person may apply to the Supreme Court within the next thirty days for relief or redress.

¹³ The Ministry of Education circulars are only in Sinhala and Tamil, the name boards at the Samurdhi Ministry are only in Sinhala.

¹⁴ *Id.*, section 23.

¹⁵ *Id.*, section 23 (5).

Where the Commission has made recommendations to the head of a public institution and the head has not given effect to the recommendations within a period of 90 days, then the Chairman or the Official Languages Department – after informing the Attorney General in writing – may apply for a direction within the next 90 days to the High Court of the province in which the complainant resides.¹⁶ To date the Commission has not referred any matters to the High Court in the event of any recommendations not being fulfilled.¹⁷

The Supreme Court, on the application of the Attorney General or the Commission, may – where public interest requires – instruct the High Court to transfer any application made under this Act to the Supreme Court.¹⁸ Where in such cases the Supreme Court determines that a public institution has failed to comply with Chapter IV of the Constitution or any of the laws implementing Chapter IV, the Supreme Court may grant such relief or make such directions as it considers just and equitable. Where a matter is before a High Court, and the High Court determines that the head of a public institution has not given effect to the recommendations of the Commission, the High Court shall direct the implementation of the recommendations contained in the report of the Commission.¹⁹

Public officers who willfully fail or neglect to transact business in the relevant languages shall be guilty of an offence and shall, on conviction after a summary trial before the Magistrate, be liable to a fine not exceeding one thousand rupees or to imprisonment for a term not exceeding three months or to both.²⁰ Prior sanction

¹⁶ Section 25 (1).

¹⁷ Personal interview with the Chairman.

¹⁸ *Id.*, section 26.

¹⁹ *Id.*, section 27 (a) and (b).

²⁰ *Id.*, section 28 (1).

of the Attorney General is required for prosecution.²¹ To date, this provision has not been utilised due to the high standard of proof required for prosecution which decrees that wilful neglect of a public official be proved.²² Lowering the standard of proof is, however, dangerous since it might lead to lower level officers getting prosecuted for neglect, when the real problem is institutional and, perhaps, also political and may lie at a higher level of responsibility.

The Commission is also required to submit an annual report containing its recommendations to the Minister, who shall cause such report to be laid before Parliament.²³ To date, the Commission has not submitted an annual report. According to the present Chairman, one report was prepared which covered the first five years, but it was never presented in Parliament and the public does not have access to it. Its contents, therefore, cannot be assessed. Although the preparation of annual reports is a statutory duty, the Chairman expressed the view that preparation of reports is merely a formality, and that it is more important to get the job done.

The absence of any publicly available reports on the Commission's work made it impossible to obtain the necessary information for a proper evaluation of its work. There is no public record of the number or nature of complaints that the Commission has received, or of its findings in investigations. There is no record of the recommendations it may have made to policy makers or to public institutions – or, indeed, of whether it has even made any such recommendations formally. It is essential for the Commission to institute efficient and effective systems of recording and reporting

²¹ *Id.*, section 28 (2).

²² Personal interview with the Chairman.

²³ *Id.*, section 32.

on its work, for without these there can be no proper public accountability.

According to the Chairman no complaints have been lodged in the past six months which, in his opinion, is due to a lack of faith in the existing structures. This in the author's opinion, is the most problematic issue that the Commission has to deal with. The most effective way of dealing with it would be for the government and the Commission to undertake an extensive education campaign and more importantly build public faith through the only possible way, through the production of results.

During an interview with the author, the Chairman of the Commission made the following recommendations:

- ☐ Since marriages between Tamil persons cannot be registered in Tamil outside the North and the East, the Chairman recommended that registration of marriages and births of Tamil persons anywhere in the country be carried out in Tamil.
- ☐ He recommended that name boards of offices, roads etc., be also written in Tamil.
- ☐ All current official forms, which are not trilingual, should be withdrawn and trilingual forms should be introduced.

The Chairman stated that the principal responsibility for implementing the official languages policy lay with the Ministry of Public Administration. However, this Ministry had not fulfilled such requirements as ensuring that all government forms are in all three languages. The Commission has made recommendations to the Ministry, but according to the Chairman no action has been taken. The Chairman also stated that no one had been appointed to monitor the compliance with the official languages policy.

However, this task is the responsibility of the Official Languages Commission itself; it is a responsibility which the Commission has failed to fulfil.

Where resources are concerned, according to the Chairman of the Commission it does have computer systems etc.

4. Conclusion and Recommendations

Overall, it appears that the Official Languages Commission has failed to fulfill its mandate. However, as it does not report publicly on its work, and as it does not fulfil its statutory obligation to produce annual reports, it is hard to obtain any detailed information about its work. This makes it almost impossible to conduct a full evaluation of its work. It also means that it is accountable to neither the Parliament nor to the public whom it is supposed to serve.

