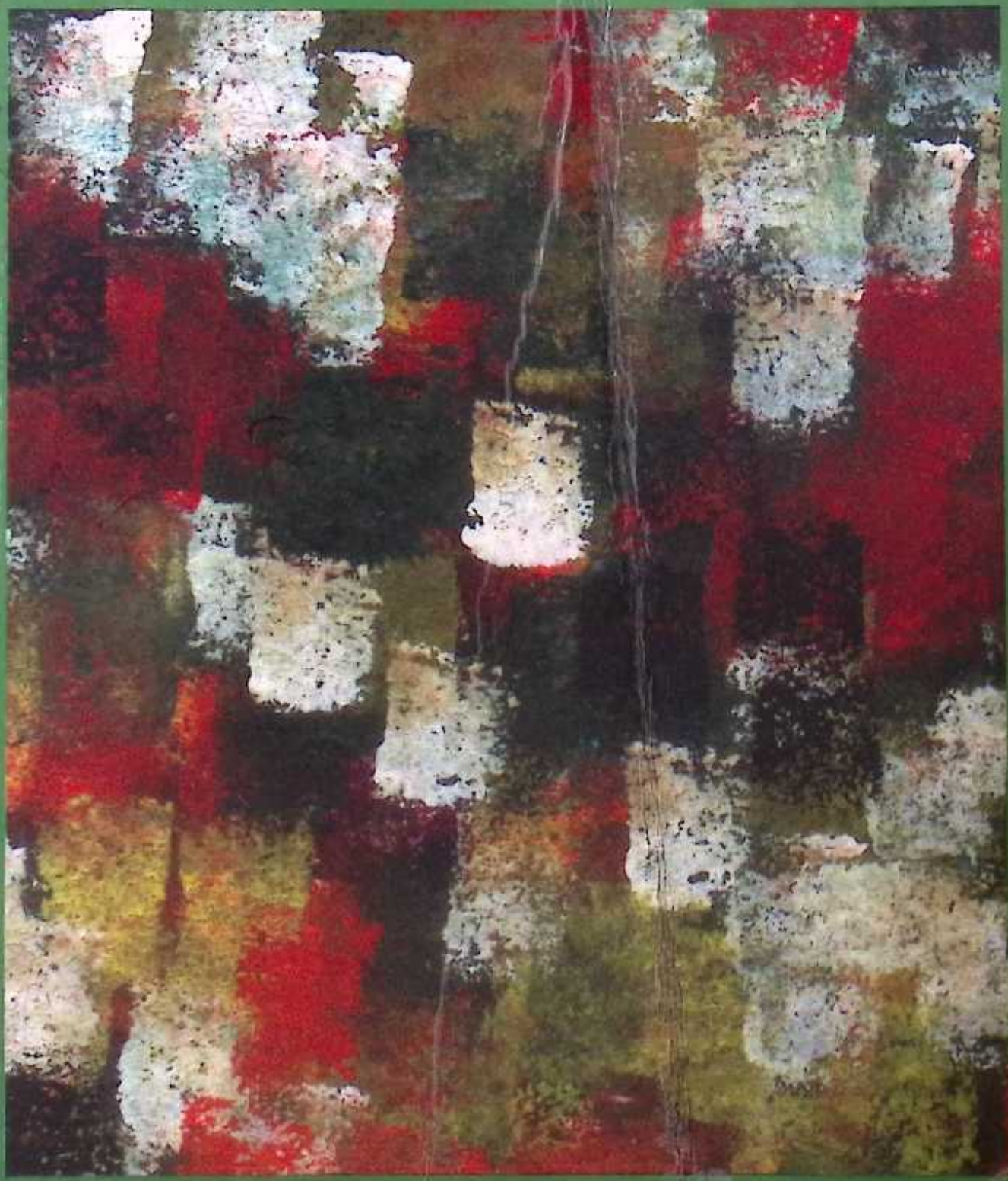
Sri Lanka: State of Human Rights 2001



LAW & SOCIETY TRUST

Rukshana

SRI LANKA: STATE OF HUMAN RIGHTS 2001

This report covers the period
January to December 2000

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

October 2000

ISBN 955-9062-60-3

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Layout and Production
Wits Associates (Pvt) Ltd.

Printed by
Gunaratne Offset Ltd.

Abbreviations

ACTC	All Ceylon Tamil Congress
ACTFORM	The Action Network for Migrant Workers
AG	Attorney General
AI	Amnesty International
ANCL	Associated Newspapers of Ceylon Limited
ASP	Assistant Superintendent of Police
BBC	British Broadcasting Corporation
BOI	Board of Investment
CA	Competent Authority
CCER	Consultative Committee on Election Reform
CDDA	Cosmetics, Devices and Drugs Authority
CEA	Central Environmental Authority
CID	Criminal Investigation Department
CIF	Cost, Insurance, Freight
CMEM	Centre for Monitoring Electronic Media
CMEV	Centre for Monitoring Election Violence
COL	Ceylon Oxygen Limited
COPSITU	Confederation of Public Service Independent Trade Unions
CPA	Centre for Policy Alternatives
CPJ	Committee to Protect Journalists

CPPU	Central Province Principals' Union
CWC	Ceylon Workers' Congress
DIG	Deputy Inspector General of Police
DMO	District Medical Officer
DIT	Department of Internal Trade
DIU	Disappearances Investigation Unit
EIA	Environmental Impact Assessment
EMPPR	Emergency (Miscellaneous Provisions and Powers) Regulations
EPDP	Eelam People's Democratic Party
ER	Emergency Regulations
EU	European Union
FMM	Free Media Movement
GOSL	Government of Sri Lanka
GPID	Guiding Principles on Internal Displacement
GST	Goods and Services Tax
HQI	Headquarters Inspector
HRC	Human Rights Commission
HRTF	Human Rights Task Force
ICRC	International Committee of the Red Cross and Red Crescent
ICCPR	International Covenant on Civil and Political Rights

IDPs	Internally Displaced Persons
IGL	Industrial Gasses (Pvt.) Limited
IGP	Inspector General of Police
IHL	International Humanitarian Law
IP	Inspector of Police
IPA	Industrial Promotions Act No. 46 of 1990
ITN	Independent Television Network
JMOs	Judicial Medical Officers
JVP	Janatha Vimukthi Peramuna
LTTE	Liberation Tigers of Tamil Eelam
ME	Middle East
MEP	Mahajana Eksath Peramuna
MFA	Migrant Forum in Asia
MFFE	Movement for Free and Fair Elections
MLEF	Medico-Legal Examination Form
MPU	Missing Persons Unit
MSC	Migrant Services Centre
NCPA	National Child Protection Authority
NGO	Non-Governmental Organisation
NMAT	National Movement Against Terrorism
NMCC	National Monitoring Committee on Children
NUA	National Unity Alliance

OIC	Officer in Charge
PA	People's Alliance
PAFFREL	People's Action for Free and Fair Elections
PERC	Public Enterprise Reform Commission
PLOTE	People's Liberation Organisation of Tamil Eelam.
PSC	Public Service Commission
PSO	Public Security Ordinance
PTA	Prevention of Terrorism Act
PTSD	Post Traumatic Stress Disorder
SC	Supreme Court
SCU	Security Coordinating Unit
SLBC	Sri Lanka Broadcasting Corporation
SLBFE	Sri Lanka Bureau of Foreign Employment
SLFP	Sri Lanka Freedom Party
SLLGTUF	Samastha Lanka Local Government Trade Unions Federation
SLMC	Sri Lanka Muslim Congress
SLRC	Sri Lanka Rupavahini Corporation
SPC	State Pharmaceutical Corporation
SU	Sihala Urumaya
TELO	Tamil Eelam Liberation Organisation
TULF	Tamil United Liberation Front

UCPF	Up Country People's Front
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNP	United National Party
UNWGEID	United Nations Working Group on Enforced or Involuntary Disappearances

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, emergency rule, fundamental rights jurisprudence, right of franchise, disappearances, displaced persons, migrant workers and freedom of expression. Further, two chapters are devoted to a discussion of the National Child Protection Authority and the Fair Trading Commission.

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 human rights conventions to which Sri Lanka is a signatory and a list of instruments, which are yet to be ratified by Sri Lanka. A list of the fundamental rights cases decided by the Supreme Court in 2000, is also attached as a schedule to the report.

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 conventions and must ensure that its domestic laws, policies and practices are in conformity with its international obligations. This report is a modest step in the continuing struggle to ensure that the State (and those non-state actors who are legitimately subject to scrutiny in this report) upholds its international and constitutional obligations to respect and safeguard human rights.

Law & Society Trust
Colombo
October 2001

I

Overview

*Elizabeth Nissan**

1. Introduction

Commentators on human rights in Sri Lanka have often observed that the conflict in the North and East provides both the context and the rationale for many of the worst violations of human rights in the country, and that its impact is not confined within these areas but felt island-wide. Certainly, serious violations of human rights also take place in Sri Lanka in contexts which are independent of the conflict – such as in the context of ordinary criminal investigation and in the abuse of defamation laws to silence critical journalists – and these violations need to be urgently addressed in themselves. But if the human rights climate in the country is to be radically transformed, it remains essential for a just and durable solution to be found that accommodates the very broad range of group and individual rights issues

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involved. Many obstacles have prevented such a solution being reached over the years, not least of which has been the polarised nature of parliamentary politics in Sri Lanka. Party political interest has rendered impossible the development of a national consensus on reconciliation, with the result that the government has been unable to introduce the kinds of far-reaching constitutional reforms that it first proposed soon after coming to power. While deep mutual distrust remains a major obstacle in any communications between the government and the Liberation Tigers of Tamil Eelam (LTTE) on the one hand, the inability of the government to reach a workable consensus with the main parliamentary opposition party, the United National Party (UNP), among others, has certainly not helped.

The conflict, and the failure of all parties concerned to find pathways that might lead to reconciliation and resolution, remain crucial factors in understanding Sri Lanka's human rights performance. Reports of people disappearing in the custody of the security forces, for example, continue from the conflict zones; torture and rape by security forces remain endemic (although it must be said that torture remains a deplorable feature of the criminal investigation process, too). The enjoyment of many other rights, also, is deeply affected by the conflict: the rights to freedom of movement, to shelter, to education, to health care and even to food are but a few of the rights which are compromised for many civilians living in the conflict zones, and particularly for those who are displaced from their homes. Emergency rule, however, affects the lives of all.

This volume examines these and other human rights issues. Some chapters – on emergency rule, integrity of the person, fundamental rights jurisprudence, freedom of expression, labour migration and the rights of internally displaced people – discuss issues that have been regularly included in *Sri Lanka: State of Human Rights*

volumes, focusing particularly on developments during 2000. Others touch on new or currently pertinent themes. The chapters on the National Child Protection Authority and the Fair Trading Commission continue Law & Society Trust's scrutiny of the work of key institutions responsible for protecting and promoting human rights. In both cases, despite their important mandates, these institutions are found to have been granted too limited scope and to be under-resourced. With the tasks of "promoting effective competition and consumer protection," the Fair Trading Commission, for example, is found to be under-staffed and ill-equipped to fulfil its mandate. The creation of such institutions with inadequate powers and resources to fulfil their tasks is already becoming a familiar theme in these critiques. It is to be hoped that by continuing to air these shortcomings in a constructive light – as is done in these chapters – some momentum for change might be generated.

2. Attacks on the Right to Vote

The political system was again put to the test in parliamentary elections in October 2000, which produced a coalition government under the People's Alliance (PA) with a majority of only three parliamentary seats. Again, as described in the chapter on "The Right of Franchise," the elections were held amid high levels of violence and intimidation, including seven murders on election day alone, as well as allegations of numerous instances of other kinds of malpractice. It is a great irony that the public is placed at greater risk of violence and intimidation during election periods than at other times, violating the right to free expression through the vote. This fundamental democratic moment has become a time of fear, whether because of bomb attacks launched on election rallies by the LTTE or thuggery and intimidation by elements within parties contesting the elections, and particularly from within the ruling PA. The parliamentary elections were held

under emergency rule, which included emergency powers to censor military news, thus denying voters information on a fundamental issue of national importance. Misuse of state resources by the ruling party during the election campaign – including the state-owned media – also continued unabated. Furthermore, many displaced people are in practice disenfranchised, unable either to register as voters or to reach a polling station. The need for an independent, non-partisan and competent election authority was again raised, together with a review of existing electoral law.

Of particular concern, and linked to the wider issues of impunity that are discussed below, is the fact that election monitors found that, "as in previous elections, the violence erupted in particular pockets of particular districts." Yet the party authorities take no action to investigate these complaints effectively and to discipline those responsible. The cycles of political violence are allowed to continue unchecked, despite the PA's claim when it came to power that it would not tolerate such behaviour within its ranks.

There is, however, a more positive dimension to election periods that has strengthened since the elections of 1994, and that is the role of civil society organisations in monitoring and publicising their findings on all aspects of the conduct of the campaign. The number of organisations involved in such monitoring has increased, as has the scope of their work. These elections, for example, were the first to include systematic monitoring of the content of both state and private print and broadcast media. In addition, some organisations have become more proactive in attempting directly to influence the conduct of the authorities during the election period itself. The Centre for Policy Alternatives, for example, filed a petition before the Human Rights Commission (HRC) on the issue of the politicisation and

intimidation of state institutions such as the police department. This resulted in the Commission requesting the Commissioner of Elections to direct the Inspector General of Police (IGP) to make public all directions, circulars and instructions issued to police to ensure free and fair elections.

Further civil society responses to the violence of the electoral campaigns were the Campaign against Political Violence, the Alliance for Democracy and the creation of a Consultative Committee on Electoral Reform. As political violence and confrontation worsens, at least some sections of the public are responding with an alternative, positive political agenda.

Sri Lanka's system of proportional representation (PR) has the benefit of ensuring the participation in government of representatives from minority communities and smaller political parties, who may gain a strong bargaining position in pledging their support to a numerically weak governing party. But while the necessity for minority voices to be heard within the political system is an undoubted benefit, the PR system has not contributed to the development of an inclusive, pluralist political culture. As pointed out in the chapter on "The Right of Franchise," the legislature has, in fact, become highly fragmented despite the broader political alliances that coalition politics demands.

Last year we wrote that, "Every effort must be made to ensure that people are free to exercise the franchise without fear, and according to their conscience." Clearly, no such action was taken; it is most regrettable that the right to vote freely – a right so fundamental to the democratic process – remains so vulnerable in Sri Lanka, despite the relatively high voter turn-out.

3. War and Peace

Although the electoral process brought a gloomy note to the latter part of the year, 2000 had begun more optimistically, with the public recognition of a Norwegian envoy nominated by the Norwegian government to facilitate communication between the government and the LTTE. Given the government's earlier opposition to any such third party role, this appeared as an important development which might help initiate a peace process acceptable to both parties.

Yet while the envoy's quiet diplomacy continued behind the scenes, the year also saw major new military confrontations in the North. These created new waves of displacement, and had island-wide repercussions when in May the President placed the country on a "war footing" as the LTTE appeared poised to reclaim Jaffna after winning control of Elephant Pass from the military. The new emergency regulations promulgated in May granted even greater powers to the police and security forces than the excessive powers they already possessed, as described in the chapter on "Emergency Rule."

In the event, the military retained their hold on Jaffna and by the end of the year, the LTTE had declared a unilateral ceasefire as an indication of its willingness to negotiate with the government providing that certain conditions were met (similar to those they had insisted on in 1994). The government did not declare a ceasefire in return, but it was noted that the level of fighting reduced.

Even with these glimmers of hope, it had to be remembered that there would be many obstacles to overcome before any direct negotiations could take place. Furthermore, the government's complete inability to progress with its proposed constitutional reforms had been made abundantly clear when it had placed a Constitutional Bill before parliament in October.

Without substantial constitutional reform, however, it is hard to imagine how a sustainable resolution can ever be found to this conflict; indeed it may require constitutional reform for a meaningful peace process even to begin. That such a process is urgently needed is clear; without it, no effective remedies can be found for some of the gross violations of rights that are widespread in the North and East. Take the case of internally displaced persons, for example: even if both parties to the conflict ameliorated the hardships faced by civilians by fully observing the basic minimum standards of humane conduct contained in Common Article 3 of the Geneva Conventions – which they currently still fail to do – the conditions that create large-scale displacement and its attendant violations of a range of rights would still remain. Civilians would still flee from areas of conflict, and have to survive with inadequate shelter, lack of employment opportunities, poor access to medical and educational services, among other hardships. The importance of the Guiding Principles on Internal Displacement and their application to Sri Lanka is discussed in the chapter on "Internally Displaced Persons."

As October 2000 came and went, we were reminded that displacement for many is a long-term fate. Some 100,000 Muslims were forced out of Jaffna and surrounding areas ten years earlier, in October 1990, and remain unable to return to their homes. Their grievances are now compounded, as explained in the chapter on "Internally Displaced People:"

> *As it is over ten years since they left, their chances of ever returning to their properties remain bleak since under current property law,[1] unlawful occupants of property can gain rights to it after a lapse of ten years. These IDPs are on the verge of losing their properties to trespassers.*

[1] Section 3 of the Prescription Ordinance, Nos. 22 of 1871 and 2 of 1889.

4. Impunity

Impunity remains a major problem in Sri Lanka, and is a contributing factor to the continuation of gross human rights violations. As the Civil Rights Movement of Sri Lanka pointed out,[2] the gruesome murder of some 28 inmates detained at Bindunuwewa rehabilitation centre in October 2000 was a powerful reminder of the killings of 52 Tamil prisoners in Welikade prison in July 1983. Nobody was ever prosecuted for the Welikade killings, giving the impression through its inaction that the state not only fails to protect its Tamil prisoners, but it also condones such killings. In addition, as stated in the chapter on "Integrity of the Person," these killings also raised important questions about the fate of child soldiers who surrender. For the inmates at this rehabilitation centre, which came under the Ministry of Youth Affairs, included such "surrendees" and others:

> *"The future of child combatants and their chances of leading a normal life after they leave the LTTE has always been an issue of concern. Children who surrender to the armed forces live with the fear that they and their families will be punished by the LTTE. Further, as events at Bindunuwewa so poignantly show, their surrender to the state authorities does not ensure their own security."*

Other issues relating to impunity that are raised in this volume include the persistence of electoral violence and intimidation, with the failure of the party authorities to act decisively against those within their ranks who are responsible. In relation to torture, by the end of 2000 there had been only seven indictments for torture and no convictions, despite the prevalence of torture in the country and the repeated pronouncements of the Supreme

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2 "The Killing of Detainees and Surrendees: Massacre at the Bindunuwewa Rehabilitation Centre," CRM Statement 01/11/2000, 2nd November 2000.

Court on the subject. Indeed, the UN Special Rapporteur on Torture noted in his report on Sri Lanka covering the year 2000 that "It remains evident that more prosecutions and convictions will be required in order significantly to affect the problem of impunity. In any event, personnel responsible for injury leading to compensation should be removed from office."[3]

The nature of the government's response to the reports of the three zonal and subsequent all-island Commissions of Inquiry into disappearances is also criticised. In the chapter on "Integrity of the Person" it is noted that some 557 cases have been brought against police and security forces personnel as a result of the Commission's reports. However, the chapter on disappearances notes that the indictments served so far are mostly against junior officers, and that senior officers appear to be protected by colleagues responsible for investigation. In addition, the procedures involved are slow, duplicating much investigative work that has already been done, and the relevant authorities do not comply with the requirements of the Establishment Code by initiating disciplinary proceedings. It remains to be seen whether any convictions will be reached. As stated in the chapter on disappearances,

> *"It would appear that the only cases in which there may be sufficient political will to ensure that justice is done are those few cases that have been the focus of intense local and international pressure – and even then, only very few of these have resulted in successful prosecutions. The notable example was the case of the schoolboys who disappeared in Embilipitiya in late 1989, where convictions were reached."*

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[3] "Civil and Political Rights Including the Questions of Torture and Detention: Report of the Special Rapporteur, Sir Nigel Rodley, submitted pursuant to the Commission on Human Rights resolution 2000/43, E/CN.4/2001/66, 25th January 2001.

As the chapter's author notes, "There is no substitute for swift and effective action against perpetrators irrespective of their rank or status. This will require changes in the law, administrative procedures and even the judicial structure to expedite the disposal of cases pertaining to disappearances." He fears that without such action, the reports of these Commissions risk becoming a dead letter; historical documents of interest to historians rather than the stimuli for reform that their authors intended.

5. The Media and Censorship

The political polarisation so evident in parliamentary processes was echoed in the increasing antagonism during 2000 between the government and the private media, as well as in the confrontational approach the government adopted towards international organisations which monitor free expression issues. While the government became more restrictive in its approach to the media, with heightened censorship imposed in May followed by the closure of two newspapers, the media community became increasingly adversarial, challenging acts of censorship in court in several important cases. These issues are discussed in the chapters on "Emergency Rule", "Freedom of Expression" and "Fundamental Rights Jurisprudence". These chapters also refer to the memorandum sent to the Presidential Secretariat by the HRC which reviewed emergency regulation 14, issued in July 2000. The HRC's critique makes substantial use of international standards relating to media freedom and stresses the importance of ensuring that the media should be able to raise issues of public accountability. Such an intervention by the HRC marks a welcome new departure, in keeping with a recommendation on the HRC's work made in last year's *Sri Lanka: State of Human Rights* report,

that the HRC should "make public statements about pressing and topical human rights matters."[4]

6. Fundamental Rights

In the area of fundamental rights jurisprudence, as the chapter on this subject discusses, the Supreme Court again produced some judgments that were "exceptionally innovative and pathbreaking." These included a judgment which recognised the right to sustainable development and the obligation of the State to respect the principle of inter-generational equity in exploiting natural resources;[5] another "broadened the scope of constitutional protection to those detained under special laws."[6] Importantly, these judgments relied considerably on international norms and stressed the need to incorporate international standards into domestic law.

7. Sri Lanka's International Human Rights Obligations

During 2000, Sri Lanka ratified several international conventions, most of which relate to international terrorism and hostage taking.[7] Sri Lanka also ratified the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict. Furthermore, Sri Lanka ratified ILO Convention No.138 on Minimum Age for Admission to Employment of 1973. We welcome the ratification of these

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4 *Sri Lanka: State of Human Rights 2000,* (Law & Society Trust, Colombo, 2000), p.315.

5 *Bulankulama & Others* v. *The Secretary of Industrial Development & Others,* SC Application No 884/99 (F.R.).

6 *Weerawansa* v. *The Attorney General,* SC Application No. 730/96.

7 For a full list of these conventions, see Schedule I.

international instruments and hope that measures will be taken at the national level to give effect to these international obligations.

The Government of Sri Lanka remains responsive to requests for information on reported violations submitted by such bodies as the UN Special Rapporteur on Torture, the UN Special Rapporteur on Summary and Arbitrary Execution and the UN Working Group on Disappearances, as their reports make clear. However, its treaty obligations require it to submit periodic reports reflecting the extent of its compliance with the various human rights treaties to which Sri Lanka is a State Party, including the Convention Against Torture (CAT), the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the Convention for the Elimination of Racial Discrimination (CERD). Sri Lanka is overdue in submitting reports under each of these treaties, as the table below shows.

	Date Due	**Report**
CAT	1.2.99	Second periodic report
ICCPR	10.9.96	Fourth periodic report
CEDAW	4.11.98	Fifth periodic report
CERD	20.3.01	Tenth periodic report
ICESCR	30.6.00	Third periodic report

It is to be hoped that these omissions will be rectified by submitting the reports due. The reporting process provides an opportunity for the thorough review of law and practice in relation to international norms, and for the identification of priority areas for reform. As the chapters in this volume show, there continues to be great need for reform in Sri Lanka across the whole spectrum of internationally recognised human rights. The reporting process could be used to contribute to this cause, if undertaken with a genuine will for reform.

While the government remains tardy in fulfilling its reporting obligations and implementing the reforms that scrutiny of earlier reports has required, various institutions within Sri Lanka are increasingly drawing on international law norms in framing their interpretations and recommendations for Sri Lankan law, including the Supreme Court and the HRC. Indeed, as explained in the chapter on "Fundamental Rights Jurisprudence",

> *"Increasingly ... the Supreme Court has, particularly in fundamental rights judgments, referred to international human rights standards as interpretative aids. But a direct pronouncement that international law can be transformed either by Parliament or by the express recognition of superior courts is a crucial breakthrough, enabling international standards to be used to expand the parameters of constitutional protection of fundamental rights."*

This could be interpreted as both offering exciting potential for reformers and a challenge to the Government. For if the Government does not take up the reins of reform itself to ensure fulfilment of its international human rights obligations, might it be that the superior courts will gradually try take on this task themselves?

II

Integrity of the Person

Ramani Muttetuwegama[*]

1. Introduction

This chapter concentrates on the impact of the conflict between the Government and the Liberation Tigers of Tamil Eelam (LTTE) on human rights, as the conflict provides the context for many of Sri Lanka's worst human rights violations. In particular, issues relating to freedom of movement, arbitrary arrest and detention, torture, extra judicial killings, deaths in custody and disappearances are discussed, together with the State's responses to these issues. However, it needs also to be remembered that rights relating to integrity of the person are not only violated in the context of conflict. Violations such as arbitrary detention and torture are committed in other contexts also, and prompt action needs to be taken by the authorities to remedy these violations too.

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[*] Consultant, Law & Society Trust, Colombo.

The general election of October 2000 was conducted against the background of both the continuing conflict in the North and East, and heightened inter-party political tensions and violence in the South. The number of politically motivated attacks and killings rose dramatically in the build-up to the election, and are discussed in the chapter on "Right of Franchise: The Parliamentary Election of October 2000."

2. Background to the Conflict and its Impact on Civilians

The conflict continued to overshadow most aspects of civilian life in the country. Both the LTTE and the government armed forces continued to prosecute their war with little or no regard for the safety of civilians in conflict areas. This included attacks on and military activities around places that would normally be considered refuges for civilians, including kovils, mosques, schools, hospitals and an elders' home.

In April 2000, the LTTE began a new, but unsuccessful, campaign to regain control of Jaffna. In the ensuing battles and skirmishes, both parties not only attacked civilian targets but also continued to use civilians as human shields against each other. In May, the Government placed the country on a "war footing." New emergency regulations were introduced by the state, some of which have serious implications for the issue of integrity of the person.[1]

Over one death a day resulted from artillery fire, shelling and indiscriminate firing by both parties. These included the deaths of many fishermen who had strayed into high security waters.

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[1] See Chapter III on Emergency Rule.

Arrests and detentions under the Prevention of Terrorism Act (PTA) on the basis of statements by the detainee, often obtained through torture, continued through the year. In marked contrast, arrests made subsequent to major human rights violations committed by the security forces, such as mass killings of detainees, if made under the regular law, require levels of evidence that very often lead to releases before the investigations are concluded. Further, investigations and prosecutions under the Torture Act remain slow.

The LTTE's use of suicide bombers led to a further deterioration of the security situation, especially in the capital, Colombo. The harassment of Tamil civilians by the state authorities, both in and around Colombo and in the Central Province, contributed to a tense environment in the country. Four policemen out of 11 prisoners of war who were on a hunger strike were released by the LTTE in February.

3. Indiscriminate Attacks

Neither the Government nor the LTTE took the steps required under international law to protect the lives of civilians and ensure that civilians are least affected by the conflict.

The war was mainly concentrated in the North during 2000, with the LTTE attempting to resist the State forces' continuing effort to open a secure land route to Jaffna. During the GCE Advanced Level examination period in August 2000, and again during the general election in October, the armed forces continued bombing areas around Jaffna regardless of the needs of civilians for free movement for examination and election purposes.

Further, in several attacks and attempted attacks on politicians and military targets, the LTTE showed little or no regard for

safeguarding the lives of civilians. For instance, in January a number of civilians died in an explosion in the main post office in Vavuniya, which was used by members of the Sri Lanka Army for sending their mail.[2]

Further, also in January, a suicide bomber detonated a bomb outside the Prime Minister's office, killing 13 people.[3] In March, an aborted attempt by the LTTE to bomb a high level Minister *en route* from the Parliament in Rajagiriya led to a confrontation between members of the armed forces and suspected LTTE cadres which lasted several hours and killed 12 civilians.[4]

In May, in Batticaloa – during the Buddhist festival of Vesak – the LTTE detonated a bomb near the Police Station and close to the Buddhist temple where most security personnel worshipped, killing approximately three policemen. Indiscriminate retaliatory fire by the armed forces caused a further 14 deaths, including of nine children. The Government maintained that the LTTE was responsible for all the deaths, claiming that the explosion had caused them all, despite eyewitness accounts and autopsy reports to the contrary.[5]

In June, a suicide bomber killed Industrial Development Minister C.V. Gooneratne during a government campaign to increase the war effort. Over 20 civilians, including the Minister's wife,[6] were killed in this attack. In October, a suspected suicide bomber who

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2 *Virakesari*, 3rd January 2000

3 *Daily News*, 9th June 2000

4 *Weekend Express*, 18th March 2000

5 *The Sun God's Children and the Big Lie*, UTHR (J) Information Bulletin No. 23, 11.7.2000. It should be noted that the Judicial Medical Officer's (JMO) report following the autopsy conformed that all deaths had been due to an explosion, despite the contrary evidence.

6 *Daily News*, 9th June 2000

was being questioned outside the headquarters of the Colombo Municipal Council (Town Hall) detonated a bomb, killing himself and injuring 23 persons.[7]

In September, a helicopter carrying the leader of the Sri Lanka Muslim Congress, M.H.M. Ashraff, Minister of Ports Development, Rehabilitation and Reconstruction, and 12 others exploded in mid air. No clear information is available on the causes of this crash. Minister Ashraff was a close and valued ally of the People's Alliance Government.[8]

4. Attacks on Civilians

During the year, the LTTE continued to attack civilian targets, mainly in the South.[9] Several explosions on buses, trains and at stations caused the deaths of over 15 people.[10] In June, a suicide bomber detonated a bomb in Wattala, killing two civilians.[11] In September a bomb exploded outside the National Eye Hospital and six civilians were killed.[12] In December, a bomb exploded in a bus in Saththurukondai, Batticaloa District, killing four civilians including a doctor. Several other medical officers were also travelling in that bus and employees at Batticaloa Hospital staged a demonstration against such bombing and refused to work in the area for several days.[13]

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7 " An explosion swearing – in" *The Sunday Leader,* 22nd October 2000.

8 *Virakesari,* 20th September 2000

9 "South" here denotes areas outside the North and East of the Island.

10 For instance, see "Bus Bombs, Peace Initiative and Parliamentary Elections" in the *Tamil Times* of 15th February 2000, for a report on explosions on buses in the month of February.

11 Tamil Net, 14th June 2000.

12 *The Tamil Times,* 15th September 2000.

13 *Virakesari,* 12th December 2000.

At least 12 people died in a bomb explosion at a musical show in Trincomalee, held to coincide with the New Year celebrations in April. Despite wide speculation as to who was responsible for this attack, there had been no definite findings by the end of the year.[14]

In July, a bomb exploded in a video parlour in Thonvikkal, Vavuniya, killing three people, including two children. The police fired at and killed two further people who were seen fleeing from the place.[15]

In May, the LTTE launched a campaign aimed at regaining control of Jaffna. Intense shelling by the LTTE and the Sri Lankan armed forces, and bombings by the Sri Lanka Air Force, led to the death of over a hundred civilians between 12th May and 15th June in the Thenmaratchy area[16] and about a hundred thousand people were displaced. The Elders' Home in Kaithady was shelled continuously between 17th and 22nd May by both the LTTE and the Sri Lanka Army, resulting in the deaths of 30 inmates.[17] Further, the Kanthasamy Temple in Kayitaviddy, the Amman temple and Sivankovilady in Chavakachcheri, Sivan Kovil in Mattuvil, Sella Pillayar Kovil in Mattuvil North and the Sivan Kovil in Puttur were shelled, resulting in the deaths of at least 23 people who had taken refuge at each of the temples. The Sri Lanka Army was believed responsible for most of these deaths.[18]

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14 *Lakbima,* 17th April 2000

15 *Virakesari,* 26th July 2000

16 *The ordeal of civilians in Themaratchy,* UTHR (J) Information Bulletin No. 24, 7.9.2000.

17 It should be noted that some persons died later as a result of shock or injury and some others in accidents while fleeing from the home.

18 *Supra* n.16.

5. Deaths in Custody

In the Kalutara Remand Prison, where many persons are held under the PTA and Emergency Regulations, a clash between inmates and the authorities in January led to the death of two inmates. Fifty eight other prisoner sustained injuries. The investigation into the incident, including the inquest inquiry, was very slow.

The killings at Bindunuwewa rehabilitation camp

The government established the "rehabilitation" camp at Bindunuwewa, Bandarawela, to rehabilitate young people who had been child combatants with the LTTE. On 24th October 2000, this camp was attacked and 28 of its 41 inmates, all Tamil, were killed.

Background

The use of children as combatants by the LTTE continued through 2000. In fact, in addition to actively recruiting children, the LTTE also conducts military training in schools in the areas within their control and runs orphanages which provide another source of child recruitment. Several LTTE personnel who died in battles with the security forces in 2000 were clearly less than 18 years old. Of 15 children known to have joined the LTTE between April 1999 and early January 2000, nine had died by mid 2000.[19]

Children who are recruited by the LTTE cannot easily leave the organisation. In one instance, five girls aged 14 and 15 years

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[19] *The Sun God's Children* etc, UTHR (J) *supra* n 5, p. 5

requested permission to return home the day after they had been recruited. Their punishment included being stripped and severely assaulted.[20]

A few children do run away from the LTTE. They live in constant fear of retaliation by the LTTE, on the one hand, and penal action by the security forces, on the other. Further, several children have surrendered to the armed forces. Some requested the authorities not to send them home for fear of reprisal. Such children were among those detained at Bindunuwewa.

A number of issues relating to child combatants remain unresolved. There is no clear government policy or legal decision regarding the culpability of child combatants.[21] While the Government asserts at every available international forum that it treats former child combatants in an exemplary manner, it has not stopped prosecuting former child combatants (especially those who are now over 18 years old). Further, in at least one incident in 2000, the Ministry of Defence took journalists to a place where former child combatants were being held and permitted them to be interviewed and photographed. Both the international and national media carried extensive stories, including photographs of the children, with little or no regard for their security or privacy.

Further, there is no clarity on the procedure used for making orders for rehabilitation or on how rehabilitation is to be conducted. For

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[20] *Ibid.*

[21] The Rome Statute establishing the International Criminal Court states that no person under the age of fifteen at the time of the commission of the offence shall be prosecuted by the Court. Despite the Government of Sri Lanka's oft repeated assurances that children are not recruited into the State armed forces, their treatment of former child combatants is to charge them under the PTA and detain them.

instance, at Bindunuwewa, the Ministry of Youth Affairs was in charge of the camp. Further, a mixture of police constables and some Home Guards were responsible for the security of the camp.

The camp contained a number of different categories of detainees. Some were children who had been convicted of political offences under either the PTA or the emergency regulations, where the court had recommended that they be considered for rehabilitation. There were also children who had surrendered but had not been charged, and whose presence was not pursuant to any court order.[22]

Other young men had been convicted of crimes that were not of a political nature, but the Prisons Department thought they would benefit from being held in custody in a less formal setting, and had been placed in Bindunuwewa.

Visitors to the camp before the attack commended the camp authorities for the manner in which it was run. Compared with other correctional institutions which are run either by the Department of Probation and Child Care or the Prisons Department, the inmates of this camp had a fair amount of freedom to move in and out of the camp. They interacted with residents of the adjoining villages, including, at times, collecting their water from the village well.

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[22] Regulation 20 C of the Emergency Regulations No. 1 of 2000 requires that surrendees are detained under a special order made by the Secretary to the Ministry of Defence. Unlike other detainees, the Emergency Regulation only permits a total of 24 months of detention for a surrendee. Further, a surrendee has some privileges that the other detainees do not have. Their detention may only be at special centres that are approved of by the Secretary to the Ministry of Defence.

Events of 23rd and 24th October and their aftermath

On 23rd October, there was a dispute between the camp authorities and the inmates regarding restrictions placed on the inmates' access to their letters and on their freedom of movement. The dispute escalated and the inmates demanded to be released immediately. They took control of one section of the camp. The authorities alerted the Bandarawela Police and the Diyatalawa Army Camp of the dispute. Police and army personnel both arrived at the camp, but the army left at around 1.30 a.m. on 24th October. The police patrolled the outer perimeters. In the meantime, villagers began to arrive at the camp to "protect the area from the Tiger Brats." They had been alerted to the dispute by camp officers.

At about 6.00 a.m., a group of persons broke into the camp and attacked the inmates. Out of 41 detainees who were in the camp on the day of the attack,[23] 26 were killed that day and two others succumbed to their injuries later. Many of the victims bore evidence of being attacked with knives and poles, but 10 of the bodies were unidentifiable and the cause of death of some was not clear. One body had gun shot injuries on it. The unidentified bodies were sent to India for further forensic tests, which it is hoped will help establish both the identities of the victims and the causes of death.

Police investigations revealed that there had been some firing during the attack. There is no evidence to suggest that any one other than members of the police force were armed with guns that day. While the obvious conclusion is that the police were, therefore, involved in the killing, only one deceased had gun shot injuries that were evident to the forensic examination.

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[23] As camp records were burnt that day, there was a delay in establishing the actual number of detainees there at the time of the attack.

While there is only meagre evidence of police involvement in the actual killings, there is plenty of evidence of police inactivity while the attack was in progress. No cartridges have been recovered from the areas where the crowds "surged" into the compound, for example. Further, no tear gas was used to attempt to control the crowds, despite it being available to the police. In marked contrast, the police fired tear gas at demonstrators protesting against a new regulation banning public demonstrations outside the Town Hall in Colombo in May on the basis that the demonstration was "unruly."

The Police Department is conducting disciplinary action against 60 police officers who were present at the camp that day. In addition, 19 police officers in a "supervisory" capacity were taken into custody, of whom four were discharged by the Supreme Court after they filed a fundamental rights application arguing that there was no evidence against them. The Captain and Lieutenant in charge of the camp were also discharged for the same reason. In addition, some civilians who were either residents of the area or students at the adjoining training school were also released from custody, pending investigation. Eight other villagers were absconding from the area. Despite several identification parades, the survivors were only able to identify three of the students from the training school.

There have been conflicting stories about events at Bindunuwewa on those two days. The Government first insisted that the attack was carried out by a huge mob at the behest of extremist Sinhalese groups. By about midday on 27th October, the Bandarawela Police had rounded up a majority of the villagers and attempted to arrest them and pin the blame for the attack on them. The villagers told journalists and human rights investigators that only the police and the security forces had conducted the attack, and that they were now trying to cover it up. Very few witnesses have been prepared

to give evidence or identify the perpetrators. At least one report on the incident hinted at the possibility that the attack had been planned by the camp authorities after the "disturbance" within the camp the previous night. As the survivors were severely traumatised, they were unable to provide much assistance to the investigators.

The investigation was complicated by the fact that the camp had not been secured immediately after the attack. The BBC news carried photographs of the camp that very day. While the area police remain under suspicion for the attack, any attempt by them to secure the grounds would have been considered suspect. There were no "independent" law enforcement authorities who could have carried out what is the most routine of activities pending an investigation. The HRC's interim report on the attack indicates that the Government's version of events – that a massive mob attack overwhelmed the police who were in charge of securing the grounds – cannot be sustained. Further, the report points out that some of the posters that were put up in the area asking for the relocation of the camp were on PA campaign posters. This suggests that far from belonging to Sinhala extremist groups, some of those who were hostile to the camp were active supporters of the Government.

The Attorney General's Department wished to circumvent the usually lengthy process of a non summary inquiry before the Magistrate by requesting that they be permitted to hold a trial at bar before three High Court judges in this case.[24] The President appointed a one person Commission of Inquiry by a High Court Judge to inquire into the happenings and the massacre. The police continue their investigations as well.

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[24] This procedure is becoming increasingly popular after the conclusion of the trial into the murder and rape of Krishanthi Kumaraswamy and the murder of her mother, brother and neighbour. For details see *Sri Lanka: State of Human Rights 1999* (Law & Society Trust, Colombo, 1999).

The attack at Bindunuwewa is the largest killing of prisoners in Sri Lanka since the attack on Welikada Prison in July 1983. The future of child combatants and their chances of leading a normal life after they leave the LTTE has always been an issue of concern. Children who surrender to the armed forces live with the fear that they and their families will be punished by the LTTE. Further, as events at Bindunuwewa so poignantly show, their surrender to the state authorities does not ensure their security.

The Government's treatment of the survivors after the attack led to further criticism. The children were first taken to the Army Hospital in Diyatalawa and were then transferred to the Army Hospital at the Army Headquarters in Colombo. For most of the time, the children remained handcuffed, either to their beds or to each other.

After the funeral of one of the inmates at Thalawakele, in the Nuwara Eliya District, a riot broke out between Sinhalese and Tamils and also supporters of two different parties who represent Up Country Tamils. At least two people were killed and much damage was caused to property.[25]

6. Extra-judicial Killings and Political Killings

On 5th January, the leader of the All Ceylon Tamil Congress, G.G. Ponnambalam was shot dead in Colombo. Although one arrest was made, the deceased's family expressed concern over the manner in which the investigations were conducted.

Ganesh Chandrakanthan was arrested together with four others on 4th June by officers belonging the Kantalai police station.

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[25] *Thinakural*, 30th October 2000

Although he was seen being carried out of the police station the next day, the police informed his family that he had died when he detonated a grenade at the time he was taken into custody. The police also told the family that his body would be released to them only if they signed a statement to the effect that he was a member of the LTTE. Upon their refusal to do so, they buried the body at the Kantalai cemetery.[26]

In early August, members of the Sri Lanka Army, in Sithandy Batticaloa, killed A. Chandramohan. An investigation into the death in continuing.[27]

Four persons who were logging in the forests in the Maha Oya area were killed in August and their bodies were discovered later. Five others who had been with them and escaped alleged that they had been attacked by Sri Lanka Army officers.[28]

Seven farmers were killed, allegedly by Home Guards, on 2nd October in Poonagar, Ichchiampathai, Mutur in the Trincomalee District. A Magisterial inquiry had not concluded at the time of writing.[29]

In October, just after the general elections had concluded, a journalist resident in Jaffna, M. Nimalarajan, was killed. No progress had been made in the investigation by the end of the year.

Naval personnel based in Nilaveli, Trincomalee are suspected of being responsible for the death of four villagers from Gopalapuram, Trincomalee, including a 15 year old boy, on 22nd November, apparently as they laid out their fishing nets. Following

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26 Amnesty International Urgent Action, ASA 37/16/00 of 14th June 2000.

27 Tamil Net, 11th August 2000 and 30th Novmber 2000.

28 Tamil Net, 29th August 2000.

29 Tamil Net, 5th October 2000.

a demonstration against the killings by villagers, Mahalingam Thamiran and Shanmugarajah Sornahasan (from the same village), who were last seen in the company of naval personnel on 13th December, were found dead on 14th December. Their bodies reportedly showed signs of torture. Villagers of Gopalapuram returning from their funeral on 16th December were reportedly warned not to protest further by navy personnel.

On 19th December, a group of persons visiting their former home in a "high security" area in Mirusuvil – with the permission of the army – disappeared. After one of them returned, it was revealed that army personnel had attacked the group, killed eight of them and buried them in a mass grave. The ninth survived. During the inquiry into this incident, a suspect identified the grave site. The dead included three children, one of whom was only five years old and two of whom were fifteen. Fourteen suspects were identified, and it was reported that the Attorney General had decided to file action against six of them.[30]

There were several attacks on members of the Eelam People's Democratic Party (EPDP) who held office in various local authorities during the year. On 16th January, Vadivelu Vijeyaratnam, Chairman of the Point Pedro Urban Council, in March, Anton Sivalingam, member of the Jaffna Municipal Council and on 15th May, Santhanam Kantheepan,[31] member of the Valikaman South Pradeshiya Sabha were all shot dead by unidentified gunmen.

On 7th November, Nimalan Soundaranayagam, a Member of Parliament of the Tamil United Liberation Front (TULF) for the Batticaloa District, was shot dead at Kiran in the Eastern Province, allegedly by members of the LTTE. No arrests had been made in

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30 *Thinakural*, 25th May 2001

31 Tamil Net, 15th May 2000

this regard at the time of writing. In the case of the rape and murder of Ida Harmellitta in July 1999 at Pallimunai, Mannar District, seven members of the Sri Lanka Army have been charged.

7. Disappearances

Disappearances continued to be reported in the year 2000; indeed, Amnesty International recorded at least 20 such cases. Vinayagamoorthy Vijayaraja was seen being arrested by members of the Sri Lanka Army on 3rd January. When his parent inquired after him at the Valachenai Harbour View army camp, they were first informed that he was in custody and would be released after questioning, but were later told that he had not been arrested at all.[32]

Vyramuttu Jeyakili was arrested on 25th February together with three others by navy personnel and taken to the Nilaveli navy camp. While the other three people were released, no further information was forthcoming about Jeyakili, and the authorities did not officially acknowledge his arrest.[33]

Mahendrarajah Gajamukan was taken away from his home by men believed to be members of the People's Liberation Organisation of Tamil Eelam (PLOTE) on 30th January and subsequently disappeared. He was taken away in a vehicle with covered number plates from his home in a village in Vavuniya. The fact that the truck was being driven around in broad daylight in one of the highest security areas of Sri Lanka with covered number plates indicated a connection with the authorities. The

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[32] AI Urgent Action, ASA 37/01/00 of 11th January 2000.

[33] AI Urgent Action, ASA 37/06/00 of 6th March 2000.

police, army and leaders of all the other armed Tamil groups denied any knowledge of the incident.[34]

Thambiah Vijayakumar was arrested from his work place in Vavuniya by members of the Security Coordinating Unit (SCU) on 22nd June. For almost three weeks, the authorities denied any knowledge of him. Then, his family members were permitted to see him on 11th July.[35]

Gnanapragasam Gnaneswaran was taken away by a person in camouflage uniform believed to belong to the SCU in Vavuniya on 1st July. All authorities have denied any knowledge of him.[36] Airyathas Vijayakumar and Shanmugasundaaram Suyanathan were arrested in two separate instances on 15th August, reportedly by the army, in Vauniya. They both then disappeared.[37]

Velupillai Tharmalingam and Ponnusamy Sivakumar (also known as Raja) were arrested on 10th August and 13th August respectively and their whereabouts remained unknown.[38] A 45 year old father of five, Gulam Mohidèen Mohammed Zakariya, was arrested on 11th November, in his wife's presence, by navy personnel. When inquiries were made at the closest Navy Camp at Nilaveli, they denied having any information about him.[39]

In the case of the school children who disappeared in Embilipitiya in the period between 1989/90, seven persons including a school

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34 AI Urgent Action, ASA 37/05/00 of 22nd February 2000.
35 AI Urgent Action, ASA 37/20/00 of 12th July 2000.
36 AI Urgent Action, ASA 37/21/00 of 13th July 2000.
37 AI Urgent Action, ASA 37/26/00 of 21st August 2000.
38 AI Urgent Action, ASA 37/25/00 of 21st August 2000.
39 AI Urgent Action, ASA 37/28/00 of 21st August 2000.

principal and six army personnel were convicted in February 1999 of abduction and other related crimes. Two others were acquitted. Both the convicted and the State appealed against the sentences in 2000.

Further, the number of cases filed by the Attorney General's Department against members of the police and state security forces in various High Courts in response to the reports from the three zonal and the all-island Presidential Commissions of Inquiry into Involuntary Removals was 557 by the end of 2000. The Police had concluded investigations in 1060 of the 1681 cases that were identified by the three zonal commissions as having sufficient evidence of the perpetrators.

One of the main drawbacks of the procedure involved in the Presidential Commissions of Inquiry is that the investigation authorities must duplicate the Commission's investigations. It is recommended that all mandates to Commissions be carefully examined to prevent duplication. Either the current prosecution authority (the Attorney General) should be able to adopt the Commission's evidence without further assistance from the police, or the Commissions should themselves be empowered to follow up with prosecutions where they consider it possible. This would prevent both duplication of investigative work and the long delays that characterise prosecutions for human rights violations which also translate into crimes under the Penal Code.

In the cases of the 372 people who disappeared in Jaffna in 1996, as identified by the Board of Inquiry set up by the Army,[40] the Board concluded that in 155 of these cases, the persons

[40] The International Committee of Red Cross (ICRC) had already identified 346 cases.

responsible for the disappearances were members of the security forces. At the time of writing, the Disappearance Investigation Unit (DIU) of the police had completed taking statements with respect to 138 of these cases. Once again, it would have been more efficient if the evidence gathered by one investigating unit could have been adopted by the prosecution authorities, instead of the latter having to duplicate the work.

The DIU had also concluded investigations into 22 alleged disappearances in the Vavuniya area in 2000. Of these, it concluded that eight persons had in fact disappeared. A few of the people who had reportedly disappeared had been found alive, and been identified.

In order to verify police reports that people reported to have disappeared have been found, the Attorney General's Department has developed a unique system. In the event that the area police say the person has been "found," the Department asks that a photograph of the person holding a newspaper of that particular date be taken and sent on to the Department.[41] However, it is not known whether this procedure is enforced consistently.

In a case regarding the disappearance of six young men in 1989, the key witness, the only survivor of the arrest, was threatened by the first accused, K. Chandra Karunaratne, an Assistant Superintendent of Police (ASP), in court. The same accused also threatened the two police officers who are investigating this case.[42]

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[41] Interview with Yasantha Kodagoda, Senior State Counsel, 3*rd* May 2001.

[42] AI Urgent Action, ASA 37/08/00 of 14th April 2000.

8. Torture

Investigations into allegations of torture and trials under the Torture Act remained slow. Further, some trials relating to activities which took place almost a decade ago were impeded by the fact that the accused are now high-ranking army or police officers who continue to serve regardless of the grave charges against them. In one case, the complainant, M.G. Chandrakumara, was threatened by persons suspected to be connected with one of the accused, a police officer, against giving evidence.[43]

There have been seven indictments under the Torture Act.[44] Notes of investigation had been completed in 21 other cases at the time of writing, of which the State Counsel assessed that prosecution would be possible in about six cases, including one against a member of the PLOTE.[45] One block to successful investigation of torture, and indeed of other causes of death in custody, seems to be the lack of proper medical evidence. In most places, the Judicial Medical Officers (JMO) have fairly good experience in

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[43] *Urgent Action* - Amnesty International 7th August 2000

[44] The Units decided to begin with investigation of the Reports by the Special Rapportuer.

[45] The PLOTE is one of several political parties which were involved in an armed struggle to establish a separate state and joined main stream politics after the Indo Lanka accord of 1987. Since 1990, several of these parties are closely aligned with the state security apparatus especially in intelligence gathering. Many of their members including parliamentarians have been killed, probably by the LTTE since 1990. There have been many allegations of unlawful detention (including the maintenance of detention camps), torture and extra judicial killings against members of these groups. Up to date, the Government of Sri Lanka refuses to acknowledge any formal link between their security forces and these groups and, as such, every one of the incidents continues to be treated by the State (including the Supreme Court) as a private act. This is the first instance of any meaningful follow up in a complaint against the activities of these "former militant groups."

forensic medicine. However, JMOs are only found in the larger towns, close to High Courts. In other places, forensic examinations are conducted by District Medical Officers (DMOs) who have little or no training in forensic medicine. It is recommended that more forensic training be given to all medical officers so that consistent and useful evidence can be gathered from the point of first contact with doctors.

The Committee against Torture visited Sri Lanka in October. Their report was still pending at the end of the year. Following the Committee's visit, several salutory steps were taken by the State in early 2001, which will be examined in the next report.

9. Arbitrary Arrest and Detention and Treatment in Custody

It should be noted that in almost every case of disappearance in the custody of state officials, the first step was an arrest or detention. In many cases, no reasons for the detention were given and, in some cases, despite overwhelming evidence to the contrary, the relevant authority denied the arrest or detention.

The changes in the emergency regulations that were introduced in May 2000 also introduced new concerns relating to detention. Until then, the regulations required that all places of detention must be designated as such by a Gazette publication. This requirement was removed from the new emergency regulations, leaving room for detention of persons unregulated by the law, and thus making it possible for secret places of detention to function legitimately.[46]

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[46] See Chapter III on Emergency Rule.

There have also been several incidents of torture by the LTTE[47] but not much reportage or follow up has taken place except with respect to prisoners of war. For instance, there are reports of detainees who have been chained in the bunkers. Further, detainees have been reported to be blindfolded at a place in North Vanni.[48]

Three police officers were sentenced to six months' rigorous imprisonment each for the abduction, detention and attempt in July 1996 to force Jude Ockerz to marry a woman with whom two of the officers had been having a relationship. The parents of Ockerz were both killed by gunfire shortly after they complained that their son had disappeared.

10. Freedom of Movement

Freedom of movement was severely curtailed, especially in the North and East, during the year. The LTTE continued to regulate the movement of civilians out of areas under their control, including by imposing a tax on those who wished to move out permanently and denying permission to leave to those who had refused to participate in the LTTE training sessions.

The Government's policy of requiring passes for movement out of Vavuniya into the South of the country remains unregulated by any law. The pass system causes endless difficulties to people. In one case, a person who challenged the Vavuniya Assistant Superintendent of Police's decision not to issue a pass found himself arrested, detained, tortured and charged for association with two "suspicious" looking persons. The two "suspicious" looking persons have never even been taken in for questioning

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[47] *Supra* n 5 pp 7 & 8

[48] *Ibid*

by the police or any other authority.[49] In January, the LTTE announced a lifting of the ban on air travel by civilians from Jaffna. The ban had been imposed in November 1999.[50]

The Government also creates "High Security Zones" in and around areas of strategic importance in the conflict areas. The Supreme Court rejected an attempt to challenge the declaration of these zones as being areas in which people may not reside.[51] It should be noted that the people who are not permitted to return to their homes in these areas are not given any compensation or relocation costs. The State also attempted to introduce a pass system for movement of people from the East. However, the plan met with considerable resistance and was dropped.

Further, much disruption was caused to public transportation due to sporadic attacks. On 18th January, one person died and three were wounded when a bus came under fire near Valachchenai. On 29th January, a bomb exploded on a bus at Polgahawela and 20 persons were injured. On 30th January, a bomb exploded at the Gal Oya Railway Station and one person was killed. On 3rd February, 33 people were injured when bombs exploded on buses in Kadawatha, Kurunegala and Urugodawatte. On 26th March and 16th April bombs were discovered on the Vavuniya-Colombo train in Vavuniya. Seven passengeres were killed when a bomb exploded on the Kebetigollawa - Padavisiripura bus.

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[49] Vavuniya Magistrate's Court Inquiry No. B 89/2000

[50] Tamil Net 31st January 2000

[51] SC Application No. 40/2000

11. Conclusion

The year 2000 was another dismal year as far as protection of rights relating to integrity of the person was concerned. Both the Government and the LTTE showed very little regard for protecting the lives of civilians; indeed, at times civilians were deliberately targeted in furtherance of military ends.

Further, the killing of detainees held at Bindunuwewa rehabilitation camp raised a range of questions extending well beyond issues of the immediate security of detainees. In particular, issues concerning the State's treatment of former combatants, especially children, need to be addressed. It is recommended that children be treated under the Children and Young Persons Ordinance and that a strict separation between child offenders or surrendees and adults be maintained at all times. It is also recommended that when in detention (whether for rehabilitative purposes or not), the nature of each detainee's past activities should not be revealed to their fellow inmates. Further, the investigation into the massacre at Bindunuwewa must be transparent and all possible action must be taken against all persons identified as having been involved.

The State's response to violations remained unsatisfactory during 2000. While some important steps were taken, they are too few in number, given the continuing climate of impunity in the country. It is recommended that a special post of a prosecutor for human rights be established with its own investigation unit with a mandate to take immediate steps to reduce the back-log in the prosecution of at least those who the Disappearance Commissions identified as being responsible for disappearances.

III

Emergency Rule

*Suriya Wickremasinghe**

1. Introduction

Far-reaching changes were made during the year by the resurrection, with a few variations, of emergency regulations in force in 1989, replacing those which had been current since 1994. The changes and additions were both numerous and complicated, covering a vast array of subjects. Provisions related to censorship and prohibited publication followed a particularly tortuous process of change during 2000.

Apart from this major change to the Emergency (Miscellaneous Provisions and Powers) Regulations, the only emergency

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regulations of note made during the year were the granting of financial relief to private sector employees, and an ill-fated attempt to impose a discriminatory surcharge on electricity consumers. The short-lived Joint Operations Council was abolished and the National Security Council resurrected. Once again there were interesting legal challenges, both successful and unsuccessful. For the second year in succession an emergency regulation was struck down by the courts.

2. The Emergency (Miscellaneous Provisions and Powers) Regulations

When an emergency is in force, the President usually makes a set of regulations called the Emergency (Miscellaneous Provisions and Powers) Regulations (EMPPR). These deal with powers of search, arrest, detention and a number of other subjects. From time to time, other regulations on specific topics are made, but the EMPPR usually remain the longest and the most wide-ranging.

