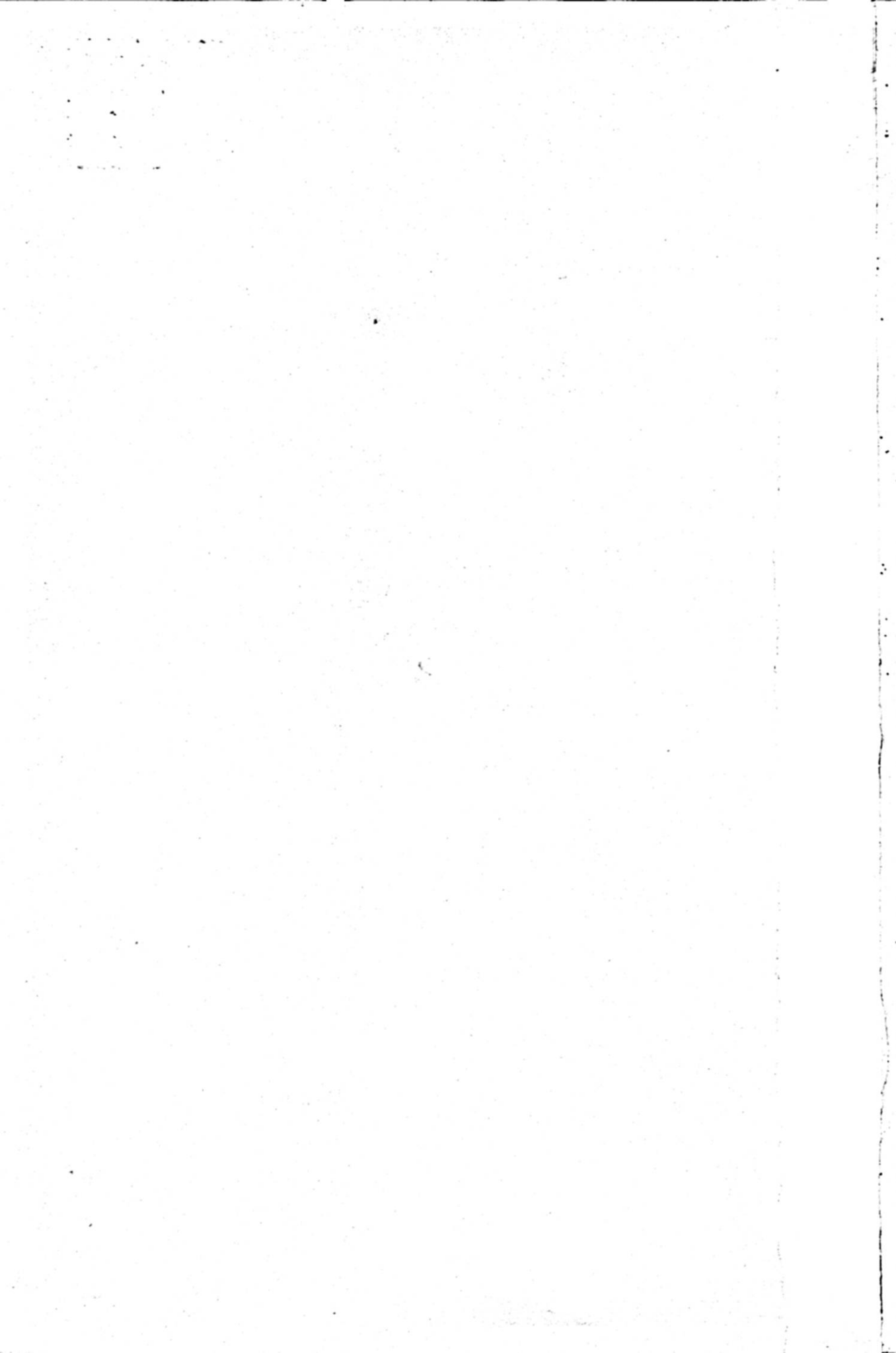




Sri Lanka: State of Human Rights 2007



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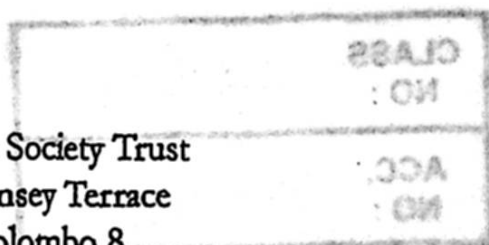


STATE OF HUMAN RIGHTS

SRI LANKA: STATE OF HUMAN RIGHTS 2007

**This report covers the period
January to December 2006**

Law & Society Trust
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ABBREVIATIONS & ACRONYMS

ACF	<i>Action Contre la Faim</i> (Action Against Hunger)
ACHR	Asian Centre for Human Rights
ACTFORM	Action Network for Migrant Workers
AFHRD	Asian Forum for Human Rights and Development
AG	Attorney General
AHRC	Asian Human Rights Commission
AI	Amnesty International
AMARC	<i>Association Mondiale des Radiodiffuseurs Communautaires</i> (World Association of Community Radio Broadcasters)
ANCL	Associated Newspapers of Ceylon Limited
APC	All Party Conference
APRC	All Party Representative Committee
ASP	Assistant Superintendent of Police
AZC	Autonomous Zonal Council
CA Minutes	Court of Appeal Minutes
CAT Act	Convention Against Torture Act
CATAW	Coalition for Assisting Tsunami Affected Women
CC	Constitutional Council
CCHA	Consultative Committee on Humanitarian Assistance
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CENWOR	Centre for Women's Research
CFA	Ceasefire Agreement
CID	Criminal Investigation Department
CMC	Colombo Municipal Council
CNO	Centre for National Operations
COHRE	Centre on Housing Rights and Eviction
COI	Commission of Inquiry
CPA	Centre for Policy Alternatives
CPJ	Committee to Protect Journalists
CRC	Convention on the Rights of the Child

CRM	Civil Rights Movement
CYPO	Child and Young Persons' Ordinance
DIG	Deputy Inspector General
DRMU	Disaster Relief and Monitoring Unit
DS	Divisional Secretary
EAJP	Equal Access to Justice Project
EMPPR	Emergency (Miscellaneous Provisions and Powers) Regulations
EPDP	Eelam People's Democratic Party
EPRLF (V)	Eelam People's Revolutionary Liberation Front (Vanni)
FMETU	Federation of Media Employees Trade Unions
GA	Government Agent
GDI	Gender Development Index
GEM	Gender Empowerment Measure
GOSL	Government of Sri Lanka
HDI	Human Development Index
HRC	Human Rights Commission
HRW	Human Rights Watch
HSZ	High Security Zone
HUDEC	Human Development Centre
IASC	Inter-Agency Standing Committee
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICG	International Crisis Group
ICJ	International Commission of Jurists / International Court of Justice
ICRC	International Committee of the Red Cross
IDMC	Internal Displacement Monitoring Centre
IDP	Internally Displaced Person
IFJ	International Federation of Journalists
IGP	Inspector General of Police
IHL	International Humanitarian Law

IIGEP	International Independent Group of Eminent Persons
ILO	International Labour Organisation
IMADR	The International Movement Against All Forms of Discrimination and Racism
IMS	International Media Support
INFORM	INFORM human rights documentation center
INGO	International Non-Governmental Organisation
INSI	International News Safety Institute
IPI	International Press Institute
ITCC	Indian Tamil Cultural Council
JHU	<i>Jathika Hela Urumaya</i> (National Heritage Party)
JVP	<i>Janatha Vimukthi Peramuna</i> (People's Liberation Front)
LAC	Legal Aid Commission
LDO	Land Development Ordinance
LTTE	Liberation Tigers of Tamil Eelam
MCNS	Media Centre for National Security
MOU	Memorandum of Understanding
MP	Member of Parliament
NCDF	National Civil Defence Force
NCPA	National Child Protection Authority
NCW	National Committee on Women
NEHRP	North East Housing Reconstruction Programme
NESOHR	North-East Secretariat on Human Rights
NGOs	Non-Governmental Organisations
NHDA	National Housing Development Authority
NIC	National Identity Card
NILET	National Institute of Language Education and Training
NLR	New Law Reports
NPC	National Police Commission
OIC	Officer in Charge
OLC	Official Languages Commission
OP-ICCPR	Optional Protocol of the ICCPR

OPFMD	Organisation of Parents and Family Members of the Disappeared
PA	People's Alliance
PLOTE	People's Liberation Organisation of Tamil Eelam
PPB	Public Performances Board
PSO	Public Security Ordinance
PTA	Prevention of Terrorism Act
PTOMS	Post-Tsunami Operational Management Structure
RADA	Reconstruction and Development Agency
REPPIA	Rehabilitation of Persons, Properties and Industries Authority
RRAN	Resettlement and Rehabilitation Authority of the North
RSF	<i>Reporters Sans Frontières</i> (Reporters without Borders)
SAPC	South Asia Press Commission
SC Minutes	Supreme Court Minutes
SCOPP	Secretariat for Coordinating the Peace Process
SCSL	Save the Children in Sri Lanka
SIHRN	Subcommittee on Immediate Humanitarian and Rehabilitation Needs
SLBFE	Sri Lanka Bureau of Foreign Employment
SLFP	Sri Lanka Freedom Party
SLMC	Sri Lanka Muslim Congress
SLMM	Sri Lanka Monitoring Mission
SLO	State Lands Ordinance
SLR	Sri Lanka Law Reports
SLRC	Sri Lanka <i>Rupavahini</i> Corporation
SLWJA	Sri Lanka Working Journalists Association
SLWPD	Sri Lankan Women for Peace and Democracy
SP	Superintendent of Police
SSP	Senior Superintendent of Police
STF	Special Task Force
TAFOR	Task Force for Relief
TAFREN	Task Force for Rebuilding the Nation

TAP	Transitional Accommodation Project
THP	Tsunami Housing Policy
THRU	Tsunami Housing Reconstruction Unit
TNA	Tamil National Alliance
TRO	Tamil Rehabilitation Organisation
TULF	Tamil United Liberation Front
UDHR	Universal Declaration of Human Rights
UGC	University Grants Commission
UNDP	United Nations Development Programme
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNHCR	United Nations High Commissioner for Refugees
UNHRC	United Nations Human Rights Committee
UNICEF	United Nations Children's Fund
UNOCHA	United Nations Office for the Coordination of Humanitarian Affairs
UNP	United National Party
UPFA	United People's Freedom Alliance
UTHR (J)	University Teachers for Human Rights (Jaffna)
VOT	Voice of Tigers
WAN	World Association of Newspapers
WFP	World Food Programme
WHO	World Health Organization
WPFC	World Press Freedom Committee

FOREWORD

Sri Lanka: State of Human Rights (SHR) is published annually by the Law & Society Trust and the present volume sets out the status of human rights in Sri Lanka during the year 2006, focusing on—in separate chapters—those areas which emerged important and topical for that year.

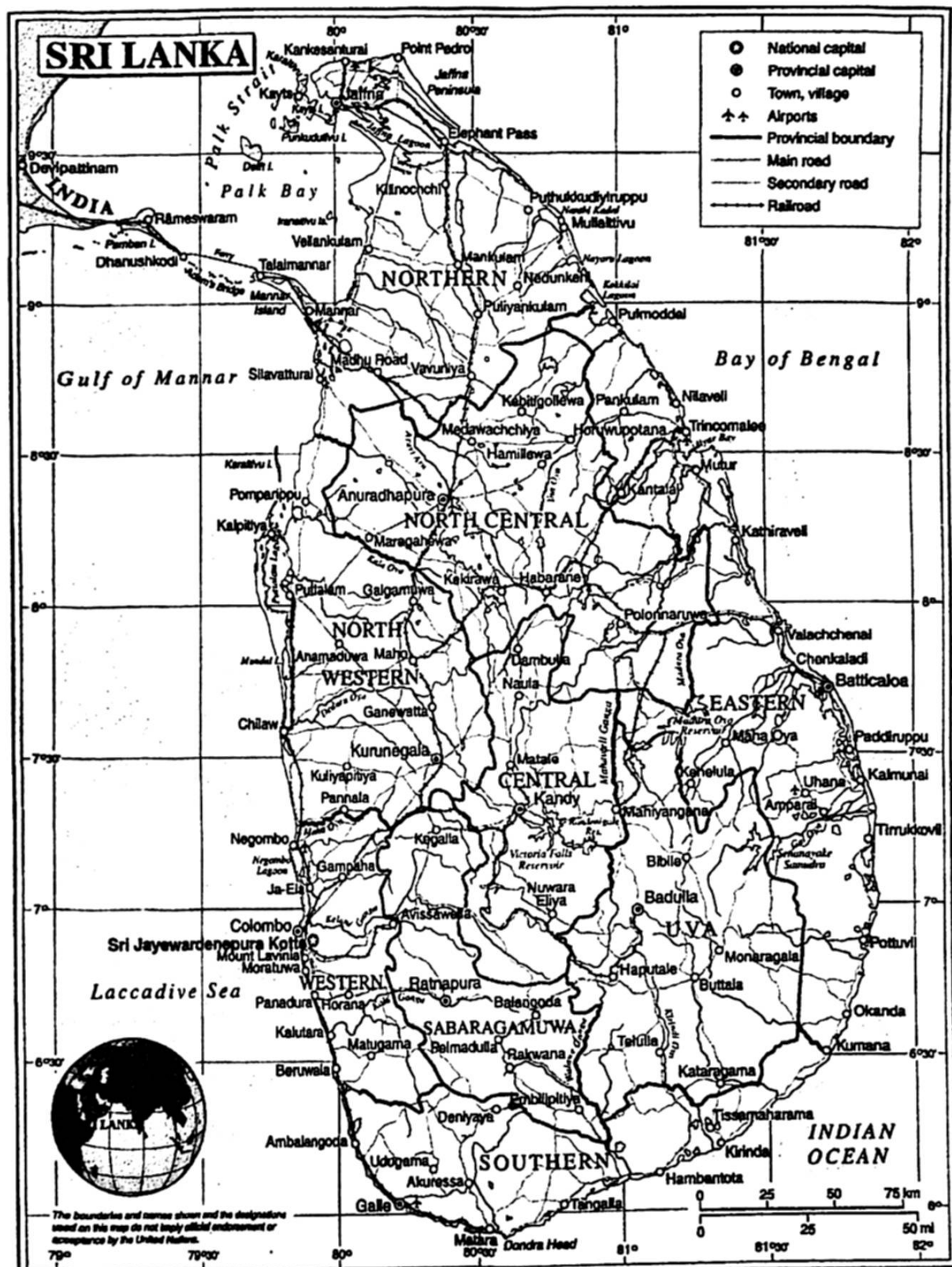
The present *State of Human Rights 2007* publication is in essence an attempt to assess the extent to which Sri Lanka conformed both to its international and fundamental rights obligations as well as considered seriously fulfilling its human rights undertakings.

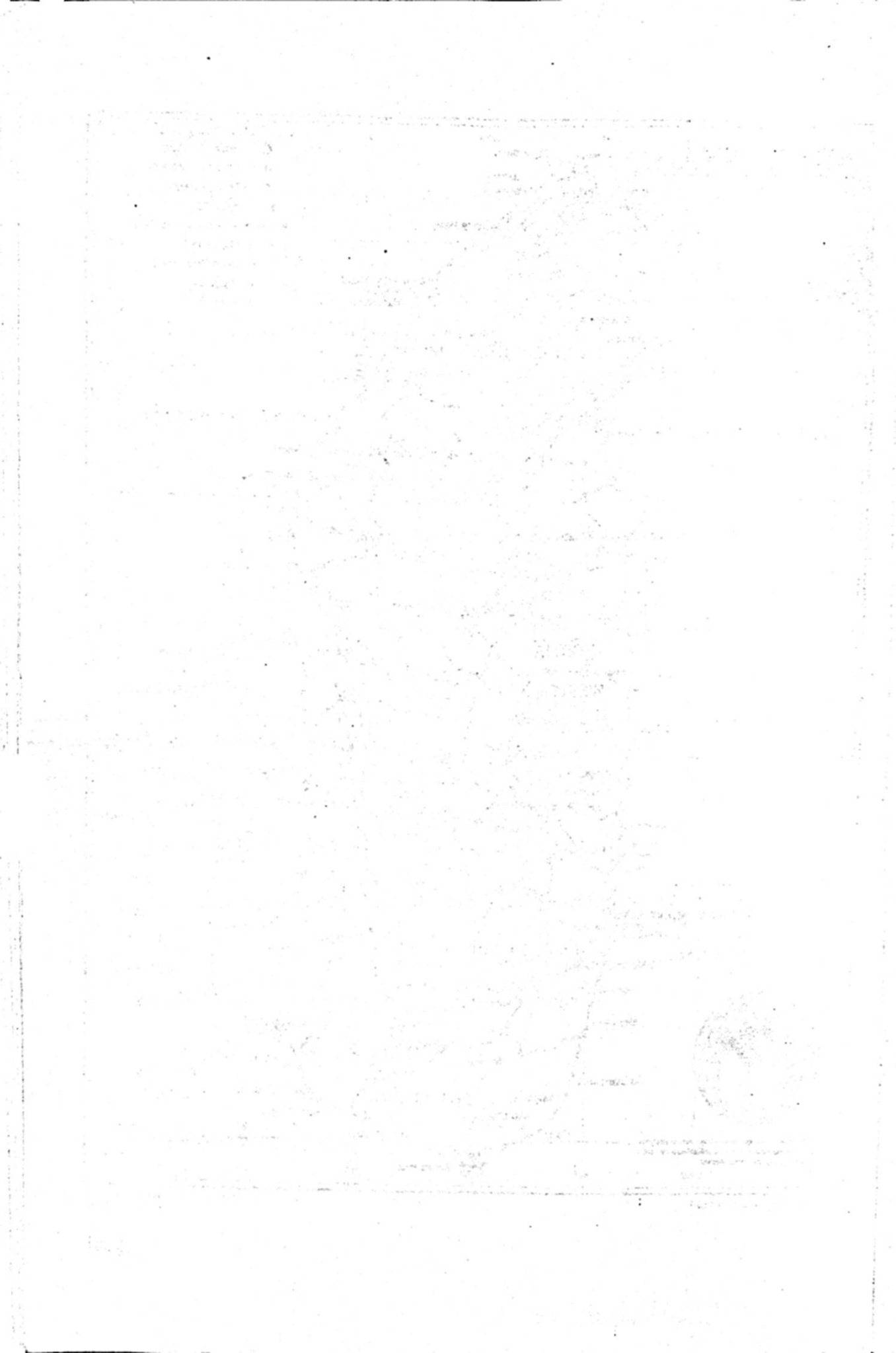
Following on the precedent set in last year's publication, the content of the "Overview" in the present volume is not an executive summary; instead, it gives a broad outline of key issues for the year 2006 while also commenting on issues and areas not dealt with in-depth in the other chapters.

Each chapter is authored by a specialist in the subject area and given that the topic covered in each chapter could be approached from several viewpoints, some overlap between chapters is inevitable while some cross-cutting issues are covered more comprehensively than others.

The SHR could be viewed as a vital periodic measure of Sri Lanka's progress towards full compliance with international legal standards it has undertaken to uphold. It is hoped the present volume inspires meaningful dialogue among all those committed to human rights and leads to facilitating effective protection and promotion of human rights primarily by the State.