Based on the available information, it is recommended that:

- ☐ the Act be amended to do away with the high standard of proof required for prosecution of non-compliance with the official languages policy of the country. These reforms should at the same time ensure that lower level officials are not prosecuted for structural shortcomings.
- ☐ the Commission enhance its public education role, and develop effective campaigns to inform people of their language rights and of the existence and work of the Commission;
- ☐ the Commission conduct language training for all government officials which would include awareness raising about

language policy and its practical implications i.e. requirements for three languages on all forms issues, and on the right of public to transact business in any language. Language training should also be given to officials, i.e. teach Sinhala speakers Tamil and vice versa;

- ☐ the Commission publish a detailed report on its work to date, and henceforth fulfil its statutory obligation to submit a full annual report to parliament containing details of all aspects of its work and the recommendations it has made;
- ☐ the Commission utilise its powers under sections 30 and 31 and initiate investigations of its own motion on crucial aspects of the official languages policy, and that it use these to develop specific policy recommendations;
- ☐ the Commission set out clear guidelines, and establish a reasonable time frame, for government institutions to implement the official language policy;
- ☐ the members of the Commission be actively involved and committed and that at least two members be full-time.
- ☐ the Commission work closely with the Ministry of Public Administration to ensure the proper implementation of the official languages policy in all government ministries and departments.

XIX

State Interference with Public Institutions: A Case Study of the Bribery Commission

*Ambika Satkunanathan**

1. Introduction

The existence of high levels of bribery and corruption illustrates the ineffective process of governance and the lack of due process. Good governance is imperative to ensure the protection and promotion of human rights. Although the government has set up many human rights institutions they are unable to exercise their powers and fulfil their mandate due to state interference. Bribery and corruption in such institutions and state interference can only

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lead to the deterioration of principles of good governance and a loss of public faith.

The elimination of bribery and corruption was amongst the most publicised election promises of the People's Alliance (PA) in 1994. The PA promised to create a permanent commission to investigate allegations of bribery and corruption. As such a commission would have to probe allegations against the government of the day, its impartiality and integrity were of obvious importance, and were recognised as such by the PA. In its election manifesto, the PA advocated "that the power of the appointment of a Permanent Commission on Bribery and Corruption should reside not on the government of the day but on a Constitutional Council."¹ It also said that the members should be given security of tenure and should not be removed except for misconduct, and shall not be removed from office except by an order of the President made after an address of Parliament supported by a majority in Parliament.

The significance that the PA attached to the establishment of such a commission was such that following the party's victory at the elections, the first piece of legislation it presented in parliament was the Commission to Investigate Allegations of Bribery and Corruption Act No. 19 of 1994, which was passed unanimously. Yet, the high expectations engendered by this legislation soon petered out, and by 1999 the Bribery Commission stood ineffective and defunct.

The process by which the Commission was reduced to a sham is complicated and controversial. Scandal, allegations and counter-allegations earn no place in a human rights report. Instead, this chapter will look at the questionable procedure (or lack of

¹ The Island, 11th April 1998.

procedure) by which attempts were made by the state to remove the Commissioners. The procedures used were questionable and contravened the provisions set out in the Act. The impact of these events on the administration of justice in Sri Lanka will also be touched upon. First, however, the structure and powers of the Commission and the events leading up to the request for the Commissioners to resign will have to be set out and traced.

2. The Structure and Powers of the Commission

The Commission consists of three members of whom two shall be retired judges of the Supreme Court or of the Court of Appeal, and one shall be a person with wide experience relating to the investigation of crime and law enforcement.² They shall be appointed by the President on the recommendation of the Constitutional Council; before the establishment of the Constitutional Council they shall be appointed by the President on the recommendation of the Prime Minister in consultation with the Speaker.³ As no Constitutional Council has yet been created, the latter procedure was adopted in 1994.

The Commissioners are given security of tenure by section 5 which states that no member shall be removed except by an order of the President made after an address of Parliament supported by a majority of the total number of members of Parliament (including those not present) has been presented to the President for such removal on the ground of misconduct or incapacity. Such a resolution shall not be placed on the Order Paper of the Parliament unless it is signed by not less than one-third of the

² Commission to Investigate Allegations of Bribery or Corruption Act, No.19 of 1994, section 2 (a).

³ *Id.*, section 2(b) and (c).

total number of Members of Parliament and sets out full particulars of the alleged misconduct or incapacity.⁴ Every member of the Commission holds office for a period of five years and is not eligible for reappointment.⁵

The Act also makes provision for the appointment of a Director General of the Commission. The Director General whose duty is to assist the Commission in the discharge of the functions assigned to the Commission is appointed by the President in consultation with the members of the Commission. Mrs. Nelum Gamage was later appointed as Director General.