In May 2000, following the escalation of the armed conflict in the North and the overrunning by the LTTE of the strategic Elephant Pass camp, the government decided to "mobilise the country on a war footing."[1] Part of this mobilisation was the repeal of the EMPPR hitherto in force (which dated back to November 1994) and their replacement with a much more drastic set of EMPPR, the Emergency (Miscellaneous Provisions and Powers) Regulations No 1 of 2000 made on 3rd May 2000.[2] These were, in the main, a resurrection of the EMPPR of 1989, with some changes. The President in defending the emergency regulations reportedly said that they were needed to fight the

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1 *Daily News*, 4th May 2000.

2 Gazette Extraordinary 1130/8 of 3rd May 2000.

LTTE, and that they would be rescinded as soon as the situation was brought under control.[3]

This new EMPPR of 3rd May 2000 brought in a number of changes which related, amongst other things, to supervision, arrest and detention, inquests and deaths in custody, essential services and censorship. These changes are described under their respective headings below. The EMPPR also contained a number of other additions. These cannot be dealt with in full due to constraints of space, but for the benefit of the reader have been listed below under the head "Other Provisions Added in May 2000".

3. Supervision

A new regulation (reg.16) has been included, which enables the Secretary to the Ministry of Defence to make supervision orders with a view to preventing a person from acting in a manner prejudicial to national security, etc. Under this regulation, a person can be prevented from being in specified areas, prior notification of his movements may be required, he may be prohibited from leaving his residence without permission (which could amount to house arrest), and any other person may be prohibited from entering or leaving such residence except in specified circumstances. He may be required to surrender his passport and travel documents. His possession or use of any specified articles may be prohibited, restrictions may be imposed with regard to his employment or business, his rights of association and communication may be restricted, and also his activities in connection with the dissemination of news or the propagation of opinions.

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[3] President's speech over Rupavahini as reported in *The Island* of 9th May 2000.

This provision, which empowers the Secretary to impose restrictions on almost all aspects of a person's life, is reminiscent of South African banning orders of the apartheid era. In Sri Lanka, it existed in the 1989 regulations, and previously. Unlike in the case of preventive detention under regulation 17, which is described below, no maximum duration for a supervision order is specified, nor is there provision for executive review by an Advisory Committee.

4. Arrest and Detention

Far-reaching changes have been made in the sphere of arrest and detention.

4.1 Preventive detention under regulation 17

The description of the basis on which the Secretary may issue a detention order has been rephrased, an earlier formulation being resurrected. This appears to be an attempt to counter the effect of Cooray's and other cases[4] in which detention orders made by the Secretary were held *ultra vires*. It is doubtful, however, whether the re-wording has substantially changed the legal position.

More serious is that the Secretary is not required to specify the period of detention in the detention order, as he was required to do under the previous regulation. This omission could be interpreted as giving the Secretary the power to detain a person for an unspecified period, subject to the maximum period of one year. Further, the earlier regulation stipulated a maximum period of three months at a time, the total of which could not exceed one year. This provision ensured that the Secretary would review the

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4 *Sri Lanka: State of Human Rights 1998.* (Law & Society Trust, Colombo, 1998), p 48 et seq.

necessity of continuing the detention at least once in every three months. Now, a detainee can be "forgotten" for a whole year. Past experience of emergency rule in Sri Lanka has shown that where there is no compulsory regular review, persons who do not have influential contacts to ensure that their cases are looked into, are liable to suffer in detention for unnecessarily long periods, simply due to official inertia. The removal of these safeguards seriously erodes the liberty of the individual.

In terms of regulation 17(9), if a person who is subjected to a preventive detention order is suspected by the Secretary to be or to have been a member of a proscribed organisation, then such person loses his right to make a case for his release to the Advisory Committee established under regulation 17. The wording in regulation 17(9) suggests that this right of appeal is taken away simply on the subjective opinion of the Secretary. While depriving a detained person of this right on mere suspicion is anyway unreasonable, depriving it to a detainee who is suspected to have been (but is not any more) a member of a proscribed organisation is manifestly illogical.

4.2 Arrest on suspicion under regulation 18

4.2.1 Who can arrest?

Before 3rd May 2000, such powers as search and arrest without warrant under the emergency regulations were conferred only on police officers and members of the armed forces. Now, a search or arrest under regulation 18 may also be made by "any other person authorized by the President to act under this regulation."

This has serious implications. How are arrested persons to know whether the person who claims the right to search and take them into custody – and perhaps also seize their vehicles – has in fact

been so authorised by the President? What form is the authorisation by the President to take and how is it to be established? The wording of the regulation suggests that it may be merely verbal. Is, then, the law-abiding citizen expected to meekly submit to the demands of any person who claims to have had this awesome power conferred on him? In the case of arrest by persons claiming to be members of the police or armed forces one can at least request them to establish their official standing.

A similar provision existed in the emergency regulations in the 1980s and previously. The provision was, advisedly, dropped under the last government in 1993. It does not reappear in any of the four sets of EMPPRs made by President Wijetunge in 1994, the last of which remained operative (with some amendments) until the change in May 2000.

The revival of this provision has certain undesirable consequences which ignore important safeguards against misuse of powers of arrest that have been introduced over the years due to pressure of public opinion. These relate to the reporting of the arrest to a higher authority, and to the issue of arrest "receipts."

4.2.2 Reporting the arrest

Where an arrest under this regulation is made, the arresting officer must, if a police officer, report it to the Superintendent of Police of the Division, and if a member of the armed forces, to the Commanding Officer of the area in which the arrest is made. But no equivalent duty to report the arrest to anyone at all is imposed on "any other person authorized by the President to act under this regulation."

4.2.3 Failure to issue "receipts"

Then again, the regulations require that when an arrest is made it shall be the duty of the arresting officer to issue to a close relative a document acknowledging the fact of arrest (popularly referred to as "arrest receipts"). This important safeguard was first introduced in June 1993. "Arresting officer" would doubtless now be interpreted to include "any other person authorized by the President." However, the regulation goes on to say that where it is not possible to issue such a document, a police officer shall make an entry in the Information Book giving the reasons. If a member of the armed forces, he must report such reasons to the officer in charge of the police station, who shall make an entry of such fact and the reasons in the Information Book [proviso to regulation 18(9)]. This safeguard is considered so important for the arrested person, that the regulation goes on to provide specifically that failure to issue a "receipt" or failure to make an entry of the reasons for not doing so in the Information Book is an offence.

However, in the case of "any other person authorized by the President" who arrests a person and fails to issue a "receipt", there is no provision requiring him to have the failure and the reasons therefor recorded anywhere.

4.2.4 Where may arrested persons be held?

The regulations as prevailing immediately prior to 3rd May 2000 contained yet another important safeguard first introduced in 1993. They provided:

> *The Secretary shall cause to be published in the Gazette a list, with the addresses of all places authorised by him as places of detention for the purposes of regulation 17 and 19,*

> *and shall also notify the existence and the address of such places of detention to the Magistrate within whose jurisdiction such places of detention are located.*
>
> *Regulation 19(4)*[5]

The former EMPPR went on to say:

> *No person shall be detained at any place other than a place of detention authorised by the Secretary, and where any person had been detained contrary to this regulation the person or persons responsible for such detention shall be guilty of an offence.*
>
> *Regulation 19(8)*

Conviction for this offence carried a mandatory jail term of six months to five years plus a fine.

As a result, places of detention were from time to time specifically authorised and gazetted by the Defence Secretary. This was an important safeguard against secret detention and its accompanying danger of ill treatment in custody. It was introduced at the same time as the "arrest receipts" provision and, in the words of the Supreme Court, "...clearly and in plain words indicated that secrecy was to be displaced by publicity and openness..."[6] There

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[5] The regulations 17 and 19 referred to in the above provision relate to the two types of detention that exist under the emergency regulations, namely "preventive detention" under regulation 17 by order of the Defence Secretary, and the detention under regulation 19 that follows an arrest on suspicion under regulation 18 that we have already examined in another context.

[6] Wimalenthiran's case, SC Application 26/94; [1997] 1 Sri LR113. Thus it was held that a place of detention became "authorised" only once it was actually gazetted and not when the Defence Secretary signed the notification in his office.

were also accompanying provisions requiring that officers in charge of places of detention furnish a list of detainees to the magistrate once in 14 days and that magistrates visit such places of detention at least once a month.

The legal requirement that places of detention be designated and gazetted was omitted from the new emergency regulations made on 3rd May. Persons detained under regulation 17 may now be detained in such place as the Inspector General of Police (IGP) or a Deputy Inspector General (DIG) decides. In respect of persons detained under regulation 19 (after arrest under regulation 18), there is no provision in the regulations for designation of the place of detention.[7] The provision regarding furnishing fortnightly lists of detainees to, and visits by, the magistrate have also been omitted.

On 14th June 2000 the IGP publicised by a gazette notification[8] a list of 346 places of detention for the purpose of regulations 17 and 19. While this is to be welcomed, it is not an adequate substitute for the safeguard that existed prior to May 2000. The gazette notification is not pursuant to any legal obligation under the emergency regulations. The emergency regulations no longer make it an offence to hold persons in places which have not been gazetted.

4.3 The period for investigative detention under regulation 19

Previously, the period of detention for investigative detention was a maximum of 60 days for persons arrested or suspected of

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[7] The Amendment to Regulation 19(2) by Gazette Extraordinary No. 1132/14 of 16th May 2000.

[8] Gazette Extraordinary No. 1136/10 of 14th June 2000.

committing offences under the emergency regulations in the northern and eastern regions, and a maximum of 21 days in other cases. This has now been increased to a maximum of 270 days in all cases (90 days initially, and a further six months if requested by a police officer holding a certain rank when producing the suspect before a magistrate). This is a very steep increase.

5. Bail

Under the previous EMPPR there were very specific provisions regarding bail. When a person suspected or accused of any offence was remanded by the magistrate, he could not be released on bail during the first three months except with the prior written consent of the Attorney General. However, after a person had been on remand for a continuous period of three months, then the bail provisions specified that the magistrate shall release on bail unless the Attorney General directed otherwise. (An exception was made in respect of certain serious offences, where the person could not be released before the conclusion of the trial except with the written consent of the Attorney General). In instances where the magistrate had granted bail, the Attorney General could direct the magistrate to take such person back into remand custody. There was a further provision that the Court of Appeal could in exceptional circumstances release on bail any person who had been on remand for a period of more than three months. These provisions were straightforward, easy to understand and easy to implement. They were contained in regulation 54 of the EMPPR. In the 1989 version similar provisions were found in regulation 64.

The new regulations brought in on 3rd May 2000 caused serious confusion. These new Emergency (Miscellaneous Provisions and Powers) Regulations No 1 of 2000, while requiring the magistrate to remand persons produced on account of being suspected or

accused of committing an offence under emergency regulations, do not include any specific provisions regarding the granting of bail to such persons. The fate of persons produced before a magistrate on account of being suspected or accused of committing an offence under an emergency regulation is thus uncertain.

One possible interpretation is that no bail is possible, and once the magistrate remands, that is indefinite remand. But this situation would be unacceptable, because there may be suspects in respect of whom investigations are over or against whom no indictment is contemplated. It would be inconsistent with the determination of the Supreme Court on the Anti-Ragging Bill,[9] where the Court took the view that a provision ousting judicial discretion in granting bail for a period of six months was excessive and not a reasonable restriction of Article 13(2) of the Constitution,[10] and that it also amounted to a punishment contrary to Article 13(4)[11] of the Constitution. Violation of Article 13(4) was on the basis that a suspect would be in compulsory remand irrespective of whether investigations had been completed or a trial was pending.

The other possible interpretation would be that the absence of any restrictions on bail in the emergency regulations makes the

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[9] Prohibition of Ragging and Other Forms of Violence in Educational Institutions Bill: Supreme Court Special Determination No. 6 and 7 of 1998.

[10] This includes the right of an arrested person not to be held in further custody except upon and in terms of an order of a judge. Restriction of this right is permitted, inter alia, on the grounds of national security.

[11] This provides the right not to be punished with death or imprisonment except on the order of a competent court. Deprivation of liberty on account of pending investigation or trial does not constitute punishment. No restriction to this right is permitted, except in respect of security personnel.

normal law relating to bail, including section 115 of the Code of Criminal Procedure (Crim. PC),[12] applicable. This would be on the basis that what is not prohibited is permitted. Furthermore, it must be noted that the 1994 and 1989 EMPPRs specifically made section 115 inapplicable (regs. 19(10) and 20, respectively) to suspects and accused produced before a magistrate. There is no such specific ouster in the current EMPPR. Of course, as mentioned above, there were separate provisions for bail in both the 1994 and 1989 versions of the EMPPR.

However, it might be pertinent to note that regulation 61 of the current regulations makes Chapter XI of the Crim. PC inapplicable to any investigation conducted under any emergency regulation, and Section 115 is in Chapter XI of the Crim. PC. The 1994 and 1989 EMPPRs also had similar provisions.

A possible explanation for this nebulous situation could be a simple printer's error, namely the omission of regulation 64 in the current EMPPR, where the numbering jumps straight from 63 to 65. Provisions in the 2000 and 1989 versions of the EMPPRs are substantially similar. Part 7 of the 1989 EMPPR corresponds basically to part 7 of the current EMPPR and contains provision for bail at regulation 64. If the omission of regulation 64 in the 2000 EMPPR was a printer's error, then it would be reasonable to assume that the 2000 EMPPR intended (but omitted) to provide for bail by a regulation 64, similar to the provisions contained in the EMPPR of 1989, which was substantially repeated in the 1994 EMPPR at regulation 54.

Also, it may be noted that the Bail Act No. 30 of 1997 specifically excludes from its purview persons arrested under the emergency regulations.

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[12] The Code of Criminal Procedure Act No 15 of 1979.

As regards persons indicted for committing offences under emergency regulations, the granting of bail is provided for, on the same basis as in the 1994 EMPPR, but only with the consent of the Attorney General.

6. Inquests, Deaths in Custody

Emergency regulations have frequently eroded the normal procedure relating to inquests, to varying degrees. The current regulations brought into force on 3rd May 2000 revert to a very oppressive form, with serious implications for the prevention and investigation of human rights violations, in particular deaths due to torture and deaths in custody.

The current emergency regulations bypass the normal inquest procedure relating to:

- deaths which are claimed to have been caused by the police or armed services in the course of duty; or

- deaths occurring in police or military custody.

The current regulations provide an alternative procedure for such cases which is wholly inadequate from the point of view of the protection of the individual. Moreover, the normal law is bypassed in respect of all such deaths occurring throughout the country, irrespective of any connection with the armed conflict taking place in certain areas. Constraints of space preclude a description and critique of the procedure here; it has been comprehensively dealt with elsewhere.[13]

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[13] See (1) Deaths in Custody or at Hands of Police and Armed Forces: CRM urges restoration of normal law relating to inquests. CRM ref E 92/11/2000. (2) The Current Emergency Regulations Relating to Inquests: A note by the Civil Rights Movement, CRM ref. E02A/11/2000.

It should be noted that a normal inquest was held into the massacre in October 2000 of over 26 Tamil inmates at the Bindunuwewa camp. The general law was applied in this case because the camp happened to come under the Commissioner General of Rehabilitation; had the inmates been held in police or military custody, no such inquest would have been held.

Before leaving this topic, it should be remembered that as initially drafted, the May 2000 EMPPR included the notorious regulation 55FF. This provided that:

> *55FF. (1) It shall be lawful for any police officer of a rank not below that of Assistant Superintendent of Police or any other Officer or person authorized by him in that behalf, to take all such measures as may be necessary for the taking possession of and the burial or cremation of any dead body, and to determine in his discretion the persons who may be permitted to be present at any assembly for the purpose of or in connection with any such burial or cremation; and any person who is present at any such assembly without the permission of such authorised person or who obstructs such officer or authorised person in the exercise of the powers herein before conferred shall be guilty of an offence.*
>
> ***(2) It shall not be necessary for any officer or person taking measures relating to the possession and burial or cremation, of a dead body under this regulation to comply with the other provisions of these regulations and any other written law relating to the inquest of death or to burial or cremation.*** *(Emphasis added)*

Following an outcry against a return to this regulation, the Government promptly announced that it had amended the regulations to repeal 55FF. In fact, the May 3 EMPPR does not contain a regulation 55FF; it had apparently been taken out at the proof stage.

7. Essential Services

Provisions relating to essential services had been included in the 1994 version of the EMPPRs by an amendment in 1996 which introduced a new regulation, 29A. At the time, we welcomed the fact that the harshness of previous regulations on the subject had now been tempered with the addition of the words "without lawful excuse" when providing for vacation of post on a person absenting himself or failing to perform work in an essential service.[14] The May 2000 EMPPR regrettably incorporates the earlier, harsher version of the provisions on this subject, leaving out the words "without lawful excuse."

Other oppressive provisions remain, enabling the proscription of organisations on the basis of the President's opinion that they are aiding and abetting certain acts relating to essential services. These have been commented on in an earlier issue of this publication.[15] The position has now been made all the more oppressive by the inclusion of a separate provision for the proscription of organisations, parts of which are made applicable *mutatis mutandis* to organisations proscribed in respect of essential services. This is described further below.

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[14] *Sri Lanka: State of Human Rights 1997* (Law & Society Trust, Colombo, 1997), p 54.

[15] *Ibid.*

It is also noteworthy that a schedule was added comprising a wide-ranging list of some 12 essential services, including the Associated Newspapers of Ceylon, the export of "commodities, garments and other products," and "the sale, supply or distribution, of any article of food or medicine or any other article required by a member of the public." Once again this is a "borrowing" from the more illiberal regulations of past times, which had been omitted in the 1994 regulations.

The definition given of essential services is the services listed in the schedule. It is nevertheless contemplated, that the President will make a specific order declaring an essential service, before any consequences can flow from such fact (regulation 41).

8. Censorship, Prohibitions on Publication

Censorship followed a tortuous and confusing course during the year 2000. Different regulations existed in parallel, some of which were incorporated in the EMPPR while others had a separate existence; different censorship and prohibition of publication provisions co-existed within the same set of EMPPR; there were both unsuccessful and successful challenges to censorship regulations, the latter leading to amendment; and the operation of certain regulations was suspended. This section first outlines the factual situation before going into more detail regarding certain of the regulations and legal challenges.

At the beginning of the year 2000 there were no censorship provisions in the EMPPRs. There was, however, in force a regulation promulgated in June 1998, the Emergency (Prohibition on Publication and Transmission of Sensitive Military Information) Regulation No 1 of 1998, which was amended in November 1999. This was under legal challenge at the end of 1999; in May 2000

the case was dismissed and the regulation upheld.[16] This regulation thus remained in force, without amendment, throughout the year.

The new EMPPRs of 3rd May 2000 brought in two provisions related to the dissemination of information.

One, regulation 30, imposes a blanket prohibition on the publication of certain matter, and is wide-ranging in scope. It prohibits, for example, any comment on the activities of a proscribed organisation. This regulation does not appear to have been subjected to legal challenge. It has gone comparatively unnoticed, probably because it is, in parts, so impractical that in practice it is frequently ignored. It is a resurrection of a provision that existed in emergency regulations in former times. Its contents are worthy of note, however, and its text is reproduced in Annex A.

The second censorship regulation brought in with the 3rd May EMPPR is regulation 14, which received much more attention. On 10th May it was substituted by a new regulation 14. There was a successful legal challenge by the Sunday Leader, as a result of which it was amended by substitution on 1st July of yet a new regulation 14. Thereafter, on 4th September, regulation 14 was suspended[17] in view of the forthcoming October general election, and the suspension remained in force at the end of the year.

By the end of the year, therefore, the provisions in force affecting the dissemination of information were the Emergency (Prohibition on Publication and Transmission of Sensitive Military

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[16] See Sunila Abeysekara's case discussed *infra*.

[17] The Emergency (Temporary Suspension of Regulations) Regulation No 2 (sic) of 2000 published in Gazette Extraordinary 148/2 of 4th September 2000. The numbering is a mistake, it should be No 1 of 2000.

Information) Regulations No 1 of 1998 and regulation 30 of the Emergency (Miscellaneous Provisions and Powers) Regulations No 1 of 2000.

8.1 Sunila Abeysekera's case[18]

The Emergency (Prohibition on Publication and Transmission of Sensitive Military Information) Regulations were described in last year's report,[19] which also mentioned that they were under challenge at the end of the year. In May 2000 the case was dismissed and the regulation upheld. The judgment is a long and meticulous one, containing an exhaustive review of the law of freedom of speech and permissible restrictions.[20]

The crunch of the case was whether the formulation of at least some of the topics prohibited by the regulations was overbroad. The Court held that it was not, a controversial decision given the language used. The Court held, however, that a restricted interpretation would have to be given to the wording of the regulations: although in literal terms the regulations appeared to ban any reference to such matters as the conduct of members of the armed forces throughout the country, this must be considered in context, and limited to such members in the North and East.

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[18] SC Application No. 994/99, SC Minutes 15.05.2000.

[19] *Sri Lanka: State of Human Rights 1999* (Law & Society Trust, Colombo, 1999) p 60 et seq.

[20] See the chapter on "Review of Fundamental Rights Jurisprudence" for further discussion of this case.

8.2 Regulation 14

The EMPPR of 3rd May included a lengthy regulation 14 providing for censorship. Originally concerned primarily with the print media, on 10th May it was amended to bring television and radio broadcasting within its purview.[21]

Regulation 14 is once again a measure taken from 1989 and previous times. It provided that a Competent Authority (CA) may take measures for preventing or restricting the publication of matters prejudicial to the interests of national security, the preservation of public order or the maintenance of supplies or services essential to the community, or inciting or encouraging persons to mutiny, riot or civil commotion or to the breach of any law in force which in the view of the CA may be prejudicial to the preservation of public order or the maintenance of supplies and services essential to the community.

The regulation also provided that the CA may give directions for securing that documents, films, audio or video cassettes, news reports, editorials, articles, letters to the editor, cartoons or comments shall before publication or broadcast be submitted to him.

Contravention of such order is an offence and on conviction the President may direct that such person shall not publish any newspaper in Sri Lanka or operate any broadcasting station for a specified period.

Where an order has been contravened, the CA may, after issuing one or more warnings, order that no person shall be concerned in the printing of the newspaper or the operation of the broadcasting station in question for a specified period. The CA may alternatively order

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[21] Gazette Extraordinary 1, 131/20 of 10th May 2000.

the closure of the printing press or equipment used for the publication or broadcasting of such matter for a period to be specified.

Another provision enables the CA, if he feels that publication or broadcasting of prohibited matter has been or is likely to take place, to order that no person be involved in the publication of the newspaper or operation of broadcasting station in question. The order will remain operative against any other newspaper, the publication of which is a continuation of or substitution for the banned newspaper.

The CA may also order that the printing press or broadcasting station cannot be used for any other purpose whatsoever, and this may extend to all other printing presses owned by that person. To this end, the CA can take possession of printing presses or equipment or of any premises in which they are contained. Provision is made for appeal to an Advisory Committee and to the President.[22]

By Gazette notification of 6th May[23] it was stated that the President had appointed Ariya Rubasinghe, Director of Information, and on 8th May[24] Ariya Rubasinghe, Director of Information, and Sripathi Sooriarachchi, Attorney-at-Law, as Competent Authorities for the purpose of regulation 14.

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22 For a comprehensive study and critique of regulation 14, drawing on international standards and the jurisprudence of international tribunals and national courts of other countries, see the written comments submitted by Article XIX, Global Campaign for Freedom of Expression, in the Sunday Leader case. (Available at the Nadesan Centre library).

23 Gazette Extraordinary 1130/23 of 6th May 2000.

24 Gazette Extraordinary 1131/8 of 8th May 2000.

8.3 The Sunday Leader case[25]

At an early stage, the editor of the *Sunday Leader* had written to the CA asking for clarification regarding the scope of regulation 14, but received no reply. The *Sunday Leader* fell foul of the censor in respect of a photograph of a demonstration, a cartoon purporting to expose the bias of the censor,[26] and a whimsical story "War in Fantasyland" which was cast ironically in negative terms throughout (for example: "Palaly is not under attack") and was based on information that was already common knowledge. These events culminated in an order made by the CA, prohibiting Leader Publications (Pvt) Ltd., from publishing any newspaper, and using its press, for a period of six months. The petitioner filed a fundamental rights application in the Supreme Court seeking relief against this order.[27]

The *Sunday Leader* case did not reach the stage of considering any of the substantive provisions of the censorship contained in regulation 14. Its decision revolved on a preliminary question of whether the appointment of the CA had been valid. The issue may appear a technical one. However, it is important for all persons interested in the operation of emergency rule, as it raised some very basic issues concerning the Public Security Ordinance (PSO) and the delegation by Parliament of the regulation-making power to the President.

It must be recalled here that the PSO governs the making of emergency regulations by the President and is the legal basis on

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[25] SC Application No. 362/2000, SC Minutes 30.06.2000.

[26] A cartoon featuring the UNP was not censored; a similar cartoon featuring the PA was refused permission, the *Sunday Leader* published both side by side under the headline CENSOR EXPOSED.

[27] SC (F/R) 362/2000, SC Minutes 30.06.2000.

which emergency rule can take place. By this enactment, Parliament has delegated to the President power to make emergency regulations under certain circumstances, bypassing the normal legislative procedure. Section 6 of the PSO governs the sub-delegation of powers in regard to making of orders and rules in respect of emergency regulations, and states: "**Emergency Regulations** may provide for empowering such authorities or persons as may be specified in the regulations to make orders and rules for any of the purposes for which such regulations are authorized by this Ordinance to be made." (Emphasis added)

Although regulation 14 had copious references to, and conferred wide-ranging powers on, a CA, it contained no provision identifying the CA or laying down how he would be appointed. In other words, the President had failed to appoint or make provision to appoint a CA by regulation, as required by section 6 of the PSO.

The CA had been appointed by means of a gazette notification[28] made by the Secretary to the President stating that the President had appointed Ariya Rubasinghe, Director of Information, as Competent Authority for the purpose of regulation 14.[29]

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[28] Gazette Extraordinary 1130/23 of 6th May 2000.

[29] The heading of the notification was: The Emergency (Miscellaneous Provisions and Powers) Regulation No.1 of 2000 Appointment of Competent Authority under Regulation 14(1). There then followed: "It is hereby notified that in terms of Regulation 2 of Emergency (Miscellaneous Provisions and Powers) Regulation No.1 of 2000, read with Regulation 14(1) of that regulation, the President has appointed Mr Ariya Rubasinghe, Director of Information, to be the Competent Authority, for the purposes of the aforesaid regulation".

An attempt was made to rely on regulation 2(1),[30] which defined "Competent Authority," and the gazette notification purporting to make the appointment also referred to regulation 2(1). However, the Court held that this was merely a definition section and could not be regarded as substantive law. It cited a textbook on statutory interpretation, which said that:

> *It is a drafting error (less frequent now than formerly) to incorporate a substantive enactment in a definition. A definition is not expected to have operative effect as an independent enactment. If it is worded that way, the Courts will tend to construe it restrictively and confine it to the proper function of a definition.*

Thus held the Supreme Court,

> *If the definition of "Competent Authority" in regulation 2(1) was drafted with the intention of having a substantive effect it must be regarded as a drafting error and construed restrictively and confined to its limited function of a definition. Parliament has reposed trust and confidence in the President and since the President is authorized to make binding, general law through emergency regulations, all conditions imposed by Parliament, including those set out in section 6 of the*

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[30] The relevant part of regulation 2(1) is as follows:
"2. (1) In any emergency regulation, unless any other definition is expressly provided therein or unless it is expressly provided therein or the context otherwise requires ...
competent authority in relation to any emergency regulation means, unless otherwise provided for in such regulation, any person appointed by name, or by office, by the President to be a competent authority for the purpose of such regulation;"

Public Security Ordinance where Parliament has, in an exceptional instance, included a power of sub-delegation to authorities and persons selected by the President, must be strictly observed, especially since the rights and freedoms of citizens under the ordinary law may be disregarded.

Numerous other instances of emergency regulations conferring powers on Competent Authorities were referred to; in all of them either the CA was appointed by the regulation itself, or his appointment was specifically provided for by the regulation.

The application was thus allowed on this preliminary question being resolved in the petitioner's favour. The *Sunday Leader* resumed publication. The Tamil language newspaper *Uthayan* in Jaffna, which had also been closed by the CA, was an indirect beneficiary of this decision and also resumed publication.[31]

8.4 The new regulation 14

The defect in regulation 14 was set right by a prompt amendment substituting a new regulation 14,[32] which empowered the President to appoint a Competent Authority. The new regulation 14, however, also brought in several other changes, among them the incorporation of certain parts of the Emergency (Prohibition on Publication and Transmission of Sensitive Military Information) Regulations of 1998. The new regulation 14:

1. Provided an enabling regulation to appoint a CA.

2. Did away with pre-censorship (but see No 10 below).

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31 See the chapter on "Review of Fundamental Rights Jurisprudence" for further discussion of this case.

32 Gazette Extraordinary 1138/34 of 1st July 2000.

3. Prohibited publication of material in or outside Sri Lanka pertaining to:

   (a) Any operation carried out or proposed to be carried out by the armed forces/police including STF

   Procurement or proposed procurement of arms or supplies

   Deployment of troops/personnel/equipment including aircraft, naval vessels

   Statements pertaining to the official conduct or performance of the head or any member of the armed forces or police, which affect the morale of the members of such forces

   (b) Material which would or might in the opinion of the CA be prejudicial to national security, preservation of public order, maintenance of supplies and services essential to the life of the community, or encouraging persons to mutiny, riot or civil commotion, or to commit the breach of any law.

4. Contravention of the above enables the CA to prohibit publication or broadcast for a specified period or until the regulation ceases to be in force

5. Contravention is an offence

6. The President can suspend direction of the CA

7. An aggrieved party can appeal to the Advisory Committee

8. In any case when CA makes order, he must inform the subject that they can appeal to the President and also to the Advisory Committee

9. The Advisory Committee sends its report to the President who may revoke or vary the CA's order

10. The CA may from time to time issue guidelines which he will take into consideration in the exercise or discharge of his functions under the regulation.

A full analysis of this regulation is not attempted here but the following aspects are worthy of note:

- Procurement or proposed procurement of arms and supplies has once again been brought within the prohibited matters; a provision which existed some time earlier but had been dropped. This is a serious matter given that accusations of corruption in this sphere are rife.

- The re-wording of the prohibition of statements on the conduct of the armed forces and police is narrower, and to that extent is to be welcomed. Previously all such statements were prohibited; now only those which affect morale are prohibited.

- The provision that to publish anything which "would or might in the opinion of the Competent Authority be prejudicial to the interests of national security" etc., is an offence is a very strange formulation, but that is the meaning of 14(2)(a) read with 14(4).

The HRC issued a review of the regulation in which it stressed the rule that restrictions on freedom of expression should only be to the extent strictly required by the exigencies of the circumstances. It also said:

> *The restrictions on material pertaining to the procurement of weapons and statements on the performance of the armed forces should be formulated in a manner that does not preclude the media from raising issues of public accountability that are in the national interest.*

The comments of the HRC, which constitute a useful critique of the regulations, are reproduced in Annex B.

It may also be noted that although regulation 14 provides for an Advisory Committee to hear objections and make recommendations to the President, there is no provision designed to ensure the Advisory Committee's independence and objectivity, and to stipulate a time frame for submitting recommendations. This is one of the many criticisms that can be levelled at the regulation.

On 4th September the operation of the new (July) regulation 14 was suspended, along with regulation 12(1) relating to public processions and meetings, in view of the forthcoming general election. These regulations remained in suspension at the end of the year.

9. Other Provisions Added in May 2000

A large number of other provisions were added in the version of the EMPPRs brought into being on 3rd May 2000. Most of these were not innovations but have been resurrected from earlier

versions of the regulations. In fact, the new regulations are in the main a reproduction of the 1989 regulations, with some changes. As a result, many provisions, including offences, have been added which were absent from the regulations during the preceding five years. Constraints of space preclude a full description and analysis of the changes here; the following listing gives a general idea of their nature and scope, with occasional observations added.

The additions include the following.

- Provisions relating to the acquisition and requisition of property and requisitioning of personal services (regulation 8).

- Taking into possession of buildings and premises used in connection with an offence (in certain circumstances may be forfeited to the State) (regulation 8A).

- Requisitioning of vehicles (regulation 9).

- Requisitioning of personal services (regulation 10). On conviction for non-compliance, in addition to penalty imposed by Court, all the person's property is forfeited to the state, and any alienation of his property effected **after the date of the coming into force of this regulation** (note implications, not after date of commission of offence) is null and void. No provision is made to protect rights of innocent third parties. (Emphasis added)

- Restricted entry to places used for the maintenance of essential services [regulation 11(1)].

- Provision for prohibition of meetings and processions (regulation 12). This regulation was suspended on 4th September 2000, which suspension remained in force at the end of the year.[33]

- Endeavouring to cause disaffection an offence (regulation 25).

- Sedition and incitement to an offence (regulation 26). Encompasses a wide range of acts including incitement of feeling of disaffection to the President, the Government, the Constitution, and the administration of justice.

- Advocating directly or indirectly the overthrow of the government other than by lawful means an offence (regulation 27).

- Spreading rumours or false statements likely to cause public alarm or disorder an offence (regulation 29). (In the 1980s this was used to charge the President of a Citizen's Committee who sought information about missing youths; he was acquitted after a gruelling trial).

- Prohibition of publication of a wide-ranging list of topics; an impractical and overbroad regulation - see above under "Censorship (regulation 30)."

- Taking certain photographs without official permission an offence (regulation 30A).

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[33] Emergency (Temporary Suspension of Regulations) Regulation No 2 (sic) of 2000 published in Gazette Extraordinary 1148/2 of 4th September 2000. The numbering is an error, it should be No 1 of 2000.

- Possession of certain maps etc., without lawful authority an offence (regulation 32).

- Possession of subversive literature an offence (regulation 33).

- Training in use of or collection of arms an offence (regulation 34).

- Wearing or possessing police or armed forces uniform etc., an offence (regulation 35).

- Forfeiture of all property movable or immovable is added as a punishment to possession of gun, offensive weapon or offensive substance, and death or life imprisonment is substituted for the earlier sentence of death or five to twenty years' imprisonment (regulation 36).

- Throwing things at railway or vehicle on road an offence (regulation 37).

- Pointing of loaded or unloaded guns at persons without lawful authority an offence (regulation 38).

- Conducting oneself in an intimidatory fashion in or near a house or place where another person is an offence (regulation 39).

- Obstructing or damaging public road, bridge, culvert, railway, public road transport vehicle an offence (regulation 42).

- Travel on railway or public road transport vehicle without a ticket, obstructing working of railway or public vehicle or postal services, an offence (regulation 43).

- Offences relating to telegraph, postal, telecommunication or broadcasting services, including possessing certain instruments and equipment in premises used for Government telephone services (regulation 44).

- Offences relating to death threats. These include possessing, printing, publishing or distributing any statement or picture constituting a threat of death or bodily harm; by threats endeavouring to induce a person to resign from a political party, trade union or office; or to induce a person engaged in essential service to act in breach of duty. The offence is ***punishable by a mandatory death sentence.*** Furthermore, ***a confession to whomsoever and in whatsoever circumstances made*** is admissible; the circumstances (example: torture) can go to minimising weight but will not exclude the confession. This provision has its origin in a special regulation made in November 1988 in the very different context of the JVP insurgency of that time, when such death threats were an important element of the political scene.[34] The next year, the regulation was incorporated into the Emergency (Miscellaneous Provisions and Powers) Regulations No 1 of 1989 from where, over a decade later, apparently by mindless copying, it finds its way into the regulations of the year 2000. (Emphasis added)

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[34] The Emergency (Prevention of Threat of Death) Regulations No 1 of 1988 published in Gazette Extraordinary 531/6 of 9th November 1988. The Civil Rights Movement at the time criticised the over- harshness of some of its provisions. New Regulations on dead bodies and death threats: CRM statement E01/11/88 of 19th November 1988.

- Section 306(2) of the Criminal Procedure Code (relating to conditional discharge) made inapplicable to any person convicted of an offence under an emergency regulation [regulation 48(3)].

- Any document etc., found in possession of any person suspected to be concerned in an offence under an emergency regulation shall be relevant in any proceedings against such person, and the contents shall be admitted in evidence against such person without proof thereof (regulation 51).

- A police officer or other person duly authorised under the emergency regulations to investigate an offence may take a person held in custody from place to place for the purpose of such investigation. This may be contrasted with the earlier provision which enabled a police officer or a member of the armed forces to take back a person from judicial custody for a period **not exceeding 48 hours** with the **written permission** of a Deputy Inspector General of Police and **after notifying the Magistrate** [former regulation 38 (a) (ii)]. Now there is no permission written or otherwise from a higher authority needed, no limit specified on the duration the person may be taken out of judicial custody and no notification to the magistrate required. [(regulation 52 (a) (i))]. (Emphasis added)

- In reproducing the provision that a person under investigation must deliver to the investigating officer on request any article, document or other thing in his possession, a very important element has been **omitted.** Earlier it was provided that "**A receipt shall be issued** whenever any article or other thing is so taken by a police

officer or authorized person". [(Former regulation 38 (c)]. Comparison of the texts reveals that this basic requirement of issuing a receipt is now unaccountably missing [(regulation 52 (c))]. (Emphasis added)

- The powers of a police officer under any emergency regulation may be exercised by any person authorised by the President in that behalf. This is a far-reaching provision that seems to have escaped general notice. There is no requirement that the authorisation be in writing or that it be notified by Gazette or otherwise [(regulation 55 (2))].

- Members of armed forces driving vehicles exempt from certain laws in certain circumstances (regulation 67).

- President empowered to proscribe an organisation where she "is of the opinion that there is a danger" of it acting or being utilised by its members for purposes prejudicial to national security etc. This provision is in addition to the power to ban organisations in connection with essential services. Drastic consequences follow. There is no provision for the organisation to appeal against the proscription and seek to demonstrate that the President's fears are based on misinformation or otherwise unfounded; it commits an offence even if it calls a committee meeting to make such representations. This regulation was found in the EMPPR of June 1989 but was repealed within less than a year;[35] ten years later sees its resurrection (regulation 68).

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[35] Gazette Extraordinary 579/9 of 15th February 1990.

- Person rendering or receiving a request for medical assistance from a person injured by firearm or bomb must record particulars of identity of injured person and inform the nearest police station forthwith (regulation 69).

So far, we have been dealing with changes and additions brought in by the Emergency (Miscellaneous Provisions and Powers) Regulations No 1 of 3rd May 2000. Quite apart from these, in the course of the year 2000 separate emergency regulations were made on various topics, and there were judicial decisions on other issues.

10. Restrictions on Use of Electricity

In view of an anticipated power shortage due to the drying up of the hydro-power reservoirs, the government resorted to the use of emergency powers for the curtailment of consumption of electricity from the national grid. The President made an emergency regulation titled Emergency (Restriction on Use of Consumption of Electricity) Regulations No. 1 of 2000.[36]

The first part of this regulation prohibited use of power from the national grid for purposes such as the lighting of fairgrounds, floodlighting of buildings, lighting of shop windows and the like, and also for the operation of air-conditioners. There was nothing unusual in this prohibition which had been introduced from time to time in past years to meet a similar situation.

This year, however, the regulation had an additional provision. Regulation 6 provided as follows:

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[36] Gazette Extraordinary 1134/21 of 31st May 2000.

6(a) Every person who consumes electricity shall reduce his monthly electricity consumption by twenty per centum of his average monthly consumption.

(b) Every person who fails to comply with this regulation shall be liable to a surcharge amounting to twenty-five per centum of the amount of his monthly electricity bill.

For the purpose of this regulation, "average monthly consumption" of a person shall be the average of his electricity consumption for the months of March, April and May 2000.

10.1 The legal challenge[37]

An electricity consumer Lilanthi de Silva complained that the above regulation was *ultra vires* the PSO and infringed her fundamental right to equality under Article 12(1) of the Constitution.

Mandatory reduction in electricity consumption and/or a surcharge on excessive consumption were legitimate measures "for the maintenance of supplies and services essential to the life of the community," and for which the PSO could be resorted to for the making of emergency regulations. However, the matter in issue here was whether the basis of such reduction and/or surcharge was arbitrary and unfair to the extent that it infringed Article 12(1) of the Constitution.

The petitioner challenged regulation 6 on two grounds. Firstly, on the basis that it had failed to take into account that as at June

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[37] SC Application No. 428/2000, SC Minutes, 25th September 2000.

2000, all consumers of electricity could not be treated as being similarly circumstanced. Secondly, that the surcharge itself treated unequals equally, because consumers who had curtailed consumption and those who had not were liable to an identical surcharge of 25% of the total consumption, and not just on the excess.

In support of the first ground, the situation could be looked at from two viewpoints. The first was that the impugned regulation failed to take into account the different categories of consumers who existed as at June 2000, namely, public spirited consumers who, in response to the power crisis which was anticipated in January, had voluntarily reduced their consumption in March-May; other consumers who would have been indifferent; and even some anti-social consumers who might have increased their consumption. The petitioner argued that whether consumers had reduced their consumption or not would have been readily ascertainable from the records of the Ceylon Electricity Board (2nd respondent). Hence, to compel a uniform 20% reduction by reference to the average March-May consumption imposed a greater burden on public-spirited and conservation-minded consumers than on others.

The second viewpoint was that consumers fell into two categories: a large number who by necessity or choice used electricity sparingly for essential purposes only and, therefore, consumed little, and others – the more affluent – who used electricity more lavishly, and for non-essential purposes as well. Therefore, the mandatory reduction and surcharge operated unequally on these two categories because the former would have to curtail essentials while the latter would only have to cut down on "luxuries." The failure to recognise to any degree the special needs of the former was unfair and arbitrary.

In regard to the levying of the surcharge, the matter was illustrated in terms of a consumer who reduced monthly consumption from 800 units to 650 units, another who maintained consumption at 650 units, and a third who increased consumption from 500 to 650 units. According to regulation 6(b), all three consumers would be liable to an identical surcharge of 25% on the monthly consumption of 650 units. Consumers who curtailed consumption as well as those who did not were treated equally, thus treating unequals equally. Counsel for the respondents was unable suggest a basis to justify regulation 6. His only submission was that it was enacted to achieve a lawful and desirable objective of conserving electricity.

The Court pointed out that however legitimate and proper the objective, the means selected was in violation of Article 12(1) of the Constitution and was not a reasonable exercise of the power conferred by the PSO. The Court held that regulation 6 was *ultra vires* and in violation of the petitioner's fundamental rights guaranteed under Article 12(1), and awarded her Rs 3000 as costs payable by the 2nd respondent.

11. The Prohibited Zones Case[38]

An emergency regulation made in 1995[39] declared certain maritime areas in the northern and eastern parts of Sri Lanka as prohibited zones. Permission to enter the "prohibited zones" could be granted by the Additional Secretary of the Ministry of Defence (2nd respondent) under the supervision of the Defence Secretary (1st respondent), on the recommendations of either the

[38] SC Application No. 312/99, SC Minutes 28.01.2001.

[39] The Emergency (Establishment of a Prohibited Zone) Regulation No. 4 of 1995 published in the Gazette Extraordinary No 867/11 of 20th April 1995.

Commander of the Navy, the Commander of the Northern Naval Area, or the Commander of the Eastern Naval Area - 3rd, 4th and 5th respondents, respectively - who were appointed as Competent Authorities for the purpose of this regulation.

The petitioner, a company by the name of Liverpool Navigation (Pvt) Limited, complained of a violation of its fundamental right to equality guaranteed by Article 12(1) of the Constitution, by the 1st to the 5th respondents, by their failure or refusal to grant security clearance for the petitioner's vessel to ply from Colombo to Jaffna (located in the prohibited zone).

About 18 days after the petitioner-company had applied for security clearance, the chairman of the company, Mr Sathasivam Vincendrarajan, had been arrested by the Criminal Investigations Department and detained for further investigations, on account of being suspected, *inter alia*, of having links with the LTTE. Mr Vincendrarajan complained to Court[40] regarding his arrest and detention, and sought by way of interim relief, release from detention subject to appropriate restrictions on his movements. The Court took the view that the evidence against the petitioner did not justify detaining him, and granted him the interim relief he sought, pending the conclusion of investigations.

Following the arrest of the chairman, there had been a change of the directorate of the petitioner-company. This included, *inter alia*, the deletion of the names of the chairman and his wife from the list of directors, and the appointment of Mrs K.L.R. Tennakoon (wife of a Deputy Minister), a former director of the company, as its chairperson and managing director. The petitioner attempted

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[40] SC Application No 7/99.

to explain the numerous changes to the directorate as mere commercial decisions taken in the best interest of the company. However, the Court was of the view that the respondents had been entitled to view the changes with suspicion, as they appeared to be a mere facade to obtain security clearance.

Investigations into the alleged involvement of Mr Vincendrarajan in large scale transfer of foreign currency from Sri Lanka by dubious means and its possible utilisation for the purchase of arms and ammunition for the LTTE were not complete. Furthermore, vital information had been suppressed relating to the fact that Mr Vincendrarajan and his wife had signed the charter party on behalf of the foreign company that owned the vessel, while being the chairman and director, respectively, of the local company that chartered the vessel. The Court inferred from this that the entire transaction was a sham.

The petitioner tried to rely on the findings of the Court in the case filed by Mr Vincendrarajan against his arrest and detention, to support its request for security clearance for its vessel to enter the "prohibited zone." However, the Court pointed out that different considerations apply when resolving issues relating to national security, and referred to both local and foreign cases where the courts had explained their reluctance to interfere with the discretion of the executive in matters concerning national security.

The Court pointed out that in regard to the present matter, the paramount consideration in granting security clearance to the vessel was whether it would in any way undermine the security of the state specially, in regard to the transport of certain prohibited items to the North and East. Taking into account all the circumstances of the case, the Court found no justification for interfering with the decision of the respondents not to grant

permission to the vessel of the petitioner-company to sail to the North.

12. The National Security Council and the Joint Operations Headquarters

Last year we pointed out changes in the above regulations and said that the background "appeared to be conflict or confusion as to the chain of command, and the control of and responsibility for security affairs."

This uncertainty continued into the year 2000, when the Emergency (Joint Operations Headquarters) Regulations No 1 of 1999 were rescinded, and replaced by the Emergency (National Security Council) Regulations No 1 of 2000.[41] The latter are identical in terms with the Emergency (National Security Council) Regulations No 1 of 1999. Once again, General Daluwatte was appointed as Chief of Defence Staff Joint Operations.[42]

13. Provisions Relating to Surrendees

The provisions relating to surrendees remained unchanged. We have previously drawn attention to the extremely unsatisfactory nature of these provisions.[43] These regulations became relevant in gruesome circumstances when over 26 inmates of a rehabilitation camp in Bindunuwewa, many of whom were surrendees, were massacred in October.

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41 Published in Gazette Extraordinary 1128/9 of 21st April 2000.

42 For a description of the two disparate bodies see *Sri Lanka: State of Human Rights 1999* (Law & Society Trust, Colombo, 1999) p 62-63.

43 For a critical account of the emergency regulations relating to surrendees see (a) *Sri Lanka: State of Human Rights 1997* (Law & Society Trust, Colombo, 1997) (b) Detention in the Context of Rehabilitation and Surrender - a CRM briefing paper; CRM document E03A/11/2000.

14. Curfew Orders

Curfew orders during the course of the year were made operative in the Colombo and Dehiwala - Mt. Lavinia Municipal Council areas from 11.55 pm on 6th January till 2 pm the next day following a suicide bomb explosion in Flower Road, Colombo 7; in areas North of Colombo (Kolonnawa of the Colombo District and Kelaniya, Biyagama, Wattala, Ja-Ela, Kandana, Negombo, Katana and Diwulapitiya of the Gampaha District) on 22nd January from 4 am till 2 pm in connection with a surprise cordon and search operation; on a series of days at end October/ early November in the Nuwara Eliya and Badulla Districts in the aftermath of violence in the hill country following the massacre of Tamil inmates of the Bindunuwewa Rehabilitation camp; and island-wide from 10 pm on 11th October till 5 am the next day as a precautionary measure after the General Election.

15. Other Regulations

Other regulations made during the course of the year related to:

- the rescinding of the Emergency (Civil Affairs) Regulations No 1 of 1999;[44]

- the extension of terms of office of local authorities;[45]

- the granting of financial relief to employees in the private sector;[46]

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[44] Gazette Extraordinary 1114/11 of 13th January 2000.

[45] Emergency (Term of Office of Local Authorities) Regulations No 1 of 2000 published in Gazette Extraordinary 1117/17 of 2nd February 2000.

[46] Emergency (Additional Allowance to Private Sector Employees) Regulations No1 of 2000 published in Gazette Extraordinary 1143/9 of 31st July 2000.

- extension of the operation of the Registration of Deaths (Temporary Provisions) Act.[47]

16. Conclusion

The wide-ranging changes brought about by the virtual resurrection of the 1989 EMPPR were not carefully thought out. There are several obsolete and inappropriate provisions. Many of the regulations are unduly harsh, especially those relating to arrest and detention. The absence of provision for bail is particularly inexcusable.

It must be remembered that this chapter only describes developments during the year 2000. Although not many other new regulations were made during the period under review, there are numerous regulations made in preceding years that remain in force. Complaints by civil rights groups that there is no official indexing or listing of emergency regulations remain unaddressed. The "compilation and publication of a consolidated version of all current emergency regulations to promote public awareness" promised by the Sri Lanka Government at the meeting of the Human Rights Commission of the United Nations in March 1993 appears long forgotten.

Access to emergency regulations remains a problem; gazettes are printed and distributed late, and subscribers do not receive every issue. It was heartening to note, in this context, that the Sunila Abeysekera judgment emphasised that accessibility is a necessary component of valid law, reinforcing our oft-repeated warning that emergency regulations that are not accessible run

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[47] Gazette Extraordinary 1159/41 of 24th November 2000.

the risk of being struck down. Towards the end of the year, the state-controlled Daily News started to publish contemporaneously, as an insert to its issue each Friday, Part I Section (IIA) of the Gazette, which carries advertisements of interest to the public. This demonstrates that our repeated demand that emergency regulations be promptly reproduced in the daily press could easily be acceded to, if only there was a will.

Annex – A

Regulation 30 of the new Emergency (Miscellaneous Provisions and Powers) Regulations of 3rd May 2000

Printing or publishing certain types of documents

Any person who prints or publishes any document recording or giving information or commenting about, or any pictorial representation, photograph or cinematograph film of any of the following matters:

(a) the activities of any organization proscribed under these regulations;

(b) any matter relating to the investigations carried on by the Government into the terrorist movement;

(c) the disposition, condition, movement or operations of the Police, Sri Lanka Army, Sri Lanka Navy and Sri Lanka Air Force;

(d) any matter pertaining to the defence and the security of Sri Lanka;

(e) any matter likely, directly or indirectly to create communal tension, shall be guilty of an offence.

Annex – B

Comments of the human rights commission on the amendments to the emergency "Miscellaneous Provisions and Powers" regulation

Derogation (temporary suspension) from the guarantee of free expression during periods of public emergency has to be in conformity with the international legal obligations of Sri Lanka. Those obligations are spelt out in Article 4 of the International Covenant on Civil and Political Rights (ICCPR). While this provides for derogation, under Article 19 of the ICCPR relating to freedom of expression, one of the important conditions stipulated is that any derogation imposed has to be only to the extent strictly required by the exigencies of the situation. In other words, there has to be a distinct nexus between the threat to public security and derogation (such as censorship).

The Johannesburg Principles on National Security, Freedom of Expression and Access to Information (which are not legally binding but have wide international acceptance) expand on the requirements laid down in Article 4 of the ICCPR. According to Principle 3, prior censorship is permitted only during periods of public emergency and is subject to the requirements laid out in the ICCPR.

The Government's proposals for constitutional reform (October 1997) has a separate article on derogation in times of public emergency which in effect reiterates the obligations under Articles 4 and 19 of the ICCPR. It states that measures prescribed by law derogating from the exercise and operation of the fundamental rights should be to the extent **strictly required** by the exigencies of the situation and necessary in a democratic society.

Therefore, Emergency Regulations and directions pertaining to censorship during a public emergency have to be very specific and narrowly defined. Authorities have to justify the extent of censorship by establishing that it is strictly required by the exigencies of the situation. Arguably, in a war situation the extent of censorship that is legally permissible varies, inter alia, according to the nature and intensity of combat and the date of occurrence of the events that are covered. For example, the guidelines issued by the Pentagon during the Gulf War stated that reports on major battle damage or personnel losses should not be reported until "that information no longer provides tactical advantage to the enemy and is, therefore, released by the state (CENTOM)." What is considered to be the exigencies of the situation will have to be clearly elaborated by the authorities. In other words, the onus of the providing the necessity and the legality of the censorship lies with the government.

The directions under Emergency Regulation 14 (Gazette No.1.131/20 of 10/5/2000) which imposed news censorship were couched in language that was over broad and vague. Regulation 14 promulgated on 1/7/2000 attempts to correct some of the deficiencies in the earlier Regulation 14 dated 10/5/2000.

The new regulations have imposed restrictions of two types.

In Regulation 14.2.a the restricted material pertains to military and security operations carried out by the armed forces and police including the special task force and broadly satisfy the criteria of specificity and the nexus that should exist between the exigencies of the situation and the censorship that is being imposed. It covers:

- Deployment of troops
- Deployment and use of equipment including air craft and naval vessels
- The procurement of weapons
- Any statements pertaining to the performance of the head or members of the armed force which affects the moral of the armed forces.

These restrictions could be further amplified to provide more detailed guidelines as in those that were issued by the Pentagon during the Gulf War to ensure that the censorship is restricted only to the material which may provide information that may adversely affect the conduct of the military operation and do not include other information about the war which the public have a right to receive. The restriction covering police operations as included in the Regulation is too broad as presently formulated and will extend to operations that may have no connection to the emergency situation. **The restrictions on material pertaining to procurement of weapons and statements on the performance of the armed forces should be formulated in a manner that does not preclude the media from raising issues of public accountability that are in the national interest.**

In contrast to regulation 14.2.a Emergency Regulation 14.2.b retains the generality and vagueness of language of the previous regulations. Under this part, censorship may be imposed on the grounds of "prejudice to the interest of national security or the preservation of public order or the maintenance of supplies and services essential to life of the community." Such language, which confers extensive discretion on the competent authority, is in violation of Article 4 of the ICCPR. The regulation, it can be argued, is also unconstitutional in the light of the Supreme Court

judgement in Joseph Perera Vs. A.G (1992) SLR 199 which required proof of a rational nexus between an Emergency Regulation and the objective sought to be achieved by the government. In the submission made to the Supreme Court by Article 19 – the global organisation concerned with freedom of speech – attention is drawn to a wide range of Superior Court judgements from several countries that have ruled against laws of censorship which are too widely expressed, too unclear as to its limitations and too intimidating, because no one could be sure whether what he may write, would or would not attract the penalties prescribed for contravention of the regulations. These criteria have special bearing on the present situation where pre-censorship has been lifted. More specific guidelines are required in regard to the restrictions imposed on the ground that the material is "prejudicial to the interest of national security, preservation of public order or maintenance of essential supplies and services." An example of a justifiable restriction would be any information on the security arrangements for key installations providing essential services.

Censorship should not be imposed with regard to any violations of human rights and humanitarian laws. During a duly proclaimed period of public emergency, emergency regulations supersede normal laws, Consequently, they have a great impact on the lives, especially on the rights of people. The drafting of emergency regulations and directives must be done with utmost care so as to minimise the negative impact on human rights while also achieving the legitimate objectives of the State. The need for professionalism and meticulous attention to detail is acutely felt in this respect.

The authority that is appointed to implement oversee censorship should ideally consist of a body of persons as opposed to a single individual. Such a body should include a person with military knowledge as well as a senior journalist. Such a collective body would to a great extent reduce the risk of subjective and abusive exercise of power and establish the right relationship between the censorship authority and the media.

Faisz Musthapha, P.C,
Chairman
Human Rights Commission of Sri Lanka.

IV

The Phenomenon of Disappearances In Sri Lanka*

*M.C.M. Iqbal*** *

1. Introduction

Since independence, emergency powers have been repeatedly invoked in Sri Lanka. Although the stated objective of imposing emergency rule is the maintenance of law and order, emergency powers have often enabled the police and the security forces to act with scant regard for the law, or for the fundamental rights of individuals. Indeed, at times, emergency regulations have facilitated gross violations of human rights by the police and the security forces, including causing the disappearances of tens of thousands of persons held in the custody of the police or the security forces. The requirement under the 1978 Constitution for

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* Some information in this chapter is based on the writer's personal knowledge.

* * Consultant, Law & Society Trust, Colombo.

the declaration of a state of emergency to be debated and approved by Parliament every month has not inhibited the continuance of emergency rule.

This chapter reviews the recent history of disappearances in Sri Lanka, being the first time that a separate chapter devoted to this subject has been included in a *Sri Lanka: State of Human Rights* report. It draws particularly on the findings of the zonal Presidential Commissions of Inquiry into Disappearances that were established by President Kumaratunga in November 1998, and also reviews the other institutions set up by both the present and previous governments as an ostensible means of curbing disappearances. Information relating to reported disappearances in 2000 is also included. However, it needs to be emphasised at the outset that no official institution other than the infamous Board of Investigation into Disappearances in Jaffna consisting of Defence Ministry officials has been empowered to date to investigate the many hundreds of disappearances which were reported in the North and East prior to 1st January 1998, in the context of civil strife in this area. Thus, whereas the scale and pattern of disappearances which occurred in the South during and after the period of the Janatha Vimukthi Peramuna (JVP) uprising, and in the North and East since 1988, have now at least received some degree of official recognition, the same cannot be said for those disappearances which occurred in the North and East in earlier years.