Law & Society Trust
Colombo





OVERVIEW OF THE STATE OF HUMAN RIGHTS IN 2006

Farzana Haniffa and Dulani Kulasinghe**

1 Introduction

The issues which dominated the Sri Lankan political and human rights landscape in the year 2006 can be traced to the final months of the previous year, in particular the election of Mahinda Rajapakse as President on 18 November 2005. He was brought to power on an anti-peace process and pro-unitary State platform formed through the Sri Lanka Freedom Party (SLFP)'s partnership with the ultra Sinhala nationalist parties – Janatha Vimukthi Peramuna (JVP) and the Jathika Hela Urumaya (JHU). Rajapakse's win with 51 percent of the vote was due mainly to the fact that the Liberation Tigers of Tamil Eelam (LTTE) prevented the Tamil population of the North and East from voting. Through this symbolic assertion of their separation, the LTTE effectively prevented the election of the pro-peace, federalist United National Party (UNP) candidate, Ranil Wickremasinghe. The result, seeming to represent the majority Sinhala south, also appeared to endorse the Rajapakse platform.

The Rajapakse-led shift in the peace process, combined with a hard-line stance from the LTTE, resulted in the effective, though not formal, collapse of the Ceasefire Agreement (CFA) in the face of ever-increasing military engagement throughout the year. The

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President's installation of two of his brothers in the new government (one as Senior Advisor to the President and the other as Defence Secretary) and his subsequent direct appointment of heads to the National Police Commission, Judicial Services Commission and Human Rights Commission among others, in defiance of the 17th Amendment to the Constitution, also signalled a new stage in Sri Lanka's constitutional crisis, with serious implications for impunity and the rule of law. On the issue of separation of powers, a Supreme Court case of significant interest in 2006 was the decision in *NWM Jayantha Wijesekera and Others v. Attorney General and Others*,¹ in which the North and East province, merged since the 1987 Indo-Lanka accords, was controversially "demerged."²

Both the human rights and humanitarian situations in the country worsened considerably over the year, with the North and East badly affected both by the heightened conflict and a parallel rise in impunity. As in 2005, the situation in the North and East, largely rebuilt in the post-tsunami period, highlighted the interdependence of civil, political, social and economic rights, particularly in relation to the plight of internally displaced persons (IDPs).³ Colombo saw a wave of enforced disappearances carried out in circumstances that pointed to official involvement or complicity, in an unsettling throwback to earlier counter-insurgency periods.⁴

In fact, much of the violence of 2006 echoed earlier episodes in Sri Lanka's history. In April, an alleged LTTE bomb attack in Trincomalee market killed five people. Less than 15 minutes after the explosion, riots by Sinhalese mobs resulted in the further deaths of 20 people, with 75 hospitalised for their injuries. Eyewitness accounts suggested that the riots may have been orchestrated, in a

¹ SC(FR) Application Nos 243-245/06, SCM 16/10/06

² For a discussion of the issues raised in this case, see this volume, Kishali Pinto-Jayawardena "Judicial Protection of Human Rights," section 3.2

³ According to UNHCR Sri Lanka, an estimated 215,421 persons were IDPs at year's end. See <http://www.unhcr.lk/statistics/docs/SummaryofDisplacement-7Apr06-2Jan07.pdf>

⁴ 1971 and 1987-1990

troubling echo of July 1983, with police said to have stood by for two hours before intervening to stop the rioters.⁵ Other sources indicated that security forces were not mere onlookers but actively involved in fomenting the violence.⁶

As in the early 1970s and late 1980s, forced disappearances were increasingly carried out in circumstances that pointed to the complicity of Sri Lankan security forces. This time, however, these rights violations disproportionately affected the minority Tamil speaking population – both Tamil and Muslim. Perhaps the most high profile instance of this was the abduction, within a Colombo high security zone, of the Eastern University's Vice-Chancellor, who remained missing at year's end.

In response to this situation, two *ad-hoc* mechanisms to look into human rights violations were set up: the one-man Commission to investigate disappearances and abductions in the island, of former High Court Justice Mahanama Tillekeratna,⁷ and the Presidential Commission of Inquiry into serious human rights abuses, headed by Supreme Court Justice Nissanka Kumara Udalgama and including seven other distinguished persons.⁸

Regardless of these official measures, taken despite historic experience of their ineffectiveness, there appeared to be no deterrent effect on serious human rights violations which increased in proportion with the conflict.

Muslims have been particularly affected by the conflict and yet their experience has only rarely been acknowledged. From the largely

⁵ Human Rights Watch (HRW), "Government must respond to anti-Tamil violence," 25 April 2006; <http://hrw.org/english/docs/2006/04/25/slan-ka13262.htm>

⁶ University Teachers for Human Rights (Jaffna) (UTHR(J)), "When Indignation is Past and the Dust Settles - Reckoning Incompatible Agendas," Special Report No. 21, 15 May 2006

⁷ Gazette Extraordinary No. 1462/30 of 15 September 2006

⁸ Gazette Extraordinary No. 1471/6 of 13 November 2006

unbroken silence around the LTTE expulsion of Northern Muslims in 1990 to the lack of attention to civilian presence – by both the Government and LTTE – during the taking of Mutur in August 2006, Muslims' political experience has been fragmented by geography and the strategic disinterest of the armed parties to the conflict. In an attempt to address this silence, the Overview ends with a look at human rights challenges in Sri Lanka in 2006 through the minority Muslim political experience.

2 The failure of the Ceasefire Agreement

Commentators have noted the structural failures of the CFA: gaps in effective protection of human rights,⁹ exclusion of the Muslim minority¹⁰ and insufficient focus on institution building,¹¹ to name a few. The CFA entrenched the LTTE's own view of itself as the sole representatives of the Tamil people in the peace process and relegated the Muslim community to bystanders. These failures were compounded by the Tigers' strategy of using the freedom of movement provided by the ceasefire to eliminate political rivals in Government-held territory while Government forces in many cases were instructed to look the other way, due to reluctance to take action that could endanger the fragile ceasefire itself. The CFA was further weakened by its lack of an effective monitoring mechanism. Under its terms of reference, the Sri Lanka Monitoring Mission (SLMM) could only report on violations of the CFA, but had no powers to bring sanctions against any party responsible for breaching the agreement.

Nearly 4,000 people were killed as a result of the conflict in 2006. Though neither the Government nor the LTTE could afford to

⁹ International Crisis Group (ICG), "Sri Lanka: The Failure of the Peace Process," Asia Report No. 124, 28 November 2006

¹⁰ Farzana Haniffa, "Muslims in Sri Lanka's Ethnic Conflict," *ISIM Review* 19, Spring 2007

¹¹ ICG, "Failure of the Peace Process"

formally withdraw from the CFA, both sides disregarded its terms to the extent that the Sri Lanka Monitoring Mission (SLMM) noted in February 2007, at the five year anniversary of the Agreement, that "...abductions, harassments, killings, shelling and air strikes are taking place at a war like level."¹²

The logic of this stage of the conflict – revealed so far through action rather than expression by this Government – appears to have been to weaken the Tigers through direct military engagement in order to prepare the ground for negotiation of a political settlement.

3 Escalation in conflict

Though the majority of ceasefire violations were caused by the LTTE seeking to provoke State security forces' response or eliminate dissent within the Tamil community, the end of 2005 and early 2006 pointed to a new readiness for violence within the State security apparatus itself.¹³ The year began with the extrajudicial killing of five students in Trincomalee, on 2 January 2006. Though defence sources initially stated the five were Tiger cadres killed by the untimely explosion of their own grenade, it soon became clear that the young men had been shot at close range in circumstances which directly implicated State security forces.¹⁴

In a press statement dated 12 June 2006 condemning SLMM partiality in favour of the LTTE, the Government alleged that 173 armed forces personnel had been killed between the election of President Rajapakse and the 7 April 2006 assassination of Vigneswaran, an alleged LTTE operative in Trincomalee. However it was the LTTE's assassination attempt against Army Commander Sarath Fonseka on

¹² Sri Lanka Monitoring Mission (SLMM), "CFA five years on," 22 February 2007, http://www.slmm.lk/press_releases/CFA%205%20years.pdf

¹³ UTHR(J), "Terrorism, Counter-Terrorism and Challenges to Human Rights Advocacy," Special Report No. 20, 1 April 2006

¹⁴ *Ibid*

25 April 2006 at Army headquarters in Colombo that led to the first open military engagement between Government and LTTE forces since the signing of the CFA, including Air Force strikes on LTTE targets in the East. The year was marked by a steady increase in such encounters.

3.1 Major incidents

The LTTE's closure in late July of the Mavil Aru sluice gate deprived, mostly Sinhala, farmers of irrigation water at a critical dry season moment, leading to an all-out attack on LTTE positions by the military. Though the SLMM negotiated a re-opening of the gate, the Sri Lankan army bombed the area on 5 August in an apparent attempt to take credit for the breakthrough. The LTTE immediately responded by attacking Mutur. In the siege of the town, during which neither side attempted to minimise civilian casualties, nearly 50, mainly Muslims, were killed. In addition, 17 local aid workers with the French NGO Action Contre la Faim were killed at this time, during a period when control of the town was contested – the Government accused the LTTE, while the SLMM and the LTTE blamed the Government.

In September the Government took Sampur, in the first major capture of enemy territory by either side since the signing of the CFA. In October a suicide bomber attacked a military convoy, killing over 90 sailors, while a Sea Tiger attack on Galle Harbour surprised the Government, though no one was hurt. In November, 67 civilians were killed in Anuradhapura by an LTTE claymore, while TNA MP Nadarajah Raviraj, a member of the Civil Monitoring Commission and a former mayor of Jaffna, was shot and killed along with one of his bodyguards, in central Colombo close to an Army installation. Finally, the assassination attempt in December 2006 on Defence Secretary Gotabhaya Rajapakse led to the re-introduction of provisions of the Prevention of Terrorism Act as Emergency Regulations, as well as creation of the offence of "terrorism" previously undefined in Sri Lankan law. In addition to this new

offence, seemingly drafted with scope to penalise any opposition to Government, problematic provisions included increased infringement of liberty of the person and possible restriction of judicial discretion in emergency-related detention cases.¹⁵

3.2 Impact on civilians

3.2.1 Internal displacement

According to UNHCR's Global Report on displacement, there were 469,200 internally displaced persons (IDPs) and 89,400 returnees within Sri Lanka at year's end.¹⁶ The districts most affected by forced displacement were those which saw the worst of the resurgent conflict – Trincomalee and Batticaloa headed this list, followed by Jaffna and the LTTE-controlled areas of Kilinochchi and Mullaitivu.

The scale and speed of civilian displacement was such that Government resources were generally insufficient to meet needs. Thus local NGO and church groups as well as international agencies such as the World Food Program (WFP) and UNHCR often assisted in the provision of food and shelter. However, humanitarian access to IDP camp areas was often restricted by the main armed actor in the area, whether the Government or LTTE.¹⁷ Personal security remained a serious concern – abductions and harassment by both the LTTE and Karuna group were identified as problems in some IDP camps. Several instances of forced returns by the Government were also documented.¹⁸

¹⁵ For a detailed discussion of emergency regulations promulgated in 2006, see this volume, Saliya Edirisinghe, "Emergency Rule"

¹⁶ UNHCR, Global Report 2007 – Sri Lanka, see <http://www.unhcr.org/publ/PUBL/4666d2460.pdf>

¹⁷ Internal Displacement Monitoring Centre (IDMC)/Norwegian Refugee Council, "Sri Lanka: escalation of conflict leaves tens of thousands of IDPs without protection and assistance. A profile of the internal displacement situation," 16 November 2006

¹⁸ UNHCR position paper on the international protection needs of asylum-seekers from Sri Lanka, December 2006, <http://www.unhcr.org/home/RSDLEGAL/4590f12a4.pdf>

Those persons displaced in the latest conflict-related violence had, in many cases, previously been displaced by earlier phases of the conflict as well as the 2004 tsunami. These causes of displacement were not unrelated, however. UNHCR noted that inconsistent application of the coastal buffer zone in the aftermath of the tsunami had led to land disputes which, particularly in eastern areas with large populations of both Muslims and Tamils, were fuelling the renewed conflict.

3.2.2 Restrictions on freedom of movement

In the wake of heavy fighting between Government forces and the LTTE in early August, the Government closed the A9 road linking the Jaffna peninsula with the rest of Sri Lanka. This had a severe impact on civilians in the north, as the road provided the main overland link for transport of essential food and medical supplies, as well as humanitarian assistance, including construction materials. As a result, availability of essential items dropped dramatically and prices increased well out of the range of ordinary people.¹⁹

The heightened conflict also led to an increased security presence throughout the country, including a marked increase in fixed checkpoints in Government controlled areas. Given the focus on finding and detaining LTTE cadres, these restrictions had a disproportionate impact on Tamil civilians.

It was reported that both sides to the conflict had prevented civilians from moving from places of origin or displacement where they felt unsafe. The Navy is said to have prevented the flight of internally displaced persons (IDPs) from Allaipiddy to Jaffna, while in late September, the Army and Navy allegedly prevented IDPs from fleeing Mutur town by setting up air and sea blockades. The LTTE also reportedly prevented civilians – both residents and displaced persons – from leaving areas where they felt insecure

¹⁹ Christian Science Monitor, "In Sri Lanka, Peace Talks Ride on Highway," <http://www.csmonitor.com/2006/1122/p07s01-wosc.html>

due to fighting. This included nearly 32,000 IDPs, mostly from Trincomalee district, trapped in Vakarai DS division despite poor humanitarian and security conditions.²⁰

Forced returns were also a feature of displacement in 2006, with security forces using both direct force and threats of withdrawal of essential services as inducements to Muslim IDPs to return to Mutur town, Tamil IDPs to return to Trincomalee town and Sinhalese IDPs to return to border villages in the Anuradhapura district.²¹

3.2.3 Child recruitment

Alan Rock, United Nations Special Advisor to the Special Representative on Children in Armed Conflict, visited Sri Lanka on a fact finding mission in November 2006. His report noted that the practice of recruiting child soldiers by both the LTTE and Karuna faction appeared to be ongoing despite earlier undertakings to stop, particularly by the LTTE. Mr Rock also reported signs of complicity of Government forces in child recruitment by the Karuna faction, who functioned in Government controlled areas.²² The Army denied the allegations,²³ while the President promised an immediate investigation.²⁴ However, at year's end no initiative appeared to have been taken in this regard.²⁵

²⁰ Inter-Agency Standing Committee (IASC), "Conflict-Related Internal Displacement in Sri Lanka: A Study on Forced Displacement, Freedom of Movement, Return and Relocation, April 2006 – April 2007," http://www.humanitarianinfo.org/srilanka_hpsl/docs/protection/Conflict-Related%20Internal.pdf

²¹ *Ibid*

²² Press statement by Alan Rock, available at http://www.unicef.org/srilanka/media_2514.htm

²³ *Daily Mirror*, "Charges repulsive: Army," <http://www.dailymirror.lk/2006/11/14/front/04.asp>

²⁴ *Daily Mirror*, "Full probe of shocking UN report," <http://www.dailymirror.lk/2006/11/14/front/01.asp>

²⁵ This is corroborated by a statement made by the Sri Lankan Government delegation at the Human Rights Council in September 2007, in which it is stated that the Minister for Human Rights had "recently appointed a high

4 Structural failures in human rights protection

The year was also characterised by the weakening of structures mandated to provide independent human rights protection and oversight. When the term of constitutionally appointed chairperson Radhika Coomaraswamy ended in April 2006, President Rajapakse directly appointed new commissioners to the National Human Rights Commission. In rejection of the unconstitutionality of this process – made in the absence of a recommendation from the Constitutional Council as required under Article 41B(1) of the 17th Amendment – two highly respected previous commissioners declined appointment. In December 2006, when the then-head of the Commission, Justice P Ramanathan, died in office, the President appointed Justice S Anandacoomaraswamy as chairman of the premier national human rights body.²⁶ This loss of credibility in what should have been an independent body ran parallel to a development within the executive itself – the creation of the Ministry for Disaster Management and Human Rights, headed by Hon. Mahinda Samarasinghe, in May 2006. As the new ministry was created with the issue of human rights within its remit, it was not clear to what extent it would replicate or undermine the functioning of the Human Rights Commission, particularly after direct appointment of the new head.

Other changes in Government structure also affected human rights protection, notably the militarisation of the police, which was brought under the Department of Defence.²⁷ This was compounded by the failure to appoint a new head to the National Police Commission, a position which lapsed in November 2005 and had not been filled by the end of 2006.

level interdisciplinary group” to investigate the allegations, with no mention of any earlier action – see http://www.slembassyusa.org/archives/main_index_pages/2007/child_recruitment_21sept07.pdf

²⁶ *Daily Mirror*, “HRC hotline receives over 75 notifications,”

<http://www.dailymirror.lk/2007/01/09/news/11.asp>

²⁷ International Crisis Group (ICG), “The Failure of the Peace Process”

These developments took place against the backdrop of emergency rule, in place since the August 2005 assassination of Foreign Minister Lakshman Kadirgamar. As discussed in earlier editions of this report, the regulations themselves functioned to undermine fundamental rights protections enshrined in the fundamental rights chapter of the Constitution as well as Sri Lanka's adherence to its international treaty obligations under the Convention Against Torture (CAT) and the International Covenant on Civil and Political Rights (ICCPR).²⁸ The re-introduction of provisions of the Prevention of Terrorism Act (PTA) in December 2006, after the assassination attempt against Defence Secretary Gotabhaya Rajapakse, continued this troubling trend.

The Supreme Court also cast doubt on Sri Lanka's commitment to its international obligations in its judgment in the *Singarasa* case, in which the Court found that Sri Lanka's accession to the Optional Protocol of the ICCPR (OP-ICCPR), enabling applications to be made to its treaty body, the Human Rights Committee, was unconstitutional. This judgment appeared to be based on the notion that accession to the OP-ICCPR had granted judicial powers to the Committee – a notion not borne out by the Committee's jurisprudence.²⁹

The national judicial system itself seemed implicated in the worsening human rights situation, as evidenced by the small number of fundamental rights cases brought in 2006.³⁰ According to data from the Missing Persons' Unit (covering the period 1998 to 2003), of over 350 indictments at High Court based on the work of four separate Disappearance Commissions (which between them had registered over 30,000 disappearances), only nine convictions had

²⁸ See *State of Human Rights 2006*, Chapter V, Saliya Edirisinge, "Emergency Rule," pp.167-221

²⁹ For a discussion of this case see in this volume, "Judicial Protection of Human Rights"

³⁰ *Ibid*

resulted as at 2003.³¹ Thus the Government's attempt to buttress weak institutions with *ad-hoc* mechanisms does not appear to have been an effective strategy for dealing with an extraordinary situation.

5 Ad hoc institutions

In response to a growing problem with enforced disappearances and abductions, the President appointed a one-man commission to investigate and make recommendations. However despite strong initial statements, in his last 2006 statement on the matter Justice Tillakaratne said that the majority of those reported disappeared had either returned or "run away" with illicit partners, causing outrage among families of and advocates for the disappeared. Though an interim report was submitted to the President, the Government had not released the findings of the report by year's end.

The creation of a new Presidential Commission of Inquiry was announced on 4 September 2006 by President Rajapakse. At that time, he stated that the Commission would include both national and international commissioners – a seeming concession to civil society groups who had advocated for an international monitoring mission in the absence of working national human rights protection mechanisms. However, this commitment was watered down only two days later, when the President stated that the Commission would include only national commissioners, with a separate body made up of international experts who would advise the Commission on best practice. The Commission, headed by Supreme Court Justice Nissanka Udalgama, was eventually created by Executive Order in November 2006 and mandated to look at 16 high profile, unresolved cases of human rights violations; the mandate of the

³¹ LST and AHRC, "Prevalence of Torture in Sri Lanka: Persisting Problems and Outstanding Issues," alternative report to Committee Against Torture, 7 November 2005, Annex 3

International Independent Group of Eminent Persons (IIGEP) had not been finalised at year's end.³²

6 The Muslim experience – a short history and its impact on 2006

Sri Lanka's protracted conflict is most often cast as one between the majority Sinhalese and the minority Tamils. In this two-party understanding of the conflict, the Muslim community – 8.9 percent of the country's population, close to 40 percent in the conflict affected Eastern Province and expelled by the LTTE from the Northern Province – have no place.