The Commission has the power to investigate any matters disclosed in a communication it has received concerning bribery or corruption⁶ whether or not such matters relate to a period prior to the appointed date and notwithstanding anything to the contrary in any other law. The Commission has very wide powers, including powers to obtain bank information and inland revenue information about the person being investigated,⁷ to call for the declaration of assets and liabilities of a person,⁸ to search any premises, vessel, vehicle or aircraft⁹ and to seize any article which is found in the premises, vessel, vehicle or aircraft.¹⁰ Where the investigation discloses the commission of an offence, the Commission shall direct the Director General to institute criminal proceedings against such person in the appropriate court.¹¹ The

⁴ *Id.*, section 2 (5) (a).

⁵ *Id.*, section 2 (6).

⁶ *Id.*, section 4 (1).

⁷ *Id.*, section 5 (d) and (e).

⁸ *Id.*, section 6.

⁹ *Id.*, section 7 (1).

¹⁰ *Id.*, section 7 (2).

¹¹ *Id.*, section 11.

substantive powers, therefore, lie with the Commissioners, and it is the Commissioners who have the power to decide to investigate a particular matter.

Mr. A. T. Wijesundera was appointed as Chairman in December 1994 and Mr. Rudra Rajasingham as a Commissioner in July 1995. The position of the third Commissioner became vacant upon the demise of Mr. Siva Selliah in November 1997 but was not filled.

3. The Power of the Commission to Prosecute Cases in a Court of Law

The non-appointment of a third member to the Commission following Mr Selliah's death in 1997 caused much contention about the ability of the Commission to prosecute cases in a court of law. In a case of a person charged with accepting illegal gratification of Rs. 12,000 to procure government employment, the accused argued that the Commission was *functus officio* and could not prosecute cases in a court of law.¹² The defence counsel in this case stated that section 2(2)(a) of the Act says that the Commission shall consist of three members, and since no one had been appointed in place of Mr. Selliah, there was no provision in the Act to permit one or two of the members to act in the absence of a third member.¹³ He pointed out that there could be no prosecution by the Commission until a third member had been appointed or the Commissioners had been removed by Parliament, and the Commission was reconstituted.

¹² The Island, 8th July 1998.

¹³ *Ibid.*

The counsel for the Commission argued that a properly constituted Commission existed when the prosecution was initiated, and that since section 26 of the Act permitted one or two Commissioners to act independently with the action being taken to be directions of the Commission, there was no bar to the Commission prosecuting cases in a court of law. The judge observed that the contention was that even though a properly constituted Commission existed at the time of instituting proceedings, at the time of the prosecution itself there was no Commission to appear and prosecute in a court of law since the third member had not been appointed. The judge felt this to be an important matter and asked the counsels to make further submissions and fixed a date for the hearing.¹⁴

4. The Controversy

The non appointment of the third member would have hampered the effective functioning of the Commission and points to a lack of commitment and will on the part of the government. The problems began when the spouse of the Director General of the Commission was investigated by the Commission. In response to the request by the Commissioner to sign an indictment against her spouse, the Director General filed a writ in the Supreme Court against the Commissioners alleging that they were acting with malice and hostility against her.¹⁵ The government's reaction was to transfer the Director General to the Ministry of Justice and offer what the Chairman claimed was a similar post in a state institution in exchange for his resignation.¹⁶ No one was appointed to replace the Director General and the Commissioners refused to resign. This resulted in the President stating that the

¹⁴ The Island, 8th July 1998.

¹⁵ Sunday Times, 9th November 1997.

¹⁶ Sunday Times, 30th November 1997.

Commission's performance had been dismal and justified her wish to reconstitute the Commission.

Having failed to obtain the resignation of the Commissioners by unorthodox and unofficial means, the government tried to do so through the procedure set out in the Act. Eighty-four government Parliamentarians called for the removal of the Commissioners by way of a resolution placed on the order paper of 23rd June 1998. By that time, the Commission had already accepted a complaint by the General Secretary of the opposition, the United National Party (UNP), Mr. Gamini Atukorale, against the Cabinet of Ministers, including the President, relating to the privatisation of the national air carrier, Air Lanka. The UNP claimed that the government had sold Air Lanka far below its value and that individuals in the present government had done so for personal gain. As the Commission was due to investigate these allegations, the opposition claimed that the government's eagerness to reconstitute the Commission was a means of evading an investigation into this issue.