Over the years, the rate at which people have disappeared has peaked at certain times, often in response to acts of violence against the State and in the context of a rigorous imposition of emergency rule. Landmark events in Sri Lanka's history of disappearances include: the JVP uprising of 1971; the increased militancy of Tamil youth following the communal riots of 1983; the signing of the Indo-Lanka Accord in 1987 after which the

JVP started disrupting civil administration in the South; the presidential and parliamentary elections of 1989 and 1990, followed by the breakdown of the peace talks between the Government and the LTTE in June 1990; and the suicide bomb attack on Major General Hapangama, the Army Commander in charge of the Jaffna Town in July 1996.

In 1989 and 1990, when parliamentary and presidential elections were held during the JVP insurgency, the rate of disappearances reached particularly alarming levels. The provisions of the Prevention of Terrorism Act No. 48 of 1979 (PTA) and the Emergency Regulations (ER) promulgated under section 5 of the Public Security Ordinance No. 25 of 1947 (PSO), gave the police and security forces wide powers of arrest and detention, and enabled detainees to be held *incommunicado* for long periods of time. In addition, the emergency regulations were in force at times which permitted the security forces and the police to dispose of bodies without post-mortem examinations or inquests. This facilitated the cover up of deliberate and unlawful killings of those in custody or otherwise, and the perpetration of torture and disappearance with impunity by the police and the armed forces. Many of the tens of thousands of people who disappeared at this time had been detained under the provisions of the PTA and the ER; others were simply abducted on mere suspicion without reference to any legal provision whatever. Article 15(7) of the Constitution of Sri Lanka, however, provides for the restriction of rights declared and recognised in Articles 12, 13(1), 13(2) and 14:

> *in the interest of national security, public order and the protection of public health and morality or for the purpose of securing due recognition and respect for the rights and freedoms of other ..... for the general welfare of a democratic society.*

Most victims of disappearance have been young men, detained in the context of armed opposition against the State by Tamil separatist groups in the North and East, and by members of the predominantly Sinhala JVP in the South. At times when the police and security forces were able to commit gross violations of human rights with impunity, leading to many thousands of disappearances, so too were other unscrupulous people able to settle personal and political grievances by passing false information to the police and the security forces in the hope that their rivals would be disposed of. Sri Lanka became notorious internationally during this period for its violations of human rights. According to the United Nations Working Group on Enforced and Involuntary Disappearances, Sri Lanka ranked second only to Iraq for the number of disappearance cases reported to the Working Group.[1]

2. The Modus Operandi of Causing Disappearances.

The *modus operandi* of causing disappearances has changed over time in Sri Lanka, and the rate of reported disappearances increased rapidly in the late 1980s. Between 1984 and mid-1987, Amnesty International (AI) recorded over 680 disappearances in the North and East of people who had been detained by police or security forces, as the Tamil separatist groups gained strength in the wake of the 1983 communal riots. From mid-1987 to March 1990, the Indian Peace Keeping Force (IPKF) was responsible for the North and East under the terms of the 1987 Indo-Sri Lanka Accord, and during this period AI recorded 43 disappearances for which the IPKF was believed to be responsible.[2] These cases

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1 See "Integrity of the Person" in *Sri Lanka: State of Human Rights 2000* (Law & Society Trust, Colombo, 1999), n 16.

2 Amnesty International, "Sri Lanka: Disappearances and murder as techniques of counter-insurgency" in *Disappearances and Political Killings* (Amsterdam, 1994), p. 26.

involved mostly young men who had been arrested by uniformed members of the security forces in front of witnesses, but who were never seen again. The forces involved denied holding the prisoner and relatives were unable to establish their whereabouts. At times, large groups of young men were arrested together, and simply disappeared.[3]

After the IPKF arrived in the North and East in 1987, the Sri Lankan security forces moved to the South, where the JVP was mobilising against the Indo-Sri Lanka Accord. The JVP began to target for assassination, members of the ruling party, leftist parties which supported the Accord, members of the security forces and others. As their campaign grew in strength, they used terror tactics to enforce widespread strikes and stoppages of work. In this context, the security forces' response was to use tactics of counter terror; a massive rise in the numbers of extrajudicial killings and disappearances followed, including abductions and killings attributed to vigilante 'death squads' outside governmental control, which in some cases were subsequently found to have connections with the police or other security forces.[4]

By June 1990, when hostilities between the LTTE and government forces resumed in the East, the JVP had effectively been crushed in the South. The Sri Lankan security forces returned to the North and East, taking the tactics of widespread killings and disappearances utilised in the South back with them. Amnesty International estimated that some 3,000 people disappeared in the East in the initial months of resumed fighting there.

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3 *Ibid*

4 *Ibid.* p. 27.

The ways in which persons were removed involuntarily and subsequently made to disappear in the late 1980s/early 1990s are given succinctly in Interim Report II of the Presidential Commission on Involuntary Removal or Disappearance of Persons in the Central, North Western, North Central and Uva Provinces, referred to as the Central Zone Commission.[5] Extracts from these findings, which relate to cases that the Commission had investigated, are set out below:

a. That persons have been involuntarily removed either from their homes, at round ups, at checkpoints or at random sites, by police personnel, members of the armed forces or others, not identified.

b. In some cases, lists of persons appear to have been given by some politicians of the area. In most other cases, the evidence reveals that the persons involuntarily removed were either Sri Lanka Freedom Party (SLFP) organisers or active supporters of the SLFP. It seems clear that political opponents of the then regime had been eliminated under the guise of crushing the JVP.

   The very large number of killings and disappearances that took place during the latter part of the 1980s and the early 1990s points to the fact that the removals and killings were with the knowledge and tacit approval of those in power at that time.

   An analysis of the removals and killings shows a marked increase from the day of the nominations for the Presidential Election in 1988 and continued in the

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[5] *vide* at p. 3 of the Report

manner until the general elections and thereafter. The security personnel who until then had dealt with the JVP problem in a fair manner were goaded into indiscriminate removals and killings, after an alleged ultimatum purported to have been issued by the JVP, that unless the service personnel deserted their posts, members of their families would be killed. It is probable that this ploy was adopted by the then government to prod the security forces to crush their political opponents.

c. In almost every case the persons removed had been taken away on the pretext that they had to be questioned and their statements recorded.

d. In most of such cases the police stations or the army camps of the area had subsequently denied having removed such persons, in spite of some of the witnesses having identified the persons who had participated in such removals.

e. In some cases, persons so removed had been seen in custody at police stations and at army detention camps, either by the complainants or by other persons whose evidence was made available to the Commission. No entries of arrest or detention appears to have been made in any of the books or registers maintained by the police or security forces in the case of persons who are alleged to have disappeared.

f. When persons went to the police station to complain about the removals they were usually driven away and their complaints were not recorded. In the cases where the complaints had been recorded, what was stated by the complainants had been recorded with distortions.

g. A surprising feature is that complaints of abductions in most cases had been entered in the Minor Offences Information Book of the police station. Abduction with intent to kill is punishable under the Penal Code with rigorous imprisonment up to 20 years and a fine. The Officers-in-Charge of police stations concerned and their superiors should be held responsible for this default.

h. There had been cases where the Police Headquarters had issued letters denying that certain persons had ever been taken to custody, when there were witnesses who had seen them in custody at the police stations.

i. Personal rivalries account for the removals and killings in some cases.

3. Efforts to Check Disappearances

Under pressure from the international human rights community for the scale of gross violations committed in the country, the Government began to respond in the early 1990s with the establishment of new human rights mechanisms. First, in late 1989 when the height of the JVP insurgency was over, it granted access to Sri Lanka to the International Committee of the Red Cross (ICRC), which started to visit detainees held in police and military custody; it then invited the UN Working Group on Enforced or Involuntary Disappearances and the UN Special Rapporteur on Summary or Arbitrary Executions to visit the country.[6] Then, in 1991 it began to establish new institutions for human rights protection. Some of the steps it took are briefly analysed below.

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[6] *Supra* n 5, p. 33

It should be said at the outset, however, that none of the steps taken have been adequate to end the practice of disappearance in Sri Lanka. Certainly the rate at which disappearances are committed has reduced, but they still continue. For example, at least 20 instances of disappearances in 2000 were reported to Amnesty International.[7]

The US State Department Report for 2000 states as follows regarding Sri Lanka:

> *Disappearances at the hands of the security forces continued in the North and the East. During the year, there were no reports of disappearances in Colombo, or Jaffna. The army, navy, police and paramilitary groups caused as many as 11 disappearances in Vavuniya and Trincomalee through September 29. In January, bodies of three Tamils allegedly taken by the Home Guards near Trincomalee, were found; two of them had been decapitated. In December, eight Tamil civilians were reported missing in Mirusuvil after being arrested and tortured by the SLA. Two SLA soldiers were identified as perpetrators and admitted to murdering seven of the civilians. The bodies were exhumed. One SLA commissioned officer and and six additional SLA soldiers were arrested later. At the year's end the army commander had ordered an inquiry into the incident. Human Rights nongovernmental organisations (NGO), including Amnesty International (AI), reported an increase in disappearances in Vavuniya during the second half of the year. As with extra judicial killings, the exact number of disappearances was impossible to ascertain due to censorship of news about security force operations and infrequent access to the North*

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[7] Amnesty International Report for 2001

and the East. However, the UN Working Group on Enforced or Involuntary Disappearances lists Sri Lanka as a country with an extremely large number of nonclarified disappearances. Those who disappeared during the year and in previous years are presumed dead.

The World Report for 2001 of the Human Rights Watch speaks of the inability of the Human Rights Commission to trace seventeen people detained by the security forces in Vavuniya during the year 2000, confirming the rush of disappearances in August at Vavuniya, referred to in the Report of Amnesty International.[8]

3.1 Human Rights Task Force

The Human Rights Task Force (HRTF) was originally established in August 1991 by a regulation gazetted under section 19 of the Sri Lanka Foundation Law No: 31 of 1973.[9] With the change of government in 1994, the performance of this body was reviewed and it was reconstituted with greater authority by regulations made by the President under section 5 of the Public Security Ordinance (PSO).[10] The objectives of the reconstitued HRTF were to

monitor observance of fundamental rights of persons detained in custody, otherwise than by a judicial order, and to ensure that humane treatment is accorded to them, and which body shall for this purpose have the following powers and duties –

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8 *vide* Human Rights Watch - 2001, p 219.

9 Government Gazette Extraordinary No. 173/2 of 31.7.1991

10 Government Gazette Extraordinary No. 874/8 of 7.6.1995

i. to maintain a comprehensive and accurate register of such person with full details of their detention and to ensure observance of, and respect for their fundamental rights, and to ensure humane treatment for them;

ii. to investigate and establish the identity of each such person by a proper identification process;

iii. to monitor the welfare of such persons;

iv. to carry out regular inspections of places of detention, make roll calls and other necessary spot checks and to take immediate steps to remedy any shortcomings; and

v. to record any complaints, representations or grievances that may be made to it and to take immediate remedial action.

In the exercise of these functions, the HRTF was particularly concerned to ensure that the fundamental rights of persons in custody were not violated. Its officials made unannounced visits to detention centres and interviewed detainees confidentially, providing detainees with an opportunity to air any grievances and requiring the persons responsible for the detention to ensure that at least the basic facilities were provided. The HRTF also helped to locate many persons taken into custody, if they were in unacknowledged detention. The HRTF was primarily concerned with locating such missing detainees; it did not generally investigate who was responsible for such events.

The HRTF established regional offices in almost every province, making itself easily accessible to complainants and enabling its officers to visit detention centres more frequently. However,

despite its efforts, disappearances of persons taken into custody continued.

Subsequently the President issued a directive dated 18th July 1995 to the armed forces and the police force under Regulation 8 of the said regulations[11] wherein special provisions were included to make the police and the security forces accountable for every person taken into custody. Paragraph 3 of this directive reads as follows:

1. The person making the arrest shall identify himself to the person arrested or any relative or friend of such person, by name and rank;

2. every person arrested or detained shall be informed of the reason for the arrest;

3. the person making the arrest or detention shall issue to the spouse , parents or any other close relative a document acknowledging the fact of arrest.

4. the person arrested shall be afforded reasonable means of communicating with a relative or friend to enable his whereabouts being known to his family.

Despite these specific directives, illegal arrests and detentions continue because there are no penal provisions to deal with those who do not comply with the directives.

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[11] The Emergency (Establishment of a Human Rights Task Force) Regulation 1 of 1995 published in Government Gazette Extraordinary No. 874/8 of 7.6.1995.

3.2 Commissions of Inquiry into Disappearances

Complaints of involuntary removals and disappearances to the police or others in authority proved futile. The police often failed to record such complaints at all. In desperation, relatives of the disappeared sought the assistance of NGOs, both local and international. They even complained to AI and the UNWGEID, in a bid to trace their lost ones. The pressure exerted by these organisations, by the UN Commission on Human Rights and Western aid donors, induced the then President of Sri Lanka, Mr. Ranasinghe Premadasa, to appoint a Commission to inquire into and report on involuntary removals. However, President Premadasa did not open past disappearances up for inquiry; instead, he created a Commission – referred to as the B.E. de Silva Commission – which was mandated only to investigate disappearances that took place from the date of the Commission's establishment in January 1991. By this time, the rate of disappearances had anyway declined dramatically compared to its peak in 1989. The earlier mass killings and disappearances remained closed to investigation.

When the PA contested the parliamentary elections in 1994, it made the issue of disappearances and human rights protection a major element of its election campaign. The PA promised to put an end to involuntary removals and disappearances and undertook to ensure that those responsible for disappearances would be dealt with effectively.

After coming to power, the new President, Chandrika Bandaranaike Kumaratunga, appointed three Commissions of Inquiry into the Involuntary Removal or Disappearance of Persons on 13th November 1994. These Commissions operated on a zonal basis: one covered the Northern and Eastern Provinces; the other

covered the Western, Southern and Sabaragamuwa Provinces; while the third covered the Central, North Western, North Central and Uva Provinces.[12] These Commissions were mandated to inquire into and report on disappearances that took place after 1st January 1988. They were thus empowered to report on the period of mass disappearances from 1988 – 1990, which the B.E. de Silva Commission had not been authorised to investigate, but they were not empowered to investigate the hundreds of disappearances that had been reported in the North and East and the rest of the country prior to 1988.

The terms of reference of these Commissions were as follows:

To inquire into and report on the following -

a. *Whether any persons have been involuntarily removed or have disappeared from their places of residence at any time after 1st January 1988;*

b. *The evidence available to establish such alleged removals or disappearances;*

c. *The present whereabouts of the persons alleged to have been so removed, or to have so disappeared;*

d. *Whether there is any credible material indicative of the person or persons responsible for the alleged removals or disappearances;*

e. *The legal proceedings that can be taken against the persons held to be so responsible;*

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[12] Hereinafter referred to as the Northern Zone, the Southern Zone and the Central Zone Commissions, respectively.

f. The measures necessary to prevent the occurrence of such alleged activities in the future;

g. The relief, if any, that should be afforded to the parents, spouses and dependents of the persons alleged to have been so removed or to have so disappeared.

These Commissions received about 30,000 complaints in all (which included multiple complaints in respect of many of the disappeared persons). In mid-1997 the Commissions were asked to halt their inquiries and to submit reports on the basis of the complaints they had inquired into to date. Their reports, which were handed to the President in September 1997, have since been published as Sessional Papers.[13]

The Commissions were unable to inquire into all the cases reported to them. When they wrote their final reports, a total of 10,136 complaints remained uninvestigated. To deal with these remaining cases, the President appointed another Commission in April 1998, with island wide jurisdiction and with the same mandate as the three zonal Commissions, except that it was precluded from inquiring into new complaints.

However, around 16,000 further cases of disappearance that had not been reported to any previous Commission were brought to the notice of the All-Island Commission. Although the parties concerned now wished these cases to be investigated and made the particulars available to the Commission, the mandate of the Commission barred it from inquiring into them. These cases have thus not been investigated by any Commission of Inquiry to date.

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[13] Sessional Paper V of 1997 – Southern Zone Commission Report, Sessional Paper VI of 1997 – Central Zone Commission Report, Sessional Paper VII of 1997 – Northern Zone Commission Report.

The All Island Commission handed its report to the President in August 2000, but the report is yet to be published.

3.3 Missing Persons Unit of the Attorney General's Department (MPU)

The zonal Commissions recommended, among other things, that a special unit be established in the Attorney General's Department to study the evidence unearthed by the Commissions indicative of the persons responsible for disappearances, and ensure that such persons are brought to book. Consequently, in July 1998, a Missing Persons Unit (MPU) was established in the Attorney General's Department with these functions. It had to examine about 3,000 cases that the zonal Commissions had investigated where *prima facie* evidence of responsibility was available. The unit is headed by a Senior State Counsel and consists of five attorneys-at-law recruited on contract. It comes under the direct supervision of the Attorney General and the Senior Additional Solicitor General in charge of the Criminal Division of the Department. Three State Counsel assist the unit.

The MPU has categorised the cases as follows: those in which indictments could be filed straight away before the High Court; those which needed further investigation to tighten up the evidence; and those where the evidence was inadequate to establish proof beyond reasonable doubt, but was adequate to initiate disciplinary proceedings.

The MPU has initiated legal proceedings against over 500 police and armed forces personnel, but it will take several years for these cases to reach a conclusion. However, even though the provisions of the Establishment Code make it mandatory for the heads of departments to interdict these officers from service and commence disciplinary proceedings, no such action has been taken either by

the Police or the Army Headquarters. However, in respect of some gazetted officers,[14] the Public Service Commission (PSC) has taken disciplinary action. Discreet inquiries made by the writer revealed that the PSC has not taken action because neither the Police nor the Army Headquarters have forwarded the names of those concerned to it. Consequently, these personnel continue in service while their cases are pending in the courts. It is yet to be seen whether any of these cases will result in a conviction.

The cases in which legal action has been initiated are only those where there was already direct evidence of responsibility for abduction. Those where circumstantial evidence was available have not yet been taken up, because they would require a greater effort by the prosecutor.

It should be noted that causing disappearances is not a punishable offence under Sri Lanka's Penal Code. Thus, the most serious charge that can be levelled against persons responsible for disappearances is abduction with intent to murder.[15] As bodies have not been found in most cases of disappearance, it is very difficult to sustain a charge of murder.

Most of the cases that have been filed so far are against junior officers. This is because the Disappearances Investigation Unit within the Police Department (see below) simply does not return files relating to senior officers to the MPU, claiming that its investigations are not yet complete. The MPU is then helpless to

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[14] A category of officers whose appointments take effect with a gazette notification.

[15] Section 355 of the Penal Code.

expedite action in these cases. The 'delays' on the part of the Police Department are said to result from 'considerations of brotherhood', which leads the investigators to protect brother officers, especially the seniors at the expense of the juniors.

It has been suggested that the establishment of a Special Unit and a Prosecutors' Office, on the model of the Bribery Commission would help to overcome this problem. However, this suggestion has not received serious consideration.

3.4 Disappearances Investigation Unit of the Police Department

Consequent to the establishment of the MPU in the Attorney General's Department, it became necessary for a special unit to be established in the Police Department to attend exclusively to cases referred to the Inspector General of Police (IGP) for further investigation. This unit – the Disappearances Investigation Unit (DIU) – was established in 1997 with a retired Deputy Inspector General of Police as its head.

As evidence given before the Commissions of Inquiry is not admissible in courts of law, it is necessary for normal legal procedures to be followed prior to the institution of court proceedings. Thus, the MPU refers cases in which there is direct evidence of responsibility for causing disappearances to the IGP so that the statements of witnesses can be recorded by police officers afresh. The evidence laid before the Commissions of Inquiry thus has to be re-recorded by police officers of the DIU, who use the evidence elicited by the Commissions as the basis for their investigations. At the beginning of the year 2000, the IGP had referred 2796 such cases to the DIU for investigation.

The approved cadre of the DIU provides for one Senior Superintendent of Police (SSP), three Assistant Superintendents of Police (ASP), 18 Inspectors of Police, 7 Sub-Inspectors, 55 Police Constables and 21 police drivers. An Inspector heads each investigation team, while each ASP supervises five teams.

However, the teams work very slowly. This is possibly because the investigating DIU officers are sympathetic to colleagues who are under investigation and because there is little political will to see these prosecutions succeed. One SSP who was in charge of the Unit tried to take speedy action against some senior police officers named by the Commissions, but faced problems with the Police Department and experienced pressure to delay the investigations.

3.5 The Human Rights Commission

A Human Rights Commission (HRC) was created under the PA government by the Human Rights Commission Act No. 21 of 1996; it began functioning in 1997. With regard to the prevention of disappearances, amongst other powers, the HRC can monitor the welfare of persons taken to custody by the police or security forces, a function which it took over from the HRTF, which was disbanded in 1998 when the HRC had been created. Upon receiving a complaint, the HRC can visit the person at the place of detention. If the place of detention is not known and if there is evidence of arrest, the HRC has the power to ask the arresting authority for the place of detention, so that it can visit and look after his welfare.

The existence of a body that can visit detainees is an important safeguard against torture and disappearance. However, the HRC has been unable to perform this task adequately because it does not have adequate staff. Further, the law does not empower the HRC to give binding decisions; it can only make

recommendations. In the event that such recommendations are not complied with, the HRC is empowered to make a full report of the facts to the President, who can place the report before the Parliament. However, this procedure does not appear to have been followed so far.

The HRC has been criticised by some human rights activists for being a "lion without teeth," it has not fulfilled the hopes that the creation of such an institution inspired. Those who are bent on violating the rights of detainees can carry on regardless of the HRC.

The HRC was unable to provide information on the number of complaints of disappearances it had received during 2000. Given Sri Lanka's horrific record of disappearances, it is astonishing that the HRC fails to distinguish in its records between reports of 'missing people' and reports of people who may have disappeared in custody. The only figure that the HRC could provide in response to this request was that during year 2000, 1,146 persons had been reported to the Commission as missing, of whom 912 had been traced. Yet HRC could not say whether the remaining 234 could be categorised as disappeared. Repeated requests for a reply failed to get any response from HRC. Nor was it possible to find out from their records whether any of the 912 people who had been traced had experienced periods of unacknowledged detention.

The HRC alone cannot be blamed for its failings. Although it was expected that the HRC would act as an independent body, in practice it continues as an appendage of the Presidential Secretariat and has not been provided with adequate resources. For example, the HRC has to get approval from the Presidential Secretariat for cadre provisions and other necessities. It was reported sometime ago that a directive had been sent by the

Secretary to the President to the HRC to close down some of its branch offices, in order to cut down expenditure. The HRC would have been far more effective if it had been created as a truly independent body; indeed, the HRC Act should be amended accordingly.

3.6 Anti-Harassment Committee

Following numerous complaints made to the President concerning illegal arrests and detentions of Tamil people in Colombo by the armed forces and the police, a special presidential committee of Ministers and senior Members of Parliament headed by the Minister of Cultural Affairs was appointed in July 1998. At first this was called the Anti-Harassment Committee, but later its name was changed to The Committee of Inquiry into Undue Arrests and Harassment. The function of this Committee was to examine representations regarding illegal arrests, detentions, or harassment so that prompt action could be taken to grant relief. The Committee was serviced by the Public Complaints Unit of the Ministry of Justice, which passed appropriate complaints on to the Committee for action. The Committee was expected to submit weekly reports to the President and help prevent the rights of persons taken into custody being violated.

The Committee consists of seven members, all of whom are Members of Parliament, and some of whom are Cabinet Members. The Committee was empowered not only to inquire into complaints but also to give appropriate directions to any head of the armed forces and the police with regard to any illegal arrest or undue harassment. Since, by definition, every case of disappearance is preceded by the arrest or taking into custody of an individual by the army, police or other person, this Committee potentially plays a key role in checking disappearances. However, its effectiveness has been questioned, partly because it is not

accessible to people living outside Colombo, and because even within Colombo many do not know its existence as it has not been adequately publicised.

Another problem is that the functions of the Committee overlap with those of the HRC. People with knowledge of these matters would rather complain to the HRC than to the Committee, as the latter's powers do not compare favourably with those of the HRC.

3.7 The Board of Investigation into Disappearances in Jaffna

In 1996, a large number of people fled from the Jaffna peninsula into the Vanni while government forces were engaged in an operation to regain control of Jaffna from the LTTE. Many people returned after the security forces had taken over the peninsula, but following the suicide bomb attack on the Jaffna Town Commander, Major General Hapangama, in July 1996, instances of youth disappearing in custody began to be reported. It is alleged that nearly 600 persons disappeared in Jaffna during this period.

When the Government came under considerable pressure to trace and account for the disappeared, it appointed a Board of Investigation in 1997 to inquire into these complaints. However, as this Board consisted of officials of the Defence Ministry, it failed to win the confidence of the relatives of the victims. The Board conducted its inquiries inside Palaly Army Camp, which is a high security zone, and most of the complainants did not attend the hearings. This Board concluded its sittings in 1998; however, its report to the President has not been published to date.

4. Factors that Facilitate Disappearances

Certain key factors facilitate the occurrence of disappearances. These include extensive powers available to the police and security forces under the PTA and the ERs and the climate of impunity that prevails which enables perpetrators of disappearances to believe that they will never be called to account.

The content of the ERs has been altered repeatedly over the years. At times, the powers of arrest and detention provided under the regulations are broader than at others; at times in the past the security forces have been empowered to dispose of bodies without a post-mortem examination or an inquest. The new Emergency Regulations promulgated in May 2000 are discussed in detail in the chapter on Emergency Rule. Suffice it to say here that they provide powers of arrest and detention far in excess of the limits set out in the International Covenant on Civil and Political Rights (ICCPR), which Sri Lanka ratified in 1980. The Commissions of Inquiry into Disappearances had recommended that the ERs should be amended to prevent disappearances taking place, as did international bodies such as the UNWGEID. Yet in May 2000 the regulations were changed to weaken safeguards against arbitrary arrest and the abuse of detainees. This change took place with no reference to the 1997 directives issued by the President to the police and security forces on arrest and detention procedures (which had anyway in practice been largely ignored, perhaps partly because there were no sanctions available for non-compliance).

With regard to the continuing climate of impunity, it would appear that the government has not been sufficiently determined to ensure that perpetrators of disappearance are brought to justice. The Commissions of Inquiry appear to have been intended as a palliative for the general public and for the local and international human

rights community; they made it appear that the Government was genuinely concerned to provide redress for these gross human rights violations. In practice, however, there has not been sufficient will to act on the recommendations of these and other human rights bodies, or to ensure that the cycle of impunity is broken.

The MPU established in the Attorney General's Department is dependent on the assistance provided by the DIU of the Police Department. It is the DIU that has to conduct further investigations, record the evidence of witnesses and to tie up loose ends in the chain of evidence needed to obtain convictions in a court of law. Yet the DIU works so slowly that the MPU is unable to proceed in many cases. The few files that the DIU has disposed of and returned to the MPU concern only junior personnel.

It would appear that the only cases in which there may be sufficient political will to ensure that justice is done are those few cases that have been the focus of intense local and international pressure – and even then, only very few of these have resulted in successful prosecutions. The notable example was the case of the schoolboys who disappeared in Embilipitiya in late 1989, where convictions were reached. The Embilipitiya disappearances had been the subject of intensive, long-term campaigning by local and international human rights organisations, the wider public and the parents of those who had disappeared. The Southern Zone Disappearances Commission prepared a special report on these disappearances and unearthed quite a lot of information which facilitated speedy initiation of legal proceedings. The prosecutions in the other cases of disappearances that have been instituted have moved at a snail's pace and are not pursued in all earnest. So it is highly unlikely that these cases will end in convictions. However, without swift and deterrent punitive action there cannot be an end to such violations.

The Establishment Code of the Government of Sri Lanka lays down the rules of procedure pertaining to all matters concerning persons employed by the government, including the police and security personnel. Section 21 of Chapter XLVIII of this Code provides for an employee of the State to be interdicted from service if criminal proceedings have been initiated or are about to be initiated on charges which, if established, are sufficiently serious to warrant his dismissal. Yet none of the police officers or security personnel against whom court cases have been instituted based on the findings of Commissions of Inquiry have been interdicted; nor have disciplinary proceedings been initiated against such officers as required by the Establishment Code. This failure has an effect on how the cases proceed, for witnesses are reluctant to give evidence in court in cases where the accused is still in service, sometimes as officers-in-charge of police stations. There had been at least two cases brought to the notice of AI where witnesses have been threatened. Consequent to representations made to the President and the Attorney General by Amnesty International, steps were taken to protect the witnesses.

On a request made by the Disappearances Commissions, a specific directive was issued by the IGP to all police stations to preserve the "Telephone Registers, Prisoner's Detention Registers and other documents connected with the arrest and detention of persons covering the period 01.01.1988 to date"[16] until the Commissions (on disappearances) have completed their tasks. Yet the Commissions of Inquiry found that such books had been purposely destroyed to erase evidence that could implicate officers responsible for the custody of those who had disappeared, or in

[16] IGP's circular No. 1187/95 dated 24th February 1995 - File No. C4/104/95.

whose custody the disappeared person was last seen. Neither the then IGP nor the present IGP has taken any action against the OIC's of the police stations for this act of gross insubordination. Impunity thus appears to be condoned even by the IGP.[17]

There are numerous examples of the relevant authorities failing to act to bring known perpetrators of human rights violations to justice. Even a specific recommendation in Interim Report VII of the Presidential Commission of Inquiry covering the central zone to interdict forthwith an Assistant Superintendent of Police who had threatened to kill a witness who had testified before the Commission, was not complied with.[18] This witness is still said to be in hiding while the police officer concerned continues to enjoy promotions and other benefits arising from being in service.[19]

Since no action was taken against such an offender in spite of a specific recommendation made against him by a Commission appointed by the President, it is no surprise that members of the police and the security forces continue to disregard any restrictions that are imposed on their activities, and they continue to violate rights of persons with impunity.

5. Writ of Habeas Corpus

The right to obtain a Writ of Habeas Corpus in the event of a person being taken into custody and detained unlawfully or

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[17] *Christian Worker*, 3rd Quarter, 1999, p 8.

[18] Interim Report VII of the Presidential Commission on Removal or Disappearances of Persons in the Central, North Western, North Central and Uva Provinces. Sessional Paper III of 1997, pp 20 & 21.

[19] *Christian Worker*, 3rd Quarter, 1999, p 8.

incommunicado, is one of the important means available to prevent a person taken into custody from being caused to disappear. Although only the Court of Appeal had the jurisdiction to receive and inquire into Habeas Corpus Applications (HCA) initially, this was later extended to the Provincial High Courts as well. However, only the High Court of the Eastern Province has availed of this authority.

A study of the HCAs filed between 1988 and 1997 in respect of persons whose whereabouts were not known or were allegedly kept under unlawful detention, shows that out of the 2925 cases filed during that period, 272 had not been concluded as at the beginning of the year 2000. Most of those that had been concluded had taken over five years to be disposed of.[20]

This remedy is, unfortunately, both time consuming and expensive. Hence the easy accessibility and effectiveness of a Writ of this nature is questionable. To make HCAs more effective and readily accessible, the jurisdiction of the Magistrate's Court should be enlarged to enable Magistrates to receive petitions, visit places of alleged detention, record evidence and forward observations to the High Court expeditiously for necessary action. Until such time, the benefits from a HCA to deter disappearances would be very limited.

6. Conclusion

It is now over 10 years since the rate of disappearances in Sri Lanka reached its peak, but it now looks likely that most perpetrators of disappearances will not be brought to book at all,

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[20] Final Report of the Commission of Inquiry into Involuntary Removal or Disappearance of Persons.

and the practice of causing disappearances will continue. The three zonal commissions appointed by the President to investigate disappearances handed their reports to the President in 1997. Who knows how long it may take for the culprits they identified to be brought to book? By then, many of the complainants and witnesses may be no more and the likelihood of these cases ending in convictions becomes all the more bleak. The report of the All-Island Commission on Disappearances was handed to the President in August 2000, and is yet to be made public.

Both the Government and the main opposition party have in various ways either condoned disappearances or been silent spectators while persons disappeared during their respective regimes. Consequently, there is no strong lobby in Parliament to press for speedy action against the perpetrators of disappearances; perhaps this is because the practice has been so widespread and that too many people are implicated. The present government came to power in 1994 with a pledge to end disappearances and other human rights violations. Today, however, it stands accused of hundreds of disappearances during its own time in power and has not shown itself determined to act against perpetrators and halt this practice. It lacks the will and the commitment that goes beyond mere rhetoric.

There is no substitute for swift and effective action against perpetrators irrespective of their rank or status. This will require changes in the law, administrative procedures and even the judicial structure to expedite the disposal of cases pertaining to disappearances.

The Commissions of Inquiry into Disappearances made exhaustive recommendations on the changes to law that are necessary to prevent further disappearances occurring in the future. These recommendations need to be carefully studied and

implemented diligently, under the supervision of a body charged with this task. If they are not acted upon, the reports of these Commissions will become a dead letter, confined to the archives for the use of researchers and historians.

It is left for the Government to honour its election pledge and prove its commitment to the eradication of violations of human rights in general and disappearances in particular, from the face of Sri Lanka.

V

Freedom of Expression and Media Freedom

Kishali Pinto-Jayawardena[*]

1. Introduction

Sri Lankan courts have traditionally preferred not to acknowledge pre-eminent rights of any one institution or body within the right to freedom of expression, constitutionally bestowed on 'citizens' in the country.[1]

Indeed, free speech jurisprudence in the country is studded with notable instances where the courts have been quick to uphold the claims of ordinary citizens to this right. Thus, the right of individuals to hand over leaflets critical of the government to the

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1 Article 14(1) (a).

public,[2] the right of teenage students to dissent,[3] the right of citizens to participate in noise protests,[4] the right to freedom of speech of a participatory listener to a radio broadcast programme[5] and the right to exercise one's vote[6] have all been held to be important manifestations of the right to freedom of expression.

On the other hand, the 'watchdog' role of the media in a democratic society has been theoretically acknowledged[7] and judges have been generally sympathetic when journalists come before court alleging particularly opprobrious action by the government such as the banning of a press,[8] seizure of copies of newspapers[9] or assault in the line of duty.[10] Throughout, however, the court has been cautious to specific claims of journalistic privilege.

Thus, it was articulated in a 1998 case that :

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2 *Ratnasara Thero* v. *Udugampola* [1983] 1 Sri L.R. 461.

3 *Ekanayake* v *Herath Banda,* SC Application 25/91, S.C. Minutes 30th October 1996.

4 *Amaratunga* v. *Sirimal and Others* [1993] 1 Sri.L.R. 264.

5 *Fernando* v. *The S.L.B.C. and Others* [1996] 1 Sri. L.R. 157.

6 *Karunatilleka and Another* v *Dayananda Dissanayake, Commissioner of Elections and Others* [1999] Sri.L.R. 157.

7 *Determination Re. The Broadcasting Authority Bill*, S.D. No 1/97 – 15/97, delivered on 5th May 1997, also *Fernando* v. *The S.L.B.C. and Others, supra* n 5, and *Sunila Abeysekera* v. *The Competent Authority and Others*, SC Application No 994/99, SC Minutes 15th May 2000.

8 See, in particular, the judgment in *The Sunday Leader* case, section 3.1 of this chapter.

9 *Deshapriya and Another* v. *Municipal Council, Nuwara Eliya and Others* [1995] 1 Sri. L.R. 362.

10 *Sumith Jayantha Dias* v. *Reggie Ranatunge, Deputy Minister of Transport and Others* [1999] 2 Sri. L.R. 8.

> *The freedom of the press is not a distinct fundamental right but is part of the freedom of speech and expression including publication which Article 14(1)(a) has entrenched for everyone alike. It surely does allow the pen of the journalist to be used as a mighty sword to rip open the facades that hide misconduct and corruption but it is a two edged weapon which he (she) must wield with care not to wound the innocent while exposing the guilty.....*[11]

This judicial rejecting of the argument dear to a journalist's heart, that the free press is "not merely just a neutral vehicle for the balanced discussion of diverse ideas.....but instead, an organised expert scrutiny of government....."[12] for which it needs particular protection over and above the general protection given to the right to free speech, is unsurprising. In the United States, after all, even with an explicit 'free press' clause and with ringing judgments in favour of unrestricted freedom of expression and an unfettered press, acrimonious debate still continues as to whether the media can claim special privileges as an institution. Regardless, it cannot be disputed that a substantially favourable constitutional law of the press prevails in that jurisdiction and journalists have found the attitudes of the Supreme Court to be a useful barometer of the socio-political status of journalism.

In Sri Lanka, given very different political-legal realities that prevail, the country's media has been far more reluctant to resort to the law and the courts in its own cause. The year 2000, however, marked a significant engagement of the media with the law in many ways. While organised lobbying for a liberal regulatory

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[11] *Victor Ivan* v. *Sarath Silva*, Attorney General *[1998] 1 Sri LR 340.*

[12] William E. Francis, *First Amendment; Theory and Practice, Mass Media Law and Regulation* (4th ed. N.Y. Macmillan, 1986).

framework ensuring freedom of speech gained momentum on the one hand, attempts by the Government to restrict the right to free speech also intensified. An increasingly adversarial media community became preoccupied not only with the near total withdrawal by the Government from the media law reform process but also with heightened censorship and questions regarding specific media rights during election times.

The resulting tensions, inevitably spilling over to the legal arena, juxtaposed some crucial questions: what is the nature and extent of the right to freedom of expression when a country is at war? In what manner could attempts by the government to stifle legitimate criticism be distinguished from genuine national security concerns? And to what extent are these concerns heightened during election times as opposed to normal times?

In the North and East, intimidation and assassination of journalists by the Liberation Tigers of Tamil Eelam (LTTE) continued, illustrating an even more drastic curtailment of the right to freedom of speech. The ongoing conflict affected free expression in other ways with the government reacting against manifestations of artistic expression seen as impacting negatively on the war effort.

It is in the context of these preliminary observations that this chapter will discuss relevant political developments and major legal issues relating to freedom of expression and media law reform that arose during the year 2000.

2. Government versus the Media

The People's Alliance (PA) administration had the media in the forefront of its sweep to power in 1994. By 2000, the expansion of independent, privately owned newspapers, journals and radio

and television stations completed the transformation of Sri Lanka's mass communication structures into a diversified media culture. In particular, the year 2000 demonstrated an increased interest in highly popular political 'chat shows' on television. The Government continued, however, to control the country's largest newspaper chain, Associated Newspapers of Ceylon Limited (ANCL), despite its 1994 election campaign promise to broadbase ANCL's ownership. Two major television stations, Sri Lanka Rupavahini Corporation (SLRC) and Independent Television Network (ITN), together with Sri Lanka Broadcasting Corporation (SLBC) and Lakhanda (a FM radio station operating from the SLBC) continued also to be under government control, thereby constituting a substantial 'state media.'

Between 1994 and 2000, lip service had, at least, been paid by the PA government towards realisation of election campaign promises relating to reform of the regulatory framework relating to the media, as well as improvement of financial and training conditions for journalists. The year 2000, however, saw a complete breakdown of even this surface cordiality as relations between the private media and the Government turned highly antagonistic.

On 3rd January 2000, President Chandrika Kumaratunge's address to the nation after the December 1999 Presidential Election[13] – normally a composed address of state – developed into a scathing and regrettably personalised denunciation of the country's print media, singling out individual journalists for attack. The attempted assassination of President Kumaratunge during the presidential campaign by the LTTE was in the foreground of these remarks, leading to government allegations that journalists critical of the

[13] *The Sunday Times*, 9th January 2000.

government were in league with the LTTE and involved in the assassination attempt.

These allegations were immediately denied by the individual journalists as well as collectively by the Free Media Movement, which likened the "conspiracy theory" to accusations of a "Naxalite conspiracy" made against the press by former President J.R. Jayewardena during 1982.[14] In early June again, the state media accused four journalists, writing to Colombo's newspapers mainly on security and defence affairs, of "maintaining secret connections with the LTTE." Issuing a joint statement, the journalists pointed out that these allegations were "very clearly designed and deliberately calculated to instigate extremist elements and contract killers against us and our families."[15] Meanwhile, the imposing of a heightened censorship in May was justified by President Kumaratunge to the Hindu on the basis that "certain newspapers were guilty of treachery and had to be suitably disciplined."[16]

Government reactions to international media watch bodies, which called upon it to ensure greater freedom of expression within the country, also became more hardline. In particular, concerns expressed in January by the London based media advocacy group Article XIX regarding the alleged conspiracy by sections of the media to assassinate President Kumaratunge, non-implementation of promises to relax the regulatory framework relating to the media and the killings of three journalists, provoked angry responses by the Government. The Minister of Media castigated Article XIX for "double standards and inaccuracies" in its statement,

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[14] *The Island*, 11th January 2000.

[15] *Daily News*, 23rd March 2001.

[16] *The Sunday Times*, 25th May 2000.

calling attention particularly to the fact that the deaths of two of the three journalists cited by Article XIX had been at the hands of the LTTE.[17] The Government issued similarly harsh refutations over negative reports on press freedom in Sri Lanka released by the Commonwealth Press Union.[18] On 1st November, the International Press Institute placed Sri Lanka on its 'watch list' of countries which "appear to be moving towards suppressing or restricting press freedom."[19]

From another perspective, President Kumaratunge's stand in her January Presidential Address that the private media was biased whereas the public media was balanced,[20] were notably ill advised.[21] Pointing the way towards an even greater polarisation of the state media and the private media during the year, this bland categorisation of the state and private media as 'good' and 'bad' impacted negatively on the media industry's burgeoning debates on the need for effective self-regulation.[22]

In the coming months, government hostility towards the private media was apparent in its deliberate disassociation from the media law reform process. The imposing of new censorship regulations under emergency law in May and the harsh manner of its implementation pre-empted any immediate hopes of return to a rational dialogue between the Government and the media on issues relating to freedom of expression and media freedom.

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17 *Sunday Observer*, 30th January 2000. See section 3 of this chapter.

18 "Irresponsible Journalists Damaging Sri Lanka's Image Abroad...." *Daily News*, 4th March 2000 and 22nd March 2000.

19 *2000 Press Freedom Review*, Annual Report of the International Press Institute (Sri Lanka segment).

20 *The Sunday Times*, 9th January 2000.

21 INFORM Report on Monitoring of the Public Electronic Media during the 1999 Presidential Elections.

22 See Section 4.3 of this chapter.

3. Major Legal Issues Relating to the Media in 2000

3.1 Censorship and the media

The famously satirical encounter between Ayub Khan and editor of Sangabad, Husain Chaudhari,[23] was very apt for Sri Lanka as the country entered the new millennium:

> Ayub Khan: "Chaudhari Sahib, are you not concerned about freedom of expression in Pakistan? Chaudhari: "Oh yes, Sir, I am. But I am more worried about freedom after expression."

On 3rd May, the Government announced the imposition of a heightened censorship.[24] When this announcement was made, there was already censorship of news in the country under Emergency Regulations imposed in 1998 and further amended in 1999, banning the publication or transmission of "sensitive military information."[25] A Competent Authority had, in fact, been functioning under that particular regulation for the past two years. But following past tradition, where successive governments imposed regimes of censorship after some major military or political setback, the May regulations were put into place following the mid-April military disaster where vital territory including the Elephant Pass military complex was captured by the LTTE.

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[23] Mustafa, 'The Press in South Asia' in *Studies on the Press in Sri Lanka and South Asia*. (G.H. Peiris, ed., International Centre for Ethnic Studies, Kandy, 1994).

[24] Emergency (Miscellaneous Provisions and Powers) Regulation No 1 of 2000 in Gazette Extraordinary No: 1, 130/8.

[25] Emergency (Prohibition on Publication and Transmission of Sensitive Military Information) Regulations, Gazette Extraordinary No: 1030/28 as amended by Gazette Extraordinary No: 1104/28.

The new regulations were more far-reaching than the old. They empowered the Competent Authority "to take any measures and give any directions" necessary against the media to protect national security, public order and the maintenance of essential services and to direct editors to submit documents, editorials and articles prior to publication. Sanctions for contravention of such directives could lead to banning of the newspapers or shutting down of their printing presses. The Competent Authority was also empowered to act when he was of the opinion that "there is or has been or is likely to be" publication of matter in defiance of the prohibited categories. A further amendment to the 3rd May regulation seven days later extended the prohibition to the electronic media. The Competent Authority appointed under the old regulations continued under the new.[26]

The imposing of these new regulations in May did not, at first, cause much unrest among the media or the public in a country that had been subject to emergency law and censorship of varying degrees of severity for the past two decades. It soon became evident, however, that this time around, the censorship would be far more severe. The media community recoiled as not only military news but also political comment, satire, social comment and legal analyses of the emergency regulations were censored. Enormous sections of the newspapers began to carry blank spaces or caricatures of an individual wielding the censor's scissors. It was prior restraint of an extent unparalleled in the history of the country. As protests streamed in from international and national media watch bodies and citizens' groups, an undeterred Competent Authority further flexed his censorial muscle by banning all live political broadcasts on radio and television. Soon thereafter, two newspapers, the Jaffna based Uthayan and the Sunday Leader were closed down and their printing presses sealed.

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[26] Ariya Rubesinghe, Director of Information.

Ostensibly, this was for flouting the authority of the Competent Authority and continuing to publish material infringing on national security. The censorship agenda of the government was further exposed by the inclusion of a second Competent Authority, a pro-government political activist and former member of the government propaganda team.[27]

As the media clampdown progressed, extreme adversity united the most reluctant of bedfellows. The Sri Lankan media, not usually known for its alacrity in engaging in collective action (let alone appeal to the law for relief) decided to go to court as a body. In an unlucky coincidence, however, merely a week after the new censorship laws were imposed, the Supreme Court delivered a judgment upholding the earlier censorship which had been imposed in 1998 and amended in 1999.[28]

The case itself is interesting as one of the more notable instances in which a citizen came before the courts under the free expression clause in the Constitution with regard to matters vitally impacting on the dissemination of information. The 1998 Regulation (as amended) which human rights activist, Sunila Abeysekera heading a rights information documentation centre in Colombo, challenged before the Court, was substantially different from its successor in 2000. It prohibited the electronic and print media from disseminating information on:

> *.....any matter pertaining to military operations in the Northern and Eastern provinces including any operation*

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[27] Sripathi Sooriarachchi

[28] *Sunila Abeysekera* v. *The Competent Authority and Others*, SC Application No 994/99, SC Minutes, 15th May 2000, judgment of Amerasinghe J (with Wadugodapitiya and Weerasekera JJ). See also the concurring chapter on "Review of Fundamental Rights Jurisprudence."

carried out or being carried out or proposed to be carried out by the Armed Forces or the Police Force (including the Special Task Force), the deployment of troops or personnel or the development or use of equipment including aircraft or naval vessels by any such forces or any statement pertaining to the official conduct, morale, the performance of the head or any member 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 petitioner's argument was that, as a result of this regulation, "...she was constrained from forming and communicating information on matters of public debate that are of vital concern to the nation and in which task she had been hitherto responsibly engaged..." and, therefore, that her right to free expression, which includes the right to information, had been infringed upon. Moreover, she pointed out that in view of the upcoming presidential elections, her right to seek, receive and impart information on the ethnic conflict and the war, her right to choose her candidate in the elections and thereby exercise her right to vote in an informed manner had been adversely affected.

Her other substantial contention was that the regulation was arbitrary *per se* in that it was incoherent and vested unlimited discretion in the Competent Authority. It imposed vague, unreasonable and arbitrary prohibitions that have no nexus to limitations in relation to national security concerns as permitted by Article 15 of the Constitution and thus violated Article 12(1) of the Constitution (right to equality).

In this context, it is pertinent to note that Article 15 subjects the constitutional right to free speech to a number of restrictions,

including national security, public order and the protection of public health or morality. Sri Lankan case law has, however, laid down the principle that restrictions imposed under this Article must show a proximate or reasonable connection between the nature of the speech prohibited and the ground on which it is prohibited.[29]

The petitioner particularly argued that the right to initiate a responsible and responsive communication of public interest issues assumed crucial importance in times of national emergency and civil unrest. Any restrictions imposed on the right to free speech and expression in the interests of national security can only be to the extent strictly required by the exigencies of the situation. Accordingly, she maintained that it is extremely important to ensure that, in these situations, the pretext of national security is not used to place unjustified restrictions on the exercise of these freedoms.

Delivering a 50 page judgment in May which cited over 116 authorities both national and international, the Supreme Court found that there had been no violation of the petitioner's right to equality or her right to freedom of speech under the 1998 regulation (as amended). Given the importance of this judgment, the first in the history of the country which comprehensively examined the right to freedom of expression in a situation of conflict and the nature of censorship therein, it would perhaps be necessary to discuss the reasoning of the Court in some detail.

In principle, the Court asserted the primary importance of the right to freedom of speech in a representative democracy,

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[29] The seminal case in this regard being *Joseph Perera* v. *The Attorney General* [1992], 1 Sri L.R. 199

discussing in detail the theoretical basis of the right. Interestingly in this regard, the Court stressed the duality of the right to freedom of expression. In one sense, it is a right that belongs to each individual and requires accordingly that no one be arbitrarily limited or impeded in expressing his or her thoughts. In another sense, the Court opined that it implied a collective right to receive information and have access to the thoughts expressed by others.

In the interpretation of this right, the Court also acknowledged that a central value of the right to free speech lies in checking the abuse of power by those in authority. The free press has a legitimate interest in reporting on and drawing the attention of the public to deficiencies in government activities and, in that sense, it has a pre-eminent role in a state governed by the rule of law.

However, free speech had its limits. While laws restraining speech to ensure the safeguarding of the rights of others were common, so too was the duty placed on citizens to exercise their right to free speech with responsibility. In this respect, pre-censorship was found not necessarily unconstitutional in Sri Lankan law, even though the burden justifying such censorship was severe.

Proceeding from the theory to specific aspects of the Regulation at hand, the Supreme Court focused firstly on the allegation that the regulation itself was vague and imprecise and therefore, not "prescribed by law." While conceding that its broadly worded nature and differences in the Sinhala and English version might have caused difficulties in interpretation, it was, however, held that the mere fact that a provision may give rise to problems of interpretation could not mean that it is so vague and imprecise as to lack the quality of law. Undoubtedly, it was accessible to the petitioner and, with the appropriate legal advice, sufficiently precise to enable her to foresee the consequences that a given

action may entail. Did it, however, have a legitimate aim? Was the contention of the petitioner that the aim of the impugned regulation was to prevent the publication of information embarrassing to the government rather than the protection of national security, correct?

In meeting these questions, the Supreme Court upheld a restrictive line of reasoning reflected in an earlier decision of the Court,[30] observing that it has never been doubted that when a government is in the throes of a struggle for the very existence of the State, the security of the State may be protected. In the instant case, a violent conflict was ongoing in the North and the East and the petitioner had not shown that the grounds of national security on which basis the regulations were imposed, was a 'pretext.' In any event, the Court affirmed that it could not strike down an otherwise constitutional statute on the basis of an alleged illicit motive.

This judicial reasoning prevailed to an even greater extent when dealing with the question as to whether the regulation was "necessary in a democratic state," which, in effect, was the petitioner's primary cause of dissatisfaction. The Court conceded that this requirement had to be 'read into' the constitutional provisions permitting restrictions on fundamental rights. Accordingly, a restriction, even if justified by compelling governmental interests, such as the interests of national security, must be framed so as not to limit the right to free expression more than is necessary. It must be proportionate and closely tailored to the accomplishment of legitimate government objectives.

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[30] *Wickremasinghe* v. *Edmund Jayasinghe* [1995], 1 Sri L.R. 300

The petitioner's argument in this respect was two fold. In the first instance, she contended that the regulation specifically prohibited dissemination of news impacting on the 'morale' of the armed forces, *inter alia*, in a manner which was not confined to the North and East but to other parts of the country as well, thereby breaking the nexus between the stated aim of the regulation and its substance. While agreeing that there was 'ambiguity' in this regard, the Supreme Court preferred to correct this ambiguity by interpreting that part of the regulation restrictively so that its application was confined to the North and the East. The Court held itself reinforced in this view by the Sinhala version of the regulation. The Court then specified a high standard for ruling regulations invalid; namely that it should give naked and arbitrary power to the censor, thus "permitting him to make his own subjective opinions, the practically unreviewable measure of permissible speech." In this instance, the regulation set out with sufficient precision the reasons for which an application to publish may be refused and, therefore, could not be seen to be over-broad.

In the second instance, the petitioner cited examples from newspapers to show that the Competent Authority, in practice, arbitrarily censored information with no nexus to national security. However, it was held that the proper remedy for this was judicial review. What was before the Court was not the review of particular actions of the Competent Authority but the validity of the regulation *ex facie*. Citing from previous case law, it was stated that "the fact that a power may be abused does not render the Regulation invalid; such abuse of power is by no means beyond challenge."[31]

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[31] *Wickremabandu* v. *Herath and Others* [1990], 2 Sri L.R. 348.

In its totality, while the Court proceeded on impeccably theoretical lines for the most part, its reluctance to intervene substantially on the facts of the case or, at the very least, to administer a judicial admonition to ensure that the future promulgation of emergency regulations be less ambiguous and more tightly defined, was disappointing. The Abeysekera judgment was, however, in accordance with the historical reluctance of the Sri Lanka courts to strike down regulations imposed under the Public Security Ordinance unless they are extraordinarily perverse or leave absolutely no room for justification.

As far as public impact was concerned meanwhile, the delivering of the judgment of the Supreme Court in the Abeysekera case could not have been more ill-timed. Coming barely one week after a far more draconian censorship had been imposed on the media by the May 2000 regulations, the judgment was seized upon by government apologists to lampoon Abeysekera in the government press and to maintain that the new censorship laws were right and proper. Confusion prevailed meanwhile in the public mind over which set of regulations the Court's decision referred to.

Undeterred, in late May and early June, a spate of petitions were filed in the Supreme Court challenging the new censorship both in principle and in its implementation. To begin with, *The Sunday Leader* came before Court against the ban on its editorial offices and the sealing of its printing presses.[32] Three days later, editors of *The Sunday Times, Lankadeepa and Sunday Lankadeepa, Daily Mirror, The Island, The Island Sunday Edition, Divaina, Thinnakural, Ravaya, The Weekend Express* and *The Sunday Leader,* all members of the Editors Guild of Sri Lanka and in effect, representing the entire private print media in the country,

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[32] SC (FR) Application No: 362/2000

petitioned Court, complaining of unfair and arbitrary action by the Competent Authority.[33] Successive petitions by deputy editors, columnists, cartoonists and photographers, together with a petition by a political activist and a law lecturer (as reasonable readers whose right to information had been affected), followed.

These latter petitions were significant in that they marked the first occasion when Sri Lankan journalists felt sufficiently agitated to come before court, challenging specific censorship of their articles as opposed to the banning of a newspaper. The Supreme Court granted leave to proceed in the case filed by *The Sunday Leader* as well as in the cases filed by the individual editors and journalists.

As public pressure mounted against the censorship, the Government promised its relaxation. Two Ministers, both front rankers in the Government, admitted to a visiting delegation from the Committee to Protect Journalists (CPJ) that the censorship was "counter productive." [34] But, no steps were taken to ease the situation until late June when, ruling in *The Sunday Leader* case, the Supreme Court declared that the appointment of the Competent Authority had itself been illegal and thus forced the Government's hand.[35]

The Court declared that the May regulations under which the Competent Authority had acted contained no specific provision for the appointment of a Competent Authority. Accordingly, the order banning the newspaper by an illegal Competent Authority was not valid and the State was ordered to pay *The Sunday Leader* costs in the sum of Rs 100,000.

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[33] SC (FR) Application No: 367/2000.

[34] *Daily News*, 23rd March 2001.

[35] Per Amerasinghe J. with Justices Ranjith Dheeraratne and Ameer Ismail concurring.

The two month censorship was consequently brought to an abrupt end. But hardly a week later, the May regulations were amended by President Chandrika Kumaratunga, re-appointing the Competent Authority in accordance with the Supreme Court judgment.[36] The new regulation expressly prohibited reports on procurement of military supplies which had been omitted from the earlier regulations as a result of media protests that it would inhibit reporting on corruption in the armed forces. It also imposed a regime of self-censorship on the media.

These concerns were raised before the Supreme Court in late July when the Editors Guild petition and connected petitions came up for hearing. A substantive consideration of the factual contents of these petitions had been preceded by the ruling in *The Sunday Leader* case which invalidated the entire censorship. Opining, however, that any system of censorship must be worked out harmoniously between the journalists and the authorities, the Court ordered the Competent Authority to meet up with the editors before the end of the month to finalise acceptable guidelines under the new regulations. The Competent Authority then became far more circumspect, confining his censorial scissors to strictly military-related news. Even then, warning letters were received periodically by the newspapers, one specific instance being with regard to reporting on the controversy surrounding the appointment of a new army chief.[37]

Comments issued during this time by the Human Rights Commission (HRC) of Sri Lanka strengthened the drive against censorship. The HRC observed that the July regulations should be formulated in a manner that does not preclude the media from raising issues of public accountability in the national interest.

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[36] Gazette Extraordinary No: 1,138/34.

[37] *The Island*, 2nd September 2000.