Muslims are Tamil-speaking, although categorized as a separate ethnic group, and have sometimes been claimed by Tamil nationalists as part of the larger Tamil nation.³³ Though this identity has been publicly refuted by Muslim leaders at various historical moments, some Eastern Province Muslim youth were members of Tamil politico-military groups during the early stages of the Tamil militancy against the State, and Muslims contested elections under the mostly Tamil political parties—the Federal Party, and later the Tamil United Liberation Front. The State too has been responsible for inciting Tamil-Muslim tensions in the Eastern Province.

This section attempts to trace the history of the Muslims' place within the conflict and peace process through brief descriptions of the Expulsion of 1990, the Post-Tsunami Operational Management Structure (P-TOMS) of 2005 and the siege of Muttur in 2006.

³² The terms of references were finalized in a Letter of Invitation from the President dated 12 January 2007, see <http://www.iigep.org/mandate.htm>

³³ Close to 30 percent of the country's Muslim community are residents of the Tamil-speaking Northern and Eastern provinces. The rest of the Muslim population lives in dispersed small communities in Sinhala majority areas. This demographic factor has also influenced the Muslims' place in Sri Lankan politics and their response to the conflict

6.1 The Expulsion of 1990

In October 1990, close to a hundred thousand people all over the Northern Province were compelled at gun point to vacate their homes, hand over their belongings, place their valuables in designated LTTE storage areas and leave. This process was carried out in the five different districts of the Northern Province with different levels of brutality.³⁴

Even at the end of 2006, these Northern Muslims live in overcrowded settlements in under resourced Puttalam, a district immediately south of Mannar, the northern district from which the largest number of Muslims were expelled. Their lives parallel the hundreds of thousands of Tamils and Sinhalese in the country who were also displaced and their lives destroyed.³⁵ But certain differences about the Muslim experience reflect the Muslims' place in the Sri Lankan polity. They are a Tamil speaking group settled in a Sinhala speaking district and little has been done by successive governments to address the difficulties with language. They have problems accessing health care and other State amenities due to language problems. They cannot go back to their places of origin without the consent of the very organization that expelled them. Many expelled Muslims fear registering themselves as residents of the Puttalam district, in case they thereby forfeit the right to government subsistence rations, and assistance to reclaim their

³⁴ In the first flush of the 2002-2005 peace process, former LTTE political strategist Anton Balasingham stated at a press conference in Kilinochchi, April 2002, that the expulsion was a "strategic blunder" on their part. According to Maulawi Sufiyan – member of the Muslim community displaced from Jaffna and currently politician and human rights activist – Tamilchelvam, LTTE political wing leader, rendered an official apology to representatives of the Muslim community that visited him, and assured Muslims assistance to resettle when the North was under their administration.

³⁵ This is not the only mass expulsion of people to have occurred in Sri Lanka. The Sri Lankan army chased out Tamil residents of the Mavil Aru area of the Eastern Province in order to consolidate military control of this strategic area bordering the Northern and Eastern provinces in order to prevent the LTTE controlling the entirety of the North and East. These people also continue to languish in refugee camps to this date.

property and resettle in the North.³⁶ Puttalam residents resent the incursion of the refugees whom they say, threaten the areas' meagre resources.

Given the nature of the community, and the severe under development of the area in which they are forced to live, their dependence on politicians and government functionaries is complete. For ration distribution, the provision of services, and for general access to amenities and livelihoods the community needs the patronage of its politicians and can do little to challenge the administrators. The forms for renewal of voter lists were rarely distributed amongst the community and many who attain voting age have no way of getting registered and have not voted for years.³⁷ As a result, Northern Muslims have been denied their right to franchise and their ability to effect political change or gain a political voice has diminished.

The government has not addressed the unique nature of their problem in any way, either through establishing a commission of inquiry or having special administrative provisions for the displaced. The recently established government Secretariat for Northern Muslims located in Puttalam handles certain administrative matters for the community. However, long term solutions remain unclear.

After the 2002 ceasefire, the LTTE cadres had ready access to Muslim areas of the Eastern Province and many incidents of intimidation, extortion and sustained attempts to undermine Muslims' economic activities were reported. Relations between Muslims and the LTTE in the East were strained as a result.

6.2 The P-TOMS

The Muslims of the Eastern Province, roughly one third of the population in that region, live mostly in densely crowded

³⁶ Catherine Brun, "Local Citizens or Internally Displaced Persons - Dilemmas of Long-term Displacement in Sri Lanka," *Journal of Refugee Studies* 16(4), p.376

³⁷ Firsthand account from Puttalam resident

communities that have spread closer and closer to the ocean, given the restricted availability of land.³⁸ The tsunami took a devastating toll on this community and official figures state that 1 percent of the total Muslim population of Sri Lanka perished. Many thousands of Tamil residents in LTTE-controlled sections of the East were also badly affected. As large sections of the affected area were controlled by the LTTE, the government was urged by both local activists and the international community to work with the LTTE in formulating a mechanism to channel tsunami assistance. The country's peace process that had begun with the ceasefire of 2002 was at a standstill in December 2004 and the "joint mechanism" for aid sharing was considered a means by which to end the deadlock. In July 2005 the Post-Tsunami Operational Management Structure (P-TOMS) to address reconstruction in the North and East was unveiled.

To the Muslims it was a shock. The arrangement, intended to deal with the Eastern Province where close to 18,000 Muslims died and several Muslim villages were partially destroyed, aimed to address Muslim concerns without consulting Muslims. Like the CFA, it was an agreement between the government and the LTTE only. While a representative of the Muslim parties was to be part of the essentially symbolic apex body, the rest of the tiers of the arrangement were weighted heavily in favour of the LTTE, which was also given veto power over the decision making process. The agreement was drafted with very little consultation of either the affected Muslims or Muslims' political representatives, with Muslims given no prior access to the text of the agreement, and having no signatory status.

Muslims also feared the P-TOMS because of its unofficial link to the peace process; many saw this as a precedent for the future exclusion of Muslim parties from any process while purportedly

³⁸ Due to the highly ethnicized practice of land allocation in Sri Lanka's Eastern Province, Muslims find it difficult to access State land through government land grants in areas not already demarcated as part of the ethnically specific district secretariat divisions of which their villages are a part.

including Muslim grievances. Muslim parties felt that this was yet another attempt by the LTTE to undermine Muslims' political leadership. Members of the government felt that the Muslims were not adequately acknowledging the important breakthrough of inclusion in the apex body. Muslim agitation against the paternalism of a process that "included" them without consultation was such that the government was compelled to at least meet with Muslims and attempt to incorporate their concerns after the fact. The P-TOMS debacle remains an important benchmark in the evolution of the Muslims' place within the Sri Lankan discourse on the conflict. However, any changes that may have resulted from the agitation became invalid; the Supreme Court found sections of the agreement unconstitutional, and a presidential election augured the end of the Kumaratunga regime.

6.3 Mutur, August 2006

In 2006 Muslims were targeted, displaced and dispossessed by armed actors; both the State and the LTTE. A stark example of this was the siege of Mutur in August that year. As part of the escalation of hostilities that characterised 2006, the LTTE closure of the Mavil Aru anicut on 20 July 2006 caused distress to Sinhala farmers downstream and triggered a security force operation to "liberate" the area. During this military operation there was a struggle for control of the mostly Muslim Eastern Province town of Mutur that borders one side of the Trincomalee natural harbour.

On 1 August 2006 the town came under attack as the two parties fought for control, with both sides firing artillery at targets in built-up areas of the town. The Maternity Unit of the Mutur District Hospital, the Nadwathul Ulema Arabic School, the Ashraff High School and the Al-Hilal School were all hit. In these incidents 49 people seeking refuge in the school buildings were killed. When Mutur town was largely under LTTE control the Muslim community appealed through intermediaries for the Government to stop the shelling. The military continued its firing into the town.

At the end of the third day, Mutur Muslims decided to leave the town and were given assurances of safety by the LTTE.³⁹ On their way to Kantale on 4 August, they were diverted off the main A15 road by LTTE cadres and taken to LTTE-controlled Kiranthimunai. Here, according to eye witness accounts, the LTTE separated the men from women and children. Two masked men picked out individuals alleged to be members of a Muslim armed group working with the government. These men were tied up and the rest were told to move on. The fate of 66 individuals who went missing at Kiranthimunai is still unknown.⁴⁰

While there was some improvement in the recognition of Muslim grievances between the beginning of the peace process in 2002 and its effective lapse in 2005-2006, this did not result in any substantive development towards addressing them. Today it seems as if the meagre gains of those times may already be lost. The peace process under the CFA failed to take Muslims' specific grievances sufficiently into account, despite the presence of Muslim political actors close to the regime (in fact, the preamble to the CFA referred to Muslims as a "group not directly party to the conflict"). While civil society and political actors' agitations reversed this understanding to a certain extent, these gains now seem to be forgotten. Unfortunately, the poor attendance by MPs on the full day of debate in Parliament devoted to this subject illustrated this apathy, with only two Cabinet-level ministers speaking and the front bench of nearly all parties empty.⁴¹ The current regime, with its pursuit of a military solution

³⁹ According to a Mutur resident, while Mutur had faced several similar altercations between the LTTE and the government in 1987 and in 1990 it was the first time in the history of the conflict that the residents were compelled to flee the town

⁴⁰ A shell from Government forces hit the area and a number of people were killed and injured; some escaped. Residents stated that the LTTE cadres ran off when the shell hit and the Muslims were able to flee in the midst of the chaos. However many were killed. The LTTE gave the ICRC and members from the Muslim community barely one hour on 15 August to locate bodies in Kiranthimunai. Only three bodies were found

⁴¹ *Daily Mirror*, Gihan de Chickera and Kelum Bandara, "Big names missing in debate on Mutur crisis," 11 August 2006

and a clear majoritarian platform, appears to have little interest in Muslim concerns.

This short history of the challenges to full participation of Muslims in Sri Lankan political life cannot capture the whole picture. But perhaps more than any other single incident, the August 2006 shelling of Mutur town indicates both the State's and the LTTE's disregard for Muslim civilian lives.

7 Conclusion

There are, palpably, at least two Sri Lankas, delineated by the actions of the current Government in this latest phase of the conflict. In one, the Sinhalese view intolerable suffering in the North and East with relative complacency, while in the other, Tamil and Muslim citizens are afraid that when they leave their homes, they may not see their families again. Looking broadly at human rights protection in Sri Lanka in 2006, it appeared that existing mechanisms were undermined through a combination of judicial inconsistency, institutional weakness, political apathy and a determination to privilege security considerations above all others. Unless this trend is halted, the damage to Sri Lanka's institutions may take a very long time to repair. In their effective absence, the rights of all Sri Lankans will suffer.

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II

RIGHT TO LIBERTY AND INTEGRITY OF THE PERSON

Amal de Chickera and Mirak Raheem†*

1 Introduction

The right to liberty and integrity of the person ranks among the most fundamental of human rights, and also serves as a necessary foundation for the enjoyment of a host of other rights. There is little point arguing whether a person deprived of his liberty can satisfactorily exercise his freedom of expression, or whether a community living in fear for their lives can meaningfully pursue their aspirations.

The level of protection of liberty in a state often serves as a “rights barometer” to measure the respect and protection provided for human rights as a whole. If the right to liberty is paid scant respect, the likelihood of strong protection for other rights is minimal. The large-scale deprivation of liberty rights is both a symptom of and a strategy for the deterioration of human rights at large. Liberty rights include due process rights during arrest, detention, trial and punishment and protection from retroactive legislation.

The year 2006 saw a re-emergence of widespread violence in Sri Lanka, as both the government and the LTTE continuously violated the Ceasefire Agreement (CFA) and openly engaged in

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hostilities. An estimated 981 civilians were killed¹ and 1,000 were abducted or disappeared during the course of the year². As a situation of intermittent ceasefire violations escalated into un-declared war, both sides suffered significant losses in terms of combatants killed. The right to liberty of civilians faced multiple threats including to the most basic and fundamental of rights – the right to life. The mounting violations of international humanitarian law which provide a framework for the protection of civilians during times of conflict made clear the extent to which the integrity of persons, particularly in the North and East was under threat. As the situation worsened, public places which demand the respect of warring parties (including places of worship, hospitals and schools) were damaged and destroyed. Humanitarian workers and religious leaders were targeted for attack. Institutions with a mandate to protect human rights – notably the Supreme Court, Attorney General's Department and the Human Rights Commission – appeared unable or unwilling to do so.³ The proliferation of *ad-hoc* mechanisms to deal with this, including two Commissions of Inquiry, apparently in response to the growing international pressure, did little to resolve matters.

The “liberty” barometer swung violently in 2006, showing up the failings of Sri Lanka's democratic institutions with terrible implications for civilians and combatants alike.

1.1 Chapter Structure

Through this chapter, we hope to provide the reader with a holistic account of the right to liberty and how it has been systematically undermined and violated in this period. Consequently, we start by defining the right and providing the reader with a brief insight into national and international standards for the protection of liberty

¹ SATP database - <http://www.satp.org/satporgtp/countries/shrilanka/index.html>

² Human Rights Watch – Sri Lanka, Return to War: Human Rights Under Siege August 2007, Vol 19, No. 11(c)

³ Few investigations resulted in prosecution and there was not one successful conviction for any of the killings and disappearances reported.

rights. We then place things in perspective by setting out the very specific context of Sri Lanka in the year 2006 and the changing political, judicial and institutional framework of the nation. There follows an overview and analysis of the protection and violation of the right to liberty and integrity of the person. We will look in turn at extra-judicial killings, abductions and disappearances, unlawful detention, intimidation and the systematic denial of food, water, shelter and other basic amenities to vulnerable groups. We specially focus on liberty rights in the context of the armed conflict, as there has been an alarming rise of violations in this regard.

2 Legal Sources of the Right to Liberty and Integrity of the Person

For the purpose of this chapter, we use a broad definition of the right to liberty and integrity of the person. Such an interpretation is consistent with the acknowledgement that the fundamental basis of all human rights is the inherent dignity of all human beings. Liberty is not merely a due process right, which assures fair trial and freedom from arbitrary arrest and detention. At its very core is the inviolability of bodily integrity and security of the person. Liberty shares a strong and close connection with the right to life and freedom from torture, cruel, inhuman and degrading treatment. Bodily integrity and security can be threatened and undermined in many ways. Persistent intimidation, restriction and denial of basic amenities have serious implications for an individual's liberty and integrity. The liberty of persons living in fear of disappearance, under threat of torture and being deliberately deprived of essential resources, undermines the right to liberty of these individuals and the community at large. The mounting violations of and multiple threats to the right to liberty have serious consequences for the future of democratic and fundamental rights in Sri Lanka.

The primary source of fundamental rights in Sri Lanka is the fundamental rights chapter in the constitution and the jurisprudence based on it. In addition to this, Sri Lanka has international

obligations, derived from two primary sources: accepted principles of customary international law (which are binding regardless of formal ratification), and the rights enshrined in international covenants, treaties and other international documents (which in principle are binding consequent to ratification).

Any attempt to define the right to liberty and integrity of the person must therefore draw from these sources, if it is to realistically portray the obligations of the state towards its citizens as well as the international community.

2.1 Constitutional Protection of the Right to Liberty

Article 13 of the Constitution of Sri Lanka provides fundamental protection of liberty rights to all persons in Sri Lanka. Accordingly, all persons are ensured due process rights during arrest,⁴ detention,⁵ trial⁶ and punishment,⁷ and are protected from retroactive legislation.⁸ It needs to be noted that the right to life is not

⁴ According to Article 13 (1) of the 1978 Constitution, "No person shall be arrested except according to procedure established by law. Any person arrested shall be informed of the reason for his arrest."

⁵ According to Article 13 (2) of the 1978 Constitution, "Every person held in custody, detained or otherwise deprived of personal liberty shall be brought before the judge of the nearest competent court according to procedure established by law, and shall not be further held in custody, detained or deprived of personal liberty except upon and in terms of the order of such judge made in accordance with procedure established by law."

⁶ According to Article 13 (3), "Any person charged with an offence shall be entitled to be heard, in person or by an attorney-at-law, at a fair trial by a competent court." And 13 (5), "Every person shall be presumed innocent until he is proved guilty."

⁷ According to Article 13 (4), "No person shall be punished with death or imprisonment except by order of a competent court, made in accordance with procedure established by law. The arrest, holding in custody, detention or other deprivation of personal liberty of a person, pending investigation or trial, shall not constitute punishment."

⁸ According to Article 13 (6), "No person shall be held guilty of an offence on account of any act or omission which did not, at the time of such act or omission, constitute such an offence, and no penalty shall be imposed for any offence more severe than the penalty in force at the time such offence was committed."

specifically guaranteed in the Constitution but the Courts have, in some key rulings, favourably ruled in favour of the right to life as being implicit in the Constitution.

The right to liberty, construed in the narrowest of senses, would contain the above components as a bare minimum. However, in Sri Lanka, the right has been more broadly interpreted. Perhaps most significantly, the Supreme Court in *Sriyani Silva v. Iddamalgoda and others*⁹ recognised that the right to life is implied in Articles 11¹⁰ and 13(4). Justice Mark Fernando delivering this judgment stated that "Article 11 [read with Article 13(4)] recognises a right not to deprive of life – whether by way of punishment or otherwise – and, by necessary implication, a right to life."¹¹

The Courts have also offered significant procedural protection to persons in cases of unlawful detention and disappearance, thus broadening the scope of Articles 13(1), 13(2) and 13(4). For example, in the case of *Machchavallavan v. OIC, Army Camp, Plantain Point, Trincomalee and Others*¹² the Supreme Court, referring to the common law principle that every imprisonment is *prima facie* unlawful, and that it is for the person directing the imprisonment to justify his act, held that, "This rule is indeed an example of the principle stated at the outset, since unjustified detention is trespass to the person. It is particularly important that the principle should be preserved where personal liberty is at stake."¹³

Having established the above, it is important to note that nowhere in the world are liberty rights absolute. Article 15 of the Constitution sets out the restrictions on fundamental rights. Accordingly, the presumption of innocence protected by Article 13(5) and the

⁹ *Sriyani Silva v. Iddamalgoda and others*, SC (FR) No 471/2000

¹⁰ "No person shall be subject to torture or to cruel, inhuman or degrading treatment or punishment."

¹¹ *Sriyani Silva v. Iddamalgoda and others* (2003) 2 SLR 63 at p.77

¹² *Kanapathipillai Machchavallavan v. Officer in Charge, Plantain Point, Trincomalee* (2005) 1 SLR 341

¹³ *Ibid.*, p.356

prohibition of retroactive legislation can be restricted in the interest of national security.¹⁴ Furthermore, the protections pertaining to arrest and detention can be restricted on the much broader grounds of "the interests of national security, public order and the protection of public health or morality, or for the purpose of securing due recognition and respect for the rights and freedoms of others, or of meeting the just requirements of the general existing written law and unwritten law to continue in force."¹⁵

Significantly, Article 13(3) and 13(4) are not limited by Article 15. Consequently, the right to a fair trial and the right to life are absolute in the Sri Lankan context.

2.2 International Law Protections of the Right to Liberty

As mentioned above, Sri Lanka's international obligations primarily derive from two sources, namely customary international law and treaty law. Particularly relevant to the Sri Lankan context is international humanitarian law.¹⁶ Humanitarian law has a treaty base, comprising the four Geneva Conventions and their three Protocols,¹⁷ but some of its core principles have been recognised as being norms of customary international law.