Following the resolution, the Speaker appointed a Select Committee to investigate and report to the Parliament on the allegations referred to in the resolution. The resolution alleged, among other things, that the Commission had failed to investigate and cause the successful prosecution of even a single case involving an instance of corruption since its inception to date. This, the government claimed was despite the expenditure of approximately Rs.115 million of public funds to finance the activities of the Commission from 1995-1997. It was also said that the dispute between the Commissioners and the Director General attracted much adverse publicity resulting in a lowering of public confidence in the institution.¹⁷ Yet the Select Committee process did not run

¹⁷ Sunday Leader, 16th August 1998.

smoothly. The Commissioners made allegations against two Ministers sitting on the Committee, Professor G.L Peiris and Mr. Jeyaraj Fernandopulle, and the Ministers, in turn, made allegations against the Commissioners. The Commissioners stated they were investigating allegations of bribery and corruption against two officials working under Professor G. L. Peiris and that the close relationship between the Minister and these officials could lead to bias.¹⁸ Although the Select Committee was supposed to have completed its sitting within 30 days, it had still not released its findings by the end of 1999.

In any case, the constitution of a Select Committee to investigate allegations is questionable. The Civil Rights Movement pointed out that the parliament does not have the power to exercise judicial power and, therefore, cannot investigate allegations made against the Commissioners.¹⁹ Although this is the procedure in place for the removal of judges of the Supreme Court and the Court of Appeal, its constitutionality is questionable. The Civil Rights Movement instead recommended the creation of a system along the lines of the Indian Judges (Inquiry) Act, where judges/fellow judicial officers investigate such allegations and complaints.²⁰

With the Select Committee process stalled, the Commission remained defunct for two years, until the term of the Commissioners came to an end in December 1999 and a new Commission was appointed. During this period, complaints piled up. The Attorney General withdrew legal counsel from the Commission in January 1998 and police officers who formed the investigative unit of the Commission were transferred to the Criminal Investigation Department.²¹

¹⁸ Sunday Island, 26th July 1998.

¹⁹ Sunday Island, 8th July 1998.

²⁰ *Ibid.*

²¹ The Island, 30th March 1998.

5. Conclusion

The manner in which the government handled this affair did not restore the public's faith in the existing Commissions in Sri Lanka such as the Human Rights Commission, the Official Languages Commission and the proposed National Commission on Women. As a powerful Commission set up to investigate bribery and corruption, its lackluster performance only illustrated the sad state of the public service and state machinery. It also proved that "perfect" laws cannot and will not be implemented effectively without governmental will, public awareness and co-operation. Civil society engagement and involvement is also important to ensure the effective functioning of such institutions. More than anything the lesson to be learnt is that the state must utilise the proper procedures when dealing with contraventions of the law. If the proper procedure had been followed the Commission would not have been defunct for two years. This also highlights the problems which will be encountered due to executive interference in matters which should be resolved according to the procedures set out in law.

The independence of the Commission and its ability to carry out its duties in an efficient and effective manner should also be examined in the light of past events. The Commission does not have the power to recruit its own staff, which hampers its ability to function and makes it dependent on the good-will of state departments. It has to inform the treasury of its requirements, make requests for funds and also inquire whether the post concerned is within the approved cadre.²² Where investigating officers and legal counsel are concerned, the Commission has to write to the Inspector General of Police and the Attorney General respectively and request them to assign officers to the Commission. The Commission

²² Sunday Leader, 14th June 1998.

obtains funds from the treasury, but according to the Chairman they are inadequate, and since the chief accounting officer of the Commission, the Director General, was not replaced the relaying of funds was indefinitely delayed.²³

It is evident that the Commission was hampered by inherent shortcomings, internal squabbling and political manoeuvring. Although the shortcomings in the Act can be remedied, it is questionable whether the Commission would be able to function in an effective manner unless there was considerable change in the dominant political culture within which it must work.

²³ *Ibid.*

Schedule I

UN Human Rights Instruments Ratified By Sri Lanka (December 1999)

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

Schedule II

UN Human Rights Instruments Not Ratified By Sri Lanka

1. Optional Protocol II 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. International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families'
12. ILO Convention (No. 143) concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers
13. ILO Convention (No. 122) concerning Employment Policy
14. ILO Convention (No. 141) concerning Organisations of Rural Workers and Their Role in Economic and Social Development
15. ILO Convention (No. 151) concerning Protection of the Right to Organize and Procedures for Determining Conditions of Employment in the Public Service
16. Convention on the Political Rights of Women 1953
17. Convention on Consent to Marriage, Minimum Age for Marriage and Registration of marriages
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20. International Convention against Apartheid in Sports

21. Protocol Instituting a Conciliation and Good Offices Commission to the UNESCO Convention against discrimination in Education 1962
22. ILO Convention (No. 111) concerning Discrimination in respect of Employment and Occupation
23. Convention for the Prevention and Punishment of Terrorism 1937
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