Calling for the appointing of a collective body including a person with military knowledge as well as a senior journalist, to oversee the censorship as opposed to a single individual, it remarked that such a body would, to a great extent, reduce the risk of subjective and abusive exercise of power and establish the right relationship between the censorship authority and the media.

In early September, the Government temporarily suspended the emergency regulations imposed in May,[38] returning the country to the 1998 censorship regulations (as amended) for all intents and purposes. However, the promised guidelines to be drafted by the Competent Authority ***in consultation with the editors*** never materialised[39] and disagreement continued on whether the media can report on corruption in military procurements. Though the Competent Authority made statements to the effect that the media can expose corruption in the military, this was with the rider that it should not affect the morale of soldiers.[40] Not surprisingly, this ambivalence led many journalists to practice self censorship with regard to investigative reporting on corruption in the military. The October 2000 parliamentary elections were held under military news censorship.

3.2 Elections and the media

Serious deficiencies relating to the laws that regulate the electronic media in particular during election times were exposed during the campaign leading up to the parliamentary elections scheduled for 10th October 2000. While the two state electronic media bodies

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38 Gazette Extraordinary No 1148/2 of 4th September 2000.

39 Though the CA drafted some guidelines, these were not in consultation with the editors and were rejected by the media as indicating only a superficial compliance with the Supreme Court direction, as well as being substantively inadequate.

40 *The Sunday Times*, 9th July 2000.

are governed by laws prescribing standards of conduct during election times, these standards are often violated with impunity. The private electronic media are not subject to such laws and generally strive to achieve a balanced coverage though there are striking instances when some stations have also departed from these standards.

Towards mid year, a draft Bill amending the Parliamentary Elections (Amendment) Act No.1 of 1981[41] laying the responsibility of stipulating radio or television time afforded during an election campaign to registered political parties and independent candidates on the Elections Commissioner was proposed by the Government but not actually carried through to the legislative stage.

Meanwhile, immediately prior to the October elections, several petitions were filed in the appellate courts by the main opposition party, the United National Party, alleging that the state broadcasting and print media were being used as propaganda channels by the Government. This, it was contended, was a blatant misuse of state resources to benefit one particular political party.

The petitions against the state radio and television channels in the Court of Appeal set out the manner in which the SLBC and the SLRC had allocated more time for the People's Alliance political broadcasts and telecasts than prescribed in the Parliamentary Elections (Amendment) Act No 1 of 1981. These cases were settled with the respective media undertakings agreeing to abide by the stipulation in the amended law that, other than the time limit

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[41] *Daily News*, 11th February 2000 and *The Island*, 13th June 2000.

specified for political broadcasts, no material of any kind promoting a particular political party or candidate could be aired.[42]

The petition filed by the opposition in the Supreme Court against the ANCL on the basis that the ANCL papers published only one sided news designed to promote the activities of the Government was dismissed by a bench presided over by Chief Justice Sarath N. Silva who referred the case to the Press Council for suitable action. The cumulative effect of the litigation in the appellate courts was negligible as far as curbing the state media in its pro-government propaganda activities was concerned.

4. Structural and Legal Reform Relating to the Media

4.1 General developments

Lobbying for reform of Sri Lanka's regulatory framework relating to the media had its origins in the recommendations of a government appointed committee on media law reform which, in 1996, suggested wide ranging reforms to existing media laws.[43] Arguments urging reform of these laws were buttressed by

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[42] *Daily News*, 30th September 2000, *The Sunday Leader*, 24th September 2000.

[43] "The R.K.W. Goonesekere Committee Report on Media Law Reform." Three other committees also issued recommendations regarding the broad-basing of the state-owned Lake House newspaper group, establishing a media training institute and improving conditions for media personnel. Limited action was taken by the Government regarding the recommendations of the Committees on Media Training and Improvement of the Financial Status of Journalists.

international standards on freedom of expression with which Sri Lankan media laws were yet not in conformity.[44]

A 1997 Parliamentary Select Committee set up to inquire into the Legislative and Regulatory Framework Relating to Media concluded its deliberations without arriving at any conclusive recommendations. In the month of August 2000, Parliament debated Motion 218/99 on legal anomalies affecting the press that had been introduced by the combined opposition. The Motion included recommendations to:

- repeal section 479 of the Penal Code and sections 14 and 15 of the Press Council Law relating to Criminal Defamation;

- replace the Press Council with a Media Council;

- introduce a Freedom of Information Act; and

- introduce a Contempt of Court Act.

The parliamentary debate was also concluded without any finality. Meanwhile freedom of expression continued to be constrained by other laws. These included:

- Section 120 of the Penal Code providing for a general offence of sedition;

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[44] Sri Lanka acceded to the ICCPR on 11th June 1980 and to the First Optional Protocol to the ICCPR on 3rd October 1997 and has the duty to periodically report to the United Nations Human Rights Committee in Geneva. The State is also subject to the right of individual communication by any citizen of the country to the Human Rights Committee.

- Section 16 of the Press Council Law which makes it an offence for newspapers to publish details of Cabinet proceedings or decisions without prior authority;

- Provisions of the Public Performance Ordinance (1912) which stipulate that all films, dramas, productions etc., must be vetted by its Public Performances Board before being released to the public;

- Section 14 of the Prevention of Terrorism Act (1979) which imposes restrictions on the publication by newspapers of news and other matters in normal times and permits the embargo of a newspaper and the closure of the press.

4.2 Specific lobbying for media law reform

The following discussion briefly touches on four particularly crucial areas of media law reform.[45]

4.2.1 Criminal defamation

By the year 2000, the need for substantive reform of prevalent criminal defamation laws had become clear. Twelve criminal defamation cases had been filed against newspaper editors of both the tabloid and the mainstream press. Some were pending while the others had been settled. On 5th September, the editor of The Sunday Leader was sentenced to two years simple imprisonment, suspended for five years for criminally defaming President Kumaratunge. In issue was the publication of an article

[45] This discussion is based on recommendations of the Editors Guild of Sri Lanka as submitted before Parliament in 2000 and draft legislation that was prepared consequently.

that took the Head of State to task for failing to carry out election promises, which publication, prosecutors argued, implied that she was guilty of corruption. In early December, meanwhile, the Court of Appeal upheld the conviction and sentencing of The Sunday Times editor to one and a half years simple imprisonment suspended for seven years and a fine of approximately US $111 for publication of a gossip item in the newspaper which (incorrectly) stated that President Kumaratunge had attended the birthday party of a parliamentarian at a hotel suite around midnight. Another accused editor, acquitted of criminal defamation charges in the trial court upon publication of a similar news item in a Sinhala language newspaper, faced the State appealing against his acquittal.[46]

Using these cases in particular, the media argued for the repeal of criminal defamation provisions both in the Penal Code and in the Press Council Law, pointing out that the imposition of suspended sentences on journalists convicted of criminal defamation acted as an insidious deterrent to free expression. This was, in fact, a concern that had manifested itself in the monitoring reports of international bodies.[47]

The Government, on the other hand, contended that criminal defamation laws were necessary when the media overstepped the boundaries of legitimate journalism and that civil laws in this respect were both time-consuming and prohibitively expensive for the ordinary citizen. Much of the force of this latter argument was, however, diluted by the fact that all the cases instituted under

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[46] *The Democratic Socialist Republic of Sri Lanka* v *Sinha Ratnatunge*, HC case No 7397/95, *The Democratic Socialist Republic of Sri Lanka* v *P.A. Bandula Padmakumara*, HC case No 7580/95D.

[47] *2000 Press Freedom Review*, Annual Report of the International Press Institute (Sri Lanka segment).

the penal laws by the State was in respect of the alleged criminal defamation of President Kumaratunge or her Ministers. This lent credence to media arguments that the penal law and the resources of the State were being used by government politicians to further their own interests.

Newspapers continued to assert, meanwhile, that the need to safeguard personal privacy could be met by entrusting the task of disciplining the media to self regulatory bodies such as a press complaints commission and by appropriate amendments to the law and procedure of civil defamation.

Interestingly, the year also witnessed the use of criminal defamation laws against citizens and election monitors. A petition filed by convenors of the Centre for Monitoring Election Violence (CMEV, a Colombo based election monitoring centre) in the Supreme Court, alleging violation of their fundamental right to freedom of expression by frivolous charges of criminal defamation being filed against them by a local authority politician, was settled in court in March. It was agreed that all charges against the CMEV would be withdrawn forthwith.[48] In November, a computer student who allegedly abused President Chandrika Kumaratunge on a live radio programme broadcast was arrested for uttering defamatory statements. By year end, he was still in remand.[49]

4.2.2 Parliamentary privilege

The 1978 amendment to the Parliamentary Powers and Privileges Act (1953) giving Parliament the power to deal with breaches of

[48] *The Island*, 28th March 2000.

[49] *Daily News*, 20th November 2000.

the peace, was repealed by the Sri Lanka Parliament on 11th September 1997, in the only positive manifestation of election campaign promises of the PA regarding media law reform. The Supreme Court was handed back the power to examine whether a breach of privilege existed in respect of the serious offences specified in Part A of the Act. Parliament continued to have the authority to look into breaches of privilege specified in Part B. However, other amendments to the original Act were retained, including a 1980 amendment, providing that it is an offence to willfully publish words or statements after the Speaker has ordered them to be expunged from the Hansard and thereby offending the principle of representative democracy which decrees that the people have a right to know how their representatives speak and behave in the House.[50] Repeal of this amendment was accordingly urged by the media.

4.2.3 Contempt of court

Prevalent legal standards relating to contempt of court in Sri Lanka, laid down mostly in case law, are conservative and act as a deterrent to media reporting on legal proceedings and judgments.[51] Media lobbying during the year focused on enacting legislation on the lines of the Contempt of Courts Acts in India and the United Kingdom. The proposed legislation protects publication unless there was a real risk that the statement is intended and is likely to interfere with the administration of justice. Thus, there should not be gagging of *bona fide* public discussion in the press, of controversial matters of general public interest, merely because there are in existence contemporaneous

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[50] Amendment Act No 17 of 1980 to the Parliament (Powers and Privileges) Act No 21 of 1953.

[51] *Hewamanne* v. *Manik de Silva* [1983] 1 SriLR 1; In *Re Garuminige Tillekeratne* [1991] 1 Sri LR, 134

legal proceedings in which some particular instance of these controversial matters may be in issue. The draft law also makes provision for fair criticism of judgments and protects confidentiality of sources except in certain defined instances.

4.2.4 Freedom of information

The impetus towards enacting a Freedom of Information Act was quickened by related developments during the year. Section 3 of Chapter XXX1 of Volume 1 and, Section 6 of Chapter XLVII of Volume 2 of the Establishment Code prohibited public officials from disclosing any information to the media, even though this provision had never been implemented. But reports in February 2000 that the Cabinet had decided to implement this section resulted in public servants refusing to give any information that might impact badly on the Government. This included confirming or denying information already in the hands of journalists, giving initials of public servants or even giving statistical information without the sanction of the Secretary to the Ministry, including instances where the media played a public interest role in highlighting possible health epidemics throughout the country.

The proposed Freedom of Information Act put forward by the media community gives the public (including the media) a general right of access to government information. Exceptions are documents prohibited on the grounds of national security (other than corruption in the services and the police), individual privacy and revenue information in cases where the public interest does not outweigh disclosure. In addition, it is specified that access should be allowed for the public good and in the national interest and be unrestricted by any condition that it must be in relation to

a pending legal proceeding.[52] Non access is mandated to be subject to the scrutiny of court.

4.3 Self regulation of the media

As at least two studies of the Sri Lankan media have shown, media coverage of the ethnic conflict, for example, has been characterised by various biases which have, in fact, contributed to prevailing ethnic tensions.[53] The necessity for the media to examine and address its own weaknesses, prejudices and personal crises has been acknowledged by some senior editors.[54] Nonetheless, the dramatic expansion of the media industry in the country has not seen a strong enough drive towards internal regulation of journalistic standards.

Criticism of the media has always had a strong political bias. In the alternative, media analyses by academics and activists have been useful to a point by demonstrating sexist and racist stereotyping by the media.[55] But the media has generally viewed outsider reviews with profound suspicion, this being aggravated by the fact that, in the main, such analyses themselves have tended to be more destructively critical rather than constructively challenging.

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[52] This clause was in specific opposition to a proposed Freedom of Information Act by the Sri Lanka Law Commission in 1996 which gave only a restricted access to official information.

[53] *The Media Monitor,* Centre for Policy Alternatives (CPA), Vol 1, Issue 1, June 1997.

[54] 'Over-rule of Laws', Ratnatunge, Sinha in '*Role of the Media in a National Crisis*', Asian Media Information and Communication Centre (AMIC), 1993.

[55] *The Media Monitor*, Centre for Policy Alternatives.

Importantly, therefore, along with the push for media law reform, last year witnessed the print media at least, striving towards some measure of self-regulation. A Code of Professional Practice for journalists was issued by the Editors Guild, which imposed duties on the print media with regard to accuracy of reporting, conflict of interests and the duty to safeguard the dignity of the profession. The Code specifically provided aggrieved persons with a right of reply and the right to correction of a report that is incorrect in material aspects and resulted in some newspapers at least, reserving space for replies and corrections. Meanwhile, discussions on the setting up of a self-regulatory Press Complaints Commission, similar to the prevalent body in the United Kingdom, continued within the media industry.

5. Killings, Intimidation and Physical Assault of Journalists by the LTTE and the Government and Threats to Artistic Expression

The ongoing conflict in the North and East extracted a heavy toll during the year as far as media freedom and physical safety were concerned. In the North, Anthony Mariadas, a freelance journalist, was murdered by the LTTE on 31st December 1999 as he was to give a commentary on the midnight mass. Mariadas was a correspondent for the SLBC broadcasting from Vavuniya for residents in the North. As a propaganda tool of the Government, the SLBC generally questioned the dominance of the LTTE but also featured religious and cultural programmes. Mariadas's killing led to a citizens protest in Vavuniya in January 2000 by over 5,000 individuals. According to some reports, his killing was an instance of mistaken identity where the LTTE target was

actually a journalist who come up from Colombo to broadcast the midnight service along with Mariadas.[56]

Significantly, the year also saw the involvement of actors other than the LTTE in the physical intimidation and killing of journalists in the war torn areas. On 3rd April, a bomb exploded at the residence of Nelliah Nadesan, a regional correspondent for a widely read Tamil language newspaper. Responsibility for the bomb attack, from which Nadesan escaped unscathed, was widely believed to lie with paramilitary groups operating in the North and East in opposition to the LTTE and with the support of the government. Later on in the year, unidentified gunmen in similar circumstances killed Mylvaganam Nimalarajan, correspondent for the British Broadcasting Corporation's (BBC) Sinhala and Tamil language services. Colombo's newspapers took up the position that Nimalarajan had been targeted for his outspoken reporting on the illegalities committed during the parliamentary elections.

In the South of the country, the BBC Sandeshaya correspondent was assaulted in April when he was covering a mass protest against talks between the Government and the LTTE with Norwegian facilitation. His attackers were believed to be supporters of the National Movement Against Terrorism (NMAT), who had organised the anti-peace rally.

Pending trials and investigations with regard to journalists who had been attacked or killed during previous years, also did not reach any finality during 2000. The trial with regard to the February 1998 attack on Iqbal Athas, whose widely read defence

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[56] "The Scent Of Danger," UTHR (Jaffna), Information Bulletin No. 23, 30th January 2000.

column in The Sunday Times focused on corruption in military procurements was postponed on a number of occasions and finally put off for early 2001. While two persons were detained for questioning in connection with the 1999 murder of Rohana Kumara, the editor of a controversial Sinhala tabloid, no one was charged in the case. Similarly, the case regarding an assault on a Sinhala journalist in 1999, allegedly by an army brigadier who was arrested and then released on bail, made no headway. The 1999 shooting of Nadarajah Ramesh, a parliamentarian belonging to the EPDP and editor of a pro LTTE weekly by a gunman wielding a T-56 or AK-47 rifle in broad daylight on the 2nd of November also remained unsolved.

Several incidents of artistic personnel being assaulted and intimidated were reported during the year. In January 2000, unknown individuals torched the home and archives collection of actress Anoja Weerasinghe, who had announced her support for the opposition UNP during the 1999 presidential elections and had appeared on their election platforms. Later in the month, the husband and wife singing duo, Rukantha and Chandralekha Gunetilleke, again well known as opposition supporters, were attacked. They were subjected to degrading treatment and then robbed. In a related development, a prominent film director, Dharmasiri Bandaranayake, complained that he had been threatened for his personal connections with the singing duo.[57] Nineteen women's organisations condemned the attack on Weerasinghe. Though a statement was issued by the Minister of Media promising that the assailants would be identified and punished, no such action was forthcoming during the year.

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[57] *The Sunday Times*, 30th January 2000.

Government censorship of artistic expression was particularly experienced when an international award winning film, 'Purahanda Kaluwara' (Death on a Full Moon Day), was banned on the grounds that it created a wrong impression of the Government's war efforts. The producer subsequently filed a fundamental rights application in the Supreme Court against the banning which was pending at the end of the year.

6. Conclusion

Commencing with the first comprehensive denunciation of the private media by the Kumaratunge administration since it came to power in 1994, the year 2000 manifested increasingly defiant claims to the right to free speech and attempts by the country's media community to commandeer the law for its own purpose against a government once praised but now clearly adversarial. Amicable reform of Sri Lanka's archaic and hopelessly ineffective regulatory framework relating to the media which might have resulted in a transformed media culture in the country, receded to the background. In retrospect, therefore, 2000 was a year of infinite difference and dissension as far as freedom of expression and media freedom was concerned, unfortunately for the most part negatively rather than positively.

VI

Review of Fundamental Rights Jurisprudence

Deepika Udagama[*]

1. Introduction

This chapter reviews fundamental rights jurisprudence of the Supreme Court[1] during the year 2000. It does not examine the Court's record in granting petitioners leave to proceed due to the difficulty in obtaining relevant information in a systematic way.

An overall survey of the judgments delivered in the past year confirms a familiar pattern with regard to the types of cases that have been the subject of a majority of judgments delivered in recent years. Of the 33 judgments surveyed, 21 are directly related to claims of denial of equality and seven to allegations of arbitrary

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1 Hereinafter "the Court"

arrest and detention and/or torture. A few are related to the freedom of expression, the right to peaceful assembly and the right to engage in a lawful occupation of one's choice.

While most of the judgments could be described as routine, a few were exceptionally innovative and path breaking. One recognised the right to sustainable development and the obligation of the State to respect the principle of inter-generational equity in exploiting natural resources and granted redress through the somewhat restricted parameters of the constitutional chapter on fundamental rights.[2] Another broadened the scope of constitutional protection to those detained under special laws.[3] These two judgments relied considerably on international norms and contain important dicta on the need to incorporate international standards into domestic law.

On the other hand, one judgment, in particular, set a negative precedent relating to censorship under emergency powers, casting a pall over carefully crafted past judgments that sought to strike a balance between fundamental rights and derogation powers of the executive during periods of public emergency.[4] Another [5] threw up the issue of the diminution of the scope of constitutional redress in the context of privatisation of public enterprises.[6]

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2 *Bulankulama & Others* v. *The Secretary of Industrial Development & Others,* SC Application No 884/99 (F.R.), SC Minutes 2nd June 2000.

3 *Weerawansa* v. *The Attorney General,* SC Application No. 730/96, SC Minutes 3rd August 2000.

4 *Sunila Abeysekera* v. *Ariya Rubesinghe,* SC Application No. 994/99, SC Minutes 15th May 2000.

5 *Bandara* v. *Wayamba Bus Company Ltd. & Others,* SC Application 77/98, SC Minutes 2nd August 2000.

6 Article 126 of the 1978 Constitution requires proof of violation or imminent violation of fundamental rights by 'executive or administrative action' in order to successfully seek relief under the fundamental rights jurisdiction of the Supreme Court.

2. The Eppawala Case

Without doubt the most significant judgment was rendered in the case of *Bulankulama & Others* v. *The Secretary of Industrial Development and Others,*[7] commonly known as the Eppawala Judgment. The judgment defies traditional classification on the basis of the various articles in the fundamental rights chapter of the 1978 Constitution.

The issues raised in the petition challenged the Court to recognise the indivisibility of human rights. Although the Constitution for the most part recognises only civil and political rights as justiciable rights, the Court rose to the occasion by innovative constitutional interpretation.

Six of the petitioners were farmers and/or owners of land situated in the vicinity of the Eppawala phosphate deposits, while the seventh was the chief monk of a temple, which was sustained by land in the area. They claimed that the proposed agreement between the Government of Sri Lanka and Freeport MacMoran Resource Partners of USA, a multinational mining company, whereby the latter would be given the right to extensively mine the phosphate deposits situated in Eppawala, would result in violation of their fundamental rights to equality [Article 12(1)], the right to engage in an occupation of one's choice [Article 14(1)(g)], and freedom of movement and choosing one's residence within Sri Lanka [Article 14(1)(h)].

It was alleged by the petitioners that the terms of the proposed agreement gave the right to the company to extract the mineral in an extensive manner, which would lead to a range of detrimental

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[7] See *supra* n 3.

consequences in contravention of the principles of sustainable development. It was argued that its operations would deprive the petitioners of their land and their means of livelihood or sustenance; cause acute environmental damage to the area including harm to health, cultural monuments and the ancient irrigation systems that sustained agriculture; and deplete the phosphate deposits. The petitioners, however, did not oppose the utilisation of the mineral deposit; they opposed its exploitation in an accelerated and unregulated manner.

The proposed agreement, it was averred, also circumvented the need by the company to comply with existing national laws relating to environmental impact assessment (EIA), thereby denying the petitioners equal protection of the law. Under the National Environmental Act, the public has a right to make representations on proposed projects subject to the EIA process, whereas under the proposed agreement between the Government of Sri Lanka (GOSL) and Freeport MacMoran, the latter only had to include an environmental study in its feasibility study on the project. Under the proposed agreement, the studies would be confidential documents, thereby depriving the public of the right of participation.

In a lengthy judgment, majestic in its reasoning and vision, Justice Amerasinghe took the parameters of the discourse on constitutional protection of rights to new heights. He held that the proposed agreement did indeed violate the rights of the petitioners under Articles 12(1), 14(1)(g) and 14(1)(h). The judgment recognised and used concepts, although not entirely new to Sri Lanka's jurisprudence, in a manner that holds great potential for the future development of fundamental rights jurisprudence beyond the conventional framework.

2.1 Sustainable development

The judgment deals in extenso with the argument raised by the petitioners that the State is under an obligation to utilise natural resources in a sustainable manner. This discussion forms a central part of the judgment.

Referring to both the Stockholm (1972) and Rio (1992) Declarations on environmental protection, the Court highlighted principles relating to sustainable development and declared that "the proposed agreement must be considered in the light of the foregoing principles." The Court recognised that human beings are at the centre of the concept of sustainable development; that they are entitled to a healthy and productive life in harmony with nature; and that in order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.

Recognising that there are many operational definitions of "sustainable development" that are variations of the definition used by the Report of the World Commission on Environment and Development (1987), the Court went on to identify three main principles encompassed by that concept:

i. conservation of natural resources having regard to the principle of inter-generational equity.

ii. exploitation of natural resources in a sustainable manner.

iii. integration of environmental considerations into development programmes.

Of particular significance is the Court's stipulation that the proposed agreement should be reviewed within the framework of international environmental law. The Court found that Sri Lanka, as a member of the United Nations, could 'hardly ignore' environmental requirements in the Stockholm and Rio Declarations. Justice Amerasinghe went on to state:

> *[t]he inter-generational principles in my view, should be regarded as axiomatic in the decision making process in relation to matters concerning the natural resources and the environment of Sri Lanka in general, and particularly in the case before us. It is not something new to us, although memories may need to be jogged.*

The judgment draws heavily on ancient practices adopted by rulers of Sri Lanka in exploiting natural resources that paid due regard to the natural order of the environment. It cites the separate opinion of Justice Weeramantry in the *Case Concerning the Gabsicovo Nagymaros Project (Hungary* v. *Slovakia)*, where ancient irrigation systems of Sri Lanka dating as far back as the third century B. C. were referred to as embodiments of ancient wisdom that respected environmental conservation and sustainable development. While harking back to ancient practices does not generally provide rounds for a legal judgment, in this instance it did make a positive contribution by emphasising the universal and timeless nature of concepts such as sustainable development, which are at times perceived as "western" or alien to non-Occidental societies.

Having referred to international norms and their ancient antecedents, the Court pointed out that even under contemporary law in Sri Lanka (section 17 of the National Environmental Act), the State was obliged to utilise natural resources in a manner that

took inter-generational equity into account. However, the facts of the case clearly pointed to the fact that the Central Environmental Authority (CEA) had been considerably sidelined in the negotiations between the Government and Freeport McMoran.

2.2 The public trust doctrine

Lawyers for the respondents, with whom the Attorney General's Department had associated themselves, argued that the natural resources of the country are held in trust by the Government (in this context meaning the Executive branch) and not by the Court. The Court, therefore, could not substitute its decision for that of the Executive as long as the latter acted correctly.

The Court rejected the argument that the Executive branch was the exclusive 'trustee' of natural resources, and the judgment criticised the use of the term 'trustee' in this context. While accepting that the legal ownership of natural resources vests in the Executive on behalf of the people, the Court went on to point out that the action of the Executive is reviewable by the Court. Thus, the Court has a crucial role to play in the oversight of Executive action in relation to natural resource management. Parliament too plays a crucial role by providing legislative guidelines that express the will of the people in this regard.

Accordingly, in the final analysis, all organs of government have a duty **as guardians** to preserve the natural resources of the people as evinced by the scheme put in place by the Constitution. The theory of guardianship as recognised by the Court in this case, adds a new dimension to the evolving jurisprudence on the public trust doctrine in Sri Lanka. (Emphasis added)

2.3 The role of international law

In emphasising the necessity to review the proposed agreement between the Government and Freeport McMoran in the light of international law, the Court made an important pronouncement of the applicability of international law before domestic courts.

The Court did acknowledge that the Stockholm and Rio Declarations pertaining to the environment were 'soft law,' as they were not legally binding treaties. Nevertheless, it made an exhortation that as a member of the United Nations, these instruments could 'hardly be ignored' by Sri Lanka. Having said that, the judgment went on to declare, that even 'soft international law' would become binding **"if they have been either expressly enacted or become a part of the domestic law by adoption by superior Courts of record and by the Supreme Court in particular in their decisions."** (Emphasis added).

Often, the legal profession has been hard-pressed to use arguments based on international law before domestic courts because of the well-entrenched principle of dualism in Sri Lanka's legal system. The conservative position has been that international norms have to be transformed by enabling legislation of Parliament in order to be binding on courts. Increasingly, however, the Supreme court has, particularly in fundamental rights judgments, referred to international human rights standards as interpretative aids. But a direct pronouncement that international law can be transformed either by Parliament or by the express recognition of superior courts is a crucial breakthrough, enabling international standards to be used to expand the parameters of constitutional protection of fundamental rights. However, it is doubtful that a petition could be grounded directly on international law. International law will have to be pleaded to expand the scope of existing domestic legal provisions.

2.4 Violation of fundamental rights

As pointed out above, the judgment is mainly devoted to the discussion of how the proposed agreement violates fundamental principles of environmental protection. The *ratio decidendi* of the judgment pertains to those principles as well. However, as the Constitutional Bill of Rights does not contain provisions directly pertaining to environmental rights, the Court gave relief, as pleaded by the petitioners, on the basis of imminent violations of the right to equal protection of the law [Article 12(1)], the right to engage in a lawful occupation of one's choice [Article 14 (1)(g)] and the freedom of movement and choosing one's residence within Sri Lanka [Article 14 (1)(h)].

2.4.1 Equal protection of the law

The Court found that Freeport McMoran's exemption from submitting their project to an EIA was an imminent violation of the petitioners' right to equal protection of the law. The law (the National Environmental Act) requires every prescribed project[8] to be subjected to an EIA, affording the public the opportunity to air their views on the proposed project. To buttress this point, the Court also referred to Principle 10 of the Rio Declaration, which requires public participation.

Under the proposed agreement, Freeport McMoran was required to submit only an environmental impact study as part of a feasibility study, both of which would be confidential. The Court pointed out that the Executive cannot, through a contract, seek to alter the law. A necessary corollary of equal protection of the

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[8] Identified under the NEA as those projects which require the preparation of an EIA.

law is that no one is above the law. In this instance the public was excluded from participation in the final decision regarding the impact on the environment through a unilateral act of the Executive. The Court was extremely critical of the manner in which the proposed agreement was negotiated, pointing to the suspicion that it was entered into under pressure. Furthermore, the Court highlighted the injustice done to the public by substituting arbitration for judicial review under the proposed agreement.

2.4.2 The right to engage in a lawful occupation of one's choice and freedom of movement and choosing one's residence

For the reasons set out above, the Court found imminent violations of rights guaranteed by the Constitution under Article 14 (1)(h) and (h). It was of the opinion that the petitioners and other affected members of the public had no way of ascertaining the impact of the project on these rights. This was due to the confidentiality of the environmental study under the proposed agreement and the fact that any issue arising thereunder could only be subjected to arbitration, between the company and the Secretary of Industrial Development.

2.4.3 Imminent infringement of fundamental rights

The petition had averred that the proposed agreement had violated the above mentioned fundamental rights. Leave to proceed had been granted by the Court on that basis. However, the Court was mindful of the fact that the agreement had not yet entered into force. It declared that a petition alleging a violation of fundamental rights which had been granted leave to proceed did not preclude the Court from considering whether the alleged facts

constituted merely an imminent infringement of fundamental rights. Justice Amerasinghe, declaring that the "greater contains the less", considered it appropriate that the petition be examined for the "lesser" violation.

3. Equality and Non-discrimination

The majority of judgments delivered in 2000 pertained to allegations of violations of equal protection of the law [Article 12(1)]. The guarantee of non-discrimination [Article 12(2)] hardly figured in these petitions. Most of the petitions pertained to issues arising from employment such as promotions and transfer of public servants. It is significant that a large proportion of judgments did not find a violation.

A perusal of the judgments points to the fact that in most cases the Court used the language of the 'new doctrine' on equality. Rather than use the traditional reasonable classification doctrine, the Court was content to base its judgments on whether the alleged action or omission on the part of the Executive was arbitrary.

In *Dassanayake* v. *Secretary, Ministry of Defence & Others,*[9] the petitioner, a Rear Admiral in the Navy, alleged that he had to retire prematurely because of discriminatory treatment meted out to him mainly by the first respondent, the Defence Secretary and the second respondent, the Commander of the Navy. According to the Navy Pensions and Gratuities Code, an officer holding the substantive rank of Rear Admiral has to retire on the expiry of three years, if he is not promoted to the next higher substantive rank within that period. The age of retirement in the Navy is 55 years. However, the very same Code [regulation 3(2)(a)] provides

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[9] SC Application 262/98, SC Minutes 5th May 2000.

for an exception where the Defence Secretary in consultation with the Commander of the Navy may retain the services of an officer in any rank beyond the age or the period stipulated for that rank if, in the opinion of the President, it is essential in the interests of the Navy to do so.

The petitioner had been confirmed in the rank of Rear Admiral without his knowledge while he was undergoing training overseas. At that time he was only 44 years of age. Citing previous examples, he maintained that the normal practice in the Navy was to appoint officers to the rank of Rear Admiral on a temporary basis when they had not completed serving in the previous rank. That practice was adopted to prevent young officers from being compelled to retire prematurely as per the Code cited above. As the petitioner was confirmed in the rank of Rear Admiral contrary to regular practice, he was compelled to retire at the age of 47 years. He was the only officer in the Navy to have retired at that age holding the position of Chief of Staff.

He pointed out that repeated appeals made to the President (who is also the Commander-in-Chief of the Navy) to adjust his seniority so that he would not have to retire prematurely – which were directed through the second respondent – were to no avail. The petitioner did not receive even an acknowledgement. On one occasion, the second respondent failed to forward an appeal he made to the President for over a year. By reason of that delay, the President had barely two weeks to consider the petitioner's appeal before he was due to retire.

The Court, although not wishing to speculate on the motive behind the delay, found that it was nevertheless unwarranted. The Court also found that the second respondent had suppressed crucial facts when forwarding the petitioner's appeals to the President. These included such matters as the past practice of the Navy in similar

situations, the exception provided for by regulation 2(3)(a) of the Navy Pension and Gratuities Code and the fact that the second respondent (the Navy Commander) himself was only one month senior to the petitioner in the rank of Rear Admiral.

The second respondent was found to have wilfully suppressed material facts and to have made comments to the President that were "not fair, impartial or accurate." The Defence Secretary (the first respondent), the Court found, had also contributed to the petitioner's appeals not receiving due consideration by the President by readily concurring with the comments made by the second respondent. On those grounds, the Court found that the first and second respondents had violated the rights of the petitioner to equal protection of the law and awarded an unprecedented Rs. 500,000 as compensation by the State. The second respondent was ordered to pay Rs.50,000 by way of costs in his personal capacity. What is significant is that Court did not allude to the doctrine of reasonable classification although the facts were ripe for determination on that basis. This clearly indicates the Court's bent towards emphasising administrative fairness when adjudicating petitions on equality.

In *Sugathadasa Jayasinghe & Others* v. *Minister of Public Administration & Others,*[10] the petitioners, who were all officers of the Ministry of Health, alleged that a new salary scale introduced by a public administration circular, issued pursuant to a decision of a Cabinet sub-committee, was without a reasonable basis and, therefore, violated their right to equal protection of the law. It was maintained that the salary scales of all paramedical services were similar at all times. However, the

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[10] SC Applications 770, 772-776, 798-802/97 (judgment in consolidated case), SC Minutes 22nd November 2000.

new scheme differentiated between categories of officers to allocate them to different salary scales without considering the functions they performed.

The Court found that the new classification was without a rational basis and was, therefore, arbitrary. The Court found that by virtue of the arbitrariness, the circular in question was in violation of Article 12(1) of the Constitution and hence was null and void. The language of the judgment once again emphasised arbitrariness, suggesting that an 'unreasonable classification' is necessarily arbitrary.

Similarly, the Court found violations of Article 12(1) where a university had overlooked other qualified candidates and appointed as Registrar, a candidate against whom there was an allegation of misrepresentation of educational qualifications,[11] and where a public corporation had appointed a candidate with less qualifications using a scheme of recruitment drawn up to suit that candidate's qualifications when a better qualified candidate had applied for the same post.[12] The Court found such action to be arbitrary and unreasonable, and in the latter case to be in bad faith as well.

A case which is of significance to the emerging body of jurisprudence decrying political patronage on the one hand, and victimisation on the other, is *Hettiarachchi* v. *Mahaweli Authority of Sri Lanka & Others*.[13] Here, the petitioner, an Assistant Security Officer with the respondent Authority, alleged that he had been

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[11] *Wijesuriya* v. *University of Peradeniya*, SC Application No.739/98, SC Minutes 10th February 2000.

[12] *Ranjit Ranadeera* v. *Ceylon Petroleum Corporation*, SC Application No.544/97, SC Minutes 11th February 2000.

[13] SC Application No.131/2000, SC Minutes 15th September 2000.

fined and transferred by the respondent for not complying with demands for accommodation and use of other official facilities made by several other employees of the Authority who, by their own admission, were on their way to engage in election work in which the relevant Minister had an interest. The Court found that the procedure used to discipline the petitioner was not in compliance with the relevant disciplinary rules, *inter alia*, because the complaints that had been lodged against the petitioner did not contain allegations of any misconduct. The Court stated "[i]ndeed the complaints themselves showed that the Petitioner should have been commended for resisting improper attempts to depart from the path of duty." The action of the Authority, therefore, was found to be in violation of the petitioner's rights under Article 12(1).

Delivering the judgment of the Court, Justice Mark Fernando further went on to declare:

> *In determining what relief should be granted, it is necessary to consider the context in which the infringement took place. The attempt to influence the Petitioner to allow the misuse of Corporation premises occurred not just in general but in connection with a pending election. The use of State and Corporation resources (whether land, buildings, vehicles, equipment, funds or other facilities, or human resources) directly or indirectly for the benefit of one political party or group, would constitute unequal treatment and political discrimination because thereby an advantage is conferred on one political party or group which is denied to its rivals... Penalizing the Petitioner for resisting improper influence in such circumstances aggravated the infringement of his fundamental right; and conveyed a wrong message, that improper political influence should not be resisted.*

4. Freedom from Torture

Compared with the number of judgments on equality, those relating to petitions alleging torture were much less. As data is not available on patterns of granting leave to proceed in fundamental rights cases, it is impossible to know whether this is due to a reduction in the incidence of torture or due to the Supreme Court rejecting many torture petitions at the stage of granting leave to proceed.

Almost all the judgments in torture cases delivered in 2000 are very brief and do not contribute to the development of jurisprudence in this area. The judgments refer to facts, including the medical reports, and declare whether or not there has been a violation of rights under the torture clause of the Constitution (Article 11).

There is hardly any examination of the definition of torture or of other types of treatment that are equally prohibited by Article 11, viz., cruel, inhuman, degrading treatment or punishment. It appears that petitions under Article 11 are examined only with a view to ascertaining whether or not torture has been established. There does not seem to be any discussion of whether the alleged ill-treatment amounts to any other category of prohibited treatment.

For example, in *Ananda Wickramasainghe* v. *OIC, Neluwa & Others,*[14] the Court dismissed a petition brought by a police officer against two fellow police officers alleging they had subjected him to cruel, inhuman and degrading treatment by knocking him to the ground with a blow to his face and by beating him with a club. It has to be noted here that the petitioner did not allege

[14] SC (Special) No.33/99, SC Minutes 22nd March 2000.

torture, the most severe form of prohibited treatment. The Court was of the opinion that the petitioner had not been able to establish that he was beaten as severely as he had alleged.

Medical evidence had established that he had sustained the following injuries:

(a) laceration of the upper lip in the buccal cavity— contusion at the seath;

(b) contusion of the left elbow joint;

(c) abrasion at the right elbow joint.

He had been treated at the hospital subsequent to the beating with a tetanus toxoid injection and paracetamol. The judgment did not consider whether the beating at least amounted to inhuman or even degrading treatment. It rejected the petition in toto merely by stating that no violation of Article 11 had been established. The question arises then as to how severe ill treatment must be to amount to a violation of Article 11. The judgment sends the wrong message, suggesting that a degree of roughing-up is acceptable when the real challenge is to impress upon government officials that absolutely no ill treatment, not even degrading treatment, is permitted. The judgment, therefore, is very problematic. The submission of such cases to the UN Human Rights Committee under Optional Protocol I to the International Covenant on Civil and Political Rights (1966) (ICCPR) would be a worthwhile exercise to ascertain whether the judgments are in compliance with Sri Lanka's international obligations under that Covenant.

In only one case did the Court consider, even in passing, the definition of torture. In *Pararasagegaram Balasekeram* v. *OIC,*

JOOSP Camp, Vavuniya,[15] the petitioner's allegation that he had been assaulted while in army and police custody with PVC pipes, that his face had been covered with a shopping bag containing petrol and his genitals had been burnt with cigarette butts, was corroborated by medical evidence. The Court found that the treatment was severe enough to fall into the international definition of torture. The Chief Justice who delivered the judgment referred to the definitions of torture in the UN Declaration on Torture, The UN Convention Against Torture and also enabling legislation enacted by the Parliament of Sri Lanka (Act No.22 of 1994) which incorporates the Convention into Sri Lankan law. He found that the alleged acts did amount to those which caused severe pain or suffering, whether mental or physical as contemplated by the international legal definition of torture.

Another negative feature about the judgments relating to Article 11 is the low quantum of compensation awarded even where the most brutal forms of torture had been established. The average quantum was Rs. 15,000. In one case where medical evidence established that the petitioner, who was an agricultural labourer, was severely traumatised as a result of torture the compensation awarded was Rs.75,000.

This is in stark contrast with awards made in equality cases. In the case of *Dassanayake* v. *Secretary, Ministry of Defence*,[16] discussed above, the Court granted Rs. 500,000 by way of compensation and a further Rs.50,000 by way of costs. The average quantum of compensation paid to other professionals whose rights under the equality clause were found to be violated ranged between Rs.50,000 and Rs.100,000.[17]

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[15] SC (FR) No. 547/98, SC Minutes 8th May 2000.

[16] *Supra* text at note 7.

[17] See *supra* cases cited at notes 9-11.

This discrepancy between awards in equality cases and those in torture cases is very problematic. It raises fundamental issues relating to equity and the objective of redress for violations of human rights. Most of the petitioners who have sought redress for the violation of Article 11 are generally of a low income and educational level and are very vulnerable, whereas those who allege a violation of equality are generally professionally qualified with a high income capacity.

It is submitted with due respect that granting of redress in fundamental rights cases where the State is found to have violated its bounden duty to protect its people's constitutional rights should not depend on the victim's income level or social status. Violations of human rights strike at the very core of human existence and seriously question the legitimacy of the State. From a qualitative standpoint, torture denigrates human dignity so severely and brutalises the State. Indeed, if one considers the lifelong impact of severe torture on a victim, both mental and physical, and also its broader implications for the State and society, those responsible should be ordered to pay the highest degree of compensation irrespective of the victim's station in life. **Redress for human and fundamental rights violations must reflect its value not only to the individual victim, but also to society at large.** (Emphasis added).

5. Arbitrary Arrest and Detention

Two of the most celebrated fundamental rights judgments rendered by the Supreme Court in 2000 related to freedom from arbitrary arrest and detention guaranteed by Article 13 of the Constitution.

Weerawansa v. *Attorney-General & Others,*[18] has been hailed by civil libertarians as yet another landmark judgment which curtails extensive powers of arrest and detention under special laws. The powers in question in this case were conferred by the Prevention of Terrorism Act (PTA). Citing international human rights obligations of Sri Lanka under the ICCPR, the Court declared that even special laws cannot be construed in a manner that is violative of fundamental guarantees of individual liberty under international law.

The PTA was enacted by Parliament by a special majority. Under Article 84 of the Constitution, even if a Bill contains provisions which are unconstitutional, it can be enacted into law if passed by a special majority. Notwithstanding constitutional sanction, civil libertarians have been extremely critical of the vast powers conferred on the authorities by the PTA at the expense of individual liberty. It permits arrests without a warrant [section 6(1)], detention up to 72 hours without producing a suspect before a Magistrate [section 7(1)],[19] and administrative detention on an order made by the Minister under which detention can continue for 18 months (section 9). Section 9 is silent about the need to produce an administrative detainee before a judicial officer.

The petitioner, an Assistant Superintendent of Customs, complained that the following elements of his arrest and detention were unconstitutional because they violated Article 13(1)[20] and (2)[21] of the Constitution:

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[18] SC Application No.730/96, SC Minutes, 3rd August 2000.

[19] Under normal law the period is 24 hours.

[20] This article deals with freedom from arbitrary arrest and detention.

[21] This article deals with the rights of a detained person to be produced before a judge according to procedure established by law and the right to be informed of reasons of arrest.

- his arrest by the Criminal Investigation Department (CID) purporting to act under section 6(1) of the PTA;

- the consequential administrative detention ordered by the Minister of Defence under section 9 of the PTA;

- his subsequent transfer into the custody of the Customs; and

- detention under a magisterial order purported to be made under the normal law relating to arrest and detention.

According to the CID, the arrest of the petitioner under the PTA was based on a suspicion that he was aiding and abetting the illegal importation of containers into Sri Lanka, some of which contained weapons and light aircraft parts, and that he was releasing them from the port on forged documents. The CID also maintained that those items eventually found their way into the hands of the LTTE.

Section 6(1) of the PTA permits the police to arrest **without a warrant any person "connected with or concerned in or reasonably suspected of being connected with or concerned in any unlawful activity."** The Court, after careful examination of submissions made by the CID to justify its action, found many discrepancies in its version. The Court concluded that the CID had not established that they had grounds to entertain a reasonable suspicion that the petitioner was involved in unlawful activity as required by section 6(1). The arrest was found to be in violation of Article 13(1) as it did not comply with "procedure established by law." As there was no proper basis for an arrest under section 6(1), the Court found that the subsequent detention of the petitioner under section 7(1) was also unconstitutional: if the arrest is illegal so is the subsequent detention.(Emphasis added).

The Court also found the subsequent administrative detention of the petitioner under section 9 to be in breach of Article 13(2). The Minister can issue a detention order under that section if there is reason to believe or suspect that the person is connected with or concerned in any unlawful activity. In this instance, the Court found, the Minister (who also happens to be the President of the Republic) had issued a detention order and subsequently extended it without independently ascertaining whether there were sufficient grounds to issue such orders against the petitioner. The Minister had mechanically adopted the version submitted by the second respondent (Deputy Inspector General of Police in charge of the CID), which did not even cite evidence implicating the petitioner in the offence he is alleged to have committed. The Court stated that the Minister must form an opinion on objective standards and held that issuing detention orders mechanically was a "patent abdication of discretion" by the Minister. This was a reaffirmation of a number of past judgments in cases such as *Wickremabandu* v. *Herath*[22] and *Rodrigo* v. *de Silva,*[23] which had consistently taken officials of the Executive to task for mechanically issuing and extending detention orders either under the PTA or emergency regulations.

The most remarkable feature of the judgment relates to the Court's dictum on the need to have judicial supervision of detainees held under administrative detention under the PTA. Section 9, which provides for administrative detention, states that the Minister can extend a detention order every three months to a maximum period of 18 months. It is silent on the need to produce a detainee before a judicial officer. The Court pointed out that judicial supervision of detention is a fundamental human right recognised by

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[22] [1990] 2 Sri LR 348.

[23] [1997] Sri LR 265.

international law (under Article 9 of the ICCPR) for good reason: it affords the detainee an opportunity to communicate any complaints to a judicial officer who is bound to safeguard the rights of the detainee.

The Court went on to point out that under Article 27(15) of the Constitution, the State is required to "endeavour to foster respect for international law and treaty obligations in dealings among nations." It then declared "[Article 27(15)] implies that the State must likewise respect international law and treaty obligations in its dealings with its own citizens... In that background, it would be wrong to attribute to Parliament an intention to disregard those safeguards." Therefore, it was held that section 9 of the PTA should be interpreted accordingly, affording safeguards provided by international law. In the instant case, the failure to so produce the petitioner during administrative detention was a violation of Article 13(2) of the Constitution, which requires a person deprived of personal liberty to be produced before "the judge of the nearest competent Court according to procedure established by law."

The rule of interpretation recognised in the judgment has been consistently applied in the United Kingdom: that where Parliament does not legislate expressly to the contrary, it is presumed to have acted in compliance with the international obligations of the State.[24] As Sri Lanka has followed the United Kingdom in adopting a dualist legal system, the adoption of this rule of interpretation is a salutary development: it helps bring domestic laws in line with Sri Lanka's international obligations and also affords to its people the safeguards recognised by international law.

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[24] *Secretary of State for the Home Department, ex parte Brind* [1999] 2 WLR 188 (House of Lords).

This judgment adds to the value of the *dicta* in the earlier discussed *Eppawala case.*[25] Both judgments focus on the crucial role of the judiciary in incorporating international law into domestic law. In the *Eppawala case,* the Court recognised that not only Parliament, but even the judiciary can, by express adoption incorporate international law into domestic law. In the instant case, the Court recognised the need to interpret domestic law in line with international law and Sri Lanka's treaty obligations.

In addition to the above principle, the Court also recognised that production before a judicial officer means **not only the physical production of a detainee before such an officer,** but also affording the detainee an opportunity to communicate with that officer. This was stated in the context of the Court's examination of the subsequent transfer of the petitioner to remand custody under normal law pursuant to a magisterial order. The Court found that there was no evidence to show that the Magistrate in question (eighth respondent) had ever visited the petitioner or that the petitioner was brought before him. It was pointed out that under Article 13(2) of the Constitution, a remand order could be made only upon the proper production of a suspect before a judicial officer. As such, the Court held that the Magistrate had no jurisdiction to issue the impugned remand order (Emphasis added).

It is significant that a judicial officer was made a respondent in this case. Under Article 126 of the Constitution, the Supreme Court is granted exclusive jurisdiction over fundamental rights cases only to examine whether there is an imminent infringement or a violation by "executive or administrative" action. The Court,

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[25] See *supra,* text at note 5.

citing a long list of precedents, held that if a judicial officer exercises their discretion even in an erroneous manner, still it would amount to judicial action which is exempted from the purview of Article 126. However, if the officer was required by law to perform some function in respect of which the law itself had deprived the officer of any discretion, then that act is not a judicial act. In this case, as the Magistrate had no jurisdiction to issue the remand order, his action was not judicial in character. Therefore, the Court held that the detention in remand custody was pursuant to "executive or administrative action" that was amenable to fundamental rights jurisdiction of the Court.

This judgment is reminiscent of that in *Rodrigo* v. *de Silva*[26] (popularly referred to as the *Sirisena Cooray* case) where the Supreme Court held that emergency regulations providing for preventive administrative detention cannot be construed in a manner which dispenses with the safeguards afforded to a detainee under normal law.

The other significant case relating to arbitrary arrest and detention has implications beyond Article 13(1) and (2). *Maximus Danny* v. *IP Sirinimal Silva*[27] concerned the arrest and detention of the petitioner, ostensibly on suspicion that he was a member of the LTTE, and the subsequent charge made against him under the Brothels Ordinance. The facts of the case bring into sharp relief the manner in which the police, or at least some police officers, manipulate and abuse the law.

The petitioner was spending the night at a private guesthouse with a woman with whom he had intimate relations. The police

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[26] [1997] Sri LR 265.

[27] SC Application No. 488/98, SC Minutes 12th December 2000.

raided the guesthouse and took the petitioner and other occupants into custody. The explanation of the police to the Court was that they had received information that the guesthouse was harbouring LTTE suspects, and so they had raided and taken its occupants into custody. However, reminiscent of a tragicomedy, it transpired that the petitioner was produced before a Magistrate the following day on charges under the Brothels Ordinance. As the Magistrate had denied bail, he spent another six days in remand custody and was subsequently discharged.

The Court agreed with the petitioner's claim that his arrest was in violation of Article 13(1). The judgment once again chastised the Magistrate for mechanically issuing a remand order against the petitioner. It pointed out that under the Brothels Ordinance, sexual intercourse between consenting adults is not an offence, but the management or assisting the management of a brothel were recognised offences. There was no such evidence whatsoever against the petitioner. Section 32(1)(b) of the Code of Criminal Procedure Act, which lays down the legal procedure for arrests under normal law, requires that for an arrest to be legally effected there must be a complaint, or credible information or a reasonable suspicion that a person has committed an offence. There were no such grounds to arrest the petitioner.

Curiously, however, the Court found that the subsequent detention of the petitioner was not unconstitutional, the reason being that he was produced before a Magistrate within 24 hours of his arrest. If the initial arrest was illegal, how could the subsequent detention be valid?

At first glance the judgment appears to be well reasoned regarding the illegality of the arrest, but rather routine. What makes the

judgment valuable is the use of Article 13 of the Constitution to deal with the widespread police practice of swooping down on "couples" in parks, cinemas, guesthouses and the like, and carrying out arrests with no legal authority. In doing so, the police have unilaterally assumed the role of moral arbiters of society with disastrous consequences for civil liberties. Often, victims of such police abuse do not seek relief for fear of being shamed publicly. Clearly, the practice constitutes a serious violation of the right to privacy of consenting adults to enjoy intimacy, while also posing an unwarranted threat to personal liberty. The Constitution of Sri Lanka does not guarantee the right to privacy. Indeed, the doctrine of privacy is hardly developed in the country even as a civil law concept. Hence, the admonition of the Court to the police that intimacy between consenting adults is not an offence that warrants the exercise of police powers is, under the circumstances, very welcome. The public owes the petitioner a debt of gratitude for being so bold as to come forward and vindicate an important right.

6. Freedom of Expression and Derogation under Emergency Powers

Aside from arrest and detention, one of the most contentious human rights issues relating to emergency powers has been censorship of the media, particularly with regard to censorship of news relating to the civil war in the North and East of Sri Lanka. Earlier attempts at judicial review of censorship of war news were futile, with the Court not even granting the petition leave to proceed.[28] However, in the case of *Joseph Perera* v. *Attorney General,*[29] the Supreme Court delivered a seminal

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[28] *Wimal Wickramasinghe* v. *Edmund Jayasinghe* [1995] 1 Sri LR 300.

[29] [1992] 1 Sri LR 199.

judgment in which the Court relied on the rule of proportionality to determine the constitutionality of emergency regulations. In other words, the emergency regulation should have a rational and proximate nexus to the legitimate objective to be achieved. In that case, the Court found an emergency regulation which required police permission before circulating any handbill, to be a disproportionate limitation on freedom of expression and, therefore, unconstitutional. The Court also found the emergency regulation to be in violation of the guarantee of equality because it was vague and conferred arbitrary powers on the police. It must be noted, however, that the regulation in question did not relate to the civil war; yet, it related to a situation of near anarchy in the south of the island during the JVP uprising in the late 1980s.

In May 2000, the Supreme Court delivered the much-awaited judgment[30] on a petition submitted by human rights activist Sunila Abeysekera, which sought to test the constitutionality of censorship of news relating to the war. In her petition, Ms. Abeysekera maintained that Emergency (Prohibition on Publication and Transmission of Sensitive Military Information) Regulation No. 1 of 1998, as amended on 6th November, 1999, was in violation of her fundamental rights to equality [Article 12(1)], freedom of thought (Article 10) and freedom of expression [Article 14 (1)(a)] and, therefore, was unconstitutional. The impugned regulation (as amended) made it an offence for a newspaper publisher, or any person operating a broadcasting or television station to print, publish, distribute or transmit without the permission of the Competent Authority (CA):

> ***any*** *material...containing* ***any*** *matter pertaining to military operations in the Northern and Eastern province[s]* ***including***

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[30] *Sunila Abeysekera* v. *Ariya Rubesinghe,* SC Application No. 994/99, SC Minutes 15th August 2000.

> ***any*** *operation carried out or being carried 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 Navy vessel by any such forces or* ***any*** *statement pertaining to the official conduct, moral[e], the performance of the Head or any member of 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.* (Emphasis added)

The petitioner declared that she was a social and human rights activist concerned about the ethnic conflict and the war in the North and East and that she had actively taken part in the debate to resolve the conflict. Hence, she required to know the correct position with regard to the war. She pointed out that her opinion on all activities relating to the ethnic conflict, and in particular the Presidential Election of 1999, was based on information she received on the war. Hence, she argued any prior restraint on such information is a violation of Article 10 of the Constitution.

Ms. Abeysekera also argued that the regulation (as amended) was arbitrary, discriminatory and hence violated the equality clause of the Constitution. Furthermore, the prior restraint imposed by the regulation prevented her from forming opinions and transmitting information to the public as the Executive Director of INFORM (a human rights information service) on issues of vital importance to the public, hence violating her right under the freedom of expression clause [Article 14(1)(a)].

The scholarly judgment delivered by Justice Amerasinghe is almost encyclopaedic in nature. It examines all the relevant issues

exhaustively, taking into consideration previous judgments from Sri Lanka, India, the United States, the European Court and the Human Rights Commission, the Inter-American Court on Human Rights, and also the Johannesburg Principles on National Security, Freedom of Expression and Access to Information.

The judgment reiterates the importance of freedom of expression, the right to receive information in a democracy and the need to construe limitations to such a right (the matrix of many other rights) in a narrow manner. ***Significantly, it recognises the need to examine whether the limitation was also "necessary in a democratic society" although that phrase is not included in Article 15(2) and (7) of the Constitution, which recognise the grounds of limitation to freedom of expression.*** (Emphasis added)

Having considered all these issues, the judgment distinguished the Joseph Perera judgment from the instant case and found that the limitation (prior censorship) imposed by the emergency regulation was proportionate to the legitimate objective of the government: viz., protection of national security during a period in which the government forces were engaged in hostilities with the LTTE. The judgment declared:

> *the terrorism [as unleashed by the LTTE] not only hurts, but tends to destroy democracy and democratic institutions. There are imminent dangers threatening the free, democratic constitutional order of the Republic of Sri Lanka. In such a situation, national security must take precedence over the right of speech.*

The judgment points out that unlike in the U.S., prior restraint is permissible in Sri Lanka if it meets with constitutional

requirements. Article 15(7) of the Constitution permits such limitations, *inter alia*, on the ground of national security.

In the opinion of the Court, the impugned regulation did strike a fair balance between the free flow of information and the legitimate aim of protecting national security. It was tailored with sufficient closeness to the accomplishment of the governmental aim and unlike the regulation in the *Joseph Perera case*, was not constitutionally overbroad. Furthermore, the Court found that the petitioner had not established her assertion that the regulation was promulgated for extraneous reasons such as to cover up matters that would have caused embarrassment to the Government or the armed forces.

However, the Court left open a window of opportunity for future challenges. It pointed out that the instant petition sought to challenge the constitutionality of the regulation on the face of it. However, if a petition relating to a specific abuse of the regulation should be submitted, the Court stated that it "would have a different kind of case than that presently before us."

With due respect to the Court, the judgment was a disappointment to civil libertarians who were concerned by the breadth and the vagueness of the regulation. Especially the use of the word "including" in the regulation made it clear that the list of examples of censored news items was not exhaustive. As such it was felt that the CA was conferred with a wide discretion to censor news items in an arbitrary manner. For example, could the reporting of violations of humanitarian law by the armed forces be censored? What if corruption in the procurement of weapons was discovered and revealed by the media? Wasn't the free flow of information and debate on such issues equally important to safeguarding democracy?