¹⁴ Article 15(1) of the Constitution of the Democratic Socialist Republic of Sri Lanka

¹⁵ Article 15(6) of the Constitution of the Democratic Socialist Republic of Sri Lanka

¹⁶ Which is the international law that affords minimum rights guarantees to persons in times of war and armed conflict -

¹⁷ 1949 Geneva Convention 1 for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 1949 Geneva Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 1949 Geneva Convention III Relative to the Treatment of Prisoners of War, 1949 Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War, 1977 Geneva Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 1977 Geneva Protocol II Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflict. Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III), Geneva, 10 October 1980

2.2.1 Customary international law

Customary international law, which forms the nucleus of international law, is binding on all States, regardless of whether or not they have expressly accepted such principles. The "persistent objector rule" is the only exception to the universal application of principles of customary international law, according to which any State which has consistently and visibly objected to a particular principle of customary international law would not be bound by it.

The peremptory principles of customary international law are however not subject to compromise, even if a State has been a "persistent objector." These *jus cogens* principles of international law are universally applicable, and form the core content of a State's international obligations which cannot be derogated from under any circumstances. In a statement on customary international law, the American Law Institute identified genocide, slavery, murder and the causing of disappearances, torture, cruel, inhuman or degrading treatment, prolonged arbitrary detention, systematic racial discrimination and the consistent and gross violation of internationally recognised human rights as *jus cogens* norms of international law, then clarified that "the list is not necessarily complete, and is not closed: human rights not listed in this section may have achieved the status of customary law and some rights might achieve this status in the future."¹⁸ "Liberty" rights repeatedly appear on this non-exhaustive list of *jus cogens* norms, further emphasising the fundamental importance that must be attached to their protection.

2.2.2 Treaty law

Sri Lanka's treaty obligations in international law are subject to the ratification by Parliament of the treaties concerned. Even after

¹⁸ Restatement (Third) The Foreign Relations Law of the United States, American Law Institute (1987), Vol. 2, 161 – as cited in Steiner & Alston, *International Human Rights in Context*, p.233

ratification however, the scope of application of such treaties in domestic situations has been limited. This is because Sri Lanka has traditionally been a dualist state. In a dualist state international law/obligations have to be enacted nationally in order to take effect, which means that the domestic law of the land has always taken primacy over its international obligations. As a result, in situations where a statute was “unambiguously inconsistent with international obligations ... the statutory provision would prevail”¹⁹ as international law obligations comprising the four Geneva Conventions and their three Protocols must be enacted through domestic legislation, in order to be fully effective.

Despite the dualist nature of the state, the judiciary has repeatedly drawn from treaty law to substantiate its decisions. For example, in *Centre for Policy Alternatives v. Dissanayake*,²⁰ the Provincial Council Elections Act²¹ was interpreted in a manner which rendered the Act consistent with Article 25 of the International Covenant on Civil and Political Rights (ICCPR), while *Wickremasinghe v. de Silva*²² saw the application of Article 7(c) of the International Covenant on Economic Social and Cultural Rights (ICESCR), which assures “equal opportunity for everyone to be promoted in his employment...subject to no considerations other than those of seniority and competence.”

A significant development which resulted in the blurring of the dualist nature of Sri Lanka's international obligations – and bolstered the right to liberty – was the landmark judgment of *Weerawansa v. AG* in August 2000,²³ in which it was held that “Article 27 (15) (of the Constitution) requires the State to ‘endeavour to foster respect for international law and treaty obligations in dealings among nations.’ That implies that the State must likewise respect international law and treaty

¹⁹ Justice Mark Fernando, “Judicial Development of Human Rights; some Sri Lankan Decisions” LST Review, Volume 15, Issue 211, May 2005, p.25

²⁰ *Centre for Policy Alternatives v. Dissanayake* SC 26/2002 SCM 27.5.2003

²¹ No 2 of 1988

²² *Wickremasinghe v. de Silva* SC 551/98 SCM 31.8.2001

²³ *Weerawansa v. AG* (2000) 1 SLR 387

obligations in its dealings with its own citizens, particularly when their liberty is involved. The State must afford to them the benefit of the safeguards which international law recognises."²⁴ (Emphasis added)

It must be noted however, that the September 2006 Supreme Court judgment in the *Singarasa Case*²⁵ has significantly reversed what had been a gradual but purposeful shift in judicial thinking towards incorporating international standards into domestic law and making Sri Lanka's international obligations more meaningful, relevant and justiciable. The case reemphasised the dualist nature of the Sri Lankan system and held that the State's ratification of the ICCPR has no internal effect in Sri Lanka, while its accession to the First Optional Protocol to the ICCPR was unconstitutional.²⁶

Despite this major setback, international standards embodied in the treaties ratified by Sri Lanka remain of the utmost relevance, and continue to impose obligations on the State.

Article 9 of the ICCPR upholds and protects the right to liberty and security of the person using similar language to that of the Sri Lankan Constitution. Furthermore, Article 6 of the ICCPR protects the right to life. According to the Human Rights Committee, the treaty body of the ICCPR which is responsible for monitoring its implementation, "it is the supreme right from which no derogation is permitted even in time of public emergency which threatens the life of the nation."²⁷

2.2.3 International Humanitarian Law Governing Armed Conflict

In a context of renewed conflict, where ceasefire agreements hold little meaning and the rights provided by the Constitution are

²⁴ *Ibid.*, p.409

²⁵ SCM 15.09.2006

²⁶ For a detailed discussion of this case see this volume, "Judicial Protection of Human Rights," - Kishali Pinto-Jayawardena.

²⁷ ICCPR, General Comment No.6, Paragraph 1

under threat, international humanitarian law provides a key legal framework to uphold basic rights. Common Article 3 and Protocol II of the Geneva Conventions deal specifically with internal armed conflict laying out responsibilities and duties for both state and non-state actors. Sri Lanka has not acceded to Protocol II and has not ratified Common Article 3. Nonetheless, Common Article 3, which binds all parties to non-international conflicts to minimum standards of humane, dignified and non-violent treatment of non-belligerents, is widely recognised as customary international law, which both Government and non-state armed actors alike are obligated to respect.

3 The Sri Lankan Context in 2006

As is evident in the above section, liberty rights are core rights with strong protections in both domestic and international law. Despite the absolute nature of the right to life and fair trial rights, and strong constitutional protection for other liberty rights, 2006 saw a massive rise in violations of liberty rights by state and non-state actors alike. How is it possible that the people of a nation with relatively strong rights protections could be subjected to such rampant abuse?

The answer may lie in examining particular phases of Sri Lanka's history such as the ethnic conflict and the insurrections by the JVP, along with the other 'normal' violations which have no direct relation to these particular crises. This article will look at some of the significant developments which shaped the Sri Lankan reality in 2006, and examine how they created the space for violations of liberty rights to be carried out with impunity.

All organs of government have contributed towards this situation, through their actions, policies, decisions, indifference and ineffectiveness. The actions and inactions of these separate arms of government had a devastating impact on human rights in

general and liberty rights in particular. A few such developments are explored in brief below.

3.1 Violations and Validity of the Cease Fire Agreement

The Cease Fire Agreement (CFA) between the Government and the LTTE, which did much to help protect the integrity of the person during the peace process, faced mounting violations over 2006. The CFA included specific articles calling for the protection of civilians: Articles 1.2 called on the two parties to desist from engaging in military offensives or actions, while Article 2.1 called on the parties "in accordance with international law [to] abstain from hostile acts against the civilian population, including such acts as torture, intimidation, abduction, extortion and harassment." With the surge in violence and the increasing violations of the CFA, which were also violations of the integrity of the person, the validity of the CFA was seriously challenged.

There were symbolic efforts to revive the CFA. Throughout the year, both parties continued to express their commitment to the CFA rhetorically. The parties even participated in face-to-face talks to reach an understanding on how the CFA could be revived. The central challenge was to rein in the violence and to prevent the 'proxy war' between the armed actors including the Security Forces, the LTTE and the Karuna Group which had intensified over 2005, intensifying into a full scale war. The 'proxy war' in Sri Lanka was characterized by commando raids against LTTE and Karuna Camps, attacks on combatants, and violence against civilians ranging from killings and disappearances to assault and intimidation. Following the casualty figures of 118 in December 2005 and 158 in January 2006, the commitment to attend talks led to a dramatic drop in violence to single digits (8 casualties in February).²⁸ While the parties reached agreement at the Geneva talks in February to

²⁸ CPA, "Monitoring Factors Affecting the Peace Process," Cluster Report, November 2005- January 2006, p.30, AND <http://satp.org/satporgrp/countries/shrilanka/assessment2006.html>

create 'a ceasefire within the ceasefire,' the agreement unravelled as violations increased and with them the negotiations process unravelled resulting in a stalemate by the last meeting of the year, held on 28th and 29th October.²⁹

On the ground the violence rapidly intensified, with the month of April witnessing an upsurge of violence including aerial bombardment and communal violence. The closure of the sluice gate in Mavil Aru in July resulted in a further intensification in the 'undeclared war' as the violence shifted from killings, abductions, ambushes and occasional clashes to ground troop movement and artillery exchanges which resulted in significant shifts in the lines of control. Over 2006, the security forces captured Eastern Trincomalee from the LTTE and intensified operations in Vakarai while the two sides continued confrontations in the North. While neither party officially declared war, it was clear that the situation had become a high-intensity conflict. In assessing the overall impact of the violence and the counter violence, it was clear that the most basic right—the right to life—was seriously challenged. It is estimated that as a result of the conflict some 4,126 persons were killed in 2006³⁰. While neither party declared the CFA null and void it became clear that the CFA no longer provided a valid framework for protection of the integrity of the person.

3.2 The Emergency Regulations

Sri Lanka continued under an emergency regime in 2006, which permits derogation from human rights to constitutionally permissible limits.³¹ However, it is important to note that international law regulates emergencies and imposes certain obligations on states which declare them.

²⁹ [http://www.internal-displacement.org/idmc/website/countries.nsf/\(httpEnvelopes\)/3F921A5C16F54E3AC1257211004B4016?OpenDocument](http://www.internal-displacement.org/idmc/website/countries.nsf/(httpEnvelopes)/3F921A5C16F54E3AC1257211004B4016?OpenDocument)

³⁰ SATP database <http://www.satp.org/satporgtp/countries/shrilanka/index.html>

³¹ See in this volume, "Emergency Rule," Saliya Edirisinghe.

Article 4 of the ICCPR allows for derogations from the rights protected by the Covenant in emergency situations. General Comment No. 29 of the Human Rights Committee provides an authoritative analysis of Article 4 and serves as a guideline as to how States should act in emergency situations: "Article 4 subjects both [the] measure of derogation, as well as its material consequences, to a specific regime of safeguards. The restoration of a state of normalcy where full respect for the Covenant can again be secured must be the predominant objective of a State party derogating from the Covenant."³² Thus, any derogation must be limited "to the extent strictly required by the exigencies of the situation"³³ – an obligation which reflects the principle of proportionality.³⁴ The Sri Lankan Supreme Court has demonstrated its inclination to limit the scope of emergency regulations in keeping with the limitations imposed in Article 4 of the ICCPR. For example, in the case of *Joseph Perera v. AG*³⁵ the Court used the principle of proportionality to determine the constitutionality of emergency regulations.

Article 4 imposes four fundamental pre-conditions which must be met if a State is to legitimately derogate from the provisions of the Covenant:

1. The situation must amount to a public emergency which threatens the life of the nation;
2. A state of emergency must be officially proclaimed;
3. The State Party must immediately inform the other States Parties of the provisions it has derogated from and of the reasons for such derogation and
4. No measure derogating from the provisions of the Covenant may be inconsistent with the State Party's other international law obligations.

³² Human Rights Committee (HR Committee), General Comment No. 29, paragraph 1

³³ Article 4(1) of the ICCPR

³⁴ HR Committee, General Comment No. 29, paragraph 4

³⁵ *Joseph Perera v. AG* (1992) 1 SLR 199

Even if the above conditions are met, the right to life (Article 6, ICCPR) and a few other rights³⁶ remain non-derogable at all times.³⁷

3.3 The Fate of the 17th Amendment and the Demise of the Human Rights Commission

The implementation of the 17th Amendment to the Constitution continued to be mired in controversy, following the inability of the political leadership of the minor parties to reach a consensus regarding the appointment of members to the Constitutional Council. President Rajapakse exploited the impasse to circumvent constitutionally enshrined democratic processes and directly appoint heads to what should have been apolitical, independent bodies, including the Human Rights Commission (HRC), the Judicial Services Commission, Elections Commission and the National Police Commission.³⁸

The crippling effect that arbitrary appointments have had on the HRC is particularly significant.³⁹ The HRC has a mandate to inquire into and investigate complaints regarding procedures and infringements of fundamental rights; advise and assist the government in formulating legislation and administrative directives; make recommendations to the government to ensure that domestic laws and practices are in accordance with international human rights standards; make recommendations to the government on

³⁶ Article 7 (freedom from torture, cruel, inhuman or degrading treatment), Article 8 (freedom from slavery), Article 11 (freedom from imprisonment due to inability to fulfil a contractual obligation), Article 15 (the principle of legality in criminal law), Article 16 (the recognition of everyone as persons before the law) and Article 18 (freedom of thought conscience and religion)

³⁷ Article 4 (2) of the ICCPR

³⁸ For a detailed discussion of this subject, see in this volume, "17th Amendment," Cyrene Siriwardene.

³⁹ For a more detailed account see, "The Human Rights Commission of Sri Lanka; Sombre Reflections and a Critical Evaluation", *LST Review*, Vol.18, Issue 239 & 240, September & October 2007, Law & Society Trust.

subscribing or acceding to international human rights instruments; and promote awareness and provide education with regard to human rights.⁴⁰

Despite this strong mandate and the rapid disintegration of Sri Lanka's human rights record, the HRC has been completely ineffective at the national level. The politicization of the functioning of the HRC became evident from the outset with the new chairperson stating that the HRC would not investigate approximately 2,000 disappearances cases before it, as this would result in the state having to pay compensation.⁴¹ The Minister for Human Rights and Disaster Management intervened, demanding that the HRC should proceed irrespective of the consequences to the Government. The HRC announced that it would establish a 24-hour hotline and also promised to set up three separate commissions to investigate killings in Allaipiddy, Welikanda and Vankalai.⁴² Yet the newly appointed HRC came under criticism on multiple counts by human rights groups and commentators. The Asian Human Rights Commission noted that "the present decision of the HRCSL is in conflict with its mandate and also fundamentally contradicts its role as a prime Human Rights protection institution in the country. It cannot be defended on any legal or moral basis. The present HRC members, the legitimacy of whose appointment is under question due to them being appointed in contravention of Constitutional provisions, has completely turned its character from a Human Rights protection agency to an agency that protects the State, instead

⁴⁰ Human Rights Commission Act, No. 21 of 1996, Section 10(a) – (f)

⁴¹ CPA, "Monitoring Factors Affecting the Peace Process," Cluster Report, May-July 2006, p.43

⁴² A Presidential Special Task Force was appointed to provide relief to the displaced and the GA was instructed to pay funeral expenses to the next of kin who were killed in the bombardment and to expedite compensation payments to those whose houses were damaged. As a result of aerial bombing on 25 April 2006, 16 people were killed so funeral expenses were paid to next of kin. The GA was asked to expedite payment by 1 July. The GA was also asked to pursue requests for compensation: 52 houses were damaged – 6 fully, 25 partially, 21 minor damages and 5 shops were also partially damaged (*Daily News*, "Task force completes assessment," 4 May 2006)

of the victims of Human Rights abuses.”⁴³ Furthermore, the issue of public reporting has been raised by commentators who have noted that, “Since its appointment in May 2006, the present Human Rights Commission has issued no reports on high-profile human rights violations, disappearances, the Emergency Regulations or any other matter. It has occasionally published some figures on complaints but these are incomplete or contradictory.”⁴⁴

Despite this, at the district level the HRC continued to be a key body to which victims turned to in order to report violations. Fear of reporting violations, the combined inability of police, the Attorney General’s department and the courts to identify and prosecute perpetrators and the lack of independent human rights monitoring mechanisms on the ground mean that at the district level the HRC played a vital role. However, as the AHRC notes, “the HRCSL may record some facts of such disappearances but it does not have the capacity to investigate them in any manner that could be called a credible, criminal investigation.” In the context of politicisation however it seemed that the HRC at the national level was opting for non-confrontation with the State, thereby seriously damaging its credibility.⁴⁵

3.4 Ad Hoc Institutions and Measures⁴⁶

3.4.1 Mahanama Tillakaratne Commission

A special Presidential Commission of Inquiry to probe disappearances was established on 15 September 2006 with retired High Court

⁴³ The *Daily Mirror*, “HRCSL abandons probes into Rights abuses to avoid paying compensation”, 19 July 2006, p.2; The Sunday Island, “Court of Appeal Issues Notice on Namini Wijedasa,” 11 June 2006

⁴⁴ International Crisis Group, “Sri Lanka’s Human Rights Crisis,” 14 June 2007

⁴⁵ AHRC, “Sri Lanka: White vans without number plates: the symbol of disappearances returns,” 13 September 2006

⁴⁶ See also, in this volume, “Commissions of Inquiry.” Dr J de Almeida Guneratne.

Judge Mahanama Tillakaratne as its head. The Commission was set up against the backdrop of mounting abductions and extra judicial killings. It was expected that the Commission would present its report directly to the President. Doubts were raised widely about how independent it would be and what measures it would use to increase public confidence in the commission.⁴⁷

3.4.2 Presidential Commission of Inquiry

The President announced the creation of a Commission of Inquiry (COI) on 6 September in order to examine killings, disappearances and abductions. The measure was clearly meant to address growing local and international criticism of the human rights situation in the country. Initially the President had proposed on 4 September an International Commission of Inquiry to investigate human rights violations in all areas of the country, which he subsequently retracted in favour of a National Commission of Inquiry with international observers. On 8

⁴⁷ In June 2007 the Chairman of the Commission was quoted as stating that between September 2006 and February 2007 "a total of 2,020 people were either abducted or disappeared." He also claimed that "1,134 were later found alive and reunited with their families but the fate of the remainder is unknown." Presenting the Second Interim Report of the Presidential Commission in March 2007 to the President, Thilakaratne was reported to have stated that the allegations against the Government of committing killings, disappearances and abductions "are baseless" and the allegations result from "people who have voluntarily gone into oblivion by reason of their going abroad or gone into hiding in order to achieve their personal objective... Nearly 90 per cent of the disappeared persons in the other areas, Polonnaruwa, Kalutara and Colombo Districts have left home temporarily over personal disputes and have been found or returned. Even in Jaffna there were instances, where the son or husband being scolded by home people for excessive drinks, leaving the house and returning after a few days, or the husband eloped with the sister-in-law and admitting the Police station of their guilt." The Commission came in for heavy criticism for the dismissive manner it dealt with the issue. Local people in Batticaloa also claimed that there was little effort at informing the general public of the visit and groups working with children abducted by armed groups and the affected families were obstructed from meeting the Commissioner himself (BBC, "430 Killed in four months," 28 June 2007; *Daily News*, "Allegations against Govt baseless, unfounded, 26 March 2007; CPA and IMADR, "Fact Finding Visit to Batticaloa", February 2007)

November the Government announced the eight national commissioners and the mandate of the COI to look into fifteen specific cases.⁴⁸ The commissioners met but there were no formal sittings in 2006.

Despite the watering down of the initial position announced by the President, the structure itself was innovative, as the International Independent Group of Eminent Persons (IIGEP) was created as an oversight mechanism to ensure the independence of the Commission. The IIGEP would produce its own reports and comment on the commission's proceedings. The COI itself included eminent Sri Lankans, some of whom had served in previous COIs, and promised to offer a means of investigating past cases of human rights violations. The design did have flaws which could affect its independence, such as the "unduly intrusive role of the Government," particularly that of the Attorney General's Department.⁴⁹ Furthermore, being a political process, the President had the discretion to accept the report of the COI or not. As a local NGO noted, "At all times, the process must uphold principles of good governance, human rights norms and the rule of law, if it is to contribute to justice and human rights protection in Sri Lanka."⁵⁰ Responding to the establishment of the COI, the Special Rapporteur on extra-judicial, summary or arbitrary executions, Philip Alston warned, "If the commission does not meet the requirements the initiatives will fail and set back the cause of peace. If the requirements are taken seriously the move will prove to be courageous and could break the vicious cycle that currently grips the country."⁵¹

⁴⁸ See also Amnesty International, "Observations on a proposed Commission of Inquiry and an International Independent Group of Eminent Persons," 17 November 2006

⁴⁹ CPA, Policy Brief, No. 1 2007, "A Commentary on the Commission of Inquiry and the International Independent Group of Eminent Persons," p.7 and p.9

⁵⁰ *Ibid*, p.15

⁵¹ *The Sunday Leader*, Jamila Najmuddin, "Aid workers seek guarantees," 10 September 2006.

3.4.3 Other Measures

In addition to the creation of commissions, the Government initiated a number of other *ad-hoc* measures to address the human rights situation. In May, the President created the Inter-Ministerial Committee on Human Rights chaired by the Minister of Human Rights, Mahinda Samarasinghe. The committee included senior officials from other ministries and state agencies including Foreign Affairs, Defence, Justice, Constitutional Affairs, the Attorney General's Department, the Armed Forces, the Police and the Secretariat for Coordinating the Peace Process (SCOPP). The committee was created to address and oversee issues relating to human rights and implement resulting decisions. The Ministry for Human Rights and Disaster Management created a Human Rights Advisory Committee which included members from civil society, who would undertake visits to prisons and detention centres, among other tasks.⁵² The Government also established a Tri-Force Commission to probe the attack on Pessalai church, but no report was presented to the public nor were there any indictments. All these measures represented an attempt by the Government to respond to the growing local and international criticism of mounting human rights violations, but also demonstrated the Government's recognition that existing mechanisms were unable to address neither the scale of violations nor the culture of impunity that fostered these violations.

A cross-party group of parliamentarians also formed an *ad-hoc* committee – the Civil Monitoring Commission, convened by Western People's Front leader Mano Ganesan to monitor and address the growing number of disappearances, particularly in and around Colombo, as it became clear that the families and friends of those abducted were fearful of reporting the incidents and had no one to take up the incidents.

⁵² *Sunday Island*, "Sri Lanka will investigate human rights abuses – Minister," 21 May 2006, p.3

4 Violation of Liberty and Integrity Rights

In this context of judicial and institutional failures, violation of the constitution, political interference and increased militarization, rights of liberty and integrity of the person were repeatedly violated. This section of this chapter documents some of these incidents.

4.1 Attacks on Civilians

During the violence experienced in Sri Lanka in 2006, it became increasingly clear that “civilians are not just caught in the crossfire, but have become the targets of violence.”⁵³ Jayadeva Uyangoda noted, “the undeclared war, between the Government and the LTTE, seems to have entered a new phase. Now it is a really dirty war, in which, civilian populations are deliberately targeted, killed and terrorized.”⁵⁴ International humanitarian law (IHL) requires warring parties to distinguish between civilians and combatants, as stated in Protocol II, Article 4.1. IHL also calls on the parties to a conflict to ensure that civilians are not the object of violence or terror through acts or threats of violence (Protocol II, Articles 13.1 and 13.2). Common Article 3 of the Geneva Conventions, which applies specifically to armed conflict, reiterates this.

The number of Tamil civilians who were targeted and killed steadily increased with little discrimination of gender or age. On 2 January five Tamil youth were killed by the Dock Yard in Trincomalee Town. The five students, Shanmugarajah Gajenda, Logitharajah Rohan, Thagathurai Sivanantha, Yogarajah Hemach-andra and Manoharan Rajihar, who had just completed their A levels, had gathered by the beachside in town in the evening. Initial reports from the Ministry of Defence stated that the youths had died due to a grenade explosion and that they had been in possession of a

⁵³ CPA, Cluster Report, “Monitoring Factors Affecting the Peace Process,” First Quarterly, February 2006 – April 2006, p.39

⁵⁴ *Daily Mirror*, Jayadeva Uyangoda, “Sri Lanka: Crisis takes new turn,” 22 June 2006.

grenade. The post-mortem, however revealed injuries which could have resulted from a grenade but that the young men had in fact died due to gun shot wounds. The verdict of the Magistrate was that the youth had died due to gun shot wounds. Eyewitness accounts revealed that the grenade had been thrown towards the youths from a three wheeler that sped away despite the multiple security checkpoints. Other accounts also attested that the youth had then been assaulted, forced to lie on the ground, then shot at close range. It was alleged that there were 157 members of the security forces who were at the scene of the crime, some of whom must be, at the very least complicit. A special STF unit under the direct order of Presidential Defence Advisor DIG, H.N.B.G. Kottakadeniya was alleged to be directly responsible for moving the injured youth and for shooting them dead.⁵⁵ Like many of the other incidents, neither the perpetrator nor the motive, has been identified.

Two sisters and their mother were killed in Manipay, Jaffna on 16 January. According to some newspaper reports one of the sisters of the victims reportedly acted in a teledrama on the LTTE channel, Nitharsanam, while others noted that the individuals were members of a Maveera family.⁵⁶ The killers were said to be either the EPDP or army intelligence.⁵⁷ In Allaipiddy, Jaffna, 13 people were killed on May 13 when gunmen opened fire on two houses and a nearby shop. At the inquest relatives and survivors attested that the assailants wore navy uniforms.⁵⁸

⁵⁵ *Sunday Times*, "Kotakadeniya says he acted with Defence Secretary's Approval," 15 January 2006, p.11; *Sunday Times*, Iqbal Athas, "War on Corruption: Don't shut out media," 8 January 2006, p.11.

⁵⁶ *Maaveerar* meaning Great Hero is the term used by the LTTE to describe their fighters who have been killed. The fallen combatants' families are called *Maaveerar Families* (*Daily Mirror*, Senaka de Silva, "Maaveerar family shot dead," 17 January 2006, p.1; Tamilnet, "Three women members of *Maaveerar* family shot dead in Manipay," 16 January 2006, University Teachers for Human Rights.)

⁵⁷ *Daily Mirror*, Senaka de Silva, "Maaveerar family shot dead," 17 January 2006, p. 1; Tamilnet, "Three women members of *Maaveerar* family shot dead in Manipay," 16 January 2006.

⁵⁸ South Asia Terrorism Portal, Sri Lanka Timeline 2006

While most of the civilians killed tended to be Tamil, civilians from other communities also were targeted. On 15 June a public bus carrying more than 160 passengers from Talgasweva to Kebithigollewa was hit by a claymore killing 66 people, including women, children and two Buddhist priests. The attack was blamed on the LTTE.⁵⁹ On 17 September the bodies of 11 Muslim labourers were found in Ranthal Kulam, Pottuvil, mutilated and hacked.⁶⁰ It was unclear who was responsible, with locals Muslims claiming that the STF was responsible in some form and the Government insisting that it was the LTTE.

In addition, specific categories of civilians, such as journalists found themselves at risk. On 2 July Lakmal Sampath, a journalist, was killed, allegedly with a weapon belonging to an army officer.⁶¹ In 2006 "Over two dozen Tamil media workers [were] abducted, directly threatened, severely assaulted or killed..."⁶² Tamil politicians were also targeted. N. Raviraj, Tamil National Alliance (TNA) M.P., was shot dead driving from his home in Narahenpitiya on 10

⁵⁹ Minister Keheliya Rambukwella stated this at the press conference on the day. The Government strongly condemned the attack as "barbaric and inhuman." In subsequent investigations Government analysts found that C4 explosives had been used and stated that the LTTE was responsible for the attack. Given the LTTE's use of claymores over the previous months, the growing attacks on Sinhala border villages in recent weeks and its history of massacres of Sinhala civilians during the conflict made it an obvious suspect (*Sunday Times*, Athula Bandara and Rohana Chandradasa, "Why?" 18 June, p.6; *Daily Mirror*, Easwaran Rutnam, "Govt. urges people to be calm," 16 June, p.1; *Daily Mirror*, Kelum Bandara and Yohan Perera, "Govt. analyst's report proves LTTE hand in massacre," 22 June, p.3; *Daily Mirror*, "Tigers blame attack on 'armed elements'," 16 June, p.1).

⁶⁰ Lanka-e-News, "Eleven Muslim labourers hacked to death," 18 September 2006

⁶¹ According to Sunanda Deshapriya of the Free Media Movement the lack of progress in investigations in the Sampath case was similar to killings of other journalists including Dharmaratnam Sivaram, S. Relangani, Subaratanma Sugirdharan (*Morning Leader*, Amantha Perera and Jamila Najmuddin, "No breakthroughs in journalist killings says FMM," July 12, p.3; *Daily Mirror*, Senaka de Silva, "Lakmal killing: army captain questioned," July 12, p.2; *Daily News*, Rafik Jalaldeen, "Attack on Udayan: six taken into custody," May 4, p.1)

⁶² CPA, Annual Report, "War, Peace and Governance In Sri Lanka – Overview and Trends," p.51

November. This was preceded by the killing of Vanniasingham Vigneswaran, a Municipal Council member from the TNA on 7 April. Other Tamil political group members were also targeted and killed. Two members of the EPDP, Sebastian Irayappan and Arumugam Loganathan were shot dead in Pandarikulam, Vavuniya, reportedly by the LTTE.⁶³ Tamil political actors were also targeted: Kethesh Loganathan, Deputy Secretary General of the Secretariat for Coordinating of the Peace Process, was gunned down at his home in Dehiwela, Colombo on 11 August 2006.

Civilians also found themselves caught in the crossfire. On 2 April a claymore explosion killed five soldiers travelling in one vehicle and two NGO workers from HUDEC who were travelling in another.⁶⁴ In other instances civilians were killed in retaliation. On 18 November, a claymore went off outside the Agricultural Farm School in Vavuniya killing 5 army personnel and injuring two others. Five students were also killed and another twelve were injured in what the military spokesperson stated was crossfire. Human rights groups however stated that the students had been ordered to lie flat on the ground after the attack and asked to walk towards the men in uniform who shot at them. A soldier and a policeman were remanded for allegedly shooting at the group.⁶⁵

In certain instances, it is difficult to conclusively assert that civilians were either directly targeted or caught in the crossfire. There were reports that IDPs for instance were killed while attempting to flee the conflict areas. In other instances the armed actors seemed to contest their civilian identity. For instance, the LTTE diverted fleeing Muslim civilians at Kiranthimunai and subjected them to an identification parade.⁶⁶

⁶³ South Asia Terrorism Portal, Timeline 2006

⁶⁴ *Daily Mirror*, "Peace v. war clash before Avurudu", April 11 2006

⁶⁵ *The Sunday Times*, Asif Fuard, "Deadly game of abductions continues," 31 December 2006

⁶⁶ Human Rights Watch, "Improving Civilian Protection in Sri Lanka," September 2006, p.17

The militarization of civilians in the North and East and border areas by the State and the armed groups further blurred the distinction between civilians and combatants, placing the former at greater risk. The Government undertook measures that resulted in the militarization of civilians when it overhauled and expanded the Home Guards protection system, which was renamed the National Civil Defence Force (NCDF) and consolidated through the *Jathika Saviya* Program.⁶⁷ This measure promised to provide security for Sinhala and in some cases Muslim civilians in border villages but this militarization also placed these civilians at risk. The LTTE continued its practice of abducting and recruiting children and adults in order to strengthen its fighting force. The LTTE also established militias such as *Makkal Padai*, *Ellalan Force*, *Pongi elum Makkal Padai* and *Tamil Resurgence Force*. It also commenced military training for civilians, including women and senior citizens.⁶⁸ A group called the Tamil Resurgence Front claimed responsibility for the attacks against the security forces in Jaffna and Mannar in early 2006.⁶⁹ The LTTE in fact sought to deliberately blur the distinction between civilians and combatants by blaming certain attacks on civilian militias. Given the LTTE's categorical assertion that such groups were responsible for such attacks in Jaffna and that it had trained and armed these groups, the SLMM asked the LTTE to name the individuals involved. In a statement the SLMM declared that it found the LTTE explanation "unacceptable" and expressed concern at the LTTE's "indifference to these attacks."⁷⁰

⁶⁷ Through the *Jathika Saviya* program the Government also sought to provide basic amenities such as health, educational and transport facilities. (*Daily News*, Ranil Wijayapala, "25,000 home guards deployed under *Jathika Saviya* programme," 10 July 2006), *Sunday Leader*, Arthur Wamanan, "Government to launch civil defence force," 18 June 2006, *Daily Mirror*, police log, Senaka de Silva, 18 May 2006

⁶⁸ CPA and INFORM, "Fact-Finding Mission on Pesalai," 28 June 2006; Island, Dinasena Rathugamage, "LTTE begins combat training for village children," 18 May 2006

⁶⁹ *Sunday Leader*, Amantha Perera, "Violence greets 2006," 1 January 2006, p.16

⁷⁰ SLMM Spokesperson, Hellen Olafsdottir, in *Daily News*, Champika Weerasinghe, "SLMM urges LTTE to name 'people' behind attacks," 7 January 2006, p.1; *Sunday Leader*, Amantha Perera, "Violence greets 2006," 1 January 2006, p.14

Both sides found it increasingly convenient to deny civilian status to particular sets of victims as a means of justifying their violence. The Government on occasion refers to Tamil civilians as LTTE cadres when it wants to defend arrests or violence. On 4 May, the army reported that seven LTTE cadres were killed when they tried to attack an army checkpoint in Nelliady, Jaffna. Two human rights groups independently claimed that all those killed were unarmed civilians – five Tamil youths and two three-wheel drivers.⁷¹

The Government and the LTTE also offered contrasting versions of the identity of the 51 women and girls who were killed as a result of Sri Lanka's air force's aerial bombardment of a former children's home, Sencholai, in Vallipuram, Mullaitivu. The Government insisted that the women were receiving military training for combatants. The Defence Spokesperson Keheliya Rambukwella stated that "the gender or age limit of those inside an LTTE area was immaterial in a military offensive targeting Tiger training camps."⁷² The LTTE maintained that they were receiving medical training. The SLMM which visited the site five hours later could not find evidence of any weapons or military equipment.⁷³

On 10 June, three individuals who the Government claimed were LTTE cadres were shot dead while travelling from Mutur to Trincomalee; one was 10 years old.⁷⁴ As a Human Rights Watch (HRW) report noted "The tragic circumstances of the attack

⁷¹ Human Rights Watch, "Improving Civilian Protection in Sri Lanka," September 2006,

⁷² *The Morning Leader*, Sonali Samarasinghe, "Fall out of a full blown war," 16 August 2006

⁷³ Human Rights Watch, "Improving Civilian Protection in Sri Lanka," September 2006, p.31

⁷⁴ Also a TNA M.P. critiqued the UN Agencies for being silent on the issue of killing of children, including the 2 children killed in Allapiddy and 8 killed in aerial bombardment. A subsequent statement by UNICEF stated that children are affected by violence with at least six killed in Trincomalee and at least nine others were killed in other districts, with many thousands affected by displacement (*Daily Mirror*, "UNICEF, UNHCR silent on killing of children says TNA," 16 May 2006; *Island*, "Children pay high price in conflict – UNICEF," 17 May 2006.

underline the failure of both sides to take all feasible precautions to minimize harm to civilians.”⁷⁵

Civilians found themselves the targets of retaliation by armed groups that had suffered attacks from opposing groups. In specific instances, the Security Forces used or threatened to use violence against civilians in reprisal for attacks committed against the forces. A military patrol came under attack in Iruthayapuram, Trincomalee on January 8 injuring three soldiers. The security forces carried out a search operation in Meenakam and found weapons inside a house. HRW reported that the armed forces went from house to house, allegedly threatening the villagers with a massacre in reprisal should there be another LTTE attack. As part of this threatened reprisal, the soldiers made reference to a massacre in the nearby village of Kumarapuram that had occurred ten years earlier, when over 20 civilians were killed and two girls were raped and murdered. No actual reprisals were carried out.⁷⁶

The targeting of particular categories of individuals, the impact of these killings on the civilian population and the alleged identity of the killers meant that these killings were viewed as political in nature and intent. “The purpose of these killings has been to repress and divide the population for political gain. Today many people – most notably, Tamil and Muslim civilians – face a credible threat of death for exercising freedoms of expression, movement, association, and participation in public affairs. The role of political killings in suppressing a range of human rights explains why members of civil society raised this more than any other issue.”⁷⁷

The killings, coupled with other acts of violence and intimidation, intensified fear in civilian communities. This led not only to their

⁷⁵ Human Rights Watch (HRW), “Improving Civilian Protection in Sri Lanka,” September 2006, p.32

⁷⁶ *Ibid.*, p.35

⁷⁷ Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston, “Mission to Sri Lanka,” (November 28 to December 6 2005), 27 March 2006

greater wariness of associating with one armed group or another, but also of reporting the identity of perpetrators to the authorities. In the killing of the five students in Trincomalee, the one witness willing to come forward and his family were subjected to various threats, reportedly by the armed forces, which eventually led to the person leaving the country.⁷⁸ In some cases the incidents also led to mass displacement. More than 1,500 civilians fled Allaipiddy and its environs following the massacre in the area in May 2006. The killing of a Muslim bread vendor in the Tamil village of Bharathipura led to the flight of over 3,000 Muslims from Jinna Nagar and Azad Nagar.⁷⁹ In other instances violence led to more violence and deaths. Mob violence reared its ugly head, particularly in the Trincomalee district during April with a number of incidents in Trincomalee Town, Nadespura and Dehiwatte.⁸⁰ On 12 April, a bomb exploded in Trincomalee market killing five persons. Sinhalese mobs went on a rampage attacking and burning 30 Tamil businesses and a number of homes. Fourteen people were killed. The security forces and the police were reported to have done little to prevent the violence.⁸¹ The inability of the authorities to identify and prosecute perpetrators coupled with the continuation of extra-judicial killings deepened the culture of impunity.

The parties also failed to take adequate measures to protect civilian populations under their control.⁸² The charge of using human shields has been levelled against the parties to the conflict, particularly the LTTE. During the crisis in Mutur, it was reported that a LTTE leader fired mortar shells from close proximity to Arabic College which was sheltering 15,000 people on 3 August, despite the pleas of Muslims sheltering inside. The military fired

⁷⁸ HRW, Sri Lanka - Country Summary, January 2007, p.4

⁷⁹ *Daily Mirror*, Yohan Perera, "Over 3000 Muslims flee their homes," 16 May 2006, p.4

⁸⁰ UTHR (J), "Flight, Displacement and the Two-fold reign of Terror," Information Bulletin No. 40, 15 June 2006

⁸¹ CPA, INFORM and LST, "Fact-Finding Mission to Trincomalee," 16-17 April 2006

⁸² HRW, "Improving Civilian Protection...", p.33

artillery into Mutur, including multi-barrel rocket launchers. The Arabic College was hit by three shells, killing 19 civilians.⁸³ On 8 November, the Vigneshwara Vidyalayam School in Kathiravelli came under artillery attack from the security forces, resulting in the killing of 47 civilians and injuring of a further 136.⁸⁴ The attack on civilians was condemned by a number of actors, including the UN which stated that "the killing and wounding of displaced persons is unjustifiable and a violation of the most basic humanitarian norms."⁸⁵ The army insisted that it had used sophisticated radar to pinpoint LTTE artillery guns and charged that the LTTE was using human shields.⁸⁶ In its statement condemning the attack the Co-Chairs to the Peace Process pointed out the violations by both sides. The statement condemned the LTTE for "initiating hostilities from heavily populated areas" and the Government for "firing into such vulnerable areas and killing and wounding innocent civilians."⁸⁷

4.2 Other violations of international humanitarian law

Despite the many protections offered by domestic and international human rights and humanitarian law, a defining aspect of the violence in 2006 was the increasing willingness of the parties to violate the basic norms protecting liberty rights and governing armed conflict. Over 2006, the series of violations included instances where specific provisions of international humanitarian law governing armed conflict were contravened.