Following close on the heels of the above judgment was *Leader Publications (Pvt.) Limited* v. *Ariya Rubasinghe & Others.*[31] There, a newspaper publishing house brought action against the CA purported to be appointed under emergency regulations, complaining that the six month ban imposed by the CA under emergency powers on publishing any newspaper and the sealing of the press was in violation of the right to equality [Article 12(1)], freedom of expression [Article 14(1)(a)] and the right to engage in an occupation of one's choice [Article 14(1)(g)].

On 3rd May 2000, the President proclaimed the Emergency (Miscellaneous Provisions and Powers) Regulations No.1 of 2000 acting under the Public Security Ordinance (PSO). Regulation 14 therein, which dealt with "control of publications," was amended on 10th May by the substitution of a new regulation. The amended regulation provided, *inter alia*, that a CA may take such measures or give such directions as he may consider necessary for preventing or restricting publication of matters which would or might be prejudicial to the interests of national security or public order. The CA could direct that material intended to be published should be submitted to him for scrutiny. If a newspaper contravened the CA's directives, s/he was empowered to order the prohibition of the printing, publication and distribution of such newspaper or seal the printing press concerned for a specified period.

The CA purported to act under the above regulation. He first issued a warning to the Editor of the Sunday Leader newspaper, published by the petitioner, to comply with regulation 14. The Editor replied stating that the regulation would be complied with, but at the same time inquired as to when the CA's appointment

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[31] SC (F/R) No.362/2000, SC Minutes,30th June 2000.

was gazetted. The CA wrote back alleging that an article published in the Sunday Leader violated his directive, and saying that he was issuing orders (i) prohibiting the printing, publication and distribution of any newspaper by the petitioner and (ii) sealing their printing press for a period of six months under regulation 14. It is to be noted that the CA issued two orders, whereas regulation 14 permits only one or the other.

Justice Amerasinghe delivering the judgment of the Court did not go into the merits of the arguments based on a violation of fundamental rights. Instead, the judgment dealt exclusively with the preliminary issue raised by the petitioner as to whether the CA was properly appointed and legally empowered to issue the orders.

The Court held that under the PSO, Parliament had delegated legislative powers to the President, who does not ordinarily enjoy such powers, by permitting the proclamation of emergency regulations. By virtue of section 6 of the PSO, Parliament has permitted the President to also delegate powers under such regulations on authorities or persons to issue orders or rules for purposes of which the regulations are made. Either the President can exercise such powers, or if s/he does not wish to do so, the delegated authority can exercise such powers. The Court then went on to declare:

> *Parliament has intended to leave to the judgment of the President the question whether or not to exercise the power to empower authorities or persons at all; but where the President decided to exercise the power, the President must make emergency regulations empowering such authorities or persons as may be specified in the regulations to make orders and rules for any of the purposes for which such regulations are authorized by the Public Security Ordinance to be made.*

Examining regulation 14, the Court found no such provisions identifying who the CA is or the specific parameters of the powers to be exercised by the CA, whereas the Court found such provisions pertaining to other regulations. It pointed out that merely gazetting the appointment of a delegated authority is not sufficient:

> *The public should know not only what precisely is the authority conferred, so that it may be ensured that the exercise is not in excess of the power Parliament has conferred, but also that the authority or person designated to take such measures should be identified and duly empowered in accordance with a prescribed mode of appointment.*

For the above reason, the Court found that the respondent CA had no legal authority to issue such orders. The Inspector General of Police was ordered to restore the printing press and other such property to the petitioner and the State was ordered to pay costs in the sum of Rs.100,000 to the petitioner.

The Leader case conforms to a consistent and salutary pattern of judgments of the Supreme Court whereby the judiciary has strictly construed emergency powers so as to prevent unwarranted intrusions into individual liberties.[32] It is in this context that the Sunila Abeysekera judgment appears to be an exception to the rule.

The issue of censorship gave rise to considerable public debate. The litigation discussed above provided an avenue for the public

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[32] See Udagama, Deepika, "Taming of the Beast: Judicial Responses to State Violence in Sri Lanka," *Harvard Human Rights Journal* (Spring 1998) p.269.

to seek clarification on the pressing issues. The Human Rights Commission too intervened by sending a memorandum to the Presidential Secretariat on the need to have specific guidelines. The memorandum extensively dealt with international human rights standards on freedom of expression especially those that pertain to periods of public emergency.

On 13th July the Government issued a set of guidelines[33] to be adhered to by the media on a voluntary basis. They delineated news items that could attract the intervention of the CA under the headings of national security and public interest (the guidelines, however, deal only with national security), preservation of public order, supplies and services essential to the life of the community, news items that would encourage persons to commit breach of any law or incite or encourage persons to mutiny, riot or civil commotion. The guidelines did narrow the scope of news pertaining to those areas that would be amenable to action by the CA. With regard to reporting on military operations past or future, official conduct of the security personnel in preservation of national security, procurements and placements of weapons and military equipment and the deployment of troops, the guidelines point out that the media may (not shall, thus making it discretionary) follow the official statements and releases issued by the relevant organisations. Then they go on to point out somewhat vaguely that the media "also should refrain from reporting any matter that would affect the morale of the security forces." Censorship on the ground of "affecting the morale of the troops" (which was so vague as to include any news item) had been a major criticism of the censorship regime that existed. It is unfortunate that the uncertainty with regard to that issue was perpetuated by the

[33] See Annex I.

guidelines. That vague phrase certainly had the potential of nullifying the other guidelines, which sought to provide somewhat specific directions to the media. The most salutary feature of the guidelines was the requirement that the CA must ensure the recording of the reasons before making an order, thereby guaranteeing a degree of accountability and transparency.

7. Privatisation and Article 126

Since the adoption of the 1978 Constitution, the Supreme Court has devoted considerable efforts to defining what exactly constitutes "executive and administrative action" that is amenable to the fundamental rights jurisdiction under Article 126. The exclusion of legislative and judicial action from judicial scrutiny under that jurisdiction is negative enough. Hence, when the Supreme Court narrowly interpreted "executive and administrative action" so as to exclude public corporations, albeit carrying out commercial functions, such as the Insurance Corporation,[34] the National Paper Corporation[35] and state owned banks,[36] there was much consternation. Subsequently, the Court reversed that position and recognised certain actions of such entities, although performing purely commercial functions, as falling within the purview of Article 126.[37] The current challenge is posed by the privatisation (sometimes referred to as "peoplisation") of those entities which were once owned and operated by the State. This challenge is symptomatic of changing economic policies compelled by the globalisation process.

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[34] *Wijetunga* v. *Insurance Corporation* [1982] 1 Sri LR1.

[35] *Chandarasena* v. *National Paper Corporation* [1982] 1 Sri LR 19.

[36] *Wijeratne* v. *People's Bank* [1984]1 Sri LR 1.

[37] E.g., *Hewamallikage* v. *The People's Bank*, SC Application No.291/93, SC Minutes 14th October 1994; *Pinnawala* v *Sri Lanka Insurance Corporation* [1997] 3 Sri LR 85.

In *Bandara* v. *Wayamba Bus Company Limited & Others,*[38] the Court had to address the issue of peoplisation of previously government owned bus companies. The petitioner was an employee of the Seemasahitha Puttalam Janatha Santhaka Pravahana Sevaya, which was peoplised in 1987, pursuant to which 50% of its shares reverted to employees, while 50% of the shares were held by the Government. By Act No.30 of 1996, the Minister of Transport was empowered to amalgamate two or more of such peoplised transport companies. Using those powers, the Minister amalgamated several companies, including the Puttalam company the petitioner was employed in, and a new entitity known as the Wayamba Bus Company was incorporated. There again, the employees were given shares equivalent to what they had owned earlier. The petitioner became an employee of the Wayamba Bus Company pursuant to the amalgamation. In January 1998, the company made a disciplinary order against him whereby he was transferred to another station. He challenged the order, claiming that it was issued in violation of his right to equality under Article 12(1).

A three-judge Bench, with Chief Justice Sarath N. Silva delivering the Court's judgment, held that as 50% of the shares of the company were held by the employees, the Government did not have control of the company. Furthermore, the Court opined that the company was engaged in providing passenger transport by road and, therefore, its functions being of a commercial nature do not take the character of executive or administrative action. The application was accordingly dismissed.

What is novel about this situation is the ownership of 50% shares by employees, and not the second reason advanced in the

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[38] SC (Spl) 77/98, SC Minutes 2nd August 2000.

judgment. As pointed out above, the Court had earlier identified certain actions taken by corporations engaged in purely commercial activities as executive or administrative action. The only distinguishing feature between those entitities as they were then and the Wayamba Bus Company, was that the former were wholly owned and operated by the State, unlike the latter. It is not clear if the company's commercial nature alone would have excluded it from the ambit of Article 126 or whether it was excluded mainly because the State had no controlling shares in it. If the former position holds true, it would considerably alter the manner in which the Court would view actions of entities such as commercial banks, which are currently owned and operated by the State.

This judgment brings into sharp focus the need to re-conceptualise responsibility for human rights violations. Currently, both at international and domestic levels, responsibility is viewed exclusively through the prism of the social contract, making only State action liable. As State activity increasingly keeps shrinking under globalisation, should not private entitities whose activities have a profound effect on human life also be subjected to human rights obligations? The South African Constitution of 1996, in its characteristically progressive manner, also includes private action as falling within constitutional responsibility for violations of fundamental rights. Article 8(2) declares "[a] provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right."

It is unfortunate that the Draft Constitution of Sri Lanka released in August 2000 did not take these new developments into consideration. It once again makes only executive and administrative action fully justiciable for purposes of the

fundamental rights jurisdiction. Legislative and judicial actions are expressly excluded [Draft Article 30(4)].

It is nearly 23 years since the adoption of the 1978 Constitution. While significant developments relating to fundamental rights jurisdiction are evident over that period of time, the vast changes that the world has undergone, mainly due to globalisation and new developments in international law, make the need for change an even more pressing challenge.

Annex

Guidelines Issued by the Competent Authority under Regulation 14(10) of the Emergency Regulation No. 1 of 2000 as Amended by Gazette Extraordinary No. 1138/34 of 1st July 2000

This is in addition to the discussion held by me with the representatives of media on 4th July at this department on the above.

1. Material connected with national security and public interest.

   (a) Competent Authority must be satisfied that the material would pose a substantial threat and prejudice to national security;

   (b) Mere advertence to issues that deal with the security situations may not warrant censorship unless the content is such that it must result in national security being endangered.

   (c) The Competent Authority must be of the opinion that the publication or transmission of the material was calculated to cause prejudice to the national security.

2. Material connected with preservation of public order.

   (a) In decisions and opinions dealing with the preservations of public order, the Competent Authority must be satisfied and must form a reasonable opinion that the material is of such a serious nature that it would per se bring about a substantial disruption to public order;

(b) This, however, would not extend to material which would fall short of such a disruption of public order, mutiny, riot or civil commotion;

(c) These regulations do not contemplate material that would fall outside the ambit of the above but published or transmitted merely to keep the public informed of the current situation including the security situation and matters which, would give rise to public debate.

3. Material connected with supplies and services essential to the life of the community.

(a) The supplies and services are also necessary to be identified as essential to the life of the Community;

(b) This regulation foresees disruption to supplies and services that are so essential that those would threaten the life of the community;

(c) In this instance the phrase "life of the Community" must be interpreted to mean as those supplies and services that are essential and fundamental to the community and would not include each and every service and supply that would be necessary in the ordinary course.

4. Material that would encourage persons to commit breach of any law or incite or encourage persons to mutiny, riot or civil commotion.

(a) The Competent Authority must be satisfied and form an opinion that the relevant material encourages persons to commit breaches of any law and that breach would result in prejudice being caused to maintenance of public

order or both these conditions, i.e. a breach of the law would be committed and such breach would result in prejudice being caused to the maintenance of public order or supplies and services essential to the life of the community.

(b) With operations past or future, official conduct of the Security Personnel in preservation of National Security, procurements and placements of weapons and military equipment and deployment of troops. With regard to the above the media may follow the official statements, releases issued by the relevant organisations. The media also should refrain from reporting any matter that would affect the morale of the Security Forces.

5. Military operations past or future, official conduct of the Security Personnel in preservation of National Security, procurements and placements of weapons and military equipment and deployment of troops. With regard to the above the media may follow the official statements, releases issued by the relevant organisations. The media also should refrain from reporting any matter that would affect the morale of the Security Forces.

6. The Competent Authority must ensure before making an order that its reasons are recorded.

Ariya Rubasinghe
Director of Information.

VII

Migrant Workers

*S. Nishadini Gunaratne**

1. Introduction

Until the late 1970s, Sri Lankan labour outmigration was insignificant. The petro-dollar boom in the Middle East (ME), accompanied by accelerated development programmes in that area, towards the end of the 1970s radically changed the nature of international labour migration, creating an unprecedented demand for different categories of manpower. In time, it led to large outflows of labour from countries such as Sri Lanka. A characteristic feature of the present Sri Lankan outmigration is the fact that nearly 94% of the migrants seek employment in the ME countries.[1]

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* Researcher, Law & Society Trust. The writer wishes to express her gratitude to Mr. M.I.M. Azver, Research Assistant, Law & Society Trust, for procuring some of the documents reviewed by the writer in the preparation of this chapter.

[1] *Statistical Handbook on Migration – 1999*, Sri Lanka Bureau of Foreign Employment (1999) p.5 and provisional data for 2000.

Since the late 1970s, successive governments of Sri Lanka have promoted labour export for the dual purpose of reducing unemployment in the domestic labour force and augmenting foreign exchange reserves. The export of labour has brought both benefits and problems to the country, some of which cannot be quantified.

Sri Lanka: State of Human Rights 1998 carried a chapter on migrant women workers. Further, some aspects of migrant workers were discussed under The Rights of Women and Workers' Rights in *Sri Lanka: State of Human Rights 2000*. This chapter attempts to outline the scale and patterns of labour migration, its benefits and costs, interventions to protect migrant workers and further interventions needed for the protection of their rights.

2. Labour Export as a Parameter of Policy

The escalation of oil prices in the 1970s aggravated balance of payments problems in developing countries such as Sri Lanka. Cutting back imports and currency devaluation were inadequate to cope with the new situation, and policy makers saw in the petro-dollar boom an opportunity for exporting manpower in order to earn foreign exchange. Since then, exporting labour has remained an economic imperative for three reasons: first, the initial investment costs for the Government are minimal; second, it produced considerable foreign exchange earnings; and third, labour migration helps reduce domestic unemployment.

3. Migrant Labour Magnitudes and Trends

3.1 Data on migrant labour

Since its establishment in 1985, the Sri Lanka Bureau of Foreign Employment (SLBFE) has maintained data on migrant workers who secured foreign employment through registered or authorised agencies.[2]

Registration of migrants has been more strictly enforced since 1995[3] and it may be assumed that the data on migration since 1995 is more reliable than that for the earlier years. One consequence of the relatively stringent enforcement of registration is the fact that the percentage of migrants securing overseas employment through clandestine agencies has fallen from more than 50 (during the pre-1995 period) to nearly 30 in recent years.[4]

3.2 Magnitudes of labour migration

Data on migration of Sri Lankan manpower during the period from 1972 to 2000 are set out in Table 1.

The tabulated data indicate a rising trend in labour migration up to the year 1995. The greater part of the increase in the outflow of labour in 1995 may be attributed to the fact that the SLBFE commenced the registration of migrant workers more stringently from that year. It may also be noted that the proportion of females in the annual outmigration increased from less than 2% in the

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[2] Employment agencies are required to register themselves with the SLBFE; registered agencies are referred to as authorised agencies.

[3] *Statistical Handbook on Migration –1999*, Sri Lanka Bureau of Foreign Employment (1999) p1.

[4] *Ibid*, p 43.

early 1970s to 75% in 1997. However, in the period 1998-2000, the rate of female participation in migration declined slightly relative to the period 1994-1997.

Table 1

Migrant labour by sex: average number of migrants per year during specified periods and the numbers in specified years.

Period /Year	Male	%	Female	%	Total
* 1972-74	560	98.6	8	1.4	568
1975	-	-	-		1039
* 1976-87	11081	58.6	7819	41.4	18900
1988	8309	45.0	10119	55.0	18428
1989	8680	35.0	16044	65.0	24724
1990	15377	36.0	27248	64.0	42625
1991	21423	33.0	43560	67.0	64983
1992	15493	35.0	29159	65.0	44652
1993	17153	35.0	31600	65.0	48753
1994	16377	27.0	43791	73.0	60168
1995	46021	27.0	126468	73.0	172489
1996	43112	26.5	119464	73.5	162576
1997	37552	25.0	112731	75.0	150283
1998	53867	33.7	105949	66.3	159816
1999	63504	35.5	115610	64.5	179114
** 2000	51850	31.1	114639	68.9	166489

Source: Statistical Handbook on Migration 1999 published by the SLBFE, pp 2-3.

** The average number per year is derived by dividing the total for the period by the relevant number of years.*

*** Provisional data provided by the SLBFE.*

Although, migration is affected by government policies and strategies, it is also greatly influenced by the demand prevailing in the labour importing countries and policy changes in other countries which provide migrant labour. The part of the increase in the outflow of Sri Lankan females in recent years may be attributed to the ban/restrictions placed by some other South Asian countries on the migration of their housemaids. Recruitment of women as housemaids was banned by India, Bangladesh and Pakistan in response to social problems. Philippines restricted the recruitment of housemaids to cope with malpractices.[5]

3.3 Composition of migrant manpower

The data on migrant manpower are subsumed into such categories as professional grades, middle level and clerical grades, skilled and unskilled workers and housemaids (See Table 2).

The data in Table 2 bring into focus some salient features of the annual migration: the proportion of professionals in the outmigration is insignificant; workers in middle level and clerical grades (male and female) account for less than 6% of the outflow; skilled and unskilled workers (male and female) account for less than 46 percent; housemaids constitute more than 75% of all female migrants.

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[5] *Supra* n 3 at p 39.

Table 2 - Migrant Workers by Manpower Level and Sex in Selected Years

Year	Professional Level		Middle Level		Clerical and related		Skilled		Unskilled		House -maids	Total
	M	F	M	F	M	F	M	F	M	F		
1991	148	7	818	80	1,292	101	10,271	5,978	8,894	2,537	34,857	64,983
%	0.2	-	1.3	0.1	2.0	0.1	15.8	9.2	13.7	4.2	53.6	100
1993	465	14	953	77	1,607	206	7,712	4,652	6,416	2,411	24,240	48,753
%	0.9	-	2.0	0.1	3.0	0.4	16.0	9.5	13.1	5.0	50.0	100
1995	837	41	2,074	421	4,088	506	19,431	7,734	19,591	3,906	113,860	172,489
%	0.5	-	1.2	0.2	2.4	0.3	11.3	4.5	11.3	2.3	66.0	100
1997	534	39	1,388	251	3,008	571	15,855	8,723	16,767	3718	99,429	150,283
%	0. 3	-	1. 0	0. 2	2. 0	0. 4	10. 5	6. 0	11. 1	2. 5	66.0	100
1999	1,139	78	2,791	433	5256	940	24,420	12,926	29,898	13,523	87,710	179,114
%	0.6	-	1. 6	0.2	3.0	0.5	14.0	7.0	16.6	7.5	49.0	100
*2000	671	23	3,433	473	3,997	862	21,134	11,981	22,615	8,973	92,327	166,489
%	0.4	-	2.0	0.3	2.4	0.5	12.7	7.2	13.6	5.4	55.5	100

Source: Statistical Handbook on Migration 1999, SLBFE, p 8.

** provisional data relevant to 2000 provided to the writer by the SLBFE.*

3.4 Regions that attract migrant workers

Provisional data for the year 2000 provided by the SLBFE indicate the flow of migrants to more than 56 countries by specified manpower categories. By clustering the labour importing countries and by combining manpower levels, it is possible to provide a simplified pattern of migrant outflows. In Table 3, the labour importing countries are denoted by the regions to which they belong. The regions are: the Middle East, Asia, Africa, Europe and North America and Other Countries.

Analysis is based on provisional data for 2000 provided by the SLBFE.

The data in Table 3 bring into focus a pattern of migration that clearly indicates that the Middle-East is the predominant importer of all categories of Sri Lankan manpower.

4. Benefits from Labour Migration

An evaluation of net benefits has to be based on consideration of both gross benefits and costs, some of which are not quantifiable. Due to the lack of relevant data, only qualitative and qualified statements can be made about some aspects of benefits. This section deals mainly with gross benefits and factors that render the task of benefit assessment difficult.

Table 3 - Migrant Workers by Manpower

Categories and Labour Importing Regions in 2000.

Region	Profe-ssional		Middle Level (M &F)		Clerical and related (M &F)		Skilled & Unskilled (M &F)		House-maids (M &F)		Total (M &F)	
	No	%	No	%	No	%	No	%	No	%	No	%
Middle East	574	82.7	2,385	61.1	4,337	89.3	61,028	94.3	89,243	96.7	157,567	94.6
Asia	97	14.0	1,462	37.4	456	9.4	2,970	4.6	1,329	1.4	6,314	3.8
Africa	9	1.3	11	0.3	12	0.2	101	0.2	33	-	166	0.1
Europe & N. America	13	1.9	48	1.2	54	1.1	604	0.9	1716	1.9	2,435	1.5
Other Countries	1	0.1	-	-	-	-	-	-	6	-	7	-
Total	694	100	3,906	100	4,859	100	64,703	100	92,327	100	166,489	100

4.1 Benefits to the State

While data is available on the number of migrants in different manpower categories who leave the country for foreign employment, there is no data showing the number of those migrants who were in the domestic labour force as employed and unemployed persons prior to migration. It may be assumed that the professionals and workers in the middle-level and clerical grades were employed. However, it is difficult to make a similar assumption in relation to skilled and unskilled workers, as the domestic labour force has job-seekers in these categories. Young women and housewives are reluctant to work as domestic aides in Sri Lanka, as the wages offered are low. It may, therefore, be assumed that the majority of the females who left the country for employment were not participants in the domestic labour force.

The withdrawal of unemployed personnel from the labour force reduces the unemployment rate of the country. Therefore, it may be concluded that the migration of the unemployed skilled and unskilled workers who were in the domestic labour force makes a significant contribution to the reduction of the unemployment rate. Further, unemployment is a cause of social and political unrest and a reduction of the unemployment rate can be regarded as a benefit from a socio-political perspective.

A direct and tangible benefit from labour migration is the improvement of the country's balance of payments in consequence of remittances sent by migrant workers (See Table 4).

Table 4 - Private Remittances (Rs. Million) 1991-2000

Year	Remittances
1991	18,311
1992	24,037
1993	30,592
1994	34,992
1995	40,482
1996	46,003
1997	54,445
1998	64,517
1999	74,342
*2000	82,000

Source: Statistical Handbook on Migration 1999 published by the SLBFE, p 37.

* *Provisional data provided by the SLBFE*

The value of remittances (in rupee terms) has increased from 18311 million in 1991 to 82000 million in 2000. As the value of remittances is indicated in rupees and as the rupee has undergone considerable devaluation between 1991 and 2000, the magnitude of the real increase in the value of remittances cannot be computed without making a correction for the effect of devaluation. (The real increase in remittances could be directly derived if the remittances were indicated in terms of dollars).

4.2 Benefits to migrants

The financial benefits accruing to a migrant worker are his or her savings. In general, most migrants improve their economic conditions. The returnee migrant may use the savings in the following ways:

(a) building a housing unit or effecting improvements to an existing dwelling;

(b) opening a savings account or fixed deposit account with a bank;

(c) investing in the education of children;

(d) acquiring consumer durables, jewellery and items of furniture;

(e) repayment of loans.

Women migrants who have returned home and who have increased their earning capacity also enjoy a higher status in the family and community, and by virtue of their economic independence, exercise more decision-making power.

In general, the savings of the migrant contribute directly or indirectly to an improvement of the quality of life of the whole household. However, there may be a gap between expectations of the migrant prior to departure for foreign employment and his or her actual performance. In a study carried out by the Marga Institute,[6] the benefits to a migrant were analysed from a perspective that took into consideration the migrant's expectations and actual performance. The Marga study was based on the case

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[6] Godfrey Gunatilleke (ed.) *The Impact of Labour Migration on Households: A Comparative Study in Seven Asian Countries*,The United Nations University (1992) pp 227-263.

histories of 50 migrants selected from a survey sample of 510 that included housemaids, skilled and unskilled workers and workers in supervisory grades. The benefits to a migrant worker were assessed in terms of the "success" or "failure" experienced by the migrant. Success was evaluated in terms of economic well-being, quality of life, inter-personal and intra-family relations and relationship with the community. The cases categorised as "failures" constituted nearly 60% of the total sample of 510 migrants; the majority of the failures were among housemaids.

A distinction has to be made between a migrant who was unemployed and one who was employed before migration. To a worker in the first category, his or her savings are the financial benefits. To a worker in the second category, savings minus the income foregone or the opportunity cost are indicative of his or her financial gain. However, a migrant worker may not take into account the income foregone in assessing his or her financial benefits.

5. Costs of Migration

The totality of costs includes financial costs as well as costs that cannot be quantified in financial terms. Some of the unquantified costs include the sufferings and deprivations experienced by the migrant.

5.1 Cost to the State

State expenditure on activities connected with labour migration may be taken as a measure of the financial cost borne by the State. An unquantified cost is the loss of man-power that adversely affects the performance of the state sector. No systematic evaluation has yet been done of the impact of the departure of professional manpower on the country's economy. Although the number of professionals among migrants is relatively small,

the departure of high calibre personnel could seriously affect the institutions that employed them. The migration of experienced middle-level and skilled manpower may also have a negative impact on the performance of institutions even when they can be replaced with persons with similar qualifications as the replacements may lack the experience of their predecessors.

5.2 Costs to migrants

Registration fees, fees paid to employment agencies and other expenditures connected with or necessitated by migration, are the financial costs incurred by migrants. Some migrants also bear costs of an entirely different nature, such as exploitation, humiliation, indignity, physical abuse and other forms of violation of human rights in the host country, and the misfortunes that await the returnee migrant in the home country. The majority of victims are housemaids.

Several studies have focused on the negative aspects of labour migration.[7] Personal experiences of victimised migrants, which are often of an anecdotal nature, are highlighted in the media. A leading newspaper recently published a graphic description of the plight of garment workers who were treated like slaves in ME countries.[8] Complaints made by migrants (while they are in the host country or on their return) are redolent of an exploitative situation which afflicts a minority of Sri Lankan migrant workers.

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[7] S. Kottegoda, "The Rights of Women" in *Sri Lanka: State of Human Rights 1999* (Law & Society Trust, Colombo, 1999) pp 123-124. S. Gomez, " The Dilemma of the Migrant Worker," A Paper presented at the Conference on "50 Years of Law, Justice and Governance in Sri Lanka," organised by the Law & Society Trust, Colombo, November 2000, pp 1-4.

[8] " Lost Illusions", *The Island*, 22nd November 2000.

The available data do not indicate the actual number of aggrieved migrants. However, it is possible to estimate the percentage of the migrant population vulnerable to various forms of discrimination, exploitation and abuse. It is reasonable to assume that the majority of the migrants who fall prey to exploitation and abuse lodge complaints with the SLBFE. In 1999 and 2000, the SLBFE received complaints from 9,832 and 7,353 migrants respectively, amounting to nearly 5% of the total number of migrants in the two year period. It may, therefore, be assumed that the number of migrants with grievances in recent years amounts to less than 10% of the total number of migrants.

Analysis of complaints, research findings and the anecdotal accounts published in the print media can be pieced together to give a picture of the kinds of grievances experienced:

(a) Up to 10% of migrants, specially unskilled workers, are abused, oppressed, humiliated and exploited.

(b) Some housemaids are victims of physical abuse and they often suffer from mental depression .

(c) Unskilled contract workers often work in unhygienic conditions. Their working day generally exceeds the number of working hours stipulated in the contract of employment.

(d) A contract worker is often at the mercy of the employer. The labour regulations of the host country are not enforced to protect the migrant from encroachments on his or her human rights.

(e) Some of the returnee migrants, specially the unskilled and skilled workers, may find themselves in one or more of the following situations:

(i) Their remittances have been frittered away by their spouses. Some of the spouses have extra-marital relations and the traditional family bonds are on the verge of disintegration.

(ii) Their children have been left in a state of neglect; some have dropped out of school; some are addicted to drugs and vice; some have been victims of physical abuse.

(iii) Their prospects of employment in the domestic labour market are remote.

(iv) They have contracted HIV/AIDS.[9]

5.2.1 Discrimination and racism

A number of host countries have institutionalised discriminatory practices in their policies on migrant workers. These include differentials in wages, discriminatory labour practices, hostile work conditions, wage setting based on nationality and wage freezes.[10] The Migrant Forum in Asia, in a statement issued in connection with the International Migrants Day (celebrated on 18th December) noted that:

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[9] According to a Pamphlet issued by UNDP (Project on HIV & Development in South and South West Asia,1999) 50% of the reported HIV persons in Sri Lanka were returnee housemaids from the Middle East. It may be noted that the actual number of persons suffering from HIV/AIDS was not indicated in the publication referred to.

[10] "An International Day for Migrants," *The Island,* 20th December 2000.

discriminatory policies are also prevalent in restrictions imposed on migrant workers on their right to organise and bargain. While modern constitutions of Asian countries recognise the freedom of assembly, many migrant workers are disallowed to assemble except for sports and physical exercise as in the case of Saudi Arabia. In Singapore, migrant workers are barred to organise or to even hold meetings in public places. Organisations of migrant workers exist but they are bereft of bargaining power.[11]

Further, a migrant who is accused of committing an offence such as adultery, which is not a crime in Sri Lanka, is tried under Sharia law and sentenced to forms of punishment that may vary from imprisonment and lashing to stoning to death.

6. International Instruments

A number of international instruments seek to protect the rights of migrant workers. The most significant among them are:

1. ILO Convention No. 97 on Migration for Employment (Revised) of 1949;

2. ILO Convention No.143 on Migrant Workers (Supplementary Provisions) of 1975;

3. UN Convention on the Protection of the Rights of All Migrant Workers and Members of their Families 1990.

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[11] *Ibid.*

ILO Convention No. 97

The Convention contains a series of provisions designed to assist migrants for employment. It obliges member states to provide accurate information on the migration process and free services to assist migrant workers. The Convention also requires ratifying States to put migrants lawfully within their territory on the same footing as their own nationals in applying a wide range of laws and regulations relating to their working life, without discrimination on the grounds of nationality, race, religion or sex.

ILO Convention No. 143

The Convention deals mainly with the prevention of clandestine migration for employment and the arrest of manpower trafficking activities. Further, States must declare and pursue a policy to secure equality of treatment in respect of matters such as employment and occupation, social security, and trade union and cultural rights.

Sri Lanka has not ratified the two ILO Conventions. However, the Sri Lankan government has submitted reports under each of the above instruments on request by the ILO. [12]

UN Convention on the Protection of the Rights of all Migrant Workers and Members of their Families

The Convention on the Protection of the Rights of all Migrant Workers and Members of their Families was adopted by the General Assembly on 18 December 1990 and opened for signature

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[12] S. Gomez , " The Dilemma of the Migrant Worker," *Supra* n 7, p 5.

by all Member States of the United Nations. Sri Lanka acceded to the UN Convention on 11th March 1996.

The main thrust of the Convention is to ensure that persons who qualify as migrant workers under its provisions are entitled to enjoy their human rights regardless of their legal status. The following sections focus on the obligations of State Parties and procedures to be followed for meeting specified requirements.[13]

Part VI of the Convention imposes a series of obligations on States Parties in the interest of promoting "sound, equitable, humane and lawful conditions" for the international migration of workers and members of their families. These requirements include: the establishment of policies on migration; the exchange of information with other State Parties; the provision of information to employers, workers and their organisations on policies, laws and regulations; and assistance to migrant workers and their families.

The Convention establishes rules for the recruitment of migrant workers, and for their return to their States of origin. It also details the steps to be taken to combat illegal or clandestine migration. Under Article 72 of the Convention, a Committee on the Protection of the Rights of all Migrant Workers and Members of their Families is to be established to review the application of the Convention once it has entered into force.

State Parties accept the obligation to report on the steps they have taken to implement the Convention within a year of its entry

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[13] See *Sri Lanka: State of Human Rights 1998* (Law & Society Trust, Colombo, 1998) for a summing-up of the importance of the UN Migrant Workers Convention, pp 223-224.

into force for the State concerned, and thereafter every five years. The reports are expected to indicate problems encountered in implementing the Convention, and to provide information on migration flows. After examining the reports, the Committee will transmit such comments as it may consider appropriate to the State Party concerned.

Under Article 76, a State Party may recognise the competence of the Committee to receive and consider communications from one State Party alleging that another State Party is not fulfilling its obligations under the Convention. Such communications may be received only if State Parties have so recognised the competence of the Committee and all domestic remedies have been exhausted.

Under Article 77, an aggrieved individual may bring to the notice of the Committee that his or her rights under the Convention have been violated provided that the individual is within the jurisdiction of the State which has recognised the competence of the Committee and all domestic remedies have been exhausted.

The Convention will enter into force following ratification or accession by 20 States, which has not happened to date. As at 16th October 2000, only 15 States had either ratified or acceded to the Convention: Azerbaijan, Bosnia and Herzegovina, Bolivia, Cape Verde, Colombia, Egypt, Ghana, Guinea, Mexico, Morocco, the Philippines, Senegal, Seychelles, Sri Lanka and Uganda. As at the above date, the following States had signed the Convention: Bangladesh, Chile, Comoros, Guatemala, Guinea-Bissau, Paraguay, Sao Tome and Principe, Sierra Leone, Tajikistan and Turkey. It may be noted that if labour receiving countries fail to ratify the Convention, labour sending states and the international community cannot compel the states to abide by the standards laid down in the Convention.

Another recent mechanism created by the UN to deal with issues of migrant labour was the appointment of a Special Rapporteur on Migrants in 1999.[14] The Rapporteur is mandated to:

(a) request and receive information from all relevant sources, including migrants themselves on violations of the human rights and their families;

(b) formulate appropriate recommendations to prevent and remedy violations of the human rights of migrants wherever they may occur.[15]

7. State Interventions to Protect Migrant Workers

An examination of findings of surveys and complaints made by migrants serves to bring out factors that adversely affect migrants. These factors can be summarised as follows:

(i) Migrants were exploited by employment agencies in the home country.

(ii) Migrants were exploited in the host country.

(iii) Migrants were not aware of the labour regulations in force in the host country.

(iv) Migrants were not aware of the remedies available for redressing grievances.

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[14] "Tharani" 2000 - 4th Quarter, Newsletter of Action Network for Migrant Workers (ACTFORM).

[15] "Tharani" 2000 - 2nd Quarter, Newsletter of Action Network for Migrant Workers (ACTFORM).

(v) Prior to their departure, migrants were not aware of the working conditions in the host country.

(vi) Migrants were often not compensated for any injury suffered in the work place or for termination of employment.

(vii) The housemaid who was trapped within the household had no alternative but to submit to abuse in the workplace.

The Foreign Employment Agency Act No. 32 of 1980 did not provide for a separate authority to oversee the interests of migrant workers. The Government, therefore, decided to create a central authority wholly devoted to the protection of migrants and promotion of their welfare.

7.1 The Sri Lanka Bureau of Foreign Employment

The Sri Lanka Bureau of Foreign Employment Act No. 21 of 1985, which repealed the Foreign Employment Act No. 32 of 1980, provided for the establishment of the Sri Lanka Bureau of Foreign Employment. Accordingly, the SLBFE was set up to regulate the recruitment of Sri Lankans for employment outside Sri Lanka by a private sector undertaking or a public corporation.

The objectives of the Act, which are specified in section15, define the functions of the Bureau. Promotion and development of foreign employment opportunities for Sri Lankans, regulation of the business of foreign employment agencies, setting norms for and negotiating contracts of employment are among the above functions.[16]

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[16] See *Sri Lanka:State of Human Rights 1998* (Law & Society Trust, Colombo, 1998) for a detailed account of the objectives, pp 232-233.

7.2 Powers of SLBFE

7.2.1 Regulation of licensed foreign employment agencies

Section 24 of the SLBFE Act prohibits a person from carrying on the business of a foreign employment agency unless he or she is the holder of a licence issued by the Bureau. An application for a licence has to be forwarded to the Bureau in a specified format (section 26). The Bureau has the power to impose specified conditions (sections 27, 28) before issuing a licence. A licence has to be renewed annually (section 30). The Bureau is also vested with the power of either cancelling or refusing to renew a licence on specified grounds (sections 31, 32). This power of either cancelling or refusing the renewal of a licence is subject to the right of appeal by the aggrieved party (section 33). Sections 62-68 impose penalties for offences under the Act, which include imprisonment and payment of a fine.

7.2.2 Training and orientation of Sri Lankan recruits going abroad for recruitment

Training programmes are conducted for all unskilled female workers and for unskilled male workers who leave for Korea and Malaysia.[17] These programmes are conducted at SLBFE's head office and at a number of regional offices as well as at a few centres run by licensed agencies and NGOs.[18] A training programme conducted by the SLBFE includes a component devoted to teaching the language used in the host country.

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[17] Information obtained though an interview with a senior official of the SLBFE in March 2001.

[18] *Female Migration: Policy and Gaps in Implementation* – A Digest Produced by Marga Institute and CIDA (1999), p 5.

Housemaids are issued a certificate of training in the use of modern household equipment and the laws and regulations relating to foreign employment. It may be noted that only those migrants who are registered with the Bureau are entitled to follow a training programme. As SLBFE charges a registration fee on the basis of the salary offered by the prospective employer, a migrant who is very poor is unlikely to register with the Bureau.[19]

7.2.3 Registration of migrant workers

According to section 53(3) of the Act, a migrant worker who leaves the country for employment overseas is required to register with the Bureau. Registration enables the Bureau to keep statistical records of workers and document their employment categories. A registered migrant worker enjoys the following benefits: migrant workers are able to enter the host country as legal workers; registration acts as a deterrent to duping of job seekers by unscrupulous employment agencies; training programmes are conducted for all unskilled female workers and selected categories of male workers; migrant workers are provided with insurance benefits under the SURAKSHA insurance scheme. They can obtain low interest loans from the People's Bank (SIYATHA) and Bank of Ceylon (RANSAVIYA) under a scheme underwritten by the SLBFE. Migrant workers' children are also entitled to scholarships. Further, a transit home is maintained by the SLBFE for returning migrants with problems.

As mentioned earlier, SLBFE charges a registration fee based on the monthly salary offered by the prospective foreign employer. The amount to be paid by the migrant is indicated below:[20]

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[19] *Ibid.* p 6.

[20] S. Gomez , " The Dilemma of the Migrant Worker", Supra n 7, p 15.

Rs.	10,000	Rs.	5200
Rs.	10,000-20,000	Rs.	7700
Rs.	20,000	Rs.	10,200

In order to arrest the out-migration of unregistered workers, airlines are requested to issue tickets only if the passport bears the SLBFE stamp. A desk has been set up at the airport to monitor departing migrants.[21] Those who assist migrants to leave without the SLBFE stamp violate the provisions of the SLBFE Act. The airport monitoring system has been effective to a great extent in detecting departures in violation of regulations. However, an unregistered migrant who is not allowed to proceed for foreign employment is in a very unfortunate situation. He or she cannot reclaim the money paid to the illegal employment agency, even when they are denied the promised job.

7.2.4 The formulation of standard contracts of employment

The SLBFE has introduced a standard contract for safeguarding the rights of migrant housemaids. This contract has to be signed by the sponsor or agent with the authentication of the Sri Lankan embassy in the host country. A standard contract contains:[22]

- particulars of the overseas sponsor and the housemaid;
- conditions under which the contract is offered;
- monthly wage;
- duties and hours of work;
- rest days and leave;

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[21] *Supra* n 18, p 9.
[22] *Ibid*,p 15.

- undertaking to provide food, lodging and medical care;
- undertaking to provide transportation to host country;
- termination of contract and disputation procedure;
- insurance cover; and
- provision in the event of death of employee.

7.2.5 Welfare and protection of migrant employees

Section 21 of the SLBFE Act makes provision for the appointment of welfare officers as representatives of the Bureau in the labour receiving countries to oversee the welfare of migrant workers in the labour receiving country. Currently, there are welfare officers in Lebanon, Dubai, Abu Dhabi, Kuwait, Riyadh, Jeddah, Jordan, Qatar, Oman, Singapore, Malaysia and Korea.[23]

The duties of the welfare officers, specified in section 22 of the SLBFE Act, can be summarised as follows:

(a) promoting employment of Sri Lankans in the labour importing country;

(b) promoting the welfare of Sri Lankans employees;

(c) safeguarding the interests of Sri Lankan employees which includes settlement of disputes with employers;

(d) attending to complaints of Sri Lankan employees and finding suitable remedies or making recommendations to the Bureau;

(e) sending periodical reports to the Bureau.

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[23] *Supra* n. 7, p 10.

In addition to the welfare officers, the Ministry of Foreign Affairs in Sri Lanka has appointed labour attachès to Sri Lankan Missions in Kuwait, Lebanon, Oman, Saudi Arabia, Singapore and the United Arab Emirates to monitor the working conditions of migrant workers.[24]

Dealing with complaints is a major function of the welfare officer. In the year 2000, the number of complaints received amounted to 7353. A breakdown of the complaints received in 2000 is given in Table 5.

Table 5

Non-payment of salaries	1779
Breach of contract	1241
Lack of communication	1720
Harassment	1407
Stranded cases	36
Number of deaths	108
Other	1062
Total	**7353**
Settled cases	**5855**

Source: Provisional data provided by the SLBFE

The reported number of deaths in 1999 was 116.[25] It is evident that the change in the incidence of deaths among migrants during 1999-2000 is negligible. The continuance of the high incidence of deaths, which is a cause for concern, indicates the need for

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[24] *Ibid*, p 11.

[25] *Sri Lanka: State of Human Rights 2000* (Law & Society Trust, Colombo, 2000) p 184.

evaluating the performance of the welfare officers attached to the Sri Lankan Missions. It was alleged that the death of a Sri Lankan housemaid in Kuwait in September 1999 could have been averted had the welfare officer in the Sri Lankan Embassy taken prompt action in response to repeated complaints made by the unfortunate victim.[26] The recent recalling of two welfare officers is an indication of the ineffective role played by some of these officers.[27]

It may be noted that two of the categories in Table 5, namely "lack of communication" and "other" fail to indicate the nature of the complaints. Both these categories need to be divided into sub-categories which are indicative of the subject-matter of the complaints.

7.3 NGO interventions to protect migrants

The Action Network for Migrant Workers (ACTFORM) was established to actively address migrant workers' issues and study the positive elements of migrant labour. The network consists of 23 NGOs and individuals concerned with, and working on, migrant workers' issues. The network brings together representatives of NGOs, the SLBFE, other relevant government ministries and the media. Members of the network collect and disseminate information, monitor the implementation of state policy, lobby for and advocate policy reform. They also conduct counselling and outreach programmes for migrant workers, provide legal assistance and research on the situation of migrants, their families and returnees. ACTFORM became a member of the Migrant Forum in Asia (MFA) in March 2000.[28]

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[26] *Asian Migrant Year Book 2000*, Asian Migration Centre (2000) p 243.

[27] *Supra* n. 7

[28] *Supra* n 26, pp 246-247.

8. Recommendations

The SLBFE has intervened to protect migrants from exploitation and abuse. It has played a mediatory role in settling disputes between migrants and foreign employers. It has published data on migrants leaving for foreign employment by gender, manpower categories and labour importing countries as well as data on abuse of migrants for a period of years. However, details of grievance management and redress provided are not available. In order to bring out the impact of particular interventions, baseline or benchmark data is needed. However, such data are not readily obtainable at present.

A number of studies on exploitation and abuse of migrants in the host country and the problems they face on their return are also available. However, these studies do not provide the data necessary for a time-series analysis to bring out trends. In the circumstances, there is an urgent need for the collection and classification of data to provide the statistical information required for evaluating the impact of State interventions for redressing migrant grievances.

A Presidential Task Force was appointed in 1997 to study all matters related to migrant workers and report on the dimensions that should form the basis of a national policy on overseas employment. However, the report of the Task Force is not available for scrutiny as a public document.[29]

The State, NGOs and interested researchers need to collaborate to find solutions to the problems faced by migrant workers, who make a very significant contribution to the country's economy.

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[29] All attempts by the writer to obtain a copy of the Report from the SLBFE were unsuccessful.

It is in this context that the following recommendations are made for enhancing the effect of State interventions in the interest of migrant workers.

- The SLBFE should annually publish a report on migrant grievances to provide, *inter alia*, the following data:

  (i) the number of complainants who secured foreign employment through registered agencies in the home country;

  (ii) the number of complainants who secured foreign employment through unregistered agencies in the home country;

  (iii) A classification of complaints under (i) and (ii) above;

  (iv) The number of disputes settled according to the category of complaints and the nature of redress provided.

- As housemaids are the most vulnerable segment of migrant workers, a proactive system should be designed and operated for the protection of housemaids in the host country. The following elements should be incorporated into such a system:

  (i) Every housemaid should be provided with the address and contact number of the welfare officer who represents the SLBFE in the host country. The welfare officer should have the addresses and contact numbers of the housemaids in the host country.

  (ii) Every housemaid should communicate with the welfare officer in an emergency. They should also communicate periodically, preferably once every three months, to indicate that she has no particular grievance.

(iii) If a housemaid fails to communicate with the welfare officer as required, the welfare officer should contact the housemaid (with the assistance of the relevant state officer of the host country if necessary) to ascertain the reasons for her failure to convey the required information.

(iv) If a housemaid is in a situation where she is under the threat of abuse, the welfare officer should take prompt action to protect the housemaid.

(v) A housemaid should be provided with legal assistance if necessary. The welfare officer should engage the services of a lawyer in the host country for this purpose.

- As an additional measure for discouraging unlicensed employment agencies in Sri Lanka from operating clandestinely, the Government should take steps to persuade the governments of labour importing countries to ban the import of housemaids through illegal agencies operating in Sri Lanka. In this connection, a list of registered employment agencies should be made available to the relevant authorities of each labour importing country.

- In order to provide data for the analysis of trends in the frequency of occurrence of situations in which the rights of migrants are violated in the host country, the SLBFE should annually carry out a survey of a representative sample of returnees using instruments appropriate for the purpose. The findings of such surveys should be published for facilitating further investigations by researchers.

- Since HIV/AIDS presents major challenges to human survival, steps should be taken to:

(a) strengthen components of SLBFE training programmes on personal hygiene and HIV/AIDS education;

(b) provide facilities for both male and female migrant returnees to undergo medical checks under conditions that ensure confidentiality.

- Banks should be encouraged to provide loans to migrant workers to meet the initial costs of registration and other expenses under a loan guarantee scheme.

- The SLBFE should organise an annual conference for the purpose of discussing the problems confronting migrants and to map out action paths for their resolution. Representatives of relevant state organisations, NGOs and researchers should be invited to participate in such a conference in order to facilitate the pooling of available resources as part of the national endeavour to protect our migrant workers.

9. Conclusions

Some migrant workers are in a situation of vulnerability: they are exploited by unscrupulous employment agencies in Sri Lanka; they are often subjected to discrimination or abuse in the host country. The human problems involved are particularly serious in the case of unskilled female workers. Many returnees who seek employment in the domestic labour market are unsuccessful. Some returnees need social and psychological rehabilitation.

The State has launched a number of interventions to protect migrant workers. However, the measures taken for providing redress for migrants with grievances need to be reinforced. As

grievance management is a national concern, state agencies, NGOs and interested researchers should collaborate in conducting surveys and analysing findings for the purpose of developing more effective approaches to such questions as prevention of abuse, settlement of disputes and rehabilitation of victims.

A number of international instruments seek to protect the rights of migrant workers. However, it may be noted that if the labour importing countries fail to ratify these instruments, the labour exporting countries and the international community cannot compel such states to abide by the standards laid down in the relevant instruments. Further, it has to be emphasised that even if the instruments are ratified by the relevant countries, the instruments may not go beyond the exertion of moral pressure, unless and until they are translated into the domestic law of the countries concerned.

VIII

National Child Protection Authority

S. Nishadini Gunaratne[*]

1. Introduction

The value system of our country has never remained static. The notions of justice and human rights, which are influenced by the value system, have never remained the same. The concept of child abuse too has changed historically. Enlightened professional views as well as efforts of concerned agencies and the media have made a significant contribution to bring about changes in the value system. The aforementioned changes have paved the way for legal reforms conducive to the protection of the rights of children.

The escalation of child abuse as evidenced by the increasing number of reported incidents of violence against children can be attributed to a variety of factors, some of which are linked to

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poverty. High living costs, low incomes and the high incidence of unemployment compel a large number of men and women to seek employment overseas, leaving their children behind with inadequate provision for their protection and care. Further, the number of working mothers in the domestic labour force has also increased and some of their children are left unsupervised during the greater part of the day. Child pornography in electronic and other media has made unprotected children more vulnerable to exploitation by paedophiles. Commercial expansion too has vastly increased the range of opportunities for exploiting children.

The escalation of offences against children underlines the need to translate the available legal remedies into concrete interventions to protect children – perhaps the most vulnerable section of our society. Moreover, the co-ordination of activities of both the state and private sector organisations is necessary to synergise the national endeavour to protect children from ruthless exploitation.

2. Background to the Establishment of the National Child Protection Authority

Sri Lanka ratified the United Nations Convention on the Rights of the Child in 1991. In pursuance of its international obligations, Sri Lanka adopted the Charter on the Rights of the Child in 1992, and a National Monitoring Committee (NMC) was established for monitoring the implementation of the Charter.[1] The Charter, which was based on the UN Convention, is not legally enforceable. It provides a frame of reference for organisations which are responsible for or concerned with the implementation of plans and programmes for the protection of children and promotion of their interests. In addition, the Penal Code was

[1] The Charter on the Rights of the Child (1992), Article 40.

amended in 1995 to criminalise certain forms of child abuse and to provide for the imposition of minimum mandatory penalties for the specified offences.

The establishment of the NMC and the 1995 Amendments to the Penal Code[2] were not sufficient in themselves to contain the incidence of child abuse. A Presidential Task Force, which was appointed in 1996, studied the ramifications and different manifestations of child abuse such as physical abuse and neglect, child labour, sexual abuse of children by tourists and locals, and conscription of children into armed conflict. The Task Force made several recommendations, including amendments to enactments and the establishment of a National Child Protection Authority (NCPA).[3] In November 1998 the NCPA Act No. 50 of 1998 was passed unanimously by Parliament. The NCPA was established in June 1999; presently, it functions under the President.

3. Provisions of the NCPA Act

The preamble to the Act describes it as:

> *An Act to provide for the establishment of the National Child Protection Authority for the purpose of formulating a national policy on the prevention of child abuse and the protection and treatment of children who are victims of such abuse; for the co-ordination and monitoring of action against all forms of child abuse; and for matters connected therewith or incidental thereto.*

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2 See *Sri Lanka: State of Human Rights 1995* (Law & Society Trust, Colombo, 1995) pp 169-173 for a discussion of the 1995 Amendments.

3 Report of the Presidential Task Force on the Prevention of Child Abuse and the Protection of Children (1998).

Section 39 of the Act interprets child abuse as any act or omission relating to a child (any person under the age of 18 years) which would amount to a contravention of any of the provisions of:

(a) sections 286A, 288, 288A, 288B, 308A, 360A, 360B, 360C, 363, 364A, 365, 365A or 365B of the Penal Code;

(b) the Employment of Women, Young Persons and Children Act;

(c) the Children and Young Persons Ordinance; or

(d) the regulation relating to compulsory education made under the Education Ordinance.

It includes the involvement of a child in armed conflict which is likely to endanger the child's life or is likely to harm such a child physically or emotionally.

3.1 Composition of the Authority

The Authority is composed of both appointed and *ex-officio* members. The group of appointed members consists of paediatricians, forensic pathologists, psychiatrists, psychologists, a senior officer of the Attorney General's Department, a senior officer of the Department of Police and five other prominent figures associated with child protection efforts. The Commissioner of Probation and Child Care, the Commissioner of Labour and the Chairman of the Committee established under Article 40 of the Charter on the Rights of the Child are the *ex-officio* members.[4]

[4] NCPA Act No. 50 of 1998, section 3.

A panel of senior officers assists the Authority in the implementation of decisions of the Authority.[5] The officers of the panel represent the Ministries of Justice, Education, Defence, Health, Social Services, Provincial Councils, Women's Affairs, Labour, Tourism and Media.

3.2 Staff of the Authority

The staff of the Authority consists of a legal officer, a law enforcement officer, a media officer, two psychologists, an administrative officer, a programme officer and a few support personnel in addition to the Chairman and the Deputy Chairman. There are also a few voluntary staff members.

3.3 Functions

In order to provide a basis for the evaluation of the performance of the NCPA, its mandated functions are summarised below:[6]

- Advising government on national policy and measures regarding prevention of child abuse and protection and treatment of children who are victims of such abuse;

- Creating awareness of the right of the child to be protected from child abuse and the methods of preventing such abuse;

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[5] *Ibid*, sections 16, 17

[6] NCPA Act No 50 of 1998, section 14; see also *Sri Lanka: State of Human Rights 1998* (Law & Society Trust, Colombo, 1998) pp 201-203 which focuses on the Presidential Task Force appointed in 1997 to exercise the powers and functions of the proposed NCPA; *Sri Lanka: State of Human Rights 1999* (Law & Society Trust, Colombo,1999) pp 96-98 which deals with some of the provisions of the NCPA Act.

- Consulting and co-ordinating with relevant ministries, local authorities, public and private sector organisations and recommending measures for prevention of child abuse and protection of victims;

- Recommending legal, administrative and other reforms for the effective implementation of national policy;

- Monitoring implementation of the law, the progress of all investigations, and criminal proceedings in cases of child abuse;

- Taking appropriate steps where necessary for securing the safety and protection of children involved in criminal investigations and criminal proceedings;

- Recommending measures in relation to protection, rehabilitation and reintegration into society of children affected by armed conflict;

- Receiving complaints from the public relating to child abuse;

- Advising and assisting local bodies and NGOs to co-ordinate campaigns against child abuse;

- Co-ordinating, promoting and conducting research on child abuse;

- Organising and facilitating workshops and seminars;

- Liaising with the tourist industry to prevent child abuse;

- Preparing and maintaining a national database on child abuse;
- Monitoring organisations providing care for children;
- Liaising and exchanging information with foreign governments and international organisations in regard to detection and prevention of child abuse.

3.4 Power of NCPA to search premises and seize articles

The Act empowers the NCPA to authorise in writing an officer of the Authority to enter and search any premises if there is reason to believe that there is child abuse on such premises.[7] An authorised officer can also seize any article which in his opinion may constitute evidence of any offence under any law relating to children.[8]

4. Performance of the NCPA in 2000

The programmes implemented during the period under review fall into five broad areas, namely awareness creation, training and skills development, recommendations for legal reforms, monitoring and co-ordination of activities of relevant ministries and departments, and protection of children and rehabilitation of victims.

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7 NCPA Act No 50 of 1998, sections 33, 34.

8 *Ibid*, section 35.

4.1 Awareness creation[9]

- In order to educate parents and the general public on different aspects of child abuse and protection of children, articles were published at regular intervals in the print media. Further, electronic media coverage was extended to provide information on the child protection activities carried out by the NCPA.

- A poster was produced to depict different forms of child abuse. Copies of the poster (printed in Sinhala, Tamil and English) were distributed throughout the country.

- With the assistance of popular singers, a CD and cassette with songs on child protection issues was produced and released.

- For the first time, a National Children's Festival was held on 3 October 2000 to mark the World Children's Day.

- Two booklets were launched for educating professionals: "Child Abuse: A Manual for Medical Officers in Sri Lanka" deals with the physical and situational indicators of abuse; "Corporal Punishment of Children: Is it really Necessary?" deals with the ill-effects of corporal punishment in schools and provides guidelines for alternative methods of discipline.

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[9] Information provided to the writer by the NCPA Chairman and his staff in January 2001.

4.2 Training and education

- A multi-disciplinary team consisting of a paediatrician, a psychiatrist and an officer from Scotland Yard conducted a training programme for medical officers and law enforcement officers. The training material used in this programme included a booklet entitled "Physical Examination in Sexual Abuse of Children" by Dr. Christopher Hobbs and Prof. D.G. Harendra de Silva.

- A seminar on "A Child Friendly Court Procedure," sponsored by the International Society for Prevention of Child Abuse and Neglect, was organised to sensitise judicial officers to the needs of child victims. The seminar considered such matters as the needs of child victims within the child protection system, procedural and evidentiary rules which need reform and non-legal measures to facilitate law enforcement.

- Training programmes for law enforcement officers attached to the Children and Women's Desks[10] were conducted for the purpose of improving interviewing skills with special reference to the use of videotaped evidence. Identification of the need for such training was based on the fact that inconsistencies and misinterpretations of a child's statement were usually due to a lack of interview skills on the part of the interviewer.

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[10] Children and Women's Desks are units set up in main police stations to facilitate the receipt and recording of complaints of violence against children and women.

- Programmes were organised for training Samurdhi officers[11] attached to each Divisional Secretariat in combating child abuse at the grassroots.