⁸³ UTHR (J), "Hubris and Humanitarian Catastrophe," 23 August 2006; HRW, "Improving Civilian Protection..." p.33

⁸⁴ *The Sunday Times*, Dilshath Banu, "Their only haven shattered by bombs," 12 November 2006, p.6 *The Sunday Leader*, D.B.S. Jeyaraj "Massacre of innocent civilians at Kathiravelli," 12 November 2006

⁸⁵ Statement quoted in *The Sunday Leader*, Suranimala, "HR noose strangulates Govt." 12 November 2006

⁸⁶ Army accused the LTTE of firing from near Vigneswaran School and Tamil Maha Vidyalaya (Military spokesperson Prasad Samarasinghe quoted in *The Sunday Leader*, Amantha Perera, "Violence engulfs Vakara," 17 December 2006, p.18-19); *The Sunday Leader*, D.B.S. Jeyaraj "Massacre of innocent civilians at Kathiravelli," 12 November 2006.

⁸⁷ Tamilnet, "Co-chairs call for full implementation of CFA," 21 November 2006.

4.2.1 Attacks on places of worship and against religious figures

Places of worship are protected under IHL (Protocol II, Article 16) and are recognised as refuges for civilians during conflict. However, on 19 June and 9 July, which was a poya day, Somawathie Chaitya, Polonnaruwa District came under attack. The army blamed the LTTE, while the latter denied the charge.⁸⁸ On 17 June 2006 a clash occurred between the Sea Tigers and the Navy, off the coast of Pesalai, Mannar. The villagers sought safety in the local church, Our Lady of Victories, but the church came under attack from unknown assailants who fired at the building and threw a grenade inside, killing one woman.⁸⁹ The Church in Allaipiddy came under attack during fighting in Kayts on 13 August, which resulted in the death of 15 civilians.⁹⁰ During the battle for Mutur in August, St Anthony's Church came under artillery attack, leading to the death of one boy.⁹¹

Although protected under Article 9 of Protocol II, religious personnel were killed in 2006. On 11 August Rev. Vincent Vinodharajah, a priest of the evangelical Church of the Apostle, disappeared.⁹² Father Thiruchelvam Nihal "Jim Brown" and Wenceslaus Vines Vimalathas went missing on August 20 driving on a motorbike from Kayts. They were last seen at a military checkpoint at the Allaipiddy Road Junction.⁹³

⁸⁸ *Daily Mirror*, Kurulu Kariyawasam, "LTTE, forces clash," 21 June 2006; *Morning Leader*, "Somawathi Chaithya attacked again," 12 July 2006.

⁸⁹ CPA, INFORM, "Fact Finding Mission to Pesalai," 28 June 2006.

⁹⁰ South Asia Terrorism Portal, Sri Lanka Timeline, 2006

⁹¹ LTTE Peace Secretariat, "Humanitarian measures for civilians of Mutur East."

⁹² *The Sunday Leader*, D.B.S. Jeyaraj, "Tamil Catholics perturbed over missing priest," 3 September 2006.

⁹³ UTHR(J), Special Report 25, "From Welikade to Mutur and Pottuvil: A Generation of Moral Denudation and the Rise of Heroes with Feet of Clay," 31 May 2007.



4.2.2 Attacks within or near to hospitals

Despite the protection guaranteed to medical staff and units under IHL (Protocol II, Article 10 and 11), they have been subject to attack. On 15 May two suspected Karuna cadres, Suresh Kumar and G.P. Selvakumar, who were injured in fighting and receiving treatment in Batticaloa, came under attack within the hospital premises; the former was killed and the latter injured.

4.2.3 Attacks on schools

While not specifically referred to in Protocol II, schools are recognized in customary IHL as places of refuge for civilian populations. In the battle for Mutur, a number of schools were damaged as a result of artillery fired into the town and surrounding areas, resulting in the death and injury of civilians who had sought shelter there. These included Arabic College where 10 persons were killed and Al Nuriah Muslim School in Thoppur where five were killed.⁹⁴ On December 7 the LTTE fired artillery on Somadevi School in Kallar killing one teacher and injuring another and nine students.⁹⁵

4.2.4 Protection of captured and/or injured combatants

Under IHL, captured and/or injured combatants should be treated as prisoners of war and as such are accorded certain rights (Protocol II, Article 5). Historically the exchange of POWs has not been a common occurrence in the Sri Lankan conflict. In this current phase of the conflict the issue of protection for combatants once more resurfaced. On 18 June two soldiers, Senaratnage Ranjith Priyanatha Herath and Wijeratnage Ajith Asokaratne, who were conducting a clearing operation in Welioya were reported missing.

⁹⁴ LTTE Peace Secretariat, "Humanitarian measures for civilians of Mutur East"

⁹⁵ *The Sunday Leader*, Amantha Perera, "Violence engulfs Vakarai," 17 December 2006

A few days later the LTTE handed over the bodies of two soldiers to the ICRC. At the inquest, it became evident that the bodies were mutilated suggesting that they had been tortured.⁹⁶

4.2.5 Protection of humanitarian workers

In 2006, it is estimated that at least 26 humanitarian agency workers were killed and a further 13 were disappeared, underscoring the lack of due regard to IHL.⁹⁷ The most high profile case was the massacre of seventeen aid workers from the Action Contre La Faim who were killed in their office premises in Mutur on 4 or 5 August. The Government and the LTTE blamed the other for the killings, with each side contesting that the other was in control of the town during that period. Humanitarian workers are protected by codified and customary international law including the Geneva Conventions and their Additional Protocols, both generally as civilians and specifically as relief societies' personnel.⁹⁸ The principle central to the protection of humanitarian workers under international humanitarian law is that a distinction must be made between combatants and civilians. Though Sri Lanka has not signed up to Protocol II, including Article 18 which deals specifically with humanitarian workers, and has not ratified Common article 3 of the agreement, it is still bound by customary law as noted above. Specific recognition is extended to humanitarian workers under customary IHL including under the Geneva Convention, Protocol II (Article 18 in particular).

⁹⁶ Island, Dinaseena Ratugamage, "LTTE hands over mutilated bodies of two soldiers to ICRC," 2 June 2006, *Daily Mirror*, Kurulu Kariyawasam, "Bodies of two soldiers handed over to Vavuniya police," 22 June 2006

⁹⁷ Based on figures compiled by the Centre for Policy Alternatives from the public realm including newspapers, human rights reports and humanitarian agency websites

⁹⁸ See section 4.2 above in this chapter on International Humanitarian Law.

4.2.6 Providing facilities critical for the survival of a community

IHL prohibits targeting or withholding civilians' access to basic facilities such as food and water (Protocol II, Article 14). The right to food, medicine and shelter are not just basics principles of humanitarian law but are also fundamental provisions of human rights as laid out in the UN Charter. On 20 July 2006, the anicut at Mavil Aru was closed, cutting off water to some 15,000 families downstream. The LTTE denied that it had shut off the sluice gate and said local villagers were responsible. In LTTE-controlled areas and government-controlled Jaffna, there were charges by both sides that the opposing parties were restricting the movement of goods and services and thereby affecting the survival of the community.

4.3 Conflict related human rights violations

The integrity of the person came under direct threat as a result of the conflict and its associated violence and security measures. The following section will detail some of the main types of violations.

4.3.1 Killings of Combatants

Both sides suffered heavy casualties due to the intensified fighting. In the early part of 2006 much of the fighting was limited to brief clashes, commando raids or individual acts of violence. In January, there were at least ten incidents of claymore attacks against the security forces which killed 14 sailors, five soldiers, four policemen and one Home Guard across the North and East.⁹⁹ On 17 June, in a clash off the coast of Pesalai between the Sea Tigers and Navy, at least 12 navy personnel were killed according to the LTTE and 30 LTTE cadres were killed according to the Defence Ministry.¹⁰⁰

⁹⁹ CPA, Cluster Report, "Monitoring Factors Affecting the Peace Process," Fourth Quarterly, November 2005 – January 2006, p.32

¹⁰⁰ See, "42 die as Lanka troops clash with rebels", <http://www.tribuneindia.com/2006/20060618/world.htm>

From July onwards the violence was more sustained, with battles raging for days if not weeks, and the utilization of the full range of the military arsenal with corresponding casualty figures. In the middle of August, battles took places on a number of fronts in Jaffna including on the Muhamalai Forward Defence Line, which reportedly resulted in the deaths of 79 soldiers and more than 100 LTTE cadres just on that FDL.¹⁰¹ On 16 October the LTTE carried out a suicide operation against a military transit point in Habarana in which more than 116 sailors were killed and 130 injured.¹⁰² This latter attack and the aerial bombardment of the Sencholai camp made clear that both sides would target those they considered combatants regardless of whether they were wearing uniform or not.

In addition to the Security Forces and the LTTE, combatants from other Tamil militant groups were involved in the fighting. In 2006, the Karuna Group became a key military actor in the East, resulting in casualties from the fighting and violence between the two groups. Approximately 20 Karuna cadres were killed when the LTTE raided its camps in Welikanda, Polonnaruwa on 30 April.¹⁰³ It was reported that 12 LTTE cadres were killed in an attack on LTTE camps in Raulkuli and Sampur on 7 May.¹⁰⁴ The LTTE insisted that on occasion the attacks by the Karuna Group were carried out with ground and artillery support from Sri Lankan security forces. On 6 September, the Karuna Group launched an operation on the LTTE camp in Kanchikudicharu resulting in some 18 casualties which the LTTE insisted included STF personnel.¹⁰⁵

¹⁰¹ *The Morning Leader*, Arthur Wamanan, "It was a military site – Govt.," 16 August 2006

¹⁰² *The Sunday Times*, Iqbal Athas, "Real heroes and mock heroics," 22 October 2006

¹⁰³ South Asia Terrorism Portal, Timeline 2006, <http://satp.org/satporgtp/countries/shrilanka/assessment2006.html>

¹⁰⁴ South Asia Terrorism Portal, Timeline 2006, <http://satp.org/satporgtp/countries/shrilanka/assessment2006.html>

¹⁰⁵ *The Nation*, Senpathi, "Sampur – a feather in the cap," 10 September 2006

The attacks and battles also took place outside the North and East. On 17 October the LTTE launched a Sea Tiger attack on the Navy Base in Galle which reportedly resulted in the deaths of one civilian, one sailor and 15 LTTE cadres.¹⁰⁶ Battles also took place outside Sri Lanka's territorial waters such as the 17 September attack on a suspected LTTE craft, some 100 nautical miles off Kalmunai, which was destroyed in a joint operation by the Sri Lankan navy and air force.¹⁰⁷

There were also a number of high profile combatant fatalities. The military suffered the loss of prominent figures such as Major Parami Kulatunge on 26 June who was killed by a suicide bomb in Pannipitiya.¹⁰⁸ A number of LTTE military leaders were also killed. In the month of May the LTTE intelligence wing leader for Batticaloa and Amparai, Ramanan was killed in Batticaloa on 21 May 2006, while in Mannar the military wing leader Rasu Mahendran and four others were killed in an explosion in LTTE-controlled areas on 10 June 2006 and Lieutenant Colonel Veeraman was killed in Nagarkovil on May 24.¹⁰⁹

4.3.2 Disappearances and abductions:

As noted above, civilians were both the victims and targets of killings and also subject to other forms of violence. Dead bodies of those abducted or disappeared began to appear in public places

¹⁰⁶ An inshore patrol boat, a coastal patrol boat, a non-operational sub chaser in addition to two oil tanks and two buildings in the base were damaged (*The Sunday Times*, Iqbal Athas, "Real heroes and mock heroics," 22 October 2006, p.11), *The Sunday Times*, Malik Gunatilleke and Gamini Mahadhura, "Aftermath of the Galle incidents," 22 October 2006, p.4

¹⁰⁷ *The Sunday Times*, Chandani Kirinde, "Attack on arms ship exposes LTTE's desperation," 24 September 2006

¹⁰⁸ *Daily Mirror*, Sunil Jayasiri, "Motorcycle Mayhem", 27 June 2006

¹⁰⁹ He was posthumously promoted to Colonel. He had been appointed as intelligence wing leader of Batticaloa and Ampara following the killing of Lt Col Nizam in a claymore attack. (*Morning Leader*, Nitharsha Theivendran, "LTTE promotes Ramanan posthumously," 24 May 2006 *Nation*, Tissa R. Perera, "Bloodiest week," June 18, p.11; *Sunday Leader*, Amantha Perera, "The writing's on the wall," 18 June 2006

in 2006, bringing “back memories of the ‘reign of terror’ of the late 1980s.”¹¹⁰ A CPA report covering the month of April reported “a body of an unidentified youth in Preethipura, Wattala on April 5; 3 beheaded bodies on the Thunmodara Puwakpitiya Road and 2 more near Warakatenna Estate, Dehiowita on April 22; a headless nude body of a young man in Mulleriyawa on April 28.”¹¹¹ According to Tamilnet, five Tamil youth who came to Kantale from Mutur were stopped and questioned by the armed forces on 22 April according to local villagers in Poddakandu. The bodies of two of these youth were found with gunshot wounds the next day.¹¹² In addition to eliminating perceived rivals or threats, in certain instances the perpetrators seemed to use the dead bodies as a means of spreading fear. In other instances, the bodies were also meant as a warning to others. Two bodies were found with multiple gun and knife injuries in Vavuniya with a note placed by the bodies warning of the consequences of giving information to the LTTE.¹¹³

The white van abduction phenomenon that has been associated with abductions and disappearances in Sri Lanka’s conflict became a dominant feature of human rights violations in 2006. Batticaloa and Welikanda in particular became vulnerable areas.¹¹⁴ On 30-31 January 10 TRO staff members were abducted; three were released but the rest remain missing. The incident was blamed on the Karuna Group, which is active in the area, but questions have been raised as to what really happened and who is responsible.¹¹⁵ In August, Colombo experienced a sharp spike in abductions.

¹¹⁰ INFORM, Situation Report: April 2006, p.4

¹¹¹ CPA, Cluster Report, “Monitoring Factors Affecting the Peace Process,” First Quarterly, February 2006 – April 2006, p.42

¹¹² Tamilnet, “Three Tamil youth killed in Trinco,” 23 April 2006

¹¹³ Thinakural, “Two bodies were found in Vavuniya with multiple gun and knife injuries and a note warning those giving information to the LTTE,” 21 April 2006

¹¹⁴ CPA, Cluster Report, “Monitoring Factors Affecting the Peace Process,” First Quarterly, February 2006 – April 2006, p.43

¹¹⁵ Tamilnet, “Paramilitaries abduct 5 TRO staff Welikanda,” January 30 2006; Tamilnet, “Another five TRO staff reported missing,” 31 January 2006; *Daily News*, 3 February 2006

According to some sources, as many as 41 people were reported to have disappeared in August alone.¹¹⁶ In some cases, the abductions also involved extortion with Tamil businessmen in particular being targeted. A lodge owner from Vivekananda Road, Kotahena disappeared on 7 July. It was reported that his mother received a call demanding that Rs 4 million be paid in Polonnaruwa and that he would be released. The money was paid but he remained missing.¹¹⁷ In other instances, abductees have been returned. On the morning of 1 September Selvamani Thavarasan, the niece of UNP MP T. Maheswaran was abducted but was released by midnight. A high profile case was the disappearance of the Vice Chancellor of the Eastern University, Sivasubramaniam Ravindranath from a high security area in Colombo – the BMICH complex – on 15 December. Professor Ravindranath had forwarded his resignation to the University Grants Commission following the abduction of the Dean of the Arts Faculty, Dr Balasingham Sugumar who was released on September 30 only after Ravindranath tendered his resignation. The UGC, however failed to accept his resignation. Two and a half months later he was kidnapped and has not been heard from since.¹¹⁸

The year 2006 also saw a surge in disappearances particularly from Jaffna. On 6 May, eight young Tamil men “disappeared” from a Hindu temple in Manduvil, Jaffna. Local people reported the sound of shots and heavy vehicles on that night. The next morning, the IDs of three of the youth and blood stains were found at the temple. Reportedly the authorities declared a 16-hour curfew when

¹¹⁶ Statement of Deputy Minister P. Radhakrishnan (UPF) (*The Nation*, Vindya Amaranayake, “Fifty Tamils abducted in August,” 3 September 2006); Letter from Mano Ganeshan (WPF) and S.B. Dissanayake (UNP) citing abductions and state failure to Norwegian Embassy (*The Nation*, Wilson Gnanadass, “Amazing disappearance of businessmen in Colombo,” 10 September 2006). *The Sunday Times*, Chris Kamalendran, “Abductions unlimited,” 24 September 2006

¹¹⁷ *Sunday Times*, Chris Kamalendran, “Abductions Unlimited” 24 September 2006

¹¹⁸ *The Sunday Times*, Asif Fuard, “Govt. denies HRW charges,” 28 January 2007

family members called for a search operation.¹¹⁹ According to the Human Rights Commission, the number of disappeared in Jaffna from December 2005 to September 2006 was 419.¹²⁰

While the LTTE continued its practice of abducting children for recruitment purposes, it also stepped up its forcible abduction of adults in 2006. In LTTE-controlled Wanni, under the slogan of '*Veetukku oru veeran allathu veeranganai*' (One hero or heroine from each house), each household was asked to contribute one person. According to one commentator, the LTTE declared that marriages conducted after August 2006 were null and placed a moratorium on marriages until men reached the age of 40 and women 35, in order to stem the tide of marriages as young people tried to avoid recruitment through the exemption of being married.¹²¹ There were some instances of escapees fleeing to nearby army or police camps.¹²²

4.3.4 Child Recruitment

Child recruitment by Tamil militant groups has for years been a defining aspect of human rights violations in Sri Lanka. The prohibition of the recruitment of persons under 18 and the use children in armed conflict has become a part of customary international law. Even though armed groups are not signatories to the Optional Protocol to the Convention on the Rights of the Child, the protocol places obligations on upon non-state armed forces. Article 4 states that "armed groups that are distinct from the armed forces of a state should not under any circumstances, recruit or use in hostilities persons under the age of eighteen." The LTTE in particular stands accused of abducting and recruiting underage

¹¹⁹ INFORM, "Some Key Concerns Regarding the Human Rights Situation"

¹²⁰ AHRC, "Sri Lanka: White vans without number plates: the symbol of disappearances returns," 13 September 2006

¹²¹ *Daily Mirror*, "Boosa detainees to be released," 25 January 2007

¹²² CPA, Cluster Report, "Monitoring Factors Affecting the Peace Process," First Quarterly, February 2006 – April 2006, p.42

children into the LTTE. While making a number of commitments to desist from this practice, including through a UNICEF Action Plan for Children Affected by Armed Conflict, the LTTE continued to recruit children during the peace process. Child recruitment cases accounted for the majority of CFA violations ruled by the SLMM against the LTTE throughout the peace process. A high profile case that was reported in the media in March was the recruitment of 17-year old Sriyanathasundaram Chandrakumar and 15-year old K. Vinoharan who were both abducted by the LTTE in Trincomalee and escaped. While highlighting the continuing spate of abductions, it also demonstrated the lack of adequate State attention to the protection and rehabilitation of ex-child combatants.

In October, 2006 the LTTE announced the introduction of new "legislation" – the Tamil Eelam Child Protection Act—which among other things included the outlawing the use of children as combatants. The LTTE also announced that it would release all child recruits from the its military force by 1 January 2007. The recruitment of children, however continued. UNICEF reported in 2006 an average of about 55 cases per month, which may not reflect the actual scale of recruitment.¹²³ It is noteworthy that the LTTE introduced the new legislation a week prior to the visit of the Special Advisor to the UN Special Rapporteur on Children in Armed Conflict, Allan Rock.¹²⁴ In his statement, Rock noted that the LTTE had not complied with its commitments made in the Action Plan and continued to recruit children and had failed to release child soldiers verified by UNICEF.¹²⁵

In 2006, the Karuna Group also emerged as a significant armed actor alleged to be involved in various human rights abuses including child recruitment. In June, the group conducted 2-day

¹²³ UNICEF figures quoted in HRW, "Improving Civilian Protection..." p.37

¹²⁴ *The Sunday Leader*, Jamila Najmuddin, "LTTE and Karuna faction guilty of child recruitment," 10 September 2006

¹²⁵ Statement from the Special Advisor on Children and Armed Conflict, 13 November 2006

mass recruitment in Batticaloa Town and Valaichennai where it is reported that 125-140 children were taken away.¹²⁶ The situation was so insecure that army officers requested an INGO to accompany children to and from school within the Batticaloa Town.¹²⁷ The issue of state complicity vis-à-vis the Karuna Group was raised by successive reports. Referring to the recruitment by the group, Rock claimed that he had evidence of linkages between the security forces and the group.¹²⁸ In a report with an explanatory title "Complicit in Crime – State Collusion in Abductions and Child Recruitment by the Karuna Group," the leading international human rights group, Human Rights Watch stated that the group had abducted and recruited at least 200 children. It charged that "No armed group could engage in such large-scale abductions, and then hold and train the abductees for combat in established camps without government knowledge and at least tacit support." Pointing to the abduction and recruitment of 135 children by the Karuna Group between May and November, the Special Advisor to the UN Representative for Children and Armed Conflict Alan Rock reiterated the charge of State complicity. He stated that he "found strong and credible evidence that certain elements of the government security forces are supporting and sometimes participating in the abductions and forced recruitment of children."¹²⁹

Children were also believed to be fatalities of the conflict. An underage LTTE combatant was killed while laying a claymore mine in Vavuniya in April.¹³⁰ The dangers of resisting child recruitment were also made clear when, in Mavadildai, Batticaloa 12 year old

¹²⁶ There were reports of recruitment preceding the June spate of abductions, like the boy abducted on his way to school in Batticaloa Town on 22 May by a group of men in a double cab (*Daily Mirror*, Senaka de Silva, 23 May 2006)

¹²⁷ CPA, Cluster Report, "Monitoring Factors Affecting the Peace Process," First Quarterly, February 2006 – April 2006, p.43

¹²⁸ United Nations, Statement from the Special Advisor on Children and Armed Conflict, 13 November 2006.

¹²⁹ Statement from the Special Advisor on Children and Armed Conflict, 13 November 2006

¹³⁰ Lanka Business Online, "Child Soldier Killed in Sri Lanka Mine Attack," 17 April 2006

boy, S. Sathyam was killed on 12 May in front of his grand mother when he reportedly refused to join the LTTE.¹³¹ Also in Batticaloa, Nirmalkumar, a father of three, was shot dead reportedly for not sending his children for military training.¹³²

4.3.5 Other acts of violence and intimidation:

Intimidation takes multiple forms and is an under reported issue where it has been difficult to gather much information in a systematic manner. One of the more high profile cases reported was the threats, allegedly by the LTTE and student groups, against Professor Ratnajeevan Hoole, who was appointed Vice Chancellor of the Jaffna University. He first moved to Colombo for security reasons but later fled the country on 21 April 2006.¹³³ As noted above, other academics also came under threat. On 27 April the car of the Vice Chancellor of the South Eastern University, Professor Hussein Ismail was shot at, following his re-appointment. In the South various actors faced intimidation. Even a cabinet minister, Periyasamy Chandrasekaran, expressed fear and charged that he was being monitored by army intelligence.¹³⁴ As one commentator noted, groups that campaigned against disappearances during the Presidency of R. Premadasa are now silent, demonstrating that the violence and intimidation has strengthened the culture of fear and impunity.¹³⁵

Intimidation can take multiple forms such as direct violence against persons, attacks on property, verbal or written threats. In April, women working in NGOs found themselves under threat following a campaign in Batticaloa and Ampara District, in both the Tamil and

¹³¹ Weekend Standard, "World media silent on child killing," 3 June 2006, Island, "Tigers kill boy (12)," 22 May 2006,

¹³² *Daily Mirror*, Police Log, Senaka de Silva, "Death disobeying," 22 June 2006

¹³³ D.B.S Jeyaraj, "Vice Chancellor Hoole forced to flee Sri Lanka", 6 May 2006, <http://transcurrents.com/tamiliana/archives/147>

¹³⁴ *The Sunday Leader*, "Tamil parties allege govt. responsible for Colombo abductions," 10 September 2006

¹³⁵ *The Sunday Leader*, Dilrukshi Handunetti "Enter the goni billas," 10 September 2006

Muslim communities, which intensified after reports of increases in abortion figures. This was followed by leaflets calling on women to stop working, which led to some women resigning or taking leave.¹³⁶ The LTTE's introduction of military training for Tamil civilians even in government-controlled areas left little room for civilians to object and opt out. Civilians found themselves having to report for training which not only meant the loss of working days but also increased their insecurity as they were possibly noted by the security forces.¹³⁷ The fear of getting called up by the LTTE led to adults seeking refuge with the army or fleeing to another part of the North and East.¹³⁸

Intimidation was also used against displaced and other conflict affected persons by the State and armed groups. The issue of forcible resettlement of displaced persons became a key issue in 2006. The Muslim displaced from Mutur, numbering 40,000 persons and who had sought shelter in Kanthale and Kinniya were forcibly returned by the authorities in early September. In Camp 98 in Kanthale for instance the 72 displaced families were told that they had to leave by the next day as the camp would be closed and all services stopped: 24 families decided to board the government buses the next morning, but the rest were fearful of returning. It was only when the police accompanied by the Kanthale Divisional Secretary ordered the remaining families to leave that they did so.¹³⁹ The intimidation intensified the culture of fear which made reporting of human rights violations increasingly difficult.

4.3.6 Arrests and Detention

In response to the increasing levels of violence and insecurity, the Government intensified security measures including arrests and

¹³⁶ HRW, "Improving Civilian Protection...", p.24; CPA, Cluster Report, "Monitoring Factors Affecting the Peace Process," First Quarterly, February 2006 – April 2006, p.43

¹³⁷ *Ibid.*, p.42

¹³⁸ *Ibid.*

¹³⁹ HRW, "Improving Civilian Protection...", p.19-20

detention. The Government carried out cordon and search operations not just in the North and East, but also in the South. As the Assistant Defence Secretary, DIG (Retired), H.N.B.G. Kottakadeniya stated, "Every nook and cranny in the city [Colombo] should be searched and Colombo's vulnerability to terrorist attacks eliminated."¹⁴⁰ Tamil youth from the North and East were the frequent targets of these operations. In the South, the cordon and search operations were initially presented by the Government not just as anti-terrorist operations but as a crackdown on crime.¹⁴¹ In Colombo, 97 Tamils were arrested following the April suicide bomb attack against the Army Commander, Sarath Fonseka.¹⁴² Tamils in the North and East were also subject to cordon and search operations and arrests. Tamil IDPs fleeing from Vakarai for instance were subjected to screening as they crossed into government-controlled areas and individuals were arrested.¹⁴³ In some cases, people were detained without any charges levelled against them, as in the case of the *Mawbima* newspaper Journalist, Mounasamy Parameswary who was arrested on 22 November and detained under the PTA. Human rights lawyer KS Ratnavale stated that "detainees in Guantanamo are better off, because there are legal methods to challenge it. But here, there are legal defence mechanisms in place but only in name."¹⁴⁴

5 Torture and custodial deaths unrelated to the ethnic conflict

It needs to be noted that while there were reports of torture relating to the armed conflict, there were also cases, seemingly unrelated to

¹⁴⁰ *Daily Mirror*, Kurulu Kariyakarawana, "Kotakadeniya says Tigers in City," 19 January 2006, p.1

¹⁴¹ *Sunday Leader*, "Over 900 people arrested in search operations," 1 January 2006, p.1; *Daily Mirror*, Senaka De Silva, "Several detained after massive search," 2 January 2006, p.1

¹⁴² Centre for Policy Alternatives, Cluster Report, "Monitoring Factors Affecting the Peace Process," First Quarterly, February 2006 – April 2006, p.4, http://www.cpalanka.org/research_papers/DPSG_Cluster_ReportQ4.pdf

¹⁴³ *Ibid*, Fourth Quarterly, November 2006-January 2007, p.19 & 36

¹⁴⁴ *Ibid*, p.23

the conflict, reported from the South. The Asian Human Rights Commission (AHRC), one of the key bodies monitoring torture in Sri Lanka, noted that torture in police custody continued, although the number of fundamental rights complaints have decreased since 2005.¹⁴⁵ A 24-year old man D. Chamara Lanka, accused of stealing, was tortured during his illegal detention by the Kurunegala Police between 27-30 May. The police subjected him to various forms of torture including chaining him to a window for hours, beating him with a pole, suspending him from a pole by his limbs (*Dharma Chakranya*) and throwing water at his face to suffocate him.¹⁴⁶

Incidents of custodial deaths were also recorded in 2006 which are unrelated to the armed conflict. According to AHRC, custodial deaths "dramatically increased in 2006."¹⁴⁷ The AHRC report for 2006 notes that:

There are two types of extrajudicial killings taking place, mainly through the police and these are extrajudicial killings after the arrest of criminals. In this first category there are reports of several deaths, almost every week in the newspapers, with a short announcement that a person who had been arrested and in police custody, and as a result of the ensuing conflict he had been killed. The second category is death after arrest of those in police custody, mostly due to torture. The pattern of cases clearly shows the breakdown of supervision at the time of arrest during detention and in some instances even in prison custody.¹⁴⁸

¹⁴⁵ AHRC, "Sri Lanka: The situation of Human Rights in 2006," 21 December 2006, p.30-1

¹⁴⁶ AHRC, Urgent Appeal, "Sri Lanka: Brutal torture of a young man by the Kurunegala police after being arbitrarily detained," 5 July 2006

¹⁴⁷ AHRC, "Sri Lanka...2006," p.25

¹⁴⁸ *Ibid.*, p.25-6

The death in custody of the “balloon man” in Rathnapura highlighted the latter instance, and made clear that even outside the conflict area, the state structures of law and order failed to respect basic human rights standards. Sunil Perera and Gamini Munaweera were arrested in Rathnapura following phone threats made to a local school, Mihindu Maha Vidyalaya, demanding that it close. They were kept in custody from 29 July to 4 August. During their detention in Kuruwita Prison, they were reportedly tortured. Perera died in custody, while Munaweera was released on 9 August.

6 Conclusion

It is clear that the range and volume of human rights violations suffered by Sri Lankans in 2006 were not just due to the renewal of violence but also to the manner in which the armed actors operated in the context of an undeclared war. Many of these violations directly result from the armed conflict. The lack of respect for IHL shown by the state, LTTE and other militant groups is alarming. Civilians, combatants, humanitarian workers, religious workers, places of worship and education and hospitals have all suffered as a result.

Addressing the situation and safeguarding the right of liberty requires multiple measures, including bringing an end to the war and ensuring respect for the CFA. A concerted effort must be made to reclaim democratic space and strengthen the institutions that are mandated to do so. The 17th amendment must be enforced, and the HRC’s independence must be ensured through the appointment of independent commissioners. The legal institutions of the land—the Attorney General’s Department and the judiciary—must be challenged to carry out their duties with integrity of purpose and the protection of human rights foremost on their agendas.

The culture of impunity which pervades our society must be reversed. It has become increasingly clear that national mechanisms

are unable and unwilling to investigate the violations and prosecute perpetrators. In such a context, civil society and human rights organisations called in 2006 for human rights monitoring with a strong international component. The Sri Lankan Government has preferred to set up *ad-hoc* mechanisms, resist the creation of an international monitoring body on the ground and continue to advocate local bodies. However, as the AHRC has noted, while “the discussion about monitoring by an international body has been trivialized with all sorts of suggestions about local monitoring, if there was such a possibility of local monitoring, the situation of continuous killings could not have happened.”¹⁴⁹

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¹⁴⁹ AHRC, “Sri Lanka: Will it be too late for the arrival of international assistance to monitor gross violations of human rights?” 10 November 2006

III

JUDICIAL PROTECTION OF HUMAN RIGHTS

*Kishali Pinto-Jayawardena**

1 Introduction

The year under review was typically characterized by fewer petitions invoking the jurisdiction of the Supreme Court in terms of Article 126.¹ As research carried out by the Law & Society Trust revealed,² the decrease in the filing of petitions was particularly in respect of alleged violations of Article 11 (right to freedom against torture) of the Constitution of the Democratic Socialist Republic of Sri Lanka, 1978 (hereafter the Constitution).

While opinions may differ as to the precise reasons for the decrease in the number of fundamental rights petitions,³ commensurately there was an even sharper decrease in the overall number of judgments delivered under Article 126 notwithstanding some decisions of the Court in cases that were politically controversial and necessitated much publicity.

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¹ "In 2004, the total number of fundamental rights applications filed was 626; in 2005, it was 517. By the end of November 2006, the number of applications filed was 342, thus 175 less than in 2005 and 284 less than in 2004" as detailed in "Sri Lanka; State and Rights collapsing amidst growing violence and injustice," *The State of Human Rights in Eleven Asian Nations* (Asian Human Rights Commission (AHRC): Hong Kong, 2006), p.288.

² See section 2.1 of this chapter.

³ "[This is] despite the fact that the political climate and the level of violence in the country has taken a turn for the worse. Under the present circumstances, the number of fundamental rights applications should have, in fact, increased," *supra* n.1

As in previous years, this chapter will examine the relevant decisions of the Court under Article 126 of the Constitution impacting on rights during the period in question. In accordance with immediate past chapters, Determinations of the Court in regard to Bills as well as decisions of the Court of Appeal having a bearing on questions of rights will be examined. Whenever judicial decisions reveal common issues for analysis, these issues will be dealt with separately. In other instances, the analysis will be included in the general examination of the judicial decision in question.

The final two segments of this chapter will look at the impact of the Optional Protocol to the International Covenant on Civil and Political Rights (OP-ICCPR) in regard to the protection of rights during 2006. First, it will examine relevant Communications of Views by the United Nations Human Rights Committee (UNHRC) in the exercise of its authority in terms of the ICCPR First Optional Protocol during the year in review. Secondly, it will critically examine the decision of the Supreme Court in the *Singarasa Case*, where the Presidential act of accession to the ICCPR First Optional Protocol was held to amount to an unconstitutional exercise of legislative power as well as an equally unconstitutional conferment of judicial power on the Committee.

2 Judicial Response of the Supreme Court in the Context of Civil and Political Rights

2.1 Decrease of Fundamental Rights Applications Alleging a Violation of Article 11

Research by the Law & Society Trust⁴ has revealed that some 115 petitions involving alleged Article 11 violations were filed in 2000 with the numbers being fairly constant therewith in 2001 and 2002.

⁴ I am indebted to attorney-at-law MKP Chandralal for obtaining the petitions/judgments from the registry of the Court. The most diligent efforts were taken by the Law & Society Trust to ensure the accuracy of the data

However, from that point onwards, the number of applications in this respect dwindled progressively until, in 2006, there were only 40 applications filed.⁵

The following observation puts forward a relevant point of view in this regard:

Many of the lawyers who, in previous years, had undertaken fundamental rights cases on behalf of victims and who had acquired the knowledge and the skills needed in the pursuit of such applications, are now refusing to undertake such cases as they feel that the increase of harassment in their pursuit has reached intolerable levels.

Being exposed to heavy levels of intimidation, many of these lawyers feel that it is both unfair to the victims and to themselves, to undertake such cases, which in all likelihood, will lead to unpleasant experiences and also are unlikely to produce a satisfactory result, despite the justifiability and gravity of the complaint. They manifest a 'once bitten, twice shy' approach with regard to the pursuit of such applications.⁶

This decrease is mirrored even more starkly in the number of judgments delivered, upholding a violation of Article 11. While such judgments had, in any event, been on the decline from the

through a process of checking and cross checking but it must be said that obtaining the data particularly relating to the petitions filed and the status of the relevant cases proved to be extremely difficult. The obtaining of data was limited to Article 11 applications given the pre-eminent nature of the right allegedly infringed and the ongoing research also examines instances where leave to proceed has been refused by the Court.

⁵ *Ibid.*

⁶ AHRC, "Sri Lanka; State and Rights collapsing amidst growing violence and injustice," p.288.

year 2000,⁷ this trend was even more apparent thereafter. During 2006, for example, only two judgments were delivered,⁸ both of which upheld a violation of Article 11 in circumstances that will be examined in this chapter. The previous year (2005) saw four judgments delivered,⁹ out of which the Court pronounced on a rights violation in one instance.¹⁰

2.2.1 Analysis of Case Law in terms of Article 11 and Article 13(1) and (2) – the Relevant Decisions

a) *KPT Kumara v. Silva*¹¹

This case involved a complaint of grievous torture lodged by a thirty one year old artisan against police officers of the Welipenna police station. The petitioner had been arrested on suspicion of his involvement in robbery. What distinguished this case from the ordinary was the allegation that the sub-inspector, (the 1st respondent in the case), had been instrumental in coercing a person suffering from tuberculosis to spit into the petitioner's mouth with the intention of causing the petitioner also to contract the disease.

The Court declined to enter a violation of Article 13(1) (freedom from arbitrary arrest) on the finding that a reasonable suspicion

⁷ According to the research by the Law & Society Trust, seven judgments were delivered in terms of Article 11 of the Constitution in 2000, namely SC(FR) Nos. 33/99, 547/98, 837/97, 255/98, 802/99, 279/98, 280/98 out of which the Court held a violation had been established in four of the complaints.

⁸ *Koralaliyanage Palitha Thisa Kumara v. Silva and Others* SC(FR) Application No 121/2004, SCM 17.02.2006 and *M.K.P Prasanna Chandralal, AAL on behalf of Dalkadura Arachchige Nimal Silva v. ASP Ranmal Koditwakken and Others* SC(FR) Application No. 565/2000, SCM 16.11.2006).

⁹ SC(FR) Nos. 263/01, 231/03, 17/03, 553/02.

¹⁰ *Brahmanage Arun Sheron Suranga Wijewardana v. Priyasan Ampawila and Others*, SC(FR) No. 553/02. SCM 27.05.2005 (judgment of Raja Fernando J. holding that the petitioner's rights under Article 11 and 13(2) were violated and awarding compensation in the amount of Rs. 12,000).

¹¹ *Koralaliyanage Palitha Thisa Kumara v. Silva and Others*, SC(FR) Application No. 121/2004, SCM 17.02.2006.

existed that the petitioner had participated in the robbery following a complaint, thereby justifying his arrest. Likewise, in regard to the alleged violation of Article 13(2), it was ruled that the burden of proof in respect of his allegation that he had been detained for over 81 hours had not been satisfied. However, in holding a violation of the petitioner's rights in terms of Article 11, familiar principles reflected in earlier jurisprudence were reiterated. Given that the assistant judicial medical officer had recorded thirty one non grievous injuries and one grievous injury resulting in the fracture of the petitioner's ankle, judicial dismissal of the 1st respondent's explanation that the injuries had been caused by the use of "reasonable force to apprehend the petitioner"¹² was crisp. Justice Shirani A. Bandaranayake, writing for the Court, ordered a total sum of Rs 25,000 as compensation and costs for the violation of rights.¹³

b) *MKP Chandralal v. Kodituwakku*¹⁴

The virtual petitioner stated that he had been assaulted and detained *incommunicado* for a period of three days while being handcuffed to a bed and without food, water or toilet facilities. During the period of detention, he was tortured resulting in, *inter alia*, the loss of one eye. The respondent police officers denied the torture and stated that the virtual petitioner was a notorious underworld figure and had been apprehended after attempting to run away, during which scuffle, the injuries had resulted.