4.3 Recommendations for legal reform

The NCPA presented a number of recommendations in a background paper for consideration by participants at the seminar for judicial officers on "A Child Friendly Court Procedure."[12] These recommendations are summarised below:

- Children should be permitted to give evidence using close–circuit television, as it does not require the child to confront the accused directly, and is less intimidating than the court-room. Sri Lanka already has legislation[13] which recognises the admissibility as evidence in court of tape recordings and video recordings which are made by electronic means. Further, the aforementioned legislation permits in child abuse cases, the reception of videotaped evidence of a child's preliminary interview with an adult.

- In order to ensure that indecent and scandalous questions are avoided in the case of child victims and witnesses, judges should control court proceedings to ensure that cross-examination does not degenerate into a traumatic experience for child victims and witnesses.

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[11] Samurdhi officers are involved in various socio-economic activities at village level.

[12] The seminar was organised by the NCPA in collaboration with the Judges' Institute of Sri Lanka on 20th July 2000.

[13] Evidence (Amendment) Act No. 14 of 1995.

- The problems arising from the mismatch between the language used by lawyers and that of children should be overcome by appropriate judicial interventions and the use of interpreters.

- Legislation should be introduced to permit lawyers watching the interest of child victims to appear in court on their behalf. This recommendation is made for providing a more effective means of looking after the interests of child victims. Presently, a judge may permit, at his or her discretion, a lawyer to watch the interest of a child victim. However, even when permission is granted, the lawyer watching the interests of the child victim may be denied access to such documents as statements of witnesses and medical reports which are available to the prosecution and defence lawyers, and he or she is not given an opportunity to cross-examine witnesses.

- Trials should be held on consecutive days in order to expedite their conclusion, prevent repetitive questions traumatising a child, minimise lapses of memory, and ensure the availability of witnesses, especially expert witnesses.

- Special court sessions should be held to hear child abuse cases in order to reduce the number of times a child is required to be present in court.

- There should be provision in the Criminal Procedure Code similar to section 21 of the Children and Young Persons Ordinance No 48 of 1939 (as amended) that deals with the welfare principle.

- A Criminal Injuries Compensation Fund should be established to support child victims of violence.

- Child abuse offences should be recognised as finger-printable offences.

- The curricula of the Judges' Institute should provide special sessions on child-friendly procedures.

4.4 Other recommendations

In pursuance of a recommendation made by the NCPA, the Legal Draftsman initiated action to amend the Obscene Publication Ordinance No. 4 of 1927 in order to widen its scope to include new or emerging forms of child abuse in pornography.

The NCPA proposed the use of a specially designed Medico-Legal Examination Form to the use of videotaped evidence (MLEF) for improving the modes of recording and reporting of instances of child abuse. A section of the proposed MLEF (Slip A) would have to be completed and forwarded to NCPA by the relevant judicial medical officer. Another section of MLEF (Slip B) would have to be completed and forwarded to the NCPA by the relevant police officer.[14]

4.5 Activities initiated

- The NCPA compiled a list of foreigners convicted or suspected of paedophilia for the Department of Immigration and Emigration, and will collaborate with

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[14] Background paper prepared for the Seminar on "A Child Friendly Court Procedure."

this Department to prevent the re-entry of such persons into the country.[15]

- In view of the rising incidence of paedophilia, a preliminary plan was prepared to install a Cyber Watch to monitor web sites which enable paedophiles to bargain with local touts for Sri Lankan children.[16]

4.6 Activities planned in 2000 for implementation in 2001[17]

During 2001, the NCPA plans to:

- establish a pilot programme of child protection committees in selected schools;
- establish a system of electronic surveillance to monitor child abuse;
- establish a database on child abuse;
- assess the prevalence of child labour in domestic service;
- assess the plight of street children;
- produce three posters to raise awareness of children's rights.

4.7 Monitoring and co-ordination

Monitoring and co-ordination activities are implemented with the assistance of the panel of representatives of the relevant ministries and departments referred to earlier and the 10 district child protection committees.

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[15] *The Sunday Times*, 14th May 2000.

[16] *Ibid.*

[17] Information obtained by the writer through an interview with the NCPA psychologist in February 2001.

4.8 The panel of representatives

The NCPA and the panel of representatives meet once a month at the Presidential Secretariat to discuss relevant matters and take decisions with regard to identified issues.

4.9 District committees

Ten district committees (one of which functions in the District of Jaffna) liaise with organisations and agencies operating at district level. District committees are composed of representatives of the relevant organisations in the district and meet periodically. The members provide a voluntary service. The chairman of the committee is the Provincial Commissioner of Probation and Child Care. The NCPA refers matters related to child abuse that come to its attention to the relevant district committee. A district committee can also initiate action and forward reports to the NCPA.

4.10 Protection of children and rehabilitation of victims

Protection and rehabilitation of children affected by the armed conflict fall directly within the purview of the Ministry of Defence and the National Youth Services Council. The NCPA plays a monitoring role in relation to religious and charitable institutions which provide child care services to children.

5. Factors Impeding Performance

The functions and performance of the NCPA are of national importance as it is expected to play a leadership role in guiding and co-ordinating the activities of both state and private sector

organisations involved in preventing child abuse. The identification of obstacles to performance and the elimination of impediments are crucially important to enable it to discharge its leadership functions. Some of the factors that adversely affect the NCPA's performance are briefly described below.

5.1 The lack of an adequate national database

A factor that adversely affects the performance of the NCPA is the lack of an adequate database to provide up-to-date information on the different forms of child abuse. Without such an information base, neither the NCPA nor other institutions concerned with the protection of children can properly analyse the current situation with regard to child abuse and rehabilitation of child victims in order to formulate appropriate policies and solutions.

The Bureau for the Protection of Children and Women maintains a database which provides information on such parameters as the number of complaints received by specified categories of offences (see table 1). However, even when the data elements from the aforementioned bureau and other sources are pieced together, one cannot get a complete picture of the interconnections among the complaints received, investigations initiated and completed, different stages of indictment, conclusion of trials and rehabilitation of child victims.

Table 1 - Complaints received by the Police Department in 2000

Category	Number
Child Labour	36
Sexual Harassment	309
Grave Sexual Harassment	47
Sexual Abuse	254
Rape	658
Gang Rape	31
Incest	22
Acts of Indecency	6
Pornography	2
Kidnapping	118
Cruelty	22

Source: The Bureau for the Protection of Children and Women

5.2 The slow inflow of data from law enforcement agencies

The police are responsible for conducting investigations in response to complaints received, but not all cases are fully investigated, and nor are all cases involving children required to be reported to the NCPA. Certain offences under the Penal Code such as infliction of simple or grievous hurt (sections 314 and 316) and sexual harassment (section 345) do not come strictly within the definition of child abuse as given in section 39 of the

NCPA Act, and the police need not report the aforementioned cases to the NCPA even when the victims of the offences are children.

The bottlenecks in the procedure followed by the Police Department at times impede the administration of justice. The nature of the dilatory procedure is illustrated by the following instance. A school girl of 15 years in Ankumbura was abducted and raped on 4th January 1999. On 19th February 1999 the officer in charge (OIC) of the local police had informed the Kandy Magistrate's Court that the investigation had been concluded and that the file would be forwarded to the Attorney General's Department for indicting the accused. Subsequently, the OIC forwarded the file to a senior officer who in turn forwarded it to the Director (Crimes), Police Headquarters, Colombo on 20th August 1999. The Director was expected to forward it to the Attorney General's Department.[18]

Delays in prosecuting offenders by the Attorney General's Department are also a factor impeding the efficient monitoring of all investigations and criminal proceedings relating to child abuse. The police may complete an investigation and send the investigation file to the Attorney General's Department within a period varying from a few months to a year. Due to the pressure of work, a file thus forwarded may remain in the Attorney General's Department for another year or more before a suspect is indicted in the High Court.[19]

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[18] *Child Abuse and the Law: A Review of the Legal Process* (Children's Desk, Lawyers for Human Rights and Development, Colombo, 2000) p 43.

[19] *Ibid,* p 31

It is common knowledge among law enforcement officers that rape cases take 4-5 years or more for the conclusion of trials. On 16th November 1999 Daily News reported on a rape case in the Ampara High Court the trial of which was concluded 18 years after the commission of the offence.[20]

The unit in the Attorney General's Department, which deals with child abuse, does not have up-to-date statistical information on the different stages of criminal proceedings.[21] Thus, while the number of reported cases of child abuse for the year 2000 is known, data on the number of cases filed, the number of cases taken up for trial and the number of cases in which judgments have been given are not available. Therefore, it is difficult for the NCPA to take appropriate follow-up action where necessary as it does not have the required information.

5.3 The lack of a sufficient number of district committees

The district committees assist the NCPA in monitoring the activities of district based organisations. At present, there are only 10 district committees, though there are 25 districts in all. The existing number of district committees is insufficient to effectively cover the whole country.

5.4 Insufficiency of staff

The NCPA has a broad mandate, requiring liaison with many organisations, monitoring of investigations by the police, criminal proceedings and the rehabilitation of victims. However, it has

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[20] *Supra* n. 18

[21] Information obtained by the writer through an interview with a senior official of the Attorney General's Department in January 2001.

insufficient staff to be able to maintain an effective system of surveillance and to take follow-up action when necessary.

5.5 Inadequacy of infrastructure

NCPA is housed in a building which provides cramped accommodation for its staff. Ergonomic considerations point to a need for providing a better working environment for the staff.

5.6 Inadequacies in legislative provisions

- The NCPA Act does not include all offences that could be committed against children. There are 23 statutes with provisions relating to children, as listed in the Annex, yet the NCPA Act interprets child abuse as any act or omission amounting to a contravention of provisions in four of the above enactments and the involvement of a child in armed conflict which is likely to endanger the child physically or emotionally.

- The NCPA Act contains an internal inconsistency which may create ambiguity in its interpretation. Section 35 of the NCPA Act empowers an authorised officer, if he has reason to believe that any offence under any law relating to children has been or is being committed, to seize and detain:

(a) any article by means of which an offence is alleged to have been committed or which is used in relation to the commission of the offence;

(b) any book, register, record or any mechanical or electronic device which in the opinion of the officer may constitute evidence of the commission of an offence .

However, section 39 of the Act interprets child abuse as an act or omission in terms of provisions in four specified enactments.

5.7 Delays in implementing relevant recommendations

The NCPA has made a number of valuable recommendations for streamlining administrative and legal procedures, but progress in implementation has been slow.

6. Recommendations

Within a relatively short period of time, the NCPA has achieved considerable progress in terms of its mandate. However, it would have performed better had the conditions referred to in paragraph 5 been more favourable. The following recommendations are intended to help remove or reduce the impediments which, at present, reduce the NCPA's effectiveness.

6.1 National database

Steps should be taken as a matter of priority for setting up a very comprehensive database to meet the data requirements of the NCPA and other concerned institutions. The database should cover, *inter alia*, physical abuse and neglect of children; child labour in domestic service and the commercial exploitation of children; sexual abuse of children by tourists and locals; conscription of children into armed forces and investigations carried out by the police and criminal proceedings against offenders and rehabilitations of victims. Further, the data in each category of abuse should include such information as the age, sex, religion, educational level, ethnicity, income level and district of origin of offenders and victims in order to facilitate the identification of appropriate remedial interventions.

6.2 Statistical report on child abuse

The NCPA should publish a regular statistical report on child abuse, covering the various categories of child abuse, which could be used by all interested institutions and researchers.

6.3 Investigations and indictments

The Department of Police should be required to report on all complaints of child abuse to the NCPA within two weeks of receipt of such complaints. The police should also conclude an investigation without delay, and send the investigation file to the Attorney General's Department within three months. In order to expeditiously dispose of every child abuse case, the Attorney General's Department should file an indictment within three months of the receipt of the police investigation file.

The Attorney General's Department should have a computerised database to provide up-to-date information on the different stages of criminal proceedings against alleged offenders. This would enable the NCPA to intervene in the interest of child victims when necessary. Further, the bottlenecks in the channels of communications between the NCPA and the police regarding investigations, and the NCPA and the Attorney General's Department regarding criminal proceedings, should be removed as a matter of priority.

6.4 District committees

The number of district committees should be increased from 10 to 18 or more, to ensure that all the areas of the country are adequately covered. Further, an evaluation of the functions and performance of the district committees should be carried out with a view to enhancing their operational efficiency. As the district

committees form a crucially important element within the child protection system, there should be a separate unit in the NCPA devoted to monitoring and reviewing the district committees' activities and performance.

6.5 Enhancement of scope of legal provisions

The definition of child abuse given in the NCPA Act should be broadened to include all criminal offences that are committed against children.

6.6 Implementation of recommendations

The recommendations made by the NCPA for streamlining legal and administrative procedures should be implemented without further delay.

6.7 Strengthening of staff and infrastructure

The services of a management or organisation specialist should be engaged to analyse the staff and infrastructure requirements of NCPA in terms of its mandated functions, and the required staff and infrastructure should be provided.

7. Conclusions

The State has attempted to deal with encroachments on children's rights through such means as legislation and the establishment of the NCPA as a central authority for the co-ordination of activities of different agencies involved in protecting children from abuse.

One function of the NCPA is to recommend measures for the protection, rehabilitation and reintegration into society of children affected by the armed conflict. Children who are directly affected by the conflict fall into three categories: child combatants between the ages of 9-18 years who have been forcibly recruited by the LTTE; children of displaced families or those who have witnessed and experienced extreme forms of violence; children of armed force personnel killed in action. No state agency can prevent the conscription of child soldiers in areas under the control of the LTTE. Despite an assurance given by the LTTE in 1998 to Olara Otunnu, the Special Representative of the UN Secretary General, to stop using children under the age of 18 years in combat, the LTTE continues this practice.[22] It may be noted that Sri Lanka has already ratified the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict in September 2000.[23] The psychological trauma of conflict, especially in childhood, often leads to the specific condition referred to as the Post Traumatic Stress Disorder (PTSD).[24] The nation as a whole should recognise the long term ill effects that the conflict will have on the society and should co-operate with the state in initiating and implementing rehabilitation programmes for achieving the common objective of reintegration into society of children affected by the conflict.

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22 *Sri Lanka: State of Human Rights 2000* (Law & Society Trust, Colombo, 2000) p 114.

23 According to Article 1 of the Optional Protocol, persons below the age of 18 years should not be recruited into the armed forces. It may be mentioned that even before the ratification of the Optional Protocol, the Sri Lankan Army had a scheme of voluntary recruitment of personnel above the age of 18 years.

24 *Supra* n.3

Most victims of child abuse come from deprived backgrounds. It is their socio-economic deprivation that renders them vulnerable to exploitation and abuse. In the ultimate analysis, elimination of all forms of abuse is dependent to a great extent on the elimination of socio-economic deprivation.

Integral to the task of raising awareness is the need to ensure that children themselves become aware of their rights as well as of the means available to seek protection from abuse and exploitation in different situations. Rights awareness should be introduced into the school curriculum.

The rehabilitation of child victims is as important as the prevention of child abuse. This raises further questions concerning the adequacy of existing institutions for rehabilitation, and post-rehabilitation services.

The NCPA alone cannot be responsible for the protection of children from abuse. All law enforcement authorities, all agencies concerned with the protection of children and the community itself should play a proactive role in combating child abuse. As stated in Article 3(1) of the Convention on the Rights of the Child:

> *In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interest of the child shall be a primary consideration.*

Annex

Laws Dealing with Children[25]

Laws relating to children in Sri Lanka are mainly found in the following Enactments.

1. The Penal Code as amended by Act No. 22 of 1995 and Act No. 29 of 1998

2. Children and Young Persons Ordinance No. 48 of 1939 as amended

3. Vagrants Ordinance of 1841 as amended

4. Children and Young Persons (Harmful Publications) Act No. 48 of 1956

5. Obscene Publications Ordinance No. 4 of 1927 as amended

6. Offences Committed under the Influence of Liquor Act No 41 of 1979

7. Employment of Women, Young Persons and Children Act No. 47 of 1956 as amended by Act Nos. 43 of 1964, 29 of 1973 and 32 of 1984 and the regulations made thereunder

8. Maintenance Ordinance No. 19 of 1889 as amended by Act Nos. 19 of 1972, 2 of 1978 and 37 of 1999

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[25] *Supra* n 18, pp 1-2.

9. Criminal Procedure Code Act as amended by Act Nos. 20 of 1995, 19 of 1997 and 28 of 1998

10. Judicature Act No. 2 of 1978 as amended by Act No. 37 of 1979 and Act No. 27 of 1998

11. Evidence Ordinance as amended by Act No. 32 of 1999

12. Probation of Offenders Ordinance No. 42 of 1944 as amended

13. Youthful Offenders (Training Schools) Ordinance No. 28 of 1939 as amended, and the regulations made thereunder

14. Orphanages Ordinance No. 22 of 1941 as amended

15. Houses of Detention Ordinance No. 22 of 1907 as amended

16. Adoption of Children Ordinance as amended by Act No. 38 of 1979 and Act No.15 of 1992

17. Education Ordinance No 31 of 1939 and Compulsory Education regulations made thereunder

18. General Marriages Ordinance No. 19 of 1907 as amended by Act No. 18 of 1995 and Act No. 12 of 1997

19. Kandyan Marriage and Divorce Act No. 44 of 1952 as amended by Act No.19 of 1995

20. Age of Majority Ordinance No. 7 of 1865 as amended by Act No. 17 of 1989

21. Registration of Births and Deaths Act No.17 of 1951 as amended

22. Civil Procedure Code Ordinance No. 2 of 1989 as amended by Law Nos. 19 of 1977, 20 of 1977 and Act No. 53 of 1980

23. Immigration and Emigration Act No. 20 of 1948 as amended

IX

Right of Franchise: The Parliamentary Election of October 2000

*Kumudini Samuel**

1. A Rights Framework

The right to exercise franchise or the right to vote and thereby elect representatives to State assemblies is a basic tenet of a democracy.[1] This is the means by which a citizen participates in the government of his or her country. The right to vote and the right to free and fair elections are enshrined as human rights in the Universal Declaration of Human Rights (UDHR). Article 21 of the UDHR affirms that:

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* Co-ordinator, Women and Media Collective.

1 See *Voters' Rights*, a voter education handbook used by People's Action for Free and Fair Elections (PAFFREL) and the Movement for Free and Fair Elections (MFFE) published by PAFFREL, Colombo, 2000.

1. *Everyone has the right to take part in the government of his country, directly or by the freely chosen representatives.*

2. *Everyone has the right to equal access to public services in his country.*

3. *The will of the people shall be the basis of the authority of the government; this will be expressed in periodic and genuine elections, which shall be by equal and universal suffrage and shall be held by secret vote or by equivalent free voting procedures.*

Article 25(b) of the International Covenant on Civil and Political Rights (ICCPR), ratified by Sri Lanka in 1980, requires State Parties to ensure the rights of citizens "to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors."

The Constitution of the Democratic Socialist Republic of Sri Lanka (1978)[2] declares by Article 3 that sovereignty is in the people and that the sovereignty of the people shall be exercised among other things through the franchise at the elections of the President, the Parliament and the Referendum. This is an inalienable right and cannot be revoked except by an amendment to the Constitution, which needs a two-thirds majority in Parliament and a subsequent referendum among the people.

Although the right to vote is not explicitly provided for in the fundamental rights chapter of the Constitution, the Supreme Court of Sri Lanka has held that the right to vote is a fundamental right

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[2] Hereinafter referred to as "The Constitution."

and an integral part of a citizen's right to freedom of speech and expression and that the postponement of elections is a violation of a citizen's fundamental rights.[3] In a positive development, the Supreme Court has, in a series of decisions, issued directions which have sought to uphold the right to vote and the integrity of the electoral process.[4]

Article 27(4) of the Constitution requires that:

> *The State shall strengthen and broaden the democratic structure of government and the democratic rights of the People by decentralizing the administration and by affording all possible opportunities to the People to participate at every level in national life and government.*

Article 4(e) of the Constitution provides that "... 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." Every citizen over the age of 18 years possesses the franchise unless disqualified on other grounds specified by Article 89, which include insanity, imprisonment and conviction for certain offences under the election laws.

Article 93 of the Constitution states that "The voting for the election of the President of the Republic and of the Members of Parliament and at every Referendum shall be free, equal and by

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[3] See judgment in *Karunathilaka and another* v. *Dayananda Dissanayake, Commissioner of Elections and others* (1999) 1 Sri L.R. 157.

[4] Rohan Edrisinha and Sundari de Alwand Sundari de Alwis, "The Rimpact on Election Laws in Sri Lanka" in *The Right to Vote and the Law Relating to Election Petitions*, Centre for Policy Alternatives, Colombo, November 2000, (ed.) Sundari de Alwis.

secret ballot." While the Constitution provides for voting at presidential and parliamentary elections and referenda, other legislation provides for the election of representatives to Provincial Councils and local government bodies.[5]

By Article 103, the Constitution also provides for the appointment of the Commissioner of Elections who holds office with powers to conduct elections. The primary responsibility for ensuring that elections are free and fair is vested in the Commissioner of Elections who is empowered by Article 104 of the Constitution to exercise, perform or discharge all such powers, duties or functions as may be conferred or imposed on or vested in him by the law for the time being in force relating to elections.

The right to periodic, free and fair elections, the right to be a voter and the right to elect representatives to national assemblies are, therefore, guaranteed by international human rights principles and standards and by the Sri Lankan Constitution.

However, as Edrisinha and de Alwis observe:

> *Election laws mean little in the absence of an independent, non-partisan and competent election authority. The election authority must be willing and able to apply the electoral law fairly, to use sanctions (and the power of persuasion) to deter violations of the law, and to competently administer the electoral process and to challenge any attempts to subvert the process.*[6]

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5 The Provincial Councils Elections Act No.2 of 1988 and Local Authorities Elections Ordinance No.53 of 1946 (as amended) respectively.

6 *Supra* n 4.

2. Inadequacy of Election Laws

The only instances where the law allows the Commissioner of Elections to annul the poll at any polling station are set out in the Elections (Special Provisions) Act No. 35 of 1988 under 'Disturbances at Polling Stations.' Section 48A of the Parliamentary Elections Act No. 1 of 1981 relates to parliamentary elections. The provisions, however, deal merely with the interruption of the poll and are extremely restrictive. The only recourse available, for example, in the event of ballot stuffing is to discard the number of votes illegally cast. However, as the Centre for Monitoring Election Violence (CMEV) observed in their report on the presidential elections of 1999, the mere removal of illegal ballots does not even begin to address a wide range of other electoral issues and abuses. These include the loss of time at polling centres due to mob interference, the intimidation and fear experienced by voters, the powerlessness of polling agents and election officials to prevent blatant acts of violence and malpractice, the sense of apathy that stems from voters' perceptions of political power, police ineptitude and complicity, and armed gangs taking over polling stations.[7]

3. Election of Members of Parliament

The Sri Lankan electoral system is based on proportional representation (PR), which was introduced by constitutional reform in 1978. The island is divided into 22 electoral districts and members are elected to Parliament from these districts. For administrative convenience, each electoral district is divided into a number of electoral divisions based on population. Each district

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[7] "Final Report on Election Related Violence, 21st December 1999, Presidential Election," Centre for Monitoring Election Violence, April 2000.

has a number of seats allocated to it and each party or independent group contesting the election may win a number of seats within the district in proportion to the votes received. Voters first indicate their choice of party or independent group on the ballot paper and then indicate their preferences for three candidates from the party candidates list.[8]

Parliament consists of a total of 225 members who are elected for a maximum term of six years. Of this 196 members are elected directly and a further 29 seats are allocated to parties or groups according to the proportion of the vote that they received nationally.[9] At the time of filing nominations, each party is required to submit a "national list" of candidates, from which it would select its representatives to fill its share of these 29 seats.

4. The Parliamentary Election of 2000[10]

Parliament was dissolved on 19th August 2000 and parliamentary elections were scheduled for 10th October 2000. Nominations were received from 28th August to 4th September 2000.

The election was contested by 5048 candidates from 29 accredited political parties and 99 independent groups. A total of 9845 polling stations were set up island-wide and 12,380,704 voters were expected to cast their ballots. In the event, 9,080,400 voters (75.43% of the total electorate) cast their votes, of which 5.27% were rejected as invalid.

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8 Article 99(2) of the Constitution.

9 Article 62(1) of the Constitution.

10 The statistics were obtained from the Department of Elections.

The People's Alliance (PA) obtained 3,892,075 (45.25%) of the poll while the United National Party (UNP) polled 3,463,822 (40.27%) of the votes. The PA was thereby entitled to 94 direct seats and 13 seats on the National List, making up a total of 107 seats. The UNP won 77 seats direct and were allocated 12 seats on the National List, totalling 89 seats.

The Janatha Vimukthi Peramuna (JVP) won the next highest number of seats with eight won direct and two from the National List. They won 6.02% of the vote with 517,620 votes. The Tamil United Liberation Front (TULF) won five seats, polling a total of 105,907 votes (1.23%) but was not entitled to any additional seat on the National List. The Sri Lanka Muslim Congress (SLMC), which contested two districts under the PA symbol and contested in the rest of the Eastern Province under the name of the National Unity Alliance (NUA), won three seats and was entitled to one extra seat on the National List, having polled 183,790 votes, or 2.14% of the total.

The Eelam People's Democratic Party (EPDP) won four seats directly with 50,702 votes, or 0.59 per cent. The Tamil Eelam Liberation Organisation (TELO) won three seats with 25,830 votes, or 0.30% of the total poll. The Sihala Urumaya (SU) or Sinhala Heritage Party polled 126,137 of the votes, or 1.47%, and was entitled to one seat from the National List. The All Ceylon Tamil Congress (ACTC) gained one seat with 27,289, or 0.32% of the poll. Independent Group 2 from Digamadulla won one seat with 19,812 votes.

Table 1 - Composition of Parliament

Parliamentary Elections – 10th October 2000

Political Party/ Independent Group		District Basis	National Basis	Total Seats
Peoples Alliance	PA	94	13	107
United National Party	UNP	77	12	89
Janatha Vimukthi Peramuna	JVP	08	02	10
Tamil United Liberation Front	TULF	05	-	05
National Unity Alliance	NUA	03	01	04
Eelam People's Liberation Front	EPDP	04	-	04
Tamil Eelam Liberation Organisation	TELO	03	-	03
Sihala Urumaya	SU	-	01	01
All Ceylon Tamil Congress	ACTC	01	-	01
Independent Group 2 Digamadulla	IND-D	01	-	01
Total Seats		**196**	**29**	**225**

The PA topped the list in 15 of the 22 electoral districts contested. These were: Gampaha, Kalutara, Galle, Matara, Ratnapura, Kurunegala, Puttalam, Anuradhapura, Kandy, Matale, Nuwara Eliya, Monaragala, Digamadulla, Trincomalee and Amparai. The UNP came first in Colombo, Hambantota, Badulla and Polonnaruwa. The EPDP topped the list in Jaffna and the TULF headed the list in Batticaloa. The TELO was first in the Vanni. The UNP contested and won seats in every electoral district in

the island while the PA did not contest in Jaffna, but won seats in every other electoral district contested.

5. The System of Proportional Representation (PR)

The PR system does not allow a single political party an absolute majority. The legislature is thus extremely fragmented and the support of minority groups becomes crucial in the formation of government. This has once again given Tamil and Muslim political parties a bargaining capacity and made this a defining feature of contemporary Sri Lanka's ethnic relations.[11]

As D. B. S. Jeyaraj notes,[12] the PR system has its paradoxes: parties are able to get seats by virtue of getting a higher percentage in particular districts while being negligible entities on a national scale. This system is of particular advantage to parties which have their principal support base among the minority communities and that are able to focus on particular regions and gain representation on a limited scale. Such examples in the latest instance include the TULF, the EPDP, the NUA, the TELO and the ACTC. Of these, only the NUA won sufficient proportion of the national vote to be eligible for a National List member. The SU, on the other hand, was able to gain a National List seat from an aggregate of votes won at the national level, although it failed to win any seat at the district level. Overall, however, the PR system appears to be fairer than the previous 'first past the post' system of voting, as it gives better weightage to parties contesting at a district level and, therefore, ensures representation for smaller parties and parties representing minority communities.

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11 "After the Parliamentary Polls," *Pravada*, Vol. 6 No. 9 & 10.

12 D.B.S. Jeyaraj, "Tallies and Pointers," *Frontline*, 28th October 2000.

By winning 10 seats, the JVP, which led armed insurrections against the State in 1971 and from1987 to 1990, became the third largest party represented in Parliament and replaces the traditional left parties as an emerging third force in Sri Lankan politics. It won seats from the traditional left districts of the Western and Southern Provinces, tapping into a disillusioned urban social base. Its well-organised campaign was based on populist rhetoric, a critique of the current socio-economic system and opposition to the PA's proposed constitutional reform package that sought to devolve power to the minorities.

The SU, which was formed in July 2000 to mobilise the Sinhala right wing, also ran a well-organised campaign. It fielded candidates in all electoral districts, including Jaffna, projecting itself as the third force in Southern politics and expecting to garner a fair proportion of the Sinhala Buddhist vote. Despite its strident chauvinist ideology and its high profile in sections of the mainstream media, it failed to do so. It won only one seat from the National List. Its project was doomed to failure, as the extremist Sinhala nationalist forces fragmented during the election campaign. Party leader S. L. Gunasekera, a Sinhala Christian, was expected to be offered the single seat won by the SU. However, he was dropped in favour of Party Secretary Thilak Karunaratne, which resulted in S. L. Gunesekera and eight key members of the Central Committee quitting the party.

The PA managed to annex the support of the other strand of Sinhala nationalism represented by the Mahajana Eksath Peramuna (MEP) with the inclusion of MEP candidates under its own banner. The MEP won two seats for the PA.

According to D. B. S. Jeyaraj's analysis, a notable feature of the elections in the North and East, which are predominantly Tamil and Muslim areas, was the success of Sinhala dominated parties.

By comparison, Tamil parties produced only a lacklustre performance. Of the 31 seats from the North and East, the PA won 9, the UNP 6, the TULF 5, the EPDP 4, the TELO 3, the NUA 2, the ACTC 1 and an Independent one seat. The ethnic composition of those elected was 12 Tamil representatives, two Sinhala, and one Muslim from the North, and eight Muslim representatives, four Tamil and four Sinhala from the East. Jeyaraj noted that a plethora of Tamil parties and independent groups had fragmented the Tamil vote through excessive competition. He further observed that whereas the lists for the Tamil parties contained only Tamil candidates, the major parties and the NUA put forward multi-ethnic lists including Muslim, Tamil and Sinhala candidates in ethnically heterogeneous electorates like Trincomalee, Batticaloa, Amparai and the Wanni.[13]

The Plantation Tamil vote, too, split at these elections. The Ceylon Workers' Congress (CWC) fractured, with one faction siding with the PA and the other with the UNP. The CWC had in the last three decades harnessed the Plantation Tamil vote and used it effectively as a bargaining chip at the national level. The Up Country Peoples Front (UCPF), the Democratic Workers' Congress (DWC) and the National Workers' Congress (NWC) also contested with the UNP. Three plantation Tamil representatives won on the PA ticket and two won on the UNP ticket.

6. Election Monitoring

National and international election monitors and observers monitored the parliamentary elections held in October 2000. At the national level, the People's Action for Free and Fair Elections

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[13] *Ibid.*

(PAFFREL), a coalition of community based organisations, and the Movement for Free and Fair Elections (MFFE), a network of human rights and regionally based grass-roots organisations, monitored the election together.

PAFFREL is the oldest election monitoring network in the country. It first monitored the presidential and parliamentary elections of 1988 and 1989. The report of the Commissioner of Election on the 9th parliamentary general election in 1989, refers to this first effort of national poll monitoring by PAFFREL and discusses some of the constraints and issues pertaining to independent election monitoring. One major constraint is that independent election monitors are not authorised to enter polling stations and observe the voting first-hand. However, PAFFREL has been able to overcome these constraints by adopting various legitimate methods of observing the poll which are discussed in the Commissioner's report.[14]

MFFE conducted its own independent monitoring of the Provincial Council elections in 1993 and monitored the parliamentary elections of 1994 in collaboration with PAFFREL. The PAFFREL/MFFE combine have monitored subsequent elections together, assuming individual responsibility for coordinating their networks. PAFFREL/MFFE observers from the mobile teams are now permitted by most senior presiding officers to enter polling stations in the course of monitoring elections.

The CMEV also monitored the October 2000 elections. CMEV was formed in 1997 by the Centre for Policy Alternatives (CPA), the Free Media Movement (FMM) and the Coalition Against Political Violence (CAPU) as an independent and non partisan

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[14] The Election Commissioner's Report on the 9th Parliamentary General Election, 1989.

organisation to monitor the incidence of election related violence. All of these groups had access to the Commissioner of Elections and worked in close collaboration with election officials.

Two independent non governmental organisations joined together in 2000 to set up the Centre for Monitoring of Electronic Media (CMEM). INFORM (Sri Lanka Information Monitor) and the CPA, through CMEV, monitored all the electronic media (radio and television, private and public) during the general election campaign and voting period. Also associated with the project was the international NGO ARTICLE XIX, the global campaign for free expression. INFORM monitored the publicly funded electronic media and CPA the privately owned broadcast media.[15]

The Confederation of Public Service Independent Trade Unions (COPSITU), the Central Province Principals' Union (CPPU) and the Samastha Lanka Local Government Trade Unions Federation (SLLGTUF) also compiled a report on the parliamentary elections titled "Occupational Health and Safety of Election Duty Staff – Parliamentary Elections October 10, 2000" based on a survey of 2,237 persons on election duty. The report was sponsored by the Solidarity Centre, Sri Lanka.

Apart from local monitoring efforts led by local organisations, international observer missions also monitored the parliamentary elections of October 2000. The European Union (EU) convened a mission of election observers at the invitation of the

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[15] "Monitoring of the Publicly Funded Electronic Media During the Sri Lanka General Election, October 2000," Centre for Monitoring Electronic Media (unpublished). Monitoring of the State-funded electronic media commenced on 7th September 2000. The monitoring ended at 4 p.m. on 10th October 2000, when the polls closed. ARTICLE XIX provided monitoring expertise and drafting assistance.

Commissioner of Elections. The EU mission observed the pre-election period and the day of the poll. It had seven team members observe the pre-election period for four weeks, 28 observers deployed throughout the country for three weeks and 42 observers for 10 days. The observers were selected from 14 member states of the EU.

A Commonwealth Secretariat team of election observers was also invited by the Commissioner of Elections and observed the poll in nine electoral districts covering 130 polling stations. A group of three British parliamentarians, who were members of the Sri Lanka-UK Friendship Society, observed the elections independently.

Each monitoring group and network used its own methodology for monitoring the elections. Their methods determined, among other things, such matters as the nature of the monitors selected, the methods of selection, the experience and expertise of the monitors, the duration of the monitoring activity, the methods of monitoring, interaction with election officials, the police and other authorities, the methods of verifying information, the dissemination of information, and follow-up activity.

The methodology adopted by monitoring organisations is crucial. It determines the reliability and authenticity of their reports and conclusions. It is essential for the monitoring process to be as comprehensive, transparent and accountable as possible. As much as monitoring organisations require a free and fair poll and expect transparency and accountability from all contesting parties and implementing institutions, monitoring agencies must themselves ensure that their own mechanisms and methodologies are open and accountable, and that they avoid partisan bias.

7. Pre-election Violence

Widespread pre-election violence was recorded from many parts of the country. By the close of the campaign, CMEV had recorded 1726 incidents of violence, of which 940 (54.5%) were noted as major incidents and 786 (45.5%) as minor ones. According to CMEV figures, the number of election related murders in this period totalled 61. The CMEV figure included 41 killed in suicide bomb attacks, allegedly by the LTTE.[16]

Among the incidents identified were murder, attempted murder, threat and intimidation, hurt, grievous hurt, assault, misuse of state resources, robbery, arson, mischief, damage to property and election offences. According to CMEV statistics, the PA was allegedly responsible for 882 incidents (51.1%), the UNP for 328 incidents (19.0%); persons of unknown political affiliation for 429 incidents (24.9%) and the JVP for 12 incidents. The CMEV media communiqué also noted that 117 (22.2%) of the PA's 526 complaints were directed against supporters of the PA itself, the only significant examples of intra-party rivalry recorded in this campaign. In terms of the major incidents alone, the PA was allegedly responsible for 55% and the UNP for 19 percent. Taking only the major incidents in which the alleged perpetrator was identified, the PA and UNP together account for 93.7% of all complaints.[17]

The PAFFREL/MFFE combine of election monitors also noted a high degree of pre-election violence. On the 24th August, less than a week after parliament was dissolved, PAFFREL/MFFE issued a statement condemning two incidents of brutal violence. In one, a JVP supporter was killed at Kirulapone on 19th August

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[16] CMEV Media Communiqué on "Election Related Violence, General Election 2000," 9th October 2000.

[17] *Ibid.*

and in the other, a UNP supporter was killed at Rambukkana, Kegalle, on 23rd August. PAFFREL/MFFE went on to note their apprehension that the forthcoming poll might deviate from the principles of a free, fair and violence-free election.[18]

PAFFREL/MFFE recorded 15 murders, including the murders of candidates, in the pre-election period.[19] It recorded killings attributed to the LTTE separately, since the LTTE was not a party contesting the election. Like the CMEV, PAFFREL, too, observed an increase in violence in the final week of the campaign.[20]

PAFFREL further identified a pattern in the places where election violence was manifest. As in previous elections, the violence erupted in particular pockets of particular districts. In the October 2000 election, PAFFREL saw the electoral districts of Matale, Kandy, Nuwara Eliya, Puttalam, Kurunegala and Anuradhapura as again being highly vulnerable to the use of violence and intimidation.[21] CMEV included some electorates in the districts of Gampaha, Hambantota, Polonnaruwa, Badulla, Monaragala, Kegalla, Digamadulla and Jaffna to this list, noting that "these 19 electorates have been so flawed during the campaign, the voters so intimidated, that the final outcome of voting may be significantly distorted."[22]

The EU Electoral Observation Mission also noted that the election campaign was flawed by violence. The incidents ranged from

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18 PAFFREL/MFFE Press Release of 24th August 2000.

19 "Interim Report on the Parliamentary Election – 10th October, 2000," PAFFREL/MFFE.

20 *Supra* n. 16

21 *Supra* n. 19

22 *Supra* n. 16

fatal shootings to attacks on 'party stands' and mutilation of posters. The EU observers reported that the vast majority of violent incidents could be classed as 'non serious' and that "in the greater part of the country the violence was sporadic during the campaign."[23] They nevertheless deplored all the violence as demeaning and degrading of the electoral process. The mission also identified certain areas of the Central and Western Provinces as being "particularly troublesome and violent" and expressed "considerable apprehension that polling day would be a flashpoint in these areas, especially the Kandy and Nuwara Eliya districts."[24]

8. Jaffna and the 'Uncleared' Areas

Fighting between the State and the LTTE in Jaffna was resumed in May 2000, with the LTTE making a serious push towards recapturing the city. Elections were declared in the midst of heavy fighting in the Thenmarachchi area, where an estimated 47,000 families were displaced. For many, safety, food and shelter were the predominant issues.

A number of problems were identified in the district of Jaffna in the run up to the elections, where there was a conflation between violence related to the ethnic conflict and violence attributed to the election campaign. The CMEV visited the peninsula on the 6th and 7th September and expressed concern about the large numbers of displaced voters, the provision of alternate polling centres for voters living in 'uncleared' areas, the carrying of firearms by candidates and supporters during the election campaign, the lack of adequate security at polling centres, issues related to the inability of some parties to campaign in certain

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[23] Final Report of the European Union's Observation Mission to Sri Lanka's October 10, 2000 Parliamentary Election.

[24] *Ibid.*

areas of the peninsula, particularly the islands, as well as the over-arching context of the ongoing military offensive.[25]

Nirupama Subramanium, reporting from Jaffna, spoke of a lacklustre campaign in the midst of on-going conflict. She noted that posters of various political parties and candidates were the only indication that an election was about to take place in the peninsula. Most contestants were not actively campaigning, while some had returned to Colombo. Whatever campaigning was being done, she observed, was not on any substantive issues but involved allegations and counter-allegations traded between contesting candidates.[26]

The CMEV, following a visit to Jaffna in late September, warned that the situation in the peninsula remained non conducive for the conduct of a free and fair election. It stated that the offensive launched by the LTTE on 28th September and the counter offensive had resulted in significant displacement of civilian populations in the Thenmarachchi area, which was expected to increase significantly. It said that the heavy shelling and counter shelling in this final phase of the campaign rendered untenable even faint hopes for minimal favourable conditions for holding an election.[27]

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[25] CMEV Media Communiqué on "Election Related violence, General Elections 2000," 12th September 2000.

[26] Nirupama Subramanian, "War of Words Dominates Jaffna Polls," *The Hindu,* 25th September 2000.

[27] CMEV Media Communiqué on "Election Related Violence, General Elections 2000," 2nd October 2000.

9. The Involvement of the LTTE

The LTTE's presence and influence on the electoral process was felt in the North and East and the 'border' areas. Campaigning in the North and East was cautious vis-à-vis the LTTE, with a number of contestants reportedly claiming they had the tacit support of the LTTE. This was despite the fact that the LTTE had made known that it did not support any of the parties or candidates contesting in the North and East.[28]

Early in the campaign, Cheliyan Perimpanayagam, the former Mayor of Batticaloa contesting on the PA ticket, was killed in Pandirippu in an attack widely attributed to the LTTE. It was alleged that Perimpanayagam had disregarded an LTTE order not to contest.[29] In another incident, candidate Mohammed Lathif Baithullah of the SLMC was killed at an election rally together with at least 20 civilians at Muttur in the Trincomalee district following an attack allegedly by a LTTE suicide bomber on 2nd October 2000.[30] The final attack, attributed to the LTTE, was at Madawachchiya in which 10 persons died and about 40 were injured.[31]

According to Nirupama Subramanium, none of the high-profile candidates in this election, with the exception of Mr. Casinathan of the ACTC, ventured to campaign in LTTE held areas in the Batticaloa district. The candidates appeared to rely more on word

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28 P.K. Balachandran, "LTTE Casts Shadow on Jaffna Polls," *Hindustan Times,* 30th September 2000.

29 Nirupama Subramanian, "LTTE Holds Sway Over Candidates, Voters," *The Hindu,* 1st October 2000.

30 *Supra* n. 27.

31 *Supra n.* 29.

of mouth to canvass the 60,000 voters who live in those areas, out of the total number of 280,000 voters in the Batticaloa district. The voters, too, were expected to exercise their options in the way they believed the LTTE would wish.[32] Subramanium quoted Father Harry Miller, a Jesuit missionary and President of the Batticaloa Peace Committee, as saying, "both candidates and voters are asking themselves what the LTTE wants, and try to make whatever they do, not a matter that the LTTE will resent."[33]

Even the fact that the LTTE had not declared a preference for any party was taken as a message. Fr. Miller was quoted as saying, "perhaps they want the votes to get divided between many parties so no single party gets too powerful, which in turn will reinforce their position among the Tamils."[34]

10. The Day of the Poll

A few hours after the poll closed, the PAFFREL/MFFE combine, as well as CMEV, appealed to the Commissioner of Elections to annul the poll in certain electoral divisions. The CMEV identified 17 such divisions and PAFFREL/MFFE listed 23, excluding the divisions of Jaffna and Wanni.[35] Both monitoring groups based their conclusions on preliminary reports submitted by election observers and monitors from the various electoral districts.

The PAFFREL/MFFE report noted that "A high level of violence, intimidation and ballot stuffing leading in some cases to an interruption of the poll itself was reported in the electoral districts

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[32] *Supra* n.29.

[33] *Ibid.*

[34] *Ibid.*

[35] Interim Press Release on the Parliamentary Elections of 10th October 2000, PAFFREL/MFFE, 10th October 2000.

of Kandy, Anuradhapura, Puttalam, Matale, Gampaha, Kegalle, Kurunegala and Nuwara Eliya."[36] Conditions were particularly bad in the electoral divisions of Galagedera, Harispattuwa, Patha Dumbara, Udu Dumbara, Teldeniya, Hewaheta, Yati Nuwara, Udu Nuwara, Nawalapitiya and Gampola in the Kandy district; Kalaweva and Kekirawa in the Anuradhapura district; Anamaduwa and Natthandiya in the Puttalam district; Dambulla in the Matale district; Aranayake and Rambukkana in the Kegalle district; Katana and Minuwangoda in the Gampaha district; Hanguranketha and Walapane in the Nuwara Eliya district; and Hiriyala, Nikeweratiya and Wariyapola in the Kurunegala district.[37] PAFFREL/MFFE called on the Commissioner of Elections to examine the poll in the polling stations affected to determine whether they should be annulled, under the provisions of Section 48A(1)(b) of the Parliamentary Elections Act, considering that in some of them the poll could not be continued uninterrupted until the time fixed for its closing.[38]

In similar vein, the CMEV noted that:

> *The nature and extent of violations have been so widespread and serious in the following electorates as to render the final outcome in these areas meaningless. In addition, the level and degree of violence in these areas during the campaign period too was higher than in other parts of the country.*

CMEV, therefore, urged the Commissioner of Elections, by virtue of the powers vested in him by Sections 48A, 128 and 129, of the Parliamentary Elections Act No 1 of 1981, to annul the voting in these electoral divisions, in order to restore credibility to the

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[36] *Ibid.*
[37] *Ibid.*
[38] *Ibid.*

electoral process in other regions of the country. The electoral divisions identified by CMEV were Galagedera, Harispattuwa, Patha Dumbara, Udu Dumbara, Nawalapitiya and Gampola in the Kandy district; Kalaweva in the Anuradhapura district; Anamaduwa in the Puttalam district; Rambukkana in the Kegalle district; Katana and Ja-ela in the Gampaha district; Hanguranketha in the Nuwara Eliya district; Wariyapola in the Kurunegala district; Mahiyangana in the Badulla district; Beliatta in the Hambantota district, Kayts in the Jaffna district; and Batticaloa in the Batticaloa district.[39]

When the results of the election were finally declared on 11th October, the Commissioner of Elections annulled the poll in 22 polling centres in six districts – 13 in the Kandy District, one in Matale, four in Nuwara Eliya, one in Hambantota, two in Balangoda, and one in Kegalle. He also discounted 9,274 votes forcibly stuffed in another 47 polling centres but did not annul the poll at these centres. In addition, the Commissioner also annulled the poll in the Kilinochchi polling division.

11. Election Violence and Malpractice

On election day, seven murders were reported among other acts of violence and election related malpractice. According to CMEV's Interim Report on Election Related Violence, released on 10th October, it had received reports of serious election violations, including murder, bombing, stuffing of ballot boxes, removal of ballot boxes, systematic impersonation and ballot rigging, threats and intimidation of both polling agents and voters,

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[39] CMEV Media Communiqué on "Election Related Violence, General Elections 2000," 10th October 2000.

and the use of firearms including automatic weapons, as well as the misuse of state resources including military vehicles and personnel, from 365 polling centres in 73 electorates. The CMEV's analysis of individual polling centres was based on an assessment of events during the entire polling period. It stressed that its assessment of election day was measured not merely on the number of incidents recorded but in terms of the degree to which they permitted an unfettered exercise of the public franchise.

PAFFREL/MFFE also reported violence and intimidation including murder, bombing and the carrying and use of firearms in some electoral divisions. Its Interim Report, released on 12th October, also recorded instances of impersonation, stuffing of ballot boxes, ballot rigging, intimidation of polling agents and voters, and chasing away of polling agents from polling stations. While the report noted that the violence and malpractice was limited to certain pockets in certain electoral divisions, it also specified that the situation in Kandy was different. In Kandy, intimidation and poll malpractices were not confined to a few polling stations as in other districts; they were so widespread that they vitiated the electoral process in the entire district.

A valuable report compiled from a survey of 2237 staff on election duty, stationed at 2237 polling booths, has revealed that 595 or 26.6% of election officials were subject to some form of abuse or intimidation. This mostly took the form of undue influence (27%), threats (19%) and verbal abuse (18%). Heading the list of perpetrators were supporters of candidates (75%), polling agents (13.2%) and candidates (8.4%).[40]

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[40] "Occupational Health and Safety of Election Duty Staff – Parliamentary Elections October 10, 2000" Report prepared by COPSITU, the Central Province Principal's Union and the SLLGTUF.

Among the incidents reported which adversely affected the functioning of polling stations, according to the election staff interviewed, were five incidents in which people lost their lives; the firing of weapons (27 instances); wounding (39 incidents) and burning (6 incidents). Election staff also reported three cases of ballot box switching and 10 cases in which ballot boxes were snatched en route to counting centres. Among the districts most affected were Kandy with 33 incidents out of a total of 77 and Nuwara Eliya with 30 incidents.

Results from the survey of election staff also indicated that 930 incidents of violations or violent acts were reported from the 2237 polling stations monitored. These included 364 incidents of unlawful gatherings in the vicinity of polling stations, 220 acts of rivalry committed by political parties at polling stations or surrounding them, and 210 instances where Provincial Councillors or local government members entered polling stations while polling was in process. There were also 31 cases in which polling agents were abducted and 105 instances where polling agents were chased away from polling stations.[41] Apart from election related violence, there were also a number of campaign related infringements, which amounted to an abuse of election laws and included flaws and abuse of electoral procedures.

CMEV, PAFFREL/MFFE, COPSITU and other trade unions representing election staff as well as international monitoring groups have, over the years, made observations and recommendations on a number of issues, common to all elections. These concern such matters as: the registration of voters; the Register of Electors; the procedure for updating the Register; the procedure of enumeration; the bias of enumerating officers; the

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[41] *Ibid.*

registration of displaced voters; election laws relating to canvassing; the use of campaign posters, signs and symbols; the distribution of handbills and notices; the distribution and theft of poll cards; unlawful gatherings outside polling stations; impersonation of voters; the identification of voters; the non presence of polling agents; the selection of election officials; police patrolling of polling stations and the vicinity of polling stations; security for polling agents, election officials and voters; visits by candidates and party supporters to polling stations while the poll is in progress; ballot stuffing; the use of indelible ink; complaint recording procedures followed by senior presiding officers and other Election Department officials, polling agents and political parties; complaint recording procedures followed by the police; the impartiality of the police; and follow-up investigation of malpractices after the election.[42]

Election linked violence and malpractice has been manifest from election to election, particularly since the 1970s, and mirrors the greater trends of militarisation, political and sexual violence in the country as a whole.

12. The Poll in the North and East

The election in the North and East was conducted quite differently from the rest of the country. Parts of this area, particularly the electoral districts of Jaffna and the Wanni, were in the midst of armed confrontation between the LTTE and the State. Parts of almost all the electoral districts were under the control of the LTTE and not accessible to the Government or the Commissioner

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[42] See previous Election Reports by PAFFREL/MFFE (1994,1997,1999); CMEV (1998,1999); COPSITU (1998) and International Human Rights Law Group (1994).

of Elections. A significant number of polling stations had to be clustered in the areas controlled by the State and were inaccessible to voters living in areas controlled by the LTTE. There was also a high degree of tension among candidates and fear of the LTTE, resulting in some candidates carrying arms and seeking the protection of the military during the campaign. There were also attacks by suicide bombers killing both voters and candidates. However, the North and East as a whole was not uniformly affected. The difficult question of whether a poll should be conducted in such a situation or postponed indefinitely given the context of Sri Lanka's on going ethnic conflict, remained unanswered.

The poll in Jaffna and the Wanni was not monitored by either the CMEV or the PAFFREL/MFFE alliance due to constraints on movement resulting from security requirements. PAFFREL/ MFFE made a general statement on the conditions in Jaffna and the Wanni, referring to the on going confrontation between the armed forces and the LTTE, the displacement of voters, the clustering of polling stations and the difficulties faced by the Government and the military in putting in place the necessary infrastructure for the polls. Making a specific statement on the election in the North and East, CMEV noted that in addition, the ongoing offensive in the Jaffna peninsula, as well as the *de facto* deprivation of voting rights to approximately 250,000 Tamil voters in so called 'uncleared' areas in the North and East, resulted in the election being a charade in that province.

However, D. B. S. Jeyaraj, writing in the Frontline, observed that despite the difficulties of conducting a poll in the midst of a war, and despite alleged electoral malpractice and the decided advantages available to some political parties over others, it was

significant that 21% of the population[43] in Jaffna sought to exercise their franchise and participate in the democratic process of electing their own representatives to Parliament.[44]

13. Voter Displacement

Elections in the Jaffna district were conducted in the midst of ongoing combat between the military and the LTTE. In Jaffna, 132,000 votes were polled, or 21% of the total registered voter population in the peninsula. However, the number of voters actually living in the district of Jaffna is now much less than the numbers who are registered to vote. Years of displacement and migration have changed this figure significantly. The official figures available for Jaffna go back to the national census of 1981. A large proportion of the population in the peninsula have since been displaced or migrated, including all Muslim and Sinhalese residents, who have left the peninsula. New voters have not been entered into the voters' register. In recent years, the resident population has been estimated at around 200,000 to 250,000 persons instead of the 830,600 who lived there in 1981.[45] The CMEV in a visit to Jaffna in September 2000 came to a similar conclusion. They also noted that the resident population in the district continued to be displaced due to the on going fighting between the military and the LTTE. The number of registered voters and the number of voters available for voting was, therefore, at a significant variance.[46] Although there are no

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[43] This figure of 21% is based on official statistics which are outdated. A more realistic estimate places the figure at about 50%. See following paragraph on Voter Displacement.

[44] *Supra* n 12.

[45] Statistical Abstract-1994, Department of Census and Statistics

[46] *Supra* n. 25

definite figures, it can be argued that since the population residing in Jaffna and eligible to vote constitutes approximately half the population of registered voters, the number of persons actually voting was closer to 50% of the population eligible to vote and currently residing in Jaffna.

The law in relation to displaced voters is contained in section 127B of the Parliamentary Elections (Amendment) Act No.15 of 1988. However, when applied to actual situations of displacement it is apparent that many practical difficulties were not anticipated. The law is patently inadequate to deal with the consequences of displacement in relation to the ethnic conflict. A major shortcoming is that it does not apply to displaced persons who attain the age of 18 years after their displacement and are not registered; displaced youth turned 18 years after 1990 have not been included in the voter list.[47] The Department of Elections also requires documentation on such matters as previous residence. However, the conflict precludes many potential voters from obtaining such material, since they have no access to their places of origin and the documentation may have been destroyed.

On 11th May 2000, the CPA attempted to get the Supreme Court to examine the situation of displaced youth, but was not granted permission to proceed with its fundamental rights application on this matter. In refusing the application, the Supreme Court held that the law relating to the registration of electors was adequate to deal with the issue of displacement. This decision by the Supreme Court unfortunately only served to obstruct displaced voters, who may have sought special methods of voting to deal with their special status.[48]

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47 *Buhari Rizlin and three others* v. *Dayananda Dishanayake, Commissioner of Elections* (SC Application No.297/2000)

48 *Supra* n 4, p.25.

14. The Carrying of Arms by Candidates

Campaigning in parts of the North and East and in particular in Jaffna was not easy. Mohammed Lathif Baithullah, a candidate for the SLMC, his bodyguards and 20 civilians were killed when a suicide bomber attacked an election meeting in Muttur on 2nd October.[49] Many candidates in the North and East, particularly in Jaffna, resorted to carrying weapons during campaigning to counter this threat from the LTTE. However, not all candidates in the North and East carried arms or sought armed protection, and the use of arms by some candidates impeded the exercise of a free and fair campaign. The TULF, in particular, did not seek to carry arms and complained about their misuse by other candidates.

Fighting between the LTTE and the military also rendered voting impossible in some areas of the peninsula. The poll was, therefore, not freely accessible to all voters eligible to vote in Jaffna for a range of reasons and impaired their right to the franchise and free and fair elections.

15. Clustering of Polling Centres

In many areas of the North and East polling centres were clustered for reasons of security, to cater to the displaced and to accommodate voters living in areas outside military control (the 'uncleared' areas), but this measure failed. Voters living in 'uncleared' areas had no access to adequate transport to travel to clustered polling centres in the 'cleared' areas. In some instances, voters living in 'uncleared' areas would have had to pass through

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[49] News Release Issued by the International Secretariat of Amnesty International dated 2nd October 2000.

both LTTE and military defence lines as well as combat zones, which meant that, in effect, they were prevented from voting as they could not reach the clustered polling booths in the 'cleared' areas.[50] The report of the Batticaloa election monitors noted that they had made a request to the Government Agent for Batticaloa as well as the elections Commissioner of Election to ensure transport to voters in 'uncleared' areas. On the day of the election the monitors found that there was only one bus available for an area with over 1000 people.[51] The measure may also have provided opportunities for impersonation, as so many voters were unable to reach the polling stations.

16. Misuse of State Resources

The misuse of state resources for purposes of campaigning was reported by all of the election monitoring groups. The use of government vehicles, government owned property and public servants were the most commonly noted violation. The PA as the incumbent in power was the most culpable in the misuse of state resources and there were few checks and balances to prevent these abuses. However, the misuse of government resources is not an offence under the election laws; it is only an offence under government regulations. Ministers and other officials using or authorising the use of these resources have to be dealt with under these regulations. This is a lacuna in the existing election laws, which needs to be addressed.

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[50] See report of Batticaloa district election monitors submitted to PAFFREL titled "PAFFREL/MFFE Election Monitoring Report: Election Day – Batticaloa District," 2000.

[51] *Ibid.*

Special mention needs also to be made of the use of Samurdhi Niyamakas[52] in election-related activities by politicians of the PA. This was despite the decisions in several court cases prohibiting the use of state resources, including human resources, for the benefit of one political party or group over its rivals, which constitute unequal treatment and political discrimination.[53] An undertaking given to court that Samurdhi Managers and Samurdhi Development Officers will not be used in political activities continued to be flouted.

Another example of the abuse of power was cited by the TULF, which complained that EPDP leader Douglas Devananda had abused the special powers conferred on him as Chairman of the Jaffna District Coordinating Committee by dispensing jobs on the eve of elections, giving him an unfair advantage as a candidate in the elections.[54]

17. Misuse of the Media

The EU Election Observation Mission noted that both the State-owned and controlled media and the privately owned media were highly partisan and that independent, objective reporting was hard to find. The Mission perceived the government controlled media to support the PA, while the private media was fiercely anti-PA with some private media clearly supporting the UNP.[55]

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[52] Samurdhi Niyamakas are grassroot level officers of the special government aid programme benefiting the "poorest of the poor."

[53] See *Deshapriya* v. *Rukmani, Divisional Secretary, Dodangoda and others* [(1999) 1 Sri L.R. 412] and *Sampath Anura Hettiarachchi* v. *Mahaweli Authority and others* (SC application No. 131/2000; SC Minutes 15.09.2000).

[54] *Supra* n. 26.

[55] *Supra* n. 23.

Balanced, non partisan coverage was lacking in both the private and publicly owned electronic and broadcast media. Apart from manifesting their support for either the ruling party or the opposition, sections of the media also sought to highlight chauvinistic propaganda, particularly as propagated by extremist Sinhala parties such as the Sihala Urumaya. State owned media also sought to link the UNP with the LTTE in an extremely speculative and detrimental manner.

17.1Publicly funded electronic media

INFORM, as a part of the CMEM, monitoring publicly funded electronic media during the election campaign, observed that the public media featured ruling party politicians, commentators, supporters and political viewpoints almost exclusively throughout the election campaign. Their coverage of the ruling party in quantitative and qualitative terms exceeded that of all the other parties combined, in contravention of the Sri Lanka Broadcasting Corporation Act, the Sri Lanka Rupavahini Corporation Act, the Parliamentary Elections Act and the Parliamentary General Election – 2000: Guidelines for Media issued by the Commissioner of Elections.[56]

INFORM noted the disturbing aggression with which the ruling party agenda was pursued in the public media during the election period, and that laws and guidelines on balance and impartiality were flouted daily. These abuses clearly continued with approval and encouragement from the highest quarters. INFORM's report also noted that wide coverage was given to the President by the public media and that since the President belongs to the ruling

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[56] "Monitoring of the Publicly Funded Electronic Media during the Sri Lanka General Election," October 2000, CMEM (unpublished).

party, the reportage was without exception in favour of the ruling party.[57] INFORM also noted that the coverage given by state media to the Commissioner of Elections was inadequate.

As well as contravening local laws and guidelines, the abuse of state owned and controlled media also contravened international standards that require a commitment to freedom of political communications and balanced political coverage at times of elections. The right to access government media is also supported by the strong prohibition of discrimination, including on grounds of political opinion, under international law.

Among its recommendations, the INFORM report called for the international community and the Government of Sri Lanka to take immediate steps to work together to introduce rigorous mechanisms for ensuring the independence and impartiality of the public media.

The monitors called for comprehensive guidelines to be enacted well in advance of the next elections which the publicly funded media will be obliged to follow during election periods. These would include obligations on balance of coverage, both quantitative and qualitative, with legal remedies for violation of the guidelines.[58]

17.2 Privately owned electronic media

The CPA on behalf of the CMEM monitored 13 non state television and radio channels operative in the country during the parliamentary election campaign to determine the extent to which the non state media performed as a disseminator of voter education

[57] *Ibid.*
[58] *Ibid.*

and information about competing parties. Their report was being finalised at the time of writing.[59]

However, an executive summary of the survey findings, based on both qualitative and quantitative data analysis, revealed how most non state media served partisan party political ends rather than providing a forum for open political dialogue and discussion of substantive issues. It was found that the main political debates and issues of concern were subsumed in personalised attacks and specific malpractices. Fact was often confused with comment, especially in the more partisan channels. The political debates most often took the form of a PA-UNP opposition and the JVP and the SU, too, received considerable coverage. The survey also revealed, however, that ethnic minority and leftist parties received little positive coverage in the private electronic media, which provided little analysis of their alternative policy standpoints.

According to the survey, those television and radio channels that reflected less bias and subjectivity, carried minimal discussion programmes. On the other hand, the channels displaying more partisan, majoritarian political support, such as TNL and, to a lesser extent, Swarnavahini, carried more discussion and 'news show' programming. It was noted that there were only few debates on economic, political and social reform, and that civil society groups were not represented in them. Civil society representatives were only brought in on issues of election violence and party-based politics. The survey found that the Tamil radio channel Sooriyan FM was an exception in this regard, giving substantially more exposure to ethnic minority parties, even though the channel broadcasts only news programming.

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[59] Further information or the final report of the monitors can be obtained from the CPA in Colombo.

A most disturbing feature recorded by the monitors in a qualitative analysis of the two main discussion programmes *Jana Handa* (TNL TV) and *Rathu Ira* (Swarnavahini) for the period under consideration, was that only 1% of the time spent discussing the ethnic conflict in each programme was allocated in favour of an unequivocally anti war stand. Conversely, *Rathu Ira* spent as much as 32% of the time allocated for discussing the ethnic conflict in invoking racism, rather than dealing with substantive issues of conflict resolution and political dialogue.

The monitors further noted that there was disproportionate coverage of the main opposition party, the UNP, in the private broadcast media. The data on news coverage alone for all non state channels showed 421 instances of direct coverage of UNP statements during the period under survey, and only 297 instances of direct PA coverage. The disparity was even greater in radio programming, with 216 instances of direct coverage of the UNP contrasting with only 138 instances of the PA. The imbalance was most pronounced in the Sinhala news bulletins and Sinhala radio channels.

Overall, very little election related programming was detected over non state radio and television during the election campaign, other than on TNL radio and television channels and Swarnavahini television. The privately owned media – and particularly the more partisan sections – flouted the guidelines prohibiting campaigning during the 48 hours immediately preceding the poll. The state owned television media, too, broke this guideline.

As with the state controlled media, the monitors noted that there was no effective regulation of bias and imbalance in the private media coverage of parties and candidates during the election. This was due both to the lack of clear guidelines and laws

governing these media, and the failure of the authorities to effectively implement the rules that do exist. Here again, clear guidelines are needed to promote and ensure balanced coverage, both qualitative and quantitative, and prevent prejudiced and racially motivated misreporting and abuse.

17.3 Advertising in the media

Most candidates advertised in the public and the private media. However, advertising was expensive. The guidelines of the Commissioner of Elections to all private media that advertising facilities "should be offered free of charge or on payment of a nominal and uniform fee" were regularly flouted and, instead, the elections were used for profit maximisation.[60]

In the light of the fact that there are no enforceable standards on limits to campaign financing by political parties and individual candidates, the system obviously favoured the larger, mainstream political parties and those candidates with financial means to run expensive, high profile campaigns. In addition, both the public and private media made only rare concessions to reduce advertising costs for civil society initiatives seeking to advertise their messages and activities.

18. The Police

As in previous elections, some police personnel continued to act in a partisan manner during the parliamentary elections of 2000. The CMEV records serious concern "about the allegations of murder against the HQI Matale, K.C. Hapuarachchi" and "the well-documented instances of systematic collusion between the OIC Puttalam, IP O.K.D. Gunadasa, and PA candidate D.M.

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[60] *Ibid.*

Dassanayake."[61] Both the CMEV and PAFFREL/MFFE expressed concern that in some instances the police are rendered helpless to deal with violence and infringement of election laws due to political interference.

The police also appeared helpless at times in the face of thuggery and intimidation used by politicians' armed gangs. The police did not have sufficient manpower to prevent the eruption of inter party gang fights and there were instances when the police themselves came under attack by the fighting factions, such as at the Agrapathana Bazaar on 1st October when armed gangs of the CWC and the UCPF fought each other on the streets.[62]

In response to a petition filed before the HRC by the CPA on the issue of the politicisation and intimidation of state institutions such as the Police Department, the Commission requested the Commissioner of Elections to direct the IGP to make public all directions, circulars and instructions issued to police to ensure free and fair elections.[63] The IGP, in turn, circulated a manual of instructions issued to the police in respect of the October 2000 parliamentary elections, identifying the objectives of the manual and laying down the duties and responsibilities of police officers.

On 1st October 2000, PAFFREL noted that it continued to "receive complaints from certain districts concerning the regime of fear and intimidation that has been imposed on the people by certain powerful politicians of the ruling party."[64] Like CMEV,

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61 *Supra* n.27

62 *Ibid.*

63 See "Electoral Reform: Post 2000: Summary of Issues Based on Reported Experiences at Recent Polls," Centre for Policy Alternatives and Citizens' Trust for Consideration of the Consultative Committee on Electoral Reform, February 2001 (unpublished).

64 PAFFREL Situation Report, 1st October 2000.

PAFFREL identified the districts of Kandy and Puttalam as the worst affected. It also expressed concern at the violation of fundamental rights of voters and candidates as well as the apprehension of imminent violations during the period leading to the election and on election day. PAFFREL observed that faced with violations of this nature, the law enforcing authority seemed to be ineffective or helpless. In such a situation, an effective remedy was needed, through the judiciary and the available human rights institutions. PAFFREL appealed to the Government promptly to restore a climate conducive to free and fair elections.[65] It was obvious that in the electoral divisions with a high incidence of pre election violence there was active police collusion with perpetrators of violence or that the police had been rendered ineffective through political interference. The most serious malpractice and violence was also reported from these same areas on the day of the poll.

In recent years, several election petitions have been filed in an attempt to deal with the issue of police inaction in the prevailing climate of electoral violence and malpractice. Among recent cases is one filed by Matale District UNP MP Ranjith Aluvihare before the Court of Appeal alleging that the police failed to apprehend those responsible for acts of violence on election day, despite complaints he had made to several police stations. On 24th January 2001, the Court directed the Attorney General to advise the police to arrest and produce the suspects before the appropriate court.[66]

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[65] *Ibid.*

[66] *Supra* n.63

19. Women's Representation in Parliament

Political parties and independent groups fielded 5,048 candidates at the parliamentary elections of 10th October 2000. Only 117 (2.3%) candidates were women, of whom eight were elected and one was appointed from the National List. At the parliamentary elections of 1994, women made up 3.9% of all candidates, 10 women were elected to Parliament and two were appointed from the National List. From 1994 to 2000, then, both the percentage of female candidates and the percentage of female parliamentarians dropped, the latter falling from 4.8% in 1994 to 4.0% in 2000.[67]

These are appalling statistics for a country that has enjoyed 69 years of universal adult franchise and which boasts the first woman Prime Minister in the world. The Platform for Action of the United Nations, Fourth World Conference on Women in 1995 noted that

> *Equality in political decision making performs a leverage function without which it is highly unlikely that a real integration of the equality dimension in government policy making is feasible. In this respect women's equal participation in political life plays a pivotal role in the general process of the advancement of women.* [68]

All 189 countries attending including Sri Lanka, with a commitment to implementation, adopted the Platform for Action at the World Conference on Women. One of the strategic

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[67] Kumudini Samuel, "Women and Political Non Representation," paper presented at a seminar on "Women and Decision Making" organised by the National Committee on Women December 2000. (unpublished)

[68] Platform for Action, Fourth World Conference on Women, Beijing, China 4 – 15 September 1995.

objectives identified was the need to ensure women's equal access to, and full participation in, power structures and decision-making. Governments were urged, *inter alia*, to encourage political parties to integrate women in elective and non-elective public positions in the same proportion and at the same levels as men. It was also suggested that governments review the differential impact of electoral systems on the political representation of women in elected bodies and consider where appropriate the adjustment or reform of those systems.

In the past, affirmative action has been taken in an attempt to ensure better representation of other sections of society in Sri Lanka. Following recommendations from the Youth Commission in February 1990, election laws were reformed to require that political parties nominate 40% youth (persons aged between 18 and 35) as contestants. Significantly, however, no political party made any noticeable effort to include young women in their youth quota.

This propelled women's groups to lobby for at least a 25% quota for women on nomination lists for local government elections. The 1997 draft constitutional reforms included this recommendation, but this clause was not included in the draft constitutional proposals presented to parliament in August 2000. Women's groups were told that the clause had been dropped at the request of some political parties which felt that sufficient women candidates could not be found to make up the required percentage. Continuing the lobby, a manifesto drafted by a coalition of 12 women's groups was presented to all political parties contesting the parliamentary elections of October 2000.[69] The manifesto argued for more women in parliament, especially

[69] "Women's Manifesto," *Pravada* Vol. 6, No.9 & 10, 2000.

at decision-making levels, to put forward the many issues affecting women and to take gender sensitive positions on matters of national and international interest. The manifesto called for:

- A 30% minimum quota of women at local government level;
- A 30% minimum quota of women in Parliament;
- That 50% of nominees of national lists be women;
- More women Ministers and Deputy Ministers;
- An increase in the nomination of women candidates at all levels by political parties;
- Adequate training and other support facilities for women candidates;
- Research and other support services for women in Parliament and other local bodies to enable them to function effectively;
- Caucuses of women in law-making bodies cutting across party politics, to focus on women's issues; and
- A national campaign to promote more women in politics and in decision-making positions.

Despite the poor representation of women in the current Parliament, a hopeful sign for the future was the election of Ferial Ashraff, a PA candidate from Digamadulla. She became the first Muslim woman to win a seat by popular vote in the Sri Lankan Parliament, polling the highest vote from the district, and replacing her husband, SLMC leader M. H. M. Ashraff, who had died tragically during the election campaign. Ferial Ashraff was appointed Deputy Leader of the National Unity Alliance (NUA) as well as the Minister of Development and Reconstruction of the East and Rural Housing. Another Muslim woman - the JVP's Anjan Umma – followed Ferial Ashraff into Parliament, after being nominated from the National List. Having served as private secretary to her husband, Ferial Ashraff was no novice to politics.

Anjan Umma also had a political background, coming from a 'political family' and having been elected in her own right to the North Western Provincial Council in 1999.

Of concern, however, was that no Tamil women were either elected or appointed to Parliament in 2000. Since 1947, Tamil women's representation in Parliament has been almost non existent. No Tamil woman has been elected or appointed by parties representing Tamils, although Tamil women such as Naysum Saravanamuttu and Sarojini Yogeswaran have contested and won at local government elections. In past elections only two Tamil women have won seats in parliament, both nominated by the UNP.

20. Voting Rights for Sri Lankans Working Overseas

According to figures from the Sri Lanka Bureau of Foreign Employment (SLBFE), 785,000 workers migrated between 1991 and 1999 for employment overseas. The Migrant Services Centre (MSC) estimated that about one million Sri Lankans were employed overseas in September 2000.[70] These migrant workers are not entitled to vote in Sri Lankan elections under current election laws, although many of them may be on the electoral list.

According to the MSC, the SLBFE data indicates the following districts as having significant migrant worker outflow for overseas employment.

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[70] See the background paper/press release for the meeting convened by the Migrants Services Centre on "Migrant Worker Voting Rights," 28th September 2000 at CENWOR Auditorium, prepared by G.D.G.P. Soysa, Director, MSC.

Districts of heavy outflow	No. of migrants
Colombo	80,354
Gampaha	49,588
Kurunegala	47,757
Kandy	37,614
Galle	27,556
Kalutara	28,113
Anuradhapura	28,185
Kegalle	24,989
Badulla	23,364
Digamadulla	19,708
Batticaloa	13,098
Ratnapura	13,264
Matale	11,862

Polonnaruwa, Hambantota, Trincomalee and Nuwara Eliya districts recorded less than 10,000 departures, while Moneragala, Jaffna and the Wanni recorded less than 5,000 departures from 1997 – 1999.

The MSC together with community based organisations, human rights groups, women's groups and trade unions launched a campaign on 18th December – International Migrant Workers Day – to enable Sri Lankans working overseas to vote at future elections in Sri Lanka.[71] The MSC appealed to the Commissioner

[71] The figures used by the MSC in its campaign pertained to the years 1997-99, presumably because statistics for 1999 alone were not available at the launch of the campaign. For a realistic assessment of the number of potential voters employed overseas and eligible to vote at an election, figures for the two years immediately preceding the election should be used for greater accuracy. However, these figures are unlikely to have changed significantly, given that the rate of migration in recent years and trends in migrant employment have hardly changed.

of Elections to request amendments to election laws, and called for new procedures to be established to enable workers overseas to exercise their franchise. These could include postal voting, establishing polling centres at Sri Lankan Embassies and Consulates overseas, providing mobile voting centres or other appropriate methods in receiving countries to enable Sri Lankan voters to participate in electing representatives. It was noted that countries such as Indonesia with a high percentage of workers employed overseas have established systems of voting to enable their nationals to participate in elections. However, it is important to caution that any system that is used needs to be properly supervised, with the participation of all contesting parties. Without adequate supervision, room would be left for large-scale irregularities.

Apart from the rights guaranteed to Sri Lankans under the constitution, Sri Lanka has ratified the International Convention on the Protection of Rights of all Migrant Workers and their Families of 1990. Article 41 of the Convention states that:

> *(i) The migrant workers and members of their families shall have the right to participate in public affairs of their state of origin and to vote and be elected at the elections of that state in accordance with its legislation.*
> *(ii) the states concerned shall as appropriate and in accordance with their legislation facilitate the exercise of these rights.*

Article 84 of the Convention further requires that "Each state authority undertakes to adopt the legislative and other measures that are necessary to implement the provisions of the present Convention."

The votes of migrant workers could make a significant difference to the outcome of elections. The vote bank would also enable migrant workers to lobby for favourable policies relating to their working conditions and status and to have their voices heard. It would also reduce the risk of migrant workers' unused votes being used for wide scale impersonation, which is a matter of considerable concern. These are all considerations for a review and change of election laws and the implementation of mechanisms to enable migrant workers to exercise their franchise.

21. Activity by Civil Society Groups

A number of activities were initiated by civil society groups to campaign against election linked violence and malpractice. A National Convention organised by PAFFREL was held on the 30th April 2000 in Colombo, including high-ranking representatives of political parties and delegates from a range of concerned civil society organisations, to launch a "Campaign Against Political Violence." This was followed by a series of conventions at provincial level, which sought public participation at local level in an island wide programme of action against electoral violence. The campaign was spearheaded by PAFFREL.[72] The campaign also sought to bring politicians from rival parties together on common platforms to pledge for a violence free election. A number of such joint meetings were held in Colombo, Kurunegala, Galle, Puttalam and Anuradhapura.

PAFFREL/MFFE used a draft "Code of Conduct for Elections" extensively during this campaign.[73] The Code addressed all

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[72] PAFFREL Annual Report for 1999/2000.

[73] "Draft Code of Conduct for Elections" proposed by PAFFREL/MFFE for their national Campaign Against Political Violence, November 1999.

political parties and independent groups contesting elections, voters, election monitors, the party in power and public servants assigned to election duty.

Another initiative was the formation of an Alliance for Democracy with the participation of 60 trade unions and mass organisations, including the election monitoring bodies of CMEV and PAFFREL, with the aim of achieving a democratic society in Sri Lanka. The Alliance for Democracy launched a programme titled 'Swarna Bandhana' or Yellow Ribbon Campaign, aimed at getting one million people to wear a yellow wristband to express their desire for a free and fair election.[74] On the day before the election, the Alliance draped a yellow banner containing thousands of signatures calling for a free and fair election around the office of the Commissioner of Elections.

Despite the high costs involved, the CMEV, PAFFREL/MFFE and the Alliance for Democracy ran a series of advertisements in the print and electronic media relating to elections, the responsibility of voters and the responsibility of candidates and political parties. A number of women's groups also ran advertisements in the media highlighting women's issues and women's responsibilities in the context of the election.

However, despite these initiatives, the parliamentary election witnessed some politicians continuing to use violence and intimidatory methods with impunity. PAFFREL/MFFE in their interim report immediately following the elections appealed to concerned citizens not to relax their efforts against political violence and to continue to campaign for the reform of political

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[74] Invitation for the inauguration of Swarna Bandhana at the Elphinston Theatre, Colombo on 11th September 2000.

parties and the expulsion of violent persons from the democratic political arena.[75]

In December 2000, a number of organisations, including the election monitoring bodies of CMEV, MFFE and PAFFREL and trade unions such as COPSITU, agreed to constitute a coalition called the Consultative Committee on Election Reform (CCER) to spearhead a civil society election reform initiative with a set of comprehensive election reform proposals. CCER would organise extensive public consultations throughout the island on the reform proposals, and interface with the Commissioner of Elections, political parties and any election reform commission that may be established by the Government. It also intends to campaign for the recommendations to be implemented. The CMEV and the Citizen's Trust were charged with drafting the preliminary recommendations based on the reports of domestic and international election monitors and on election laws and practices of other countries.[76]

22. The Human Rights Commission (HRC)

A number of petitions were brought before the HRC in the run up to the parliamentary elections in October, enabling the Commission to use its mandate to impact positively on violations of fundamental rights pertaining to the election. These petitions filed by the CPA and the CMEV covered the "sticker" issue (see below), the misuse of state media, and the imminent infringement of rights as a result of increasing violence during the pre election

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[75] PAFFREL/MFFE Interim Report – Parliamentary Elections 10th October 2000, 12th October 2000.

[76] Minutes of the meeting on "Civil Society and Electoral Reform" held at the Hotel Lanka Oberoi on 1st December 2000.

period. On the last petition, the HRC requested the police and the Commissioner of Elections to make their instructions and circulars available to the Commission and the complainant institution, the CPA. The HRC also intervened to ensure that the police gave specific instructions on matters which had not been adequately covered, such as the recording of complaints, prosecution of offenders, and protection of voters and polling agents. The invocation of the authority of the HRC to require crucial institutions such as the police and the office of the Commissioner of Elections to be proactive in facilitating free and fair elections was a new and positive intervention.

23. The Office of the Commissioner of Elections

In early September, the Criminal Investigations Department arrested a printer under the Prevention of Terrorism Act for printing 'stickers' to be used as a means of preventing election fraud, at the behest of the Commissioner of Elections. The stickers were to be used as a means of securing ballot boxes on the day of the poll. Amidst media speculation and political manipulation of the incident, the Commissioner accepted responsibility for the act and provided a full explanation and clarification. The CMEV defended the Commissioner's action in a petition before the HRC, noting that the protection of an independent Elections Commissioner is essential for the conduct of fair elections. The petitioners further noted that the printing of the stickers was in pursuance of the constitutional and statutory powers vested in the Commissioner as an independent officer and had been judicially interpreted as such in previous court judgments.

The dispute over the stickers, however, raised a wider range of issues. PAFFREL/MFFE in its Interim Report said that the existing framework of election-related laws did not provide adequately for the conduct of free and fair elections, as had been

evident through infringements of the election process over the past two decades. Yet the plans of the Commissioner of Elections to implement a new process had been undermined by ways in which politically motivated groups used this issue for patently partisan purposes, the political interpretations made and the kind of publicity given by the media.[77]

In its final report on the elections dated 14th October, CMEV expressed its grave concern that the Commissioner of Elections saw fit to annul only 22 polling centres in six districts – 13 in the Kandy District, one in Matale, four in Nuwara Eliya, one in Hambantota, two in Balangoda, and one in Kegalle – while he discounted 9,274 votes forcibly stuffed in another 47 polling centres but did not annul these polling centres. CMEV noted that in some cases, the Commissioner's decisions appeared to have no rational basis at all. Illustrating this point, CMEV gave the example of polling centre number 20 in the Beliatta polling division, where one ballot box had been forcibly removed. The Commissioner decided to ignore this incident and count the ballots cast in the remaining ballot box! CMEV noted that this was a gross travesty of the rights of those legitimate voters whose ballots happened to be in the missing box. It was also counter to the provisions of 48A(3) of the Parliamentary Elections Act No 1 of 1981.[78] CMEV also noted that in the case of ballot stuffing, the Commissioner appeared to have treated the forcible stuffing of one ballot in one polling centre and the stuffing of 650 ballots at another polling centre in the same manner – by removing the

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[77] *Supra* n. 74

[78] "Where the Commissioner makes an order under subsection (2) in respect of a poling station in an electoral district, the provisions of Part IV shall, *mutatis mutandis*, apply to the counting of votes polled in for such electoral district and the declaration of the result of such election, subject to the modification set out in this section."

offending ballots and counting the rest as if nothing untoward had happened.

CMEV maintained that the Commissioner's course of action was not merely unjust by the hundreds of ordinary voters who were deterred, even prevented, from casting their votes in these areas, but that it is also not provided for in the Parliamentary Elections Act. CMEV reiterated that the proper and least unfair procedure would have been to annul those polling centres where forcible stuffing was established, as provided for under section 48A(2) of the Act, since the stuffing would have eaten into the time available to voters, thereby violating the provision for continued access to the polling centre between 7.00 am and 4.00 pm on election day.

PAFFREL/MFFE, too, had hoped that section 48A(2) of the Parliamentary Elections Act would have enabled the Commissioner of Elections to annul the poll in areas where large scale violations of election law had occurred. The number of polls annulled was considerably below the total number of polling stations in which their monitors observed violations on a scale that would have warranted similar action.[79]

In its situation report released on 1st October 2000, PAFFREL called upon contesting political parties to publicly pledge to work with each other in a non-partisan manner to strengthen the institution of the Commissioner of Election after the election of the new Parliament. It urged that this should not become part of a lengthy process of constitutional reform, and that it would require the strengthening of supporting institutions of a free and fair elections, such as the police and public service.

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[79] *Supra* n.74

24. Conclusion

There were sharp differences of opinion regarding the way in which election irregularities may have affected the total outcome of the election in the assessment of local and international monitors, with CMEV and PAFFREL/MFFE on the one hand, and the European Union team, the Commonwealth team and the British Parliamentarians, on the other.

The national monitoring initiatives led by CMEV and PAFFREL/MFFE called for the poll to be annulled in a number of electoral divisions. Given the serious nature of the infringements encountered, in its final report on the elections, CMEV opined that at the very least the Kandy District needed to be re-polled if any semblance of faith in the democratic process was to be maintained. It also considered that taken as a whole, the 2000 general election was significantly marred by violence and election related violations. In addition, it noted that the ongoing offensive in the Jaffna peninsula, and the *de facto* deprivation of voting rights to Tamil voters in so called 'uncleared' areas in the North-East Province resulted in the election being a fraud in this province.[80]

PAFFREL/MFFE noted that the Government and political parties had adequate notice to address election-related problems, which clearly manifested themselves in the pre-election period. Despite many pledges made by individual politicians, political parties and the President herself, PAFFREL/MFFE noted that the action taken was ineffective and instead of the situation improving in the run up to election day, it had instead been further aggravated.

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[80] General Election 10th October 2000, PAFFREL/MFFE Media Release on the Conduct of the Poll, 10.10.2000.

While making a strong statement about the "large-scale breakdown of the electoral process in a number of areas in eight electoral districts," the PAFFREL/MFFE combine noted that the general election was conducted in an essentially free and fair manner in 12 out of 20 electoral districts in the country (excluding the two war affected districts of Jaffna and Wanni). Considering the high degree of violence in the pre election period, PAFFREL/ MFFE felt that the orderly conditions maintained on election day itself in the majority of polling stations was positive and augured well for the future.[81]

In its interim statement following the polls, PAFFREL/MFFE also reminded the President of her promise that candidates who violated election laws or resorted to electoral violence would receive no place in the next government. However, contrary to this pledge, some of the powerful ministers named by voters and election monitors as being responsible for grave election related violence and violations were retained in positions of power and authority. This disregard for justice does little to restore voter confidence in a free and fair electoral process. It serves, instead, to reinforce a sense of impunity and lends legitimacy to offenders. Thus, the spiral of election violation continues from election to election, making a mockery of democratic principles and process.

In contrast to the assessment of local monitors, international monitoring teams assessed the election to be essentially 'free and fair. The election observation mission of the EU considered that the violence and malpractice observed did not prevent the people of Sri Lanka from exercising their franchise, since over 75% of the country voted despite these problems. However, the monitors

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[81] *Ibid.*

also noted that it would have been difficult to conclude that the election was 'free and fair' in all districts. The EU team concluded, however, that given the prompt actions of the Commissioner of Elections, the overall result did to a reasonable degree reflect the will of the electorate.[82]

The Commonwealth Election Monitoring Unit was also impressed by the large number of voters who went to the polls "to keep their faith with the democratic process." The team also commended the expertise of the Commissioner of Elections and his staff, which they felt augured well for Sri Lanka's long standing democracy. The team had observed the poll in 130 polling stations situated in nine of the 22 electoral districts, and noted some technical shortcomings in the electoral process, none of which they considered would have affected the outcome significantly.[83]

The discrepancies in the findings of local and international monitoring teams suggests that international teams which have no link with national monitoring initiatives risk making a superficial assessment, as they miss the political nuances which demand a more sensitive and astute political analysis. The CMEV, in particular, recorded its "surprise and disappointment" at the reports submitted by the Observer Missions of the EU and the British-Sri Lanka Parliamentary Group, which also gave the elections a vote of confidence.[84]

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[82] *Supra* n 23

[83] Post-Election Statement of the Commonwealth Election Monitoring Unit, 13th October 2000.

[84] CMEV Media Communiqué on "Election Related Violence, General Election 2000," 14th October 2000.

Expressing a more holistic assessment of the elections, PAFFREL/MFFE stressed that political parties and their leadership owe the public responsible action to ensure that their candidates and supporters refrain from violating election laws and using violence. Election campaigns are increasingly violent and perpetrators blatantly flout both the law and the norms of civilised society with impunity. It added that political parties must, therefore, take on the responsibility to create a climate conducive to free and fair elections. Civil society organisations must continue to be vigilant and political parties need to take heed of the concerns and aspirations of the people who demonstrate time and time again their overwhelming desire to uphold and maintain democracy and their commitment to the democratic process by using their franchise in such great numbers despite various impediments and difficulty.

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Internally Displaced Persons

*I.K. Zanofer**

1. Introduction

Armed conflicts continue to displace people around the world. There is a broad international consensus that about 20 to 25 million people may be internally displaced around the world.[1] "An estimated 1.3 million persons out of a total population of around 19 million have been displaced within and outside Sri Lanka. Of these people, an estimated 800,000 persons are internally displaced, mainly within the North and Eastern provinces."[2]

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* LL.M (Essex), Attorney-at-Law. The views expressed are the writer's own, and are not necessarily shared by any organisation. The writer is grateful to Dulip Samaraweera, Intern, Law & Society Trust, for his research assistance.

1 *Remembering the Displaced* (UNHCR Sri Lanka, December 2000), p.6.

2 *Ibid.*

Internally Displaced Persons (IDPs) in Sri Lanka live in complex circumstances. Having been displaced from their homes, their difficulties are compounded by continuing military operations, which violate and threaten their universally guaranteed human rights. IDPs, particularly those living in conflict-affected areas, face a range of restrictions in enjoying both the rights guaranteed under the 1978 Constitution[3] and other basic services available to other citizens. These restrictions are imposed under the cloaks of Emergency Regulations (ERs)[4] and the Prevention of Terrorism Act (PTA),[5] as well as by other less formal means. In these circumstances, respect for human rights becomes a key factor in the search for a durable solution to Sri Lanka's conflict.

This chapter aims to identify the most important problems experienced by IDPs and examine to what extent, if at all, their rights are respected and protected at the domestic level. It also explores how use could be made of existing international human rights and humanitarian law norms to address violations of the rights of IDPs, when the government authorities fail to provide adequate protection. In this regard, examples from countries and organs outside Sri Lanka are used to illustrate different situations or to establish legal grounds applicable to IDPs in Sri Lanka. The chapter also explores how the 'Guiding Principles on Internal Displacement'[6] could be applied to enhance the protection of IDPs in Sri Lanka.

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3 *The Constitution of the Democratic Socialist Republic of Sri Lanka of 1978.*

4 ERs are issued under the Public Security Ordinance No.25 of 1947 (as amended). ERs may override, amend or suspend the operation of any existing law except the provisions of the Constitution [Article 155(2) of the Constitution]. However, ERs can limit the fundamental rights guaranteed under the Constitution [Section 7 of the PSO].

5 No.48 of 1975 (as amended).

6 See, Francis M. Deng, *Internally Displaced Persons-Report of the Representative of the Secretary-General*, UN doc. E/CN.4/1998/53/Add.2 (1998).

2. Legal Protection of IDPs

IDPs have been defined as:

> *Persons or groups of persons who have been forced or obliged to flee or leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border.*[7]

Every State, on the basis of either treaty obligations or customary international law, has the obligation 'to respect' and 'to ensure' universally guaranteed human rights to all its citizens, including IDPs.

Some problems relating to the protection of IDPs follow from the fact that IDPs by definition remain within their national boundaries. They are, therefore, largely dependent upon their own government to uphold their rights, even though it may be their own government that has violated their basic human rights. The government may, in fact, view IDPs as 'enemy sympathisers' in a civil conflict and may be in no position to offer any protection.[8] In such situations, both international human rights law and humanitarian law are relevant.[9]

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[7] *Guiding Principles on Internal Displacement*, United Nations Office for the Coordination of Humanitarian Affairs (OCHA)(hereinafter 'Guiding Principles').

[8] R. Wilkinson, "Who's Looking After These People? Millions of Displaced Persons Get Only Passing Attention from the International Community," US Committee for Refugees, Refugee Magazine, Issue 17 (1999), p. 2.

[9] D. Plattner, "The Protection of Displaced Persons in Non-International Armed Conflicts," 291 *International Review of the Red Cross*, November-December 1992, p. 569.

2.1 International Human Rights Law (IHRL)

International human rights law, which is applicable both in peacetime and during war, does not mention IDPs as a special category of people. The rights of IDPs are thus the same as the rights of any other person, and must be respected and protected accordingly. These rights include the right to life, protection from torture and ill-treatment, the right to freedom of movement, the right to property, and the right to family life. These rights are affirmed, among other civil, political, economic, social and cultural rights, for all persons, citizens and non-citizens alike, in the Universal Declaration of Human Rights (UDHR),[10] the International Covenant on Civil and Political Rights (ICCPR),[11] the International Covenant on Economic Social and Cultural Rights (ICESCR),[12] the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment (CAT),[13] and the Convention on the Rights of the Child (CRC).[14]

Even though human rights law based on treaties or customary international law is of paramount importance when addressing rights, there are some fundamental legal problems. Concerning treaty-based human rights law, difficulties arise if States have not ratified the relevant treaties or if, despite being party to the treaty regimes, they have invoked limitation clauses or derogated from certain guarantees in times of public emergencies.[15] Yet, even if States do invoke derogation clauses, they must still respect

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[10] GA Res., 217A(III) of 10th December 1948.

[11] GA Res., 2200 A (XXI) of 16th December 1966.

[12] GA Res.. 2200 A (XXI) of 16th December 1966.

[13] GA Res., 39/46 of 10th December 1984.

[14] GA Res., 44/25 of 20th November 1989.

[15] N. Geissler, "The International Protection Internally Displaced Persons," *International Journal of Refugee Law*, Vol.II, No.3 (1999), p.459.

various fundamental, non-derogable human rights such as the right to life and the prohibition of torture and cruel and inhuman or degrading treatment or punishment.[16] Sri Lanka is a signatory to all the above-mentioned treaties, which contain provisions relevant to the situation of IDPs, as discussed below.

2.2. International Humanitarian Law (IHL)

International humanitarian law is applied during armed conflicts, whether international or internal. The rules applicable in armed conflicts are set out in the four Geneva Conventions of 1949[17] and its two Protocols of 1977.[18] The treaty-based rules making up humanitarian law applicable in internal armed conflicts are set forth in Article 3 to the four Geneva Conventions (hereinafter 'Common Article 3') and Protocol-II (P-II), which develops and supplements Common Article 3. The mandatory provisions in Common Article 3 not only expressly bind and apply equally to both parties to internal armed conflicts, but are also absolute for both parties, applying to each party independently of the obligation of the other.

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[16] See Article 4(2), ICCPR.

[17] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (GC-I); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea (GC-II); Geneva Convention Relative to the Treatment of Prisoners of War (GC-III); and Geneva Convention Relative to the Protection of Civilian Persons in Time of War (GC-IV).

[18] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (P-I); and Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol-II).

Furthermore, international law more generally now tends to treat violations of Common Article 3 as war crimes.[19] In the *Nicaragua* case, the World Court affirmed that Common Article 3 reflects "fundamental general principles of humanitarian law."[20]

The application of these rules to internal armed conflicts can be problematic. Governments embroiled in such situations not only deny the applicability of the rules embodied in Common Article 3 and P-II, but also deny belligerency status and the concomitant rights to the dissident forces, treating them as 'common criminals' under their domestic laws.[21]

Sri Lanka is a party to the Geneva Conventions of 1949 and is legally bound to implement the human rights safeguards contained therein. But, it is not a party to either the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity[22] or to Protocol-II. In addition to its treaty obligations, Sri Lanka is also obliged to respect the relevant rules of customary international law, particularly those concerning the ***"elementary considerations of humanity"*** in times of armed conflict as well as in times of peace, as expressed in Common Article 3. When the State involved is not a party to P-II, the

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[19] N. S. Rodley, *The Treatment of Prisoners under International Law*, 2nd ed. (Clarendon Press, Oxford, 1999), p. 122.

[20] *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua* v. *United States of America)*, Merits, Judgment, 14 ICJ Rep. (1986), para.218.

[21] D. D. Nsereko, "Arbitrary Deprivation of Life: Controls and Permissible Deprivations", in Ramcharan, B.G., (ed.), *The Right to Life in International Law* (Martinus Nijhoff, London, 1985), p.272.

[22] GA, Res., 2391(XXIII) of 26th November 1968.

belligerents must rely on the rules of customary international law for their obligations during military operations[23] (emphasis added).

2.3. Guiding Principles on Internal Displacement (GPID)

The Guiding Principles, although not binding, serve as international standards to guide state and non-state actors, as well as humanitarian and development agencies, in providing assistance and protection to IDPs. They also reflect and are consistent with international human rights and humanitarian law norms.

At the national level, some governments have begun to cite the Guiding Principles and have used them in public awareness campaigns and as the basis for drafting laws.[24] For example, in Columbia, the Constitutional Court cited the Guiding Principles as a basis for protecting IDPs in two decisions and stated that "they be used as parameters for normative creation and interpretation in the field of forced displacement and in regard to attention given to displaced people by the State."[25] In addition, intergovernmental bodies, most notably the Commission on Human Rights and the General Assembly, have also acknowledged the Principles.[26] Salient features of the Guiding Principles will be discussed in the latter part of the chapter.

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[23] T. Meron, *Human Rights and Humanitarian Norms as Customary Law* (Clarendon Press, Oxford, 1989), pp. 155-171.

[24] "Report of the International Colloquy on the Guiding Principles on Internal Displacement," The Brookings Institution Project on Internal Displacement, Vienna, Austria, September 21-23, 2000, p. 3.

[25] See, Republica de Colombia, Corte Constitucional, Sentencia Numero Su-1150/2000, Expedientes de Tutela T-186589/T-201615/T-254941, Magistrado Ponente: Eduardo Cifuentes Muñoz, cited in supra, n.24, p. 3.

[26] *Ibid.*

3. Displacement in Sri Lanka

The prolonged armed conflict in Sri Lanka between government forces and the Liberation Tigers of Tamil Eelam (LTTE) has left hundreds and thousands of people displaced, and many people have been displaced several times. During 2000, regular rounds of fighting repeatedly triggered new waves of displacement, mainly in the Jaffna Peninsula. The fighting which led to the capture by the LTTE of the strategic Elephant Pass in April caused 160,000 persons to flee their homes, most of whom sought refuge within the Jaffna peninsula.[27]

As of December 2000, government figures suggested that some 725,549 persons were internally displaced.[28] While the majority of IDPs are Tamil, there are also several thousands of Muslims who were forcibly evicted from Mannar and Jaffna by the LTTE in 1990, and who remain displaced.[29] However, the government figures include only those IDPs who have registered with the government authorities for assistance. In reality, the total number of IDPs in Sri Lanka is very much higher than these figures suggest.

As soon as IDPs flee from their homes, they go either to the so-called Welfare Centres, where they are basically detained by government forces, or they go and live with relatives or friends. The problems affecting them, whether or not they are staying in

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27 For a comprehensive and updated report on Internal Displacement in Sri Lanka, See: Norwegian Refugee Council's Global IDP Project (hereinafter 'IDP Project'), available at http://www.idpproject.org/; accessed on 9 June 2001.

28 Statistics released by the Commissioner General of Essential Services (CGES), as at 01.12.2000.

29 *Ibid.* An estimated 100,000 Muslim IDPs are located in the Puttalam and Anuradhapura districts.

Welfare Centres, are enormous and complex, including disappearances, torture, arbitrary detentions, and harassment by soldiers at checkpoints, particularly of women.[30]

In 2000, there was considerable controversy over food-aid and health care facilities for IDPs. The government-imposed embargo on "war-related material" being taken to the North was further tightened in April 2000, resulting in serious restrictions on the provision of food and non-food items, including medicine. While the Government feared these items might fall into the hands of the LTTE, the restrictions contributed to a serious deterioration in the quality and quantity of medical care, food and shelter provided to IDPs in the Wanni region.[31]

Throughout the conflict, there have been incidents during which several IDPs were killed by both parties to the conflict. The total number is not known, however. Like other civilians, IDPs fall victim to shellings, landmines,[32] and air raids. The killing of IDPs by both parties not only casts doubts on the quality of their intelligence before launching such attacks and the alleged military advantage anticipated; it also poses questions about whether the parties concerned are fulfilling their obligations under international humanitarian law to discriminate between military and non-military targets and to take steps to protect civilians. If both parties are deliberately exposing IDPs to danger, this would constitute a breach of international law.[33]

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[30] See, IDP Project, *supra* n.27.

[31] *Ibid.*

[32] Landmines are a serious problem in Sri Lanka, especially for those who return to their village of origin in the North of the country. Approximately 25,000 landmines are thought to be buried in the country, most of them in the Jaffna Peninsula. For more details, see; IDP Project, *supra*, n.27; accessed on 13 June 2001.

[33] "Rules of International Humanitarian Law Governing the Conduct of Hostilities in Non-International Armed Conflicts," 278 *International Review of the Red Cross*, September-October 1990, p.388.

3.1 The Main Problems Faced by IDPs

3.1.1 The Right to Life

a. Arbitrary killings

The protection of the right to life is one of the most pressing concerns in international law today. The right to life is the basic human right which is inalienable; that is to say, that it cannot be waived or renounced. Furthermore, it is an essential right and all other rights derive from it; if a person is deprived of his right to life, all other human rights become meaningless.[34]

Arbitrary killings, torture and disappearances threaten and violate the right to life of IDPs in Sri Lanka. The US Department of State reported that more than 100 civilians were killed in clashes between the military and the LTTE in 2000.[35] However, it was not clear whether this included any IDPs.

The basic international standards on the right to life are contained in Article 3 of the Universal Declaration of Human Rights (UDHR),[36] Article 6 of the International Covenant on Civil and Political Rights (ICCPR),[37] Article 2 of the European Convention

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[34] See, generally, F. Przetacznik, "The Right to Life as a Basic Human Right," 56 *Revue de Droit International* 1978, pp. 23-47; Y. Dinstein, "The Right to Life, Physical Integrity, and Liberty", in Henkin, L., (ed.), *The International Bill of Rights: The Covenant on Civil and Political Rights* (New York, 1981), pp.114-137.

[35] US Department of State, *Sri Lanka Country Report on Human Rights Practices for 2000* (Washington DC, February 2001), pp.1-3.

[36] Article 3: "Everyone has the right to life, liberty and the security of person."

[37] Article 6(1): "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."

on Human Rights and Fundamental Freedoms of 1950 (ECHR),[38] Article 4 of the American Convention on Human Rights of 1969 (American Convention),[39] and Article 4 of the African Charter on Human and Peoples' Rights of 1981(African Charter).[40] However, the present Constitution of Sri Lanka does not guarantee this right to its citizens.

The UN Human Rights Committee, in its General Comment on Article 6 of the ICCPR,[41] described the right to life as the "supreme right" from which no derogation is permitted "even in time of emergency which threatens the life of the nations."[42] The Committee further stated that the protection against arbitrary deprivation of life in Article 6 is of "paramount importance" and stressed the need for governments to "take measures not only to prevent and punish deprivation of life by criminal acts, but also to prevent arbitrary killing by their own security forces."[43] Therefore, the government bears the responsibility of protecting its citizens, including IDPs, from such violations and for bringing those responsible to justice.

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38 Article 2(1): "Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law."

39 Article 4: "Every person has the right to have his life respected. This right shall be protected by law, and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life."

40 Article 4: "Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of his right."

41 Human Rights Committee, General Comment-6, GAOR, 16th Session, 1982.

42 *Ibid.*

43 *Ibid.*

b. Disappearances

The primary concern of IDPs in the conflict areas is their feeling of insecurity, particularly as large numbers of people have 'disappeared' at the hands of government forces. According to Amnesty International, eight displaced civilians, including a five-year-old boy, disappeared after being arrested while visiting their homes on 19th December 2000. Their bodies were recovered from an illegal grave six days later.[44] This is a clear violation of their right to life. The total number of IDP-related disappearances is impossible to ascertain due to censorship of news about security operations.[45] However, according to the UN Working Group on Enforced or Involuntary Disappearances, "Sri Lanka remains the country with the second largest number of non-clarified cases of disappearances."[46]

According to the UN Working Group, the principal human rights denied to a disappeared person include: the right to life; the right to liberty and security of the person; and the right to humane conditions of detention and freedom from torture, cruel or degrading treatment or punishment.[47] The Working Group also stressed that "no special circumstances, armed conflict, states of emergency, situations of internal conflict or tension can justify enforced or involuntary disappearances."[48]

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44 Amnesty International, *Annual Report 2001*, p.225.

45 US State Department of State, *supra* n.35, p.5.

46 Report on the visit to Sri Lanka by a member of the Working Group on Enforced or Involuntary Disappearances, E/CN.4/2000/64/Add.1, para. 60.

47 UN doc. E/CN.4/1435, para.184. The Declaration against Enforced Disappearance (A/RES/47/133, 92nd plenary meeting, 18 December 1992) also refers to it as one of the rules of international law violated by an act of disappearances [Article 1(2)].

48 UN doc. E/CN.4/1984/21, para. 172.

The Human Rights Committee, in its General Comment on Article 6 of the ICCPR,[49] refers to disappearances and asserts: "States parties should also take specific and effective measures to prevent the disappearance of individuals, something which unfortunately has become all too frequent and leads often to arbitrary deprivation of life." Therefore, the Government should establish effective facilities and procedures to investigate thoroughly cases of missing and disappeared persons in circumstances which may involve a violation of the 'right to life.'

According to Principle 16 of the Guiding Principles, all IDPs have "the right to know the fate and whereabouts of missing relatives." As an example, in *Quinteros* v. *Uruguay* case,[50] the victim, Elena Quinteros, was arrested by the Uruguayan authorities and was detained in an unknown place for a prolonged period. Her mother filed a complaint before the Human Rights Committee. The Committee found that the disappeared person's mother was also "a victim of the violations of the Covenant, in particular of article 7 [of the ICCPR], suffered by her daughter." This conclusion flowed from the Committee's understanding of "the anguish and stress caused to the mother by the disappearance of her daughter and by the continuing uncertainty concerning her fate and whereabouts."[51] In this case, the issue of the right to know the fate was discussed in the context of unacknowledged detention. Nevertheless, the situation is also of importance in the case of IDPs, since they are also often exposed to the same situation.

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[49] Report of the Human Rights Committee, *GAOR*, 16th Session, 1982.

[50] Quinteros v. Uruguay (107/1981), Report of the Human Rights Committee, GAOR, 38th Session, Supplement No.40 (1983), Annex XXII, para.13.

[51] *Ibid*, para.14.

There are no legal mechanisms in Sri Lanka to prohibit disappearances, even though specific acts which might contribute to disappearances are illegal. Therefore, the Guiding Principles need to be given due recognition by all the authorities concerned.

c. Torture

IDPs may also be subject to torture or ill-treatment, including when they disappear. The UN Working Group, in its third report, acknowledged the view that a disappearance itself constitutes *ipso facto* torture or ill-treatment. It stated: "The very fact of being detained as a disappeared person, isolated from one's family for a long period is certainly a violation of the right to humane conditions of detention and has been represented to the Working Group as torture."[52]

The right of everyone to be free from torture is guaranteed under Article 7 of the ICCPR, which allows of no limitation. The Human Rights Committee, in its General Comment on Article 7,[53] also affirmed that "even in situations of public emergency such as those referred to in article 4 of the Covenant, no derogation from the provision of article 7 is allowed and its provisions must remain in force." The Committee likewise observed that no justification or extenuating circumstances may be invoked to excuse a violation of Article 7 for any reasons, including those based on an order from a superior officer or public authority (paragraph 3).

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52 UN doc. E/CN.4/1983/14, para.131.

53 General Comment 20, Forty-fourth Session, 1992.

The detention of IDPs in unauthorised and undisclosed places would amount to a clear violation of Article 11 of the Constitution, Articles 7, 9, and 10(1) of the ICCPR, and Principles 11(2a) (prohibition of torture) and 12 (prohibition against arbitrary arrest and detention) of the Guiding Principles.

One of the basic principles of international humanitarian law is that the civilian population should be protected as far as possible from the hostilities. In respect of people who do not take a direct part or who have ceased to take part in hostilities during an internal armed conflict, Article 4 of the P-II, prohibits violence to life "at any time and in any place whatsoever." Common Article 3 also prohibits:

> *at any time and in any place whatsoever .....violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture of people taking no active part in the hostilities in armed conflict which is not international in character.*

Equally important is the rule that the civilian population, as well as individual civilians, must not be the objects of military attack.[54] A suspicion that an enemy or guerrilla is present in a village does not automatically turn the whole village into a military objective, justifying the indiscriminate killing of civilians, including women and children as happened in Sri Lanka in 1995 (the Navaly church bombing) and in 1999 (the Madhu incident).[55] In both these incidents, at least 100 IDPs were killed.

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[54] Articles 51 and 52 of P-I and Article 13 para.2 of P-II.

[55] Sri Lanka Monitor, *Refugees Die in Madhu Church*, British Refugee Council, November 1999.

Moreover, the mere presence within the civilian population of individuals who are not considered 'civilians' does not deprive the population of its civilian character.[56] Again, acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited. So too are indiscriminate attacks as well as attacks of reprisal against the civilian population.[57]

Principle 10(1) of the Guiding Principles guarantees the protection of the right to life,[58] and Principle 10(2), *inter alia*, prohibits direct or indiscriminate attacks or other acts of violence against IDPs and their use to shield military objectives from attack or to shield, favour or impede military operations.[59] This Principle, unlike other international law instruments, does not impose any limitation on this right. Therefore, it could be argued that the protection of the right to life guaranteed in Principle 10 is wider than the protection guaranteed under international law norms.

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56 Article 50(3)(P-I).

57 Article 51(P-I) and Article 13(P-II).

58 Principle 10(1): "Every human being has the inherent right to life which shall be protected by law. No one shall be arbitrarily deprived of his or her life. Internally displaced persons shall be protected in particular against: (a) Genocide; (b) Murder; (c) Summary or arbitrary executions; and (d) Enforced disappearances including abduction or unacknowledged detention, threatening or resulting in death."

59 Principle 10(2): "Attacks or other acts of violence against internally displaced persons who do not or no longer participate in hostilities are prohibited in all circumstances. Internally displaced persons shall be protected, in particular, against: (a) Direct or indiscriminate attacks or other acts of violence, including the creation of areas wherein attacks on civilians are permitted; (b) Starvation as a method of combat; (c) Their use to shield military objectives from attack or to shield, favour or impede military operations; (d) Attacks against their camps or settlements; and (e) The use of anti-personnel landmines."

From the above analysis, it is clear that the protection of the right to life of IDPs in Sri Lanka must be given a considerably higher priority. The absence of protection under the present Constitution and the failure of the State to carry out effective investigations into killings of IDPs will also entail a failure to provide an effective system of protection of the right to life. Therefore, the authorities concerned should take all the measures necessary to carry out such investigations and to bring the perpetrators to justice.

3.1.2 The right to freedom of movement

The freedom of movement of IDPs in the North is hampered by a rigid pass system regulated by both parties to the conflict. This pass system, especially the ones introduced by the government forces, divides the people into a range of "pass categories."

To quote the IDP Project:

> *There are 14 types of passes issued in Vavuniya Division, to enter, to stay and to leave. Vavuniya is the border town which separates cleared (army-controlled) and uncleared (rebel-held) areas and people coming from the conflict zones need to pass through this town to move on to any other place. The passes available to Tamils usually range from a few hours to three months, and queuing for them can take several hours. Since June 2000, once in the welfare centres, the displaced people may also apply for three-month passes to work in Vavuniya, if they can find a job, although they must return to the camp at night.*[60]

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[60] See, IDP Project, *supra* n. 27.

According to Article 14(h) of the Constitution, **every citizen** is entitled to "the freedom of movement and choosing his residence within Sri Lanka." However, this right may be restricted in the interests of, *inter alia*, national security.[61] Most human rights instruments also permit States to place restrictions on the freedom of movement and residence on national security grounds. For example, Article 12(3) of the ICCPR sets forth the requirements and criteria for validly restricting the otherwise free exercise of this right. The application of such restrictions must be prescribed by law, based on one of the enumerated grounds justifying limitations, respond to a pressing public or social need, pursue a legitimate aim, and be proportionate to that aim.[62]

Common Article 3 does not protect freedom of movement at all, and Article 17 of P-II only concerns protection from arbitrary displacement.[63] Principle 14 of the Guiding Principles protects the right to freedom of movement of IDPs and, remarkably, does not impose any limitation on this right. Therefore, it could be argued that Principle 14 not only fills the 'gap' in the Constitution but also in human rights and humanitarian law treaties. Furthermore, Principle 2 affirms that "these principles shall be observed by all authorities, groups and persons irrespective of their legal status and applied without any adverse distinction." Therefore, the parties concerned, by recognising the freedom of movement guaranteed by the instruments (both binding and non-binding) should allow the IDPs to return to their original areas or move to any other area of their choice.

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61 1978 Constitution, Article 15.

62 The Siracusa Principles on the Limitation and Derogation Provisions in the ICCPR, 7 *Human Rights Quarterly* 237 (1985), para.10; Article 12 of ICCPR.

63 See, Geissier, *supra* n.15 at p.464.

3.1.3 The right to liberty and security of person

The personal liberty of IDPs is often at risk, both during flight and upon relocation in welfare centres. IDPs frequently have no identification documents with them, such as national identity cards or birth certificates, which results in IDPs frequently being arrested and detained under the PTA or ERs. The wide powers given to the security forces under this draconian legislation enables the security forces to arrest suspected persons and detain them incommunicado and without charge or trial for long periods, conditions which provide a ready context for violation of the right to liberty and security of person.

The situation worsened on 3 May 2000 when the President promulgated new emergency regulations. The new regulations conferred broad powers of arrest to "any authorised person" in addition to the police and the armed forces.[64]

The right of everyone to be free from arbitrary arrest or detention is enshrined under Article 9 of the UDHR, Article 9(1) of the ICCPR and Principle 12 of the Guiding Principles. Although this right may be restricted, Article 9(5) of the ICCPR stipulates that "anyone who has been a victim of unlawful arrest or detention shall have an enforceable right to compensation." In the context of Sri Lanka, the right to be compensated for the violation of this right is problematic, since the Constitution does not enshrine the right to liberty and security of person to its citizens. However, under Article 141(b) of the Constitution, the Court of Appeal may grant and issue orders in the nature of writ of habeas corpus to bring before such court the body of any person illegally or improperly detained

[64] Gazette Extraordinary, 1130/8 of 3rd May 2000. See the Chapter on Emergency Rule for detailed discussion of these new regulations.

in public or private custody. Therefore, it can be argued that although the right to liberty and security of person is not a fundamental right, the protection of this right can be derived from claiming compensation under Article 141(b) of the Constitution.

3.1.4 The right to property

During displacement, people are often compelled to leave behind their property and other belongings. In some cases, IDPs can subsequently return to their properties; others, however, have been unable to do this for over 10 years. Muslim IDPs who were forced to leave Mannar and Jaffna in 1990 by the LTTE have been unable to return so far. As it is over 10 years since they left, their chances of ever returning to their properties remain bleak since under the current property law,[65] unlawful occupants pf property can gain rights to it after a lapse of 10 years. These IDPs are on the verge of losing their properties to trespassers. There is an urgent need to enact new legislation to protect their properties.

3.1.5 Women and children

There are more than 175,000 persons in 348 Government Welfare Centres around the country,[66] at least 75% of whom are women and children. Lack of privacy, lack of participation in income-generating and employment opportunities, sudden role as head of household, absence of day care centres for children, inadequate health services and sexual abuses are the main problems women in the Government Welfare Centres confront on a daily basis. Same problems affect children, too, but to this list can be added

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[65] Section 3 of the Prescription Ordinance, Nos. 22 of 1871 and 2 of 1889.

[66] See, CGES, *supra* n. 28.

nutritional problems, psycho-social trauma, and difficulties of access to education leading to non-attendance in school.[67] An additional problem is forcible military recruitment of children by the LTTE and paramilitary groups.[68]

The principles contain specific provisions to protect women and children. For example, they specifically refer to women's rights to personal identification and other documents of critical importance to internally displaced women. They also prohibit gender-specific violence, call for the full participation of women in the planning and distribution of basic supplies, provide for full and equal participation of women and girls in educational and training programmes, give special attention to women's needs for reproductive and psychological health care and call for equal opportunity in employment and other economic activities. Further, they prohibit the recruitment of children and their participation in hostilities. While there are various international instruments that set forth the rights of women and children generally, the Guiding Principles are the first to address their specific needs in situations of displacement.[69]

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[67] See, IDP Project, *supra*, n.27.

[68] See, the special section on Sri Lanka in the *Global Report on Child Soldiers 2001*, The Coalition to Stop the Use of Child Soldiers; available at http://www.child-soldiers.org; accessed on 15th June 2001.

[69] R. Cohen, "Protecting Internally Displaced Women and Children", in *Rights Have No Borders: Worldwide Internal Displacement*, Global IDP Survey of the Norwegian Refugee Council (1998) (page number not available).

4. Sri Lanka's Obligations under International Law

As mentioned above, Sri Lanka has ratified a number of international treaties, including acceding to the ICCPR in 1980. Therefore, it is obliged 'to respect' and 'to ensure' the rights guaranteed under the Covenant. A State's obligations 'to respect' and 'to ensure' human rights are spelled out in Article 2 of the ICCPR.[70] This article specifies the means by which the parties are to carry out these obligations. Under paragraph 2, the parties undertake to adopt such legislative or other measures, where not already provided for, as may be necessary to give effect to the rights recognised in the Covenant.

As can be seen, this provision of Article 2 clearly imposes an affirmative duty –a clear obligation– on the State to take whatever measures that are necessary to enable individuals to enjoy and exercise these rights. It follows that there is an obligation on the States parties to the Covenant to give effect to these rights through domestic legal measures.

Protection through domestic legal measures requires that laws to protect rights should both exist and be adequate. According to Dinstein,[71] "a violation of the duty of protection by law flowing from article 6(1) can be assumed only when State legislation is

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[70] Article 2: "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

[71] Dinstein, *supra* n. 34, p. 115, has also correctly pointed out that the significance of the right to life requires protection by law in the formal sense.

lacking altogether or when it is manifestly insufficient as measured against the actual threat." Therefore, it could be argued that Sri Lanka is violating Article 6(1) of the Covenant in respect of the right to life, the right to liberty and security of person and to freedom of movement of IDPs.

The Human Rights Committee, in its concluding observations on Sri Lanka's third periodic report[72] noted, *inter alia*, that the report was not satisfactory and that the legal system of Sri Lanka contained neither all the rights set forth in the Covenant nor all the necessary safeguards to prevent their restriction beyond the limits established by the Covenant. In other words, the domestic laws do not fully comply with the Covenant. Therefore, it is necessary for the Government to enact new laws (including particular legislation for the protection of IDPs, as has been done for elderly people[73]) to fill the gaps in its national laws and to make them conform to international human rights standards.

Sri Lanka also acceded to ICESCR in 1980. Certainly, the Government of Sri Lanka does provide assistance to IDPs through the Ministry of Rehabilitation, Reconstruction and Development of the Northern Region, despite allegations that the LTTE manipulates food aid. However, the overall situation of IDPs remains highly vulnerable. According to Article11 of the ICESCR, State parties recognise the right of everyone to an adequate standard of living for himself and his family, including adequate food and housing. Article 11(2) also recognises the fundamental right of everyone to be free from hunger.

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[72] Concluding observations of the Human Rights Committee: Sri Lanka. 03/10/95. A/50/40, paragraphs 436-476, 03 October 1995.

[73] The Protection of the Rights of Elders Act No. 9 of 2000.

The Committee on Economic, Social and Cultural Rights, in its General Comment on Article 12 of the ICESCR,[74] affirms that the right to adequate food is indivisibly linked to the inherent dignity of the human person and is indispensable for the fulfilment of other human rights enshrined in the International Bill of Human Rights. It also says, in paragraph19, that such matters as the denial of access to food to particular individuals or groups, the prevention of access to humanitarian food aid in internal conflict, the failure to regulate activities of individuals or groups so as to prevent them from violating the right to food of others, all amount to a violation of this article. Therefore, the Government should ensure that the relief aid provided to IDPs is adequate and is not determined by military and security concerns.

The Committee on Economic, Social and Cultural Rights, in its concluding observations on Sri Lanka's country report[75] noted, *inter alia*, that the absence in Sri Lanka's country report of statistics relating to the North and East only reinforces the Committee's view that the question of discrimination in relation to the economic, social and cultural rights of ethnic groups remains the central issue in the armed conflict in Sri Lanka.[76] The Committee also expressed its deep concern at the lack of anti-discrimination mechanisms in the area of employment with regard to women and minority groups (para.11). The dream of having an equal opportunity law was tarnished when the Government withdrew the Equal Opportunity Bill[77] in October 1999 just hours before it was to be presented in Parliament.

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74 General Comment-12, E/C.12/1999/5, para.4.

75 E/C.12/1/Add.24, 16 June 1998.

76 *Ibid.* para. 6.

77 For an analysis on this Bill, See: A. Satkunanathan, "The Controversy over the Equal Opportunity Bill," in *Sri Lanka: State of Human Rights 2000* (Colombo, Law & Society Trust, 2000), pp.191-216.

5. Conclusion

The plight of IDPs in Sri Lanka is unbearable. They are unable to access and enjoy a wide range of rights to the extent they are enjoyed in the other parts of the country. They are especially vulnerable to acts of violence, such as armed attacks, disappearances, torture or rape. Their rights to freedom of movement and liberty and security are often violated because of the rigid pass system and arbitrary arrest and detention. Additionally, important social, cultural and family ties are frequently cut off.

The lack of protection mechanisms and the disrespect for the rule of law by both parties to the conflict not only leads to a considerable lack of protection of IDPs but also jeopardise the remedial effect of human rights and humanitarian law norms in general. Therefore, it is necessary for the Government to take all the necessary steps to implement their human rights and humanitarian law obligations in full, and paying particular regard to situations in which human rights are particularly susceptible to violations. These include: norms for the protection of human rights during states of emergency; norms regarding arrests and the use of force by law enforcement officials; and norms regarding torture, disappearances and arbitrary killings.[78]

The wide acceptance and use internationally of the Guiding Principles must be noted. In his report to the Security Council in 1999 on "Protection of Civilians in Armed Conflict," the UN Secretary-General suggested that in situations of mass displacement, the Council should encourage governments to

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[78] B.G. Ramcharan, "The Concept and Dimensions of the Right to Life," in Ramcharan, B.G. (ed.), *supra* n. 21, p.7.

observe the Guiding Principles.[79] Therefore, it is necessary for the Government, which has primary responsibility for IDPs, to take all the necessary steps to create awareness of the principles among its authorities and to make sure that they are observed.

6. Recommendations

Sri Lanka: State of Human Rights, 1997 contained a series of recommendations[80] relating to IDPs, which were reiterated in the 1998 report[81] with the hope that at least some of the recommendations would be implemented in the coming years. Unfortunately, this has not happened. Therefore, the present chapter also, *inter alia*, includes some of the previous years' recommendations:

(a) The Government, the LTTE and other para-military groups, should respect and ensure the principles of humanitarian law and human rights law.

(b) The Government should take necessary measures to ratify Protocol-II to the Geneva Conventions.

(c) The Government should invite the Special Representative to the UN Secretary-General on Internally Displaced Persons, Francis Deng, to make a follow up visit to the country.

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79 "Report of the Secretary-General to the Security Council on Protection of Civilians in Armed Conflict," S/1999/957, 8 September 1999, pp.12-13.

80 See, M. Gomez, "Internally Displaced Persons and the Freedom of Movement," in *Sri Lanka: State of Human Rights 1997* (Law & Society Trust, Colombo, 1997), pp.254-256.

81 See, "Internally Displaced Persons and Returnees from India," in *Sri Lanka: State of Human Rights 1998* (Law & Society Trust, Colombo, 1998), pp.258-259.

(d) The Government should request the UN Special Rapporteur on Violence against Women to assess the gravity of gender-specific violence among IDPs.

(e) The Government and the LTTE should permit humanitarian organisations and humanitarian groups to have full and free access to the displaced population and the conflict areas.

(f) All the parties concerned should respect and observe the Guiding Principles on Internal Displacement.

(g) The Guiding Principles should be introduced to and integrated into the work of government authorities. They should be used as a framework for addressing the issue of internal displacement, as a tool for monitoring situations of displacement, as a basis for advocacy on behalf of the displaced, and as a reference source for interpreting and clarifying international human rights agreements in the case of the internally displaced.

(h) The Government should begin a process to draft legislation, consistent with international standards and especially with the Guiding Principles, to recognise and provide for the enforcement of the rights of IDPs, in consultation with NGOs and other humanitarian organisations working with the displaced.

XI

The Fair Trading Commission

Pubudini Wickramaratne[*]

1. Introduction

The Fair Trading Commission (FTC) is the authority which regulates competition issues in Sri Lanka. From the point of view of a competition authority, competition means a situation which ensures that markets always remain open to potential new entrants and that enterprises operate under the pressure of competition. The main objective of the FTC is thus to ensure a competitive business environment, which is the driving force of a market economy. To this end, the FTC is given the authority to control monopolies, mergers and anti competitive practices and to implement a national pricing policy.

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Although traditionally competition policy has been acquainted with antitrust law, a comprehensive competition policy needs to address all government policies that affect competition, especially consumer protection. As the ultimate goal of competition is consumer welfare, what is expected of the FTC is to utilise its mandate to its full extent to promote consumer welfare by ensuring that consumers have a greater choice of price, quality and service.

Consumer protection and competition issues have gained importance at national and international levels in the recent past especially in the light of the importance placed on socio economic rights. At the international level, consumer protection was given importance after the adoption of the International Covenant on Economic, Social and Cultural Rights (ICESCR) in 1966. The United Nations adopted the United Nations Guidelines for Consumer Protection in 1985. These seek to guide governments in taking measure to protect their citizens as consumers, set targets for businesses in their dealings with consumers and encourage consumer groups to play an active role in the consumer protection task. It covers areas such as physical safety of consumers, promotion of economic interests of consumers, standards of consumer goods, distribution facilities, redress mechanisms, consumer education and sustainable consumption.

In Sri Lanka, legal protection for consumers was granted in 1979 with the enactment of the Consumer Protection Act.[1] Consumer protection *per se* was entrusted to the Department of Internal Trade (DIT).[2] With the objective of further protecting the consumer by regulation of trade practices, the FTC was

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1 No.1 of 1979.

2 The powers of the DIT in protecting consumers will be discussed in brief under Part 4 of this chapter.

established in 1987.[3] The need for the establishment of such an authority to regulate trade and define the boundaries of businesses operating in markets arose with the pursuit of liberal, market oriented policies in 1977, which were aimed at creating an environment conducive to foreign and local investment. Rapid implementation of privatisation began in 1989 and in 1994 the Public Enterprise Reform Commission (PERC) was set up to carry out the privatisation process in a more efficient and transparent manner. The need for reform was supplemented by the amendments made to the Fair Trading Commission Act by Act No. 1 of 1993.

This chapter seeks to analyse the role played by the FTC in relation to its mandate and discusses its structure and powers in detail. It focuses on the FTC's work during the year 2000, although reference may also be made to previous years. It also contains a section on the proposed Consumer Protection Authority Bill.

2. Structure of the FTC

2.1 The Members of the Commission

The FTC is a body corporate and consists of seven members appointed by the Minister, one of whom is also appointed as the Chairman. The members or the Commissioners are required to have extensive experience in the fields of industry, law, trade, commerce or administration.

Until November 2000, six members held office, one holding office as the Acting Chairman. The Commission was reconstituted in November with a new Chairman and four members. Two seats

[3] By the Fair Trading Commission Act No. 1 of 1987 which came into operation on 01.08.1987.

remained vacant at the end of the year. Presently, all members except the Chairman are part-time members. Three of the present members including the Chairman are lawyers while the other two specialize in economics and accountancy. It has been suggested that practising lawyers who have specialised in consumer and competition law be elected to the FTC.[4] It has also been pointed out that the five areas in which the members of the FTC should be conversant with as per the Act (namely, industry, law, trade, commerce and administration) exclude the vital discipline of economics.[5]

The selection process of the commissioners and the structure of the present system is not satisfactory as it leaves room for external influences. As noted above, the members of the FTC are appointed by the Minister. This opens doors for political interference of many kinds, negating the independent nature of the FTC. The provisions of the Schedule to the Act confirm this view. Provision 3 of the Schedule empowers the Minister to remove any member of the FTC, by Order published in the Gazette, without assigning any reasons. The decision of the Minister is not justiciable in a court of law. Further, Provision 12 empowers the Minister to terminate the appointment of the Chairman without giving any reasons therefor.

2.2 Secretary General and other officers of the FTC

The FTC has the power to appoint a Secretary General to the Commission who is also the chief executive officer responsible to act under the direction of the Commission. In addition, the

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4 Saman Kelegama and Yohesan Casie Chetty, *Consumer Protection and Fair Trading in Sri Lanka,* (Law & Society Trust, Colombo, 1993).

5 *Ibid.*

FTC is empowered to appoint other officers, servants and advisors necessary for the performance of its work. The Annual Reports of the FTC show that this option has been under-utilised. The approved cadre of the Commission is 27 persons. Yet the FTC had a full cadre only in its year of inception (namely, in 1989); since then there has been a gradual decline in the number of employees, as the following table shows:

Posts Available	**Cadre**	**1996**	**1997**	**1998**	**2000**
Secretary General	01	01	Nil	Nil	01
Chief Economist	01	01	01	01	01
Chief Accountant	01	Nil	01	01	01
Legal Officer	01	Nil	Nil	Nil	Nil
Senior Divisional Accountant	01	01	Nil	Nil	01
Senior Economist	01	Nil	Nil	Nil	01
Secretary to the Board	01	01	01	01	01
Divisional Accountants	02	02	01	01	Nil
Internal Auditor / Divisional Accountant	01	01	01	Nil	Nil
Administrative & Finance Assistant	01	Nil	Nil	Nil	Nil
Statistician / Price Control Co-ordinator	01	01	01	01	01
Economist	01	01	01	01	Nil
Investigating Officer	01	Nil	Nil	Nil	Nil
Secretaries	08	04	02	02	02
Drivers	02	01	02	02	02
Office Labourers	03	02	02	02	03
Total	**27**	**16**	**12**	**12**	**14**

Source : Annual Reports of the FTC 1996 – 1998, 2000

As the above table shows, the post of legal officer has been vacant since 1996. As will be discussed later, the bulk of the FTC's work requires investigation into complaints on mergers, monopolies and anti competitive practices. Although considerable staff is needed for investigation purposes, the approved cadre includes only one investigation officer. It is alarming to observe that the post had been vacant for the past five years. In addition, the post of Senior Economist was vacant from 1996 to 1999, while the post of Administrative and Finance Assistant has been vacant since 1996.

The high number of vacancies at the FTC is a result of the low priority given to it by the Ministry of Internal and International Commerce and Food (MIICF) under which the FTC comes. In 1998, the approval of the Ministry was sought to fill all the existing vacancies. However, the Department of the National Budget approved the filling of only three vacancies, namely, that of the Secretary General, the Senior Economist and the Administrative and Finance Assistant. Difficulties in recruiting staff have been attributed to the poor salaries and other benefits paid to the FTC staff compared to the wage structure of the private sector. Full time and part time members of the FTC are placed on a similar salary scale to that of corresponding government officials. The salaries of professionals and supporting staff are clearly lower than the private sector.

2.3 The decision making process

The Chairman presides over every meeting of the FTC. The quorum for any meeting is three members and the Chairman has a casting vote in addition to his own vote. Any member who has a direct or indirect interest in a matter before the FTC, is obliged to disclose the same and should refrain from taking part in any

proceeding or decision regarding that matter. In the year 2000, the Commission met 16 times and 13 investigations were held.[6]

2.4 Funds of the FTC

The funds of the FTC are mainly dependent on the budgetary control of the Government. It has its own funds allocated by Parliament and also receives other sums by the exercise of its duties and functions. The Treasury allocates funds upon a request made by the FTC forecasting the expenditure for the financial year ahead. Remuneration payable to the commissioners and other sums required to defray the expenses incurred by the FTC are paid out of this fund. In 1998, the total amount allocated was Rs.6.4 million, out of which Rs.6.29 million was used. In 1999, Rs.8 million was allocated and the expenditure incurred was Rs.2.5 million, a low figure because no capital expenditure had been incurred during the year.[7] In the year 2000, the government grant amounted to Rs.7.8 million. The FTC receives a very nominal sum in the exercise of its powers and functions and thus is largely dependant upon the funds allocated by Parliament. This has hindered the FTC's capacity to increase the salaries of its officers, which has been identified as a root cause of the vacant posts at the FTC.

2.5 Annual Report of the FTC and Advocacy Programmes

The FTC publishes an annual report, the contents of which are regarded as public information. However, it is not made freely available to the public. Information regarding the investigations carried out, price orders made, additions to the staff, accounts

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6 "Annual Report of the Fair Trading Commission, 2000"

7 "Annual Report of the Fair Trading Commission, 1999"

and the scope and powers of the FTC are set out in the annual report.

The FTC has produced several material to educate the public on the functions and the scope of the FTC along with the types of actions that fall under monopolies, mergers and anti competitive practices etc. The FTC actively collates market surveys and information on market statistics. In 1997, the FTC along with the MIICF and the DIT facilitated the formation of the Federation of Consumer Associations in Sri Lanka in order to strengthen and promote consumer awareness activities.

3. Powers and Scope of the FTC

The broad powers of the FTC are aimed at promoting effective competition and consumer protection. The scope of the authority of the Commission is set out in the preamble to the Fair Trading Commission Act, as: "for the control of monopolies, mergers and anti competitive practices and for the formulation and implementation of a national price policy..."

3.1 Investigative powers

The Commission has the power, either on its own motion or on a complaint made by any person, to investigate into a monopoly situation, merger situation or the prevalence of any anti competitive practice.[8] In addition, it may hold such other inquiries that are necessary in the discharge of its functions.[9] However, the FTC rarely initiates investigations on its own accord. This dormancy on the part of the FTC could be attributed to the lack of staff and the lack of incentive on the part of its officers. As

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[8] Section 11, Fair Trading Commission Act No. 1 of 1987.

[9] Section 10, *ibid.*

mentioned above, the approved cadre for the FTC includes only one investigating officer and that post has been vacant for the past five years. Considering the number of complaints made to the FTC each year, even the approved cadre is inadequate to carry out proper investigations. Thus, presently it is the economists who carry out the investigations and inquiries.[10]

Complaints can be made to the FTC by private individuals, public and private sector organisations, government departments, consumer organisations or non-governmental organisations or by any other interested person. A distinction is made between a complaint made and information provided to the FTC, the former being a document made available to any person for perusal while the latter is considered confidential and not divulged except with the written permission of the party who provided the information. The FTC does not investigate all complaints received by it, but takes up only those that are within its purview. Those complaints falling outside its purview are directed to the relevant authorities such as the DIT. Before commencing an investigation, matters such as the importance of a breach under the law, availability of resources, the public interest element etc. are taken into consideration.[11]

The investigations commenced by the FTC during the period 1995-2000 are illustrated in the following table:

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[10] The FTC does not keep records of the number of complaints received. The cases taken up for investigation are reported in the Annual Reports of the FTC.

[11] As taken from the questionnaire filled out by the FTC – this questionnaire was provided by the Law & Society Trust and the Institute of Policy Studies as a part of a joint project.

	1995	1996	1997	1998	1999	2000
No. of complaints investigated	7	5	6	11	8	6
No. of complaints rejected after investigation	1	0	1	0	3	2

In carrying out an investigation, the FTC has to provide a hearing to all persons concerned.[12] It is vested with the powers of a District Court to summon witnesses, compel the production of documents and to administer any oath or affirmation to a witness. The FTC is empowered to authorise any person to furnish any such information that it may consider necessary for the carrying out of its functions.[13] Any officer may be authorised to enter any business place and to take copies of any records required to be kept under any law.[14] It can further require distributors of any article to maintain certain records as required by the FTC for the proper exercise of its powers.

The Act specifies that in determining the operation of a monopoly, merger or anti competitive practice, the FTC should take all relevant matters into account and give special regard to certain specified criteria.[15]

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[12] These include representatives of associations and organisations of consumers interested. At the hearing they may be required to produce oral or documentary evidence that is relevant to the matter in question.

[13] Section 8, *supra* n.8.

[14] Section 9, *ibid.*

[15] They include promoting effective competition among suppliers, promoting the interests of consumers, reduction of prices, facilitating entry of new competitors to the market, promoting balanced distribution of industrial activity and employment and promoting competitive activity in export markets.

Upon the conclusion of the investigation, the FTC can authorise the merger, monopoly situation or the anti competitive practice if it considers that it is not likely to operate against the public interest. If, however, the FTC decides that the monopoly, merger or anti competitive practice is against the public interest, it can take the following action: it can order the division of any business by sale of any part of the undertaking; it can appoint a person to conduct such activities on terms specified by the FTC; or it can terminate any anti competitive practice or take any other action it may consider necessary.[16]

The delay at the FTC to entertain complaints and complete investigations has been a matter of concern. Complainants to the FTC have indicated that the FTC takes several months to acknowledge the receipt of their complaints. Moreover, it is often observed that several years are taken before an investigation is completed and an order made. Such conduct of the FTC has questioned its legitimacy in the eyes of the consumers and the players in the market. Legitimacy cannot be derived by the mere fact that the FTC is a statutory body and that the faliure to comply with its orders attract penalties by the court system. Instead, it is derived by the transparent manner in which the FTC functions and the existence of an effective administrative mechanism with a swift decision making process.

The process of determination is two tiered. Firstly, the matter concerned should fall within the scope of sections 12, 13 or 14 which deal with monopolies, mergers and anti competitive practices respectively. Secondly, it should operate against the public interest. Both these requirements have to be fulfilled in order for the FTC to remedy the situation.

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[16] Section 15(1)(c), *supra* n. 8.

Although the terms 'monopolies,' 'mergers' and 'anti competitive practices' are defined widely in the Act, there is no guidance on the meaning of 'public interest.' If factors such as consumer or economic issues had been specified as needing consideration in determining the 'public interest,' the FTC could have used its powers more effectively. The example of the market for plastic water tanks illustrates this point. The dominant player in this market deliberately reduced the price with the assistance of other players in order to prevent a competitor from entering the market. Although in the longer term, the result would be an increase in price after eliminating the competitor, the FTC could not rule that the price should be increased to enable the competitor to enter the market as there was a *prima facie* benefit to the public.

A person who is aggrieved by an order made by the FTC has a right of appeal to the Court of Appeal within 30 days of the making of such order. Any person who interferes with the lawful process of the FTC or fails to carry out an order given by it, is guilty of an offence of contempt of the authority of the Commission. A person who does not comply with an order made under section 15 shall be tried in the Magistrate's Court and upon conviction, is liable to a fine up to Rs.50,000 or to up to two years' imprisonment or both such fine and imprisonment. The court may order any person to refrain from carrying on the business in respect of which an order has been made by the FTC. The penalty for a contravention of the provisions of the Act is very low and has little or no deterrent effect.

3.2 Price Control

Under the FTC Act, the FTC was given wide price surveillance powers. It was empowered to: fix prices or set out a price structure of certain articles upon a request made by the Controller of Prices; examine the price structure if requested by any agency; examine

questions relating to the price of an article which are referred to the FTC by the Minister; and to review questions relating to the price of an article or the charge for any service and report to the Minister. However, these price surveillance functions were greatly curtailed by the Industrial Promotions Act No. 46 of 1990 (IPA).

Under Section 23 of the IPA, the FTC could only review the price of any article and hold an inquiry. If the FTC found that the price was unreasonable and that it was necessary to encourage competition by allowing imports, all it could do was to recommend to the Minister that the customs tariff be lowered to encourage imports. Under Section 32 of the IPA, the FTC may be requested by the Controller of Prices to fix prices of 'specified articles' (ie. food or pharmaceutical products) if there is an unreasonable increase of prices or if the price at which it is sold is excessive. It also confers the power on the FTC to vary the maximum price fixed for a specific pharmaceutical item. In 1992, the power to fix prices for food items was taken away from the FTC.

3.2.1 Pricing of pharmaceuticals

Pharmaceuticals are currently the only item that is under the price control of the FTC. Approximately 5000 pharmaceutical items imported by 77 importers and seven local manufacturers are subject to price control of the FTC. The pharmaceutical needs of the country are met mainly through importers while a small amount of drugs are manufactured locally. The State Pharmaceuticals Corporation (SPC) imports nearly 40% of imported drugs; the rest is imported by the private sector.

3.2.1.1 Imported drugs

Every drug that is imported into the country has to be registered at the Cosmetics, Devices and Drugs Authority (CDDA) and a licence should be obtained. The CIF price (cost, insurance, freight) of a drug is used as the basis for computing the maximum retail price of imported drugs. The agreed formula for the maximum retail price for the private sector is 165% of the CIF price, which is arrived at as follows:[17]

CIF	100.00
Stamp duty (2%)	2.00
Clearing (3%)	3.00
	105.00
Importers' cost and margin (25%) 26.25	26.25
Importers' price	131.25
Wholesalers' margin (8.5% on imported price)	11.16
Wholesalers' price	142.41
Retailers' margin (16.5% on wholesalers' price)	23.14
Retail price	165.55
Rounded off to	165.00

[17] This formula was provided by the Price Control Division of the FTC.

In addition to this, a maximum of 7.5% on the CIF price is added in lieu of the defence levy currently in force. The Goods and Services Tax (GST) is not added to the formula.

The private sector mainly imports branded drugs, which are more expensive and consequently enjoy a higher profit margin than their generic equivalents. In addition, there is heavy over-invoicing of the CIF price with respect to expensive drugs. On the other hand, the SPC mainly imports generic drugs, but the pricing formula adopted for the SPC is same as that for the private sector.

3.2.1.2 Locally-manufactured drugs

The seven local manufacturers manufacture a small amount of non-prescription drugs. A different pricing formula, which focuses on the true cost for the manufacturer, is used for these drugs. Drugs that are imported in bulk and packed locally, drugs that are partly processed in Sri Lanka and drugs that are fully processed in Sri Lanka all fall into this category. The calculation is based on the actual cost to the manufacturer or on the replacement cost (ie. an amount for depreciation). The profit margin allowed for drugs imported in bulk and packed locally is 15% on the total cost, while the margin is 17.5% and 20% for drugs partly and fully processed in Sri Lanka respectively. In this category, the wholesalers' margin can go up to 8.5% of the ex-factory price, while the retailers' margin is a maximum of 17% on the wholesalers' price.

3.2.1.3 FTC's functions

Once pharmaceutical items have been imported or manufactured locally, the importer or the manufacturer should submit the relevant documents to the FTC. Upon considering these

documents, the FTC will set the maximum retail price using the formulae outlined above. Drug prices are often subject to review due to the variation of their CIF prices. Once an application is made, the FTC reviews the maximum retail prices of the said drugs.

In the year 2000, the FTC made 52 price orders fixing the maximum retail price. It revised prices for 47 locally manufactured drugs and one drug imported in bulk and locally packed. Every order made by the FTC is published in the weekly Gazette. The FTC only fixes the prices of drugs; it is not empowered to ensure that the drugs are sold at the fixed price in the market.

3.3 Anti competitive practices

Anti competitive practices are generally classified into three main categories, namely, collusive behaviour among firms, abuse of dominant market position and mergers that create market dominance. Several forms of activities come within these three broad categories. They includem, *inter alia,* bid rigging, agreements to limit production, refusal to supply, predatory pricing, price discrimination, vertical and horizontal restraints and limiting access to essential facilities.

The FTC Act, however, does not identify these different types of anti competitive practices. It defines anti competitive practices broadly, to include instances where a person, in the course of business, pursues a course of conduct which is or is likely to have the effect of restricting, distorting or preventing competition in connection with the production, supply or acquisition of goods

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[18] Section 14, Fair Trading Commission Act No. 1 of 1987.

or the supply or securing of services in Sri Lanka.[18] If after an investigation an anti competitive practice is found to exist, and is operating against the public interest, the FTC can issue an order to terminate such practice.

Sri Lankan courts, however, have narrowly interpreted section 14 to exclude certain practices which are generally accepted as forming part of anti competitive practices. The market in oxygen is a case study that shows the abuse of monopoly power in the market and resort to anti competitive practices, and the interpretation of section 14 by the courts. Ceylon Oxygen Limited (COL) enjoyed a monopolistic position from its inception in 1936 until 1993 in the production and distribution of gases and related products in the domestic market. A competitor in this market, namely Industrial Gases (Pvt.) Ltd. (IGL), commenced operations in December 1993. At present, COL has 80% of the market share, and IGL only 20 percent.

According to the order of the FTC, IGL complained to the FTC in February 1994, that COL was resorting to unfair trade practices to the detriment of IGL. The FTC observed that COL effected price reductions of oxygen and brought down the cylinder deposit from Rs.8,500 to Rs.5,500 and then down to Rs.3,000 after IGL entered the market. Likewise, it reduced the value maintenance charge from Rs.75 to levels ranging from Rs.55 to Rs.35 after IGL entered the market. Further, COL entered into written agreements with bulk purchasers of gas after October 1993, in which the buyers agreed to purchase their total requirement of industrial gases and other products during the agreed period from COL, with several substantial discounts offered.

In this case, the FTC identified three courses of conduct that would constitute an anti competitive practice, namely, predatory pricing, discriminatory discounts or rebates and exclusive dealing. The FTC found that the evidence was inadequate to establish any of the above. However, it found that the provision in the agreements that the buyers must purchase their total requirement of gas from COL amounted to an anti competitive practice within the meaning of section 14 of the Act. It further found that such practice operated against the public interest.[19]

COL instituted action in the Court of Appeal against the FTC's order.[20] The Court of Appeal held that the FTC had failed to consider the public interest test, as outlined in section15(1)(a) and that the FTC did not have the power to declare the agreements null and void without rendering an opportunity for all relevant parties to be heard, for not doing so breaches the rules of natural justice. The Court of Appeal further held that the FTC does not have the jurisdiction to inquire into predatory pricing, discriminatory rebates and exclusive dealings and that the FTC could only investigate matters specified in section 11, namely, monopolies, mergers and anti competitive practices.

It is unfortunate that the Court failed to recognise predatory pricing, exclusive dealings and discriminatory rebates as falling under the category of anti competitive practices. The court did not recognise these acts as "restricting, distorting or preventing competition," as provided in section 14.

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[19] This information was gathered from the order of the FTC in this case and C.A. Minutes 30.04.1996.

[20] *Ceylon Oxygen Ltd.* v. *Fair Trading Commission,* C.A. Minutes 30.04.1996.

3.4 Monopoly situations

Monopoly situations are dealt with in section 12 of the FTC Act. A monopoly situation is taken to exist in five instances, namely, in relation to the supply of goods, supply of services, export of goods in specific cases, export of goods generally and export of goods to any particular market.

The test for determining the existence of a monopoly situation is the 'prescribed percentage' test as opposed to the 'dominant position' test adopted by countries such as New Zealand. The prescribed percentage is determined by the Minister on the recommendation of the FTC and generally varies between 40-50 percent. The prescribed percentage should not be less than one third of the supply of goods and services and export of goods of 'any description.' In recommending the prescribed percentage to the Minister, the FTC has to consider the market share held by the different stakeholders and decide whether the market power held by them can be used to eliminate or damage a competitor in the market, and whether it could prevent the entry of a new competitor into the market.

It has been pointed out that such a wide-ranging definition of a monopoly situation (as articulated in the phrase 'any description') is not conducive to the growth and development of commercial activity in Sri Lanka.[21] At present there are 47 identified and gazetted products and services with prescribed percentages for the purpose of monopoly investigations. The FTC does not intervene in monopoly situations if the item in question is not prescribed.

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[21] Saman Kalegama and Yohesan Cassie Chetty, *supra* n 4.

Such a situation arose with regard to the monopoly situation in cable manufacturing. ACL Cables buy out of Kelani Cables gave them an estimated control of over 70% of the market. However, the FTC did not interfere as cables have not been gazetted as an item which cannot be monopolised, and as no percentage which construes a monopoly was prescribed.[22] However, the Annual Report of the FTC states that it commenced investigations into the matter in 2000 under section 13 of the FTC Act.

As stated above, a monopoly by its mere existence does not contravene the law unless there is an abuse of power detrimental to the public interest. However, this two tiered test is further qualified by the prescribed percentage requirement, as the FTC can step in only if the article concerned has been given a prescribed percentage.

3.5 Merger situations

Section 13 of the FTC Act states that a merger situation exists when a person, whether a body corporate or not, acquires any share in the capital or in the assets of a body corporate of any other person if it results in such first person being likely to be in a position of control or dominate a market for goods or services or, if where such person is in a position to control or dominate a market for goods or services, there exists a competitor of the first person and the acquisition would substantially strengthen the power of the acquirer to control or dominate the market. All mergers and acquisitions resulting in a merger situation should be notified in writing to the FTC at least 30 days before the acquisition.[23] The FTC must reply within 21 days of receiving

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[22] *Supra* n. 4

[23] Section 9 A, Fair Trading Commission Act No. 1 of 1987 as amended.

the notice stating either that it has no objection to the proposed acquisition or that it will communicate its decision after holding an inquiry or investigation.

This provision enhanced the power of the FTC as regards inquiries into mergers, as prior to the amendment, it could inquire into a merger only if another party made a complaint. Although notification of mergers is a mandatory requirement, non-compliance with this provision is common. In such a situation, the FTC can inquire into it on its own motion and demand representation by the parties. After an investigation, depending on the whether the proposed merger is likely to operate against the public interest or not, the FTC may authorise or refuse to authorise the proposed merger.

4. Consumer Protection Versus Fair Trading

Whereas the FTC is entrusted with the regulation of competition, the DIT, which also comes under the MIICF, deals with consumer protection. The consumer protection law of Sri Lanka which is found in the Consumer Protection Act, provides for the regulation of internal trade, protection of the consumer, the establishment of fair trade practices, and connected matters.[24] The Act is enforced by the Commissioner and Deputy Commissioners of Intenal Trade.

Any person can lodge a complaint with the Commissioner of Internal Trade regarding the manufacture or sale of any article not compatible with the standards set by the Commissioner. At

[24] Preamble to the Consumer Protection Act No. 1 of 1979.

the inquiry, if the Commissioner finds that the standards have not been met, the trader or manufacturer will be ordered to pay compensation to the aggrieved party, replace the article or refund the amount paid. Further, the Act requires the traders to display a price list, to issue receipts and to furnish a notice board displaying any notice, direction or warning issued by the Commissioner of Internal Trade. Due to the lack of legal provisions to deal with dispute settlement, the DIT resorts to administrative measures to negotiate amicable settlement.

The Act embodies several provisions relating to the conduct of the traders, which also promotes effective competition in the market. Some of the provisions relate to such matters as refusal to sell, hoarding of articles, sale above the controlled price, false representations, misleading or deceptive conduct, exclusive dealing and price discrimination. Exclusive dealings, price discrimination and monopolisation have been made offences under the Act. These provisions supplement the FTC Act in regulating the behaviour of manufacturers and traders for the benefit of the consumers.

5. The Proposed Consumer Protection Authority

The need for reform in the area of competition and consumer law has been highlighted for several years. Central to these proposals has been the desire to amalgamate the functions of the FTC and the DIT. A draft Bill was formulated to establish a Consumer Protection Authority, but by the end of 2000, the Bill was still in draft form and had not been presented to Parliament.

The draft Consumer Protection Authority Bill (the Bill) seeks to amalgamate the functions of the FTC and the DIT and repeal the FTC Act, the Consumer Protection Act and the Control of Prices Act. Under the Bill, the FTC and the DIT will cease to exist and

will be replaced by the Consumer Protection Authority and the Consumer Protection Council (henceforth the Authority and the Council respectively). Both areas of consumer protection and fair trading will come under the purview of the Authority and the Council and it is expected that the Bill will considerably help safeguard consumer interests while at the same time regulating internal trade to ensure healthy competition and fair trading practices.

5.1 Staff of the Authority and the Council

Under the Bill, the staff of the FTC and the DIT will be absorbed to the new Authority and the Council. The Authority will consist of a Chairman, two Vice Chairmen and six other members. There will be a Director General who will act as the Secretary to the Authority. The eight members of the Authority will be selected from a wider range of fields than those for the Commissioners of the FTC, and will include industry, law, economics, commerce, administration, science or health. The Council will consist of an Attorney-at-Law with wide expertise in the field of commercial law serving as the chairman, an economist with wide experience in the management of business enterprises and another economist with experience in trade practices and consumer affairs.

However, all these officials will be appointed by the Minister. In order to ensure the independent nature of the institutions, it is recommended that the Bill be revised so that officials will be appointed by the Public Service Commission. Improving on the present situation, however, the Bill specifies that the Minister is

empowered to remove the members and the Chairman of the Authority only in specified circumstances.[25] As noted above, at present the FTC faces difficulty in filling all existing vacancies. With the increased number of members of the Authority and the Council and its staff, considerable difficulty will be faced by the Authority with regard to recruitments.

5.2 The Authority

Under the Bill, the overall powers and functions of the Authority are broad and detailed and include the following:[26]

- Control and eliminate
  - restrictive agreements
  - arrangements amongst enterprises with regard to prices
  - acquisition or abuse of a dominant position with regard to domestic or economic development within the market or substantial part of it
  - restraint of competition adversely affecting domestic or international trade or economic development
- Investigate into mergers, monopolies and anti competitive practices and abuse of a dominant position
- Maintain and promote effective competition between persons supplying goods and services

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[25] Provision 3 of the Schedule provides that the Minister may remove a member of the Authority for misconduct or physical or mental incapacity.

[26] Section 7 of the Consumer Protection Authority Bill.

- Promote competitive prices wherever possible and regulate prices in markets where competition is less effective
- Undertake public and private sector efficiency studies
- Promote the exchange of information relating to market conditions and consumer affairs with other institutions
- Initiate studies regarding distribution of articles
- Issue directions to manufacturers and traders on such matters as price marking, labelling and packaging.

5.3 The Council

Under the Bill, the Council will be entrusted with the following powers and functions:

- Determinations on the existence of monopolies, mergers and anti competitive practices
- Investigate matters relating to excessive pricing
- Approval of items that are essential to the life of the community

6. Critique

Under the draft Bill, consumer protection comes under the purview of the Consumer Protection Authority. The Authority will inquire into consumer grievances while the Council will exercise the executive functions of the Authority.

A novel feature of the proposed legislation is the power of the Authority to conduct public and private sector efficiency studies at the request of the Minister. No government department

undertakes such studies at present. However, as noted below, as the public sector is excluded from the Act, the impact such studies can have is questionable.

The exercise of investigative powers and adjudicative powers is not clearly defined in the Bill. The Authority is empowered by draft section 36 to carry out investigations regarding the existence of a monopoly or merger situation or an anti competitive practice and at the conclusion of the investigation the Authority must make an application to the Council to determine on such matter. Under section 18, the Director General of the Authority is required to refer matters regarding excessive pricing to the Council for investigation. At the conclusion of the inquiry, it appears that the Council should make a decision which should be submitted to the Director General. Both the Council and Authority are given powers of investigation such as issuing notices, examining witnesses and receiving evidence etc. As there is no clear-cut division of investigative and adjudicative powers between the Authority and the Council, it is not clear whether the Council will handle all judicial and quasi-judicial functions or not. Although recommendations have been made that a single body should not exercise both investigative and judicial functions, this seems to have been overlooked. Had the investigative and adjudicative powers been clearly demarcated between the Authority and the Council, infrastructural bottlenecks and red tape could have been avoided, resulting in a swift decision making process.

The exemptions contained in section 50 of the Bill are noteworthy. Under section 50, provisions relating to monopolies, mergers and anti competitive practices (Part III) and the Consumer Protection Council (Part IV), are not applicable if the goods and services are provided solely by the Government or a public corporation,

or by any body which has the exclusive right to supply such goods or services under any law, or by a person to whom the Government has granted a monopoly for a period not exceeding three years. Under these exemptions, public sector monopolies such as the Ceylon Petroleum Corporation and the Ceylon Wholesale Establishemnt etc. are excluded from the purview of Parts III and VI of the Act. Further, Prima and Lanka Lubricants which have exclusive rights to operate in the local market are also exempted. Under the third limb of section 50, those who do not have an exclusive right, but are granted a monopoly are also excluded. Though the concession period may be for only three years, this may create the established firm accruing a first-mover advantage and subseqently prevent competition in that particular maket.

Another drawback in section 50 is that it expressly gives the power to the Government to grant monopolies to supply goods and services. The present laws do not confer such a power although the Government in fact has granted such monopolies. Section 50 thus has the effect of legalising the Government's power to grant monopolies. It is felt that the exemptions granted under this section place the consumer in a disadvantaged position.

Section 81 causes further problems as far as consumer protection is concerned. It states that the provisions relating to monopolies, mergers and anti competitive practices will not apply to those who supply goods and services under an agreement entered into with the Government. This protection is awarded to those agreements which are in force at the commencement of the Bill and for the duration of the agreement. Consumers will continue to be at the peril of such sanctioned firms and this is evident in the case of Shell Gas. Although the five year exclusive period of Shell Gas ended in December 2000, under Section 81, Shell Gas will be exempted from the scope of the Bill with respect to

monopolies, mergers and anti competitive practices for the rest of the 25 years of the agreement until January 2026.

The investigative powers of the Authority have been expanded beyond those of the present DIT. The Bill provides for the Authority to investigate any complaint relating to the production, supply, shortage, transportation or sale of any goods which do not conform to the standards set by the Authority. It also covers a breach of an express or implied warranty or guarantee given by the trader or manufacturer. Further, the time limit within which a complaint can be made has been extended to three months from the present limit of seven days.

In addition, any increase in the retail or wholesale price of an article which is prescribed by the Minister to be "essential to the life of the community," can be made only with the prior approval of the Council.[27] However, if the increase is justified by the consideration of market forces, the Council cannot prevent such increase. Further, power of investigation is given to the Council regarding excessive prices of goods and services which are of economic importance. Presently, however, only a limited number of articles are subject to price control. Unless the proposed Authority is given a wider area of control, the effectiveness of the increased powers over price control and consumer protection stands questioned.

Although the proposed Bill is for the protection of the consumer, it does not spell out the rights of a consumer. As it stands, consumer rights have to be deduced from the restraints imposed on traders and manufacturers. It is strongly recommended that consumer rights be spelt out expressly before the Bill is passed.

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[27] Section 17 of the Consumer Protection Authority Bill

7. Issues that the Competition Law of Sri Lanka Fails to Address

The absence of a comprehensive competition policy in Sri Lanka is a significant factor resulting in lacuna in competition law. Despite the liberalisation of the economy in 1977 and the privatisation process which followed, the formulation of an overall competition policy has received little attention. With the opening up of the economy, the private sector was allowed to play a free role in the economy until it gained confidence to undertake major investment for expansion and diversity.[28] Competition law was introduced only in 1987 with the passing of the FTC Act and successive governments have brought minor changes to the law. The PA's political manifesto for the Presidential Election in 1999 states that:

> *in the interest of consumer protection, a vital need in our country, the role of the Fair Trading Commission will be strengthened. Branch offices will be established at district and provincial levels. However, care will be taken to ensure that activities of private enterprises are not regulated unnecessarily*

However, the manifesto does not indicate that a comprehensive competition policy will be formulated. Instead, policy formulation and reform is done on an *ad hoc* basis.

The FTC was not adequately equipped or staffed to deal with the challenges that were posed by privatisation. The existing legal provisions are limited to monopolies, mergers and anti competitive practices and do not empower the FTC to deal

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[28] Saman Kelegama, "Law and Economy Conference" organised by the Law & Society Trust, March 2001.

specifically with horizontal and vertical restraints and cross-border transactions. A code with respect to advertising and market practice, setting out best practice methods among industries is lacking. Whether issues of anti-dumping fall under the FTC or are covered by the proposed Anti Dumping Bill is also not clear. Further, the powers of the FTC are not wide enough to tackle the new situations that arise.

The interpretation section of the FTC Act is not satisfactory as it either defines terms in a weak manner or fails to define them at all. For example, it fails to give any guidelines as to the meaning of the term "effective competition" and fails to give a detailed account of the term "public interest," although these two terms are given weight in the Act.

Many items, especially in the utility sector, are excluded from the scope of the FTC and are regulated by separate regulatory bodies. The powers of the FTC vis-a-vis these regulatory bodies are not clear. As a result, the complaints received by the FTC regarding these items are not taken up. Currently, only pharmaceuticals are under price control of the FTC. However, there are other items which are under price control by other bodies. For example, the Ceylon Electricity Board engages in a cross subsidisation programme which applies varying formulae for households and religious places vis-a-vis industries. The National Transport Commission, too, engages in control of transport prices.[29] The FTC has no power over these price controls.

The relationship of the FTC or the proposed Consumer Protection Authority vis a vis the PERC or the Board of Investment (BOI)

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[29] *Ibid.*

is also not clear. Once the new Authority is set up, whether PERC could grant a monopoly in a certain sector disregarding the powers of the Authority is not clear.[30]

As the Consumer Protection Authority Act does not apply to all market structures, it does not create a level playing field for all the players in the market.

8. Recommendations

- A well designed, comprehensive competition policy framework should be formulated which also governs the policies relating to privatisation and liberalisation. The competition law should be flexible enough to accommodate the dynamics of the competition policy.

- Competition law should be applicable generally to all economic agents engaged in commercial activity, including both the public and the private sector. Exemptions may be made provided that a clear rationale for exemptions is provided.

- Competition law should be 'preventive' in nature rather than 'curative.' As such, it should incorporate deterrent provisions such as exemplary fines on violations. Further, it should be strengthened with tougher enforcement mechanisms.

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[30] Saman Kalegama, *supra* n. 28

- Competition education should be initiated for the adjudicators of issues relating to competition law. This will include the judiciary and the officials of the FTC and the DIT.

- Consumer education programmes relating to consumer rights and competition issues should be initiated in order to raise the level of public awareness and to promote a healthy competition culture in the country. The United Nations Universal Charter for Consumer Protection should be reviewed in the Sri Lankan context and the adoption of a consumer charter should be encouraged.

- Formulation of codes of conducts by industries should be encouraged as a means of self-regulation or co-regulation with government.

- The proposed Consumer Protection Authority should be given the exclusive power to set out the rules relating to monopolies, mergers and anti competitive practices, thereby preventing other institutions formulating *ad hoc* policies and rules.

- All appointments to the FTC and the Authority/Council should be made by an independent Public Service Commission. The conduct of the Authority should be transparent and a mechanism with proper checks and balances should be created to monitor its conduct.

- The existing vacancies should be filled immediately in order to facilitate the smooth operation of the FTC.

- Competition policy should be constantly revised to keep abreast with changes in market behaviour, and amendments to the law should enacted in time to cover such new situations or in the alternative, should be flexible enough to meet rapidly changing market situations.

Schedule I

UN Conventions on Human Rights and International Conventions on Terrorism Signed, Ratified or Acceded to by Sri Lanka as at 31st December 2000 *

- Convention on the Prevention and Punishment of the Crime of Genocide.
  Acceded on 12th October 1950.

- International Covenant on Economic, Social and Cultural Rights.
  Acceded on 11th June 1980.

- International Covenant on Civil and Political Rights.
  Acceded on 11th June 1980.

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* *The consent of a State to be bound by a treaty is expressed by the signature of its representative when the treaty provides that signature shall have that effect. In many instances, the parties may agree either in the text of the agreement or in the negotiations accompanying the formulation of the text, that signature alone is not sufficient; a further act is required to signify consent to be bound which is called ratification. Treaties in which this approach is adopted usually intend that the signature will merely authenticate the text of the agreement. The purpose of ratification is to provide the government of the states concerned with a further opportunity to examine whether they wish to be bound by a treaty or not. For those states which did not participate in the original negotiation and were not signatories to the treaty but nonetheless wish to become parties to the treaty, can do so by acceding to the treaty. Once a state has become a party to the treaty, it enjoys all the rights and responsibilities under the treaty irrespective of whether it became a party by signature and ratification or accession.*

- Convention on the Elimination of All Forms of Discrimination against Women.
  Ratified on 5th October 1981.

- International Convention on the Elimination of All Forms of Racial Discrimination.
  Acceded on 18th February 1982.

- International Covenant on the Suppression and Punishment of the Crime of Apartheid.
  Acceded on 18th February 1982.

- Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents.
  Acceded on 27th February 1991.

- Convention on the Rights of the Child.
  Ratified on 12th July 1991.

- Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.
  Acceded on 3rd January 1994.

- International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.
  Acceded on 11th March 1996.

- Optional Protocol 1 to the International Covenant on Civil and Political Rights.
  Acceded on 3rd October 1997.

- International Convention for the Suppression of Terrorist Bombings.
  Ratified on 23rd March 1999.

- Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict.
  Ratified on 6th September 2000.

- International Convention against the Taking of Hostages.
  Acceded on 6th September 2000.

- Convention on the Suppression of Unlawful Acts against the Safety of Maritime Navigation.
  Acceded on 6th September 2000.

- International Convention for the Suppression of Financing of Terrorism.
  Ratified on 6th September 2000.

- United Nations Convention against Transnational Organised Crime.
  Signed on 15th December 2000.

- Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children - supplementing the United Nations Convention against Transnational Organised Crime.
  Signed on 15th December 2000.

- Protocol against the Smuggling of Migrants by Land, Sea and Air -supplementing the United Nations Convention against Transnational Organised Crime.
  Signed on 15th December 2000.

Ratification of ILO Conventions by Sri Lanka

Con. No.	Name of the Convention	Date of ratification	Present Status
C4	Night Work (Women) Convention 1919	08.10.1951	Denounced
C5	Minimum Age (Industry) Convention 1919	27.09.1950	Denounced
C6	Night Work of Young Persons (Industry) Convention 1919	26.10.1950	Denounced
C7	Minimum Age (Sea) Convention 1920	02.09.1950	Denounced
C8	Unemployment Indemnity (Shipwreck) Convention 1920	25.04.1951	
C10	Minimum Age (Agriculture) Convention 1921	29.11.1991	Denounced
C11	Right of Association (Agriculture) Convention 1921	25.08.1952	
C15	Minimum Age (Trimmers and Stockers) Convention 1921	25.04.1951	Denounced
C16	Medical Examination of Young Persons (Sea) Convention 1921	25.04.1950	

C18	Workmen's Compensation (Occupational Diseases) Convention 1925	17.05.1952	
C26	Minimum Wage Fixing Machinery Convention 1928	09.06.1961	
C29	Forced Labour Convention 1930	05.04.1950	
C41	Night Work (Women) Convention (Revised) 1934	02.09.1950	Denounced
C45	Underground Work (Women) Convention 1935	20.12.1950	
C58	Minimum Age (Sea) Convention (Revised) 1936	18.05.1959	
C63	Convention concerning Statistics of Wages and Hours of Work 1938	25.08.1952	
C80	Final Articles Revision Convention 1946	10.09.1950	
C81	Labour Inspection Convention 1947	03.04.1950	
C87	Freedom of Association and Protection of the Right to Organise Convention 1948	15.11.1995	
C89	Night Work (Women) Convention (Revised) 1948	31.03.1966	Denounced

C90	Night Work of Young Persons (Industry) Convention (Revised) 1948	18.05.1959
C95	Protection of Wages Convention 1949	27.10.1983
C96	Pre-charging Employment Agencies Convention (Revised) 1949	30.04.1958
C98	Right to Organise and Collective Bargaining Convention 1949	13.12.1972
C99	Minimum Wage Fixing Machinery (Agriculture) Convention 1951	05.04.1954
C100	Equal Remuneration Convention 1951	01.04.1993
C103	Maternity Protection Convention (revised) 1952	01.04.1993
C106	Weekly Rest (Commerce and Offices) Convention 1957	27.10.1983
CI08	Seafarers Identity Documents Convention 1958	24.11.1995
C110	Conditions of Employment of Plantation workers Convention 1958	24.04.1995

C111	Discrimination (Employment and Occupation) Convention 1958	27.11.1998
C115	Radiation Protection Convention 1960	18.06.1986
C116	Final Articles Revision Convention 1961	26.04.1974
C131	Minimum Wage Fixing Convention 1970	17.03.1975
C135	Workers Representatives Convention 1971	16.11.1976
C138	Minimum Age for Admission to Employment 1973	11.02.2000
C144	Tripartite Consultations to Promote the Implementation of IL0 Convention 1976	17.03.1994
C160	Labour Statistics Convention 1985	01.04.1993

Humanitarian Law Conventions Ratified by Sri Lanka

Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field 1949
Ratified on 28 th February 1959.

Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea 1949
Ratified on 28 th February 1959.

Geneva Convention Relating to the Treatment of Prisoners of War 1949
Ratified on 28 th February 1959.

Geneva Convention Relating to the Protection of Civilian Persons in Time of War 1949
Ratified on 28th February 1959.

Schedule II

Some Human Rights Instruments not Ratified by Sri Lanka

- Optional Protocol II to the International Covenant on Civil and Political Rights.
- Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity 1968.
- ILO Convention (No. 105) concerning the Abolition of Forced Labour.
- Declaration regarding Article 21 of the above (relating to the entertainment of complaints by one State Party against another).
- Declaration regarding Article 22 of the above (relating to the entertainment of complaints by individuals).
- ILO Convention (No. 102) concerning Minimum Standards of Social Security.
- ILO Convention (No. 143) concerning Migrants in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers.

- ILO Convention (No. 122) concerning Employment Policy.

- ILO Convention (No. 141) concerning Organisations of Rural Workers and Their Role in Economic and Social Development.

- ILO convention (No. 151) concerning Protection of the Right to Organise and Procedures for Determining Conditions of Employment in the Public Service.

- Convention Relating to the Status of Refugees 1951

- Protocol to the 1951 Refugees Convention 1967

- Protocol Additional to the Geneva Convention of 12th August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)

- Protocol Additional to the Geneva Convention of 12th August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)

Schedule III

Fundamental Rights Cases decided in 2000

Articles 11, 13(1) & 13(2)

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Nagodawitharana Ariyadasa v. *R.P.C. 25466, Police Station, Nagoda and Others.* S.C. Application No. 279/98; S.C. Minutes 24/10/2000.

Nithiyananthan Suthaharan v. *OIC, Army Camp, Mavadivempu.* S.C. Application No. 802/99; S.C. Minutes 06/03/2000.

Pararasagegaram Balasekeram v. *OIC, JOOSP Army Camp and Others.* S.C. Application No. 547/98; S.C. Minutes 08/05/2000.

Srimawathie Saimona Kaluthunge Fernando v. *OIC, Police Station, Dehiwala.* S.C. Application No. 255/98; S.C. Minutes 23/02/2000.

T. Ananda Wickramasinghe v. *OIC, Police Station, Neluwa and Others.* S.C. Application No. 33/99; S.C. Minutes 22/03/2000.

Articles 12(1)

Ananda Hewagama v. *Road Development Authority of the Southern Province and Others*. S.C. Application No. 67/98; S.C. Minutes 17/01/2000.

Brigadier Rohan Parakrama Liyanage v. *Secretary, Ministry of Defence and Others*. S.C. Application No. 506/99; S.C. Minutes 18/07/2000.

H.M. Dharmasena v. *Deputy Director of Education, Education Office Kahatagasdigiliya and Others*. S.C. Application No. 188/97; S.C. Minutes 19/09/2000.

Harischandara Wimal Edirimana v. *Secretary, Ministry of Education and Higher Education and Others*. Application No. 393/97, 449/97, 815/99; S.C. Minutes 01/ 06/2000.

K.A.R.A. Perera & Others v. *Secretary, Ministry of Health & Others*. S.C. Application No. 409/97, 1046/97, 69/98; S.C. Minutes 02/02/2000.

K. Narandrakumar v. *The Bank of Ceylon and Others*. S.C. Application No. 777/96; S.C. Minutes 31/03/2000.

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L.W. Kamalawathi and Others v. *The Provincial Public Service Commission*. S.C. Application No. 300/2000; S.C. Minutes 03/10/2000.

Liverpool Navigation (Private) Limited v. *Secretary, Ministry of Defence and Others.* S.C. Application No. 312/97; S.C. Minutes 28/01/2000.

Nimo & Company (Private) Limited v. *Bank of Ceylon and Others.* S.C. Application No. 638/99; S.C. Minutes 03/10/2000.

Patabandige Dharmadasa Jayaweera v. *National Youth Services Council.* S.C. Application No. 22/99, 23/99, 72/99, 197/99, 292/99, 689/99; S.C. Minutes 19/09/2000.

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ISBN - 955 - 9062 - 60 - 3

Price: Rs. 375/-