The Court accepted the virtual petitioner's version of 19 June 2000 as being the date on which he was arrested, in contrast to the respondents' version of the date of arrest being 08 July 2000, which

¹² At p.16 of the judgment.

¹³ The 1st respondent sub-inspector to personally pay Rs 5,000 and the State to pay Rs 20,000.

¹⁴ *MKP Prasanna Chandralal, AAL on behalf of Dalkadura Arachchige Nimal Silva v. ASP Ranmal Kodituwakku and Others*, SC(FR) Application No. 565/2000, SCM 16.11.2006; judgment of Jayasinghe J.

was some eighteen days later. Complaints had been made by the virtual petitioner's wife and mother to various authorities, including the Police Head Quarters/the President and the Human Rights Commission, attesting to the fact of his arrest and detention on 19 June 2000. These notifications were themselves made on dates prior to the Respondent's version of the date of arrest, namely 08 July 2000.

Further, and most importantly, the evidence of an independent witness who had also been in police custody at the same time, as well as the evidence of an investigating officer, confirmed the custody of the virtual petitioner at a date earlier than that alleged by the respondents. Consequently, the Court held that the arrest of the virtual petitioner on 19 June 2000 (denied by the respondents) was contrary to Article 13(1) and that his continued detention up to 08 July 2000 (the latter date being the date on which the detention order was obtained) was contrary to Article 13(2). Meanwhile the medical evidence supported the virtual petitioner's allegations and a violation of Article 11 was upheld.

2.2.2 Critical Analysis of the Decisions

a) Violation of Article 11

In both the cases above, medical evidence corroborated the injuries and the Court was not required to advance much beyond the boundaries of established case law in finding the constitutional violations concerned. The accepted principle that even criminals deserve due process was cited by the two Justices writing for the Court in each case, along with the now almost inevitable citation of *Amal Sudath Silva's case*.¹⁵

¹⁵ Vide *Amal Sudath Silva v. Kodituwakku* [1987] 2 SLR, 119. In one of the many cases thereafter that reiterated this principle, a specific argument that an alleged bad record of the petitioner should be held against him was summarily dismissed by Court, pointing not only to the presumption of innocence but also that by the respondent's actions in depriving the petitioner of life, he lost the opportunity to redeem the alleged bad record – see *Silva v. Iddamalgoda*

b) Violation of Article 13(1) and (2)

In *MKP Chandralal v. Kodituwakku*, it was ruled that the material before Court was quite adequate to cause the arrest of the virtual petitioner and that the allegations against him could not be construed as being vague. Hence, the Court dismissed the contention that reasons for the arrest had not been given. However, it was judicially opined¹⁶ that the concern here was not "whether there was well founded suspicion for the arrest but whether the arrest was according to procedure established by law."¹⁷ Thus:

Since the respondents deny that the arrest was on 19.06.2000 and as the evidence is to the contrary, a declaration for the infringement of Article 13(1) is inevitable.¹⁸

In other words, the fact that the virtual petitioner was credibly suspected of involvement in the offences in question did not appear to have precluded the Court from declaring that his very arrest was unconstitutional. In contrast, in *KPT Kumara v. Silva*, judicial abstention from finding a violation of Article 13(1) was based on the very fact that the petitioner was an individual against whom there had been a justifiable suspicion of involvement in crime. Here too, there had been a dispute between the petitioner and the respondents regarding the date of arrest; however, the Court preferred to consider this in the context of the question of whether there had been unlawful detention in violation of Article 13(2), rather than in relation to Article 13(1), and decided in the negative, consequent to accepting the respondents' version of the date of arrest.

[2003] 2 SLR, 63 and relevant discussions in the chapter on Judicial Protection of Human Rights, *Sri Lanka: State of Human Rights 2005* (Law & Society Trust (LST): Colombo, 2006), p.27.

¹⁶ At p.10 of the judgment.

¹⁷ Article 13 (1) states "No person shall be arrested except according to procedure established by law. Any person arrested shall be informed of the reason for his arrest."

¹⁸ *Ibid*, n.16

In considering this apparent divergence of judicial opinion, it is a pertinent question as to whether judicial reasoning in *MKP Chandralal v. Kodituwakku* that the respondent police officers had lied about the date of arrest was a fact going towards a judicial finding of unlawful detention in terms of Article 13(2) rather than unlawful arrest in terms of Article 13(1).¹⁹ This is all the more so given that on the facts of this case, acceptance of the date of the arrest on the petitioner's version (*viz* being 19.06.2000) had a crucial bearing on the length of time that he was kept in police custody as the detention order had been obtained only on 08.07.2000. Though the Court did find a violation of Article 13(2) as a result of the police cover up regarding the date of arrest, the application of this fact to the judicial finding of a violation of Article 13(1) is more debatable.

The exact nature of the relationship between Article 13(1) and Article 13(2) has been the subject of much case law of the Court; in *Channa Pieris v. Attorney General*²⁰ which is a decisive authority on

¹⁹ It is axiomatic that a finding of violation of Article 13(2) rights necessarily involves the failure to produce before a magistrate before a reasonable time period. Article 13 (2) states "Every person held in custody, detained or otherwise deprived of personal liberty shall be brought before the judge of the nearest competent court according to procedure established by law and shall not be further held in custody, detained or deprived of personal liberty except upon and in terms of the order of such judge made in accordance with procedure established by law." The Code of Criminal Procedure Act, No 15 of 1979 (Section 37) specifies an upper limit of 24 hours detention at a police station following which the suspect must be produced before a Magistrate. It has consequently been held that a suspect must be brought before a magistrate within twenty four hours of the arrest, (vide for example, *Faiz v. Attorney General* [1995] 1 SLR, 372). The recent impact of the Code of Criminal Procedure (Special Provisions) Act No 15 of 2005 and 42 of 2007 which enacts a proviso to the rule regarding prohibition of detention of person arrested without a warrant for more than twenty four hours by allowing detention in respect of a particular category of offences for a further period not exceeding twenty-four hours, so however that the aggregate period of detention shall not exceed forty eight hours, is also relevant. Extended detention according to this special provisions amendment is subject to magisterial order upon a certificate submitted by a police officer not below the rank of the Assistant Superintendent of Police.

²⁰ [1994] 1 SLR, 1

this question, it was affirmed that though there is an inextricably linked relationship between Article 13(1) and Article 13(2), each has a separate rationale in the scheme of constitutional rights.

c) Violation of Article 14(1)(g)

The virtual petitioner contended in *MKP Chandralal v. Kodituvakku* was that he had been deprived of his right in terms of Article 14(1) (g) to engage in his lawful occupation as a result of the unlawful arrest and detention. This contention was dismissed by Court for the reason that his arrest had been occasioned by a well founded suspicion of the respondent police officers that he had been engaged in the commission of a number of offences.²¹

d) Vicarious Liability

Charges of vicarious liability against superior officers, (the officer-in-charge of the police station and the Assistant Superintendent of Police in the two cases respectively), were also dismissed on the basis that there was insufficient evidence implicating them. In *KPT Kumara v. Silva*, the 2nd respondent officer-in-charge of the police station was absolved from responsibility due to his absence on the day that the petitioner had been brought in and subjected to torture, which therefore, in the Court's view, did not make the 2nd respondent responsible on the ground of vicarious liability.²²

In *MKP Chandralal v. Kodituvakku*, the judges appeared satisfied with the defence of the 1st respondent ASP that he had been elsewhere on the day of arrest in question. However, the question of the non-involvement of the ASP during the continued detention of the virtual petitioner at the ASP's office, during which time he was grievously assaulted, appears not to have been addressed by the Court apart from stating that 'there was no specific allegation

²¹ At the time of arrest, the virtual petitioner was in possession of an unlicensed revolver and live ammunition, see p.12 of the judgment.

²² At p.18 of the judgment.

that the 1st respondent was concerned in the assault and torture of the virtual petitioner.²³ In addition, while the respondent officer-in-charge in *KPT Kumara v. Silva* had, at least, absolved himself to some extent by directing that the tortured petitioner should be afforded medical attention at the point that the petitioner was brought before him, the same minimum standard of due diligence was not evidenced in *MKP Chandralal v. Kodituwakku*.

The question therefore, (in so far as the vicarious liability of the respondent ASP in *MKP Chandralal v. Kodituwakku* was concerned), was whether the ASP had discharged his responsibility in regard to acts committed by his subordinates and in his place of work to the standard required in law? Previous case law had declared the high responsibility of superior officers in no uncertain terms. Thus, in *Silva v. Iddamalgoda*,²⁴ the 1st respondent OIC's responsibility and liability was not judicially restricted to participation, authorisation, complicity and/or knowledge of the acts of torture and cruelty meted out to the petitioner. On the contrary, he was held liable due to his not ensuring that the petitioner was being treated as the law required; in other words, his culpable inaction included failure to monitor the activities of his subordinates, which would have prevented further ill treatment of the petitioner, and failure to investigate any misconduct.

Similarly, the 3rd, 4th and 5th Respondents in *Wewalage Rani Fernando (wife of deceased Lama Hewage Lal) and others v. OIC, Minor Offences, Seeduwa Police Station, Seeduwa and eight others*²⁵ – the OIC, Negombo Prison, the chief jailor and the Superintendent of Prisons, Negombo Prison – were found liable, (even though there was no evidence of their direct implication in the assault on the deceased), on the judicial finding that there had been dereliction of their duties.

²³ At p.13 of the judgment.

²⁴ [2003] 2 SLR, p.63.

²⁵ SC(FR) No. 700/2002, SCM 26.07.2004.

3 Judicial Response of the Supreme Court in the Context of Right to Equality

As the cases dealt with in this chapter affirm different aspects of a violation of Article 12(1), the issues relevant to each case will be analysed separately, unlike in the preceding segment.

3.1 *Mahinda Rajapakse v. Chandra Fernando, IGP and others*²⁶

The actions of the head of police and police officers attached to the Criminal Investigations Department (CID) in proceeding to investigate the petitioner for alleged misappropriation of funds and criminal breach of trust by transferring donations that he had received in the post-tsunami period to a private account, namely the "Helping Hambantota" fund, were in issue. The petitioner contended that he had been denied the equal protection of the law by the commencement of the criminal investigation, its continuance and the filing of the "B" Reports in the Magistrate's Court.

At the time that the petition was filed, Rajapakse was the Prime Minister whose nomination to contest the then imminent Presidential elections from the Peoples Alliance was being considered by that party's central committee. The fact that a fundamental rights petition by the country's Prime Minister was filed against senior police officers (forming part of that same government) alleging abuse of power, might appear vastly peculiar to some but not to those familiar with the extreme vagaries of Sri Lanka's political culture. This aspect will be referred to later. The allegation made by the petitioner was that the police officers were acting in concert with the opposition to discredit him in view of the Presidential

²⁶ SC(FR) No. 387/2005, SCM 27.03.2006, judgment of Chief Justice Sarath Nanda Silva. Leave to proceed and interim order stopping the investigations prior to the 2005 Presidential Elections was granted in 2005. Given its importance in the context of police actions vis a vis a first information, the interim order was discussed in "Judicial Protection of Human Rights," *Sri Lanka: State of Human Rights 2006*, p.136.

election campaign. The legal question was as to whether the police were justified in initiating the said investigations or whether their actions had resulted in a violation of Article 12(1). The succeeding analysis takes into account the facts of the case as disclosed in the judgment.

3.1.1 Relevant Issues arising from the Case

a) The Nature and Importance of the First Information

The police actions were consequent to a complaint being lodged by the 4th respondent, an opposition member of parliament, at the police headquarters. The 4th respondent had failed to file a complaint at a police station but had forwarded a written complaint to the police headquarters which, in the opinion of the Court did not satisfy the requirements of a "first complaint."²⁷ The Court emphasized the significance of the first information in the process of a criminal investigation and the importance of the correct verifiability of a complaint. At all times, a complaint should be recorded at a police station as opposed to the police headquarters, it was stressed. This point was of central importance to the judicial ruling that the petitioner's rights in terms of Article 12(1) had been violated.

Section 109(1) of the Code of Criminal Procedure Act (hereafter the Code) states that "every information relating to the commission of an offence may be given orally or in writing to a police officer or inquirer" while subsequent sub-sections require meticulous care to be taken in entering such first information in the Information Book, to be kept by the officer in charge of the relevant police station. The Court's ruling was that such meticulous care had not been followed in this case and that, indeed, the police officers concerned had engaged in fabrication of the documentation. It was opined that the "very commencement of the investigation on the basis of totally hearsay information without any supporting documentary

²⁷ At p.14 of the judgment.

evidence”²⁸ was contrary to procedure established by law and was a violation of Article 12(1). The explanation of the Secretary to the Prime Minister that the post-tsunami donations had been properly deposited was judicially affirmed with the untrustworthiness of the purported written complaint and the subsequent statement of the 4th respondent at the CID office being emphasized. The fact that the entirety of the donations received was in an account in the Standard Chartered Bank and that this was within the control primarily of the Secretary to the Prime Minister (“a senior public officer”) was specifically adverted to.

b) Fabrication of Documentation by the police

The Court was of the view that the relevant documentation at the police headquarters and elsewhere had been fabricated, resulting in a “jumble of prevarication regrettably done at the highest level of the police.”²⁹

c) Importance of Proper Pleadings

A matter of some importance in the case was the fact that the legal pleadings filed by counsel appearing for the 4th respondent in court appeared to have been seriously flawed as, for example, the 4th respondent had failed to controvert an averment by the petitioner that the 4th respondent’s complaint was “totally false and malicious and made for a collateral purpose.”³⁰

Further, the said written complaint of the 4th respondent had not been apparently annexed to the papers of the 1st Respondent IGP

²⁸ At p.25 of the judgment.

²⁹ At p.16 of the judgment. Such observations by the Supreme Court have not been uncommon in our jurisprudence. See assertions by the Court that tampering with the official record has become a habit on the part of police officers in *Kemasiri Kumara Caldera’s Case* SC(FR) Application No. 343/99, SCM 6.11.2001.

³⁰ At p.1 and 12 of the judgment.

nor the 2nd Respondent DIG, CID.³¹ Produced by the 4th respondent in his own papers, the Court highlights several errors in the contents of this document; including the fact that it was not typed on the letterhead of the 4th respondent and did not contain the name and address of the 4th respondent as the person making the statement in Sinhala. It was also not date stamped nor was there any endorsement of any officer authenticating its receipt at the police headquarters.

d) *Liability of a person not forming part of the executive in the context of Article 126*

The 4th respondent's liability as an opposition politician was found to rest on the fact that he had been guilty of connivance with the executive and was responsible for setting the process of (wrongful) investigation of the petitioner in motion.³²

3.1.2 Critical Analysis of the Decision

The central issue in this case pertains to the context in which a police investigation may commence and be taken forward. The decision restates the commonly accepted principle as stated above, that a police investigation must always commence upon a first information. The Court goes on to state that such a first information needs to be lodged at a police station and not the police headquarters. While the distinction between a police station and the police headquarters may be not so finely drawn to the minds of ordinary lay persons, there is no doubt that if this principle is indeed applied, it must be applied across the board. Particularly this principle needs to be uniformly applied to instances where criminal investigations are launched devoid of a first information against persons helpless to defend themselves and who may not possess that extent of political power necessarily commanded by a Prime Minister.

³¹ At p.17 of the judgment.

³² While case law relevant to this principle including *Faiz v. AG* ([1995] 1 SLR 372), *Rabuma Umma v. Dasanayake* ([1996] 2 SLR 40) and *Pieris v. Rupasinghe* ([2000] 1 SLR 40) were cited, the Court relied particularly on *Shabul Hameed v. Rupasinghe* ([1990] 1 SLR 104).

In further analyzing the facts of this particular case, it must be recalled that the impugned "Helping Hambantota" fund was opened at a private bank, to which monies initially deposited in the government account titled the "Punarjeewana Fund" had been transferred. While the former account was governed by financial regulations, the same did not apply to the "Helping Hambantota" fund. The issue therefore was about following due process and procedures. Consequently, the question as to whether an investigation was warranted in this case remains arguable, (notwithstanding the judgment of the Court), given the high level of probity that an individual holding office at the Prime Ministerial level, together with his Secretary and accountant, are expected to adhere to.

The fact that the Secretary to the Prime Minister³³ had established a separate Management Committee chaired by him to supervise the disbursement of the Rs 82.9 million deposited in the Fund, had later informed the Treasury that sums would not be withdrawn from the account until formal approval of the Treasury was obtained and had issued guidelines to the manner in which such disbursement should take place, were all matters ancillary to the central question as to whether the approved course of conduct would have been to deposit such monies in an account in a private bank.

However, there is no doubt that the process of criminal investigations on the part of the police should have taken place with far greater circumspection rather than assuming all the characteristics of a political "witch hunt," as it were.

From the same perspective meanwhile, uninformed observers may wonder at the profound irony of a sitting Prime Minister lodging a complaint to court on the basis that the opposition had been able to manipulate the country's most senior police officers as well as, for that matter, the state law officers who were, at one point, adamant in pressing ahead with this case. Rather than being a factor pointing

³³ And currently the Secretary to the President.

to good governance, (*viz*, that the law should treat even the most politically powerful in the same manner as those less privileged), this dogged determination of state officers to proceed with the complaint, emanated more from the acrimonious differences of opinion that prevailed during that time between the then head of the Peoples Alliance, President Chandrika Kumaratunge, and her Prime Minister, Mahinda Rajapakse. This was in the context where Rajapakse's (the petitioner in this case) nomination to contest the Presidential elections was, in fact, initially opposed and thereafter only reluctantly acceded to by Kumaratunge.

The whole goes to illustrate the extremely unfortunate politicisation of the police as well as the Department of the Attorney General. Indeed, the Attorney General resisted interim relief being granted in this case prior to the elections but decided "not to continue" with the case after the election of the Petitioner as Executive President. The reason as to why the Attorney General "did not wish to continue" after the elections was apparently upon "further material" being submitted to court which was, however, not disclosed.³⁴ The political pressures to which the Department of the Attorney General were subjected, both at the instance of approving the criminal investigation and resisting interim relief as well as at the point of deciding (after the election of the petitioner as Executive President) not to proceed with the case thereafter for reasons not publicly disclosed, were manifest. This indeed, was not the only case of its kind in this respect in recent decades.

3.2 *NWM Jayantha Wijesekera and Others v. Attorney General and Others*³⁵

In this case, which attracted no small controversy during 2006, the petitioners pleaded a violation of Article 12(1) by reason of the failure to constitute a Provincial Council for the Eastern

³⁴ At p.3 of the judgment.

³⁵ SC(FR) Application Nos. 243-245/06, SCM 16.10.06, judgment of Chief Justice Sarath Nanda Silva

Province as required by Article 154A (2) of the 13th Amendment to the Constitution and the continued denial to the electors of the Eastern Province (including the petitioners) of the right to vote at an election for the members of the said Council.

The infringement was contended by the petitioners to stem from the continued invalid merger of the North and East Provinces, resulting from a Presidential Proclamation (P2) and an Emergency Regulation (P1), both made in September 1998.³⁶ These had the effect of unlawfully amending the mandatory conditions for the continuation of the merger of the North and East Provincial Councils as stipulated in Section 37(1)(b) of the Provincial Councils Act, No 42 of 1987 (hereafter the Provincial Councils Act).

The said Section 37(1)(b) contained two specific conditions to be satisfied prior to the making of a Proclamation declaring that the provisions of sub-section (1)(a) shall apply to the Northern and Eastern Provinces. This Proclamation would have the effect of the two Provinces being merged as one administrative unit until a poll is held on the question of merger in each of the Provinces "not later than 31.12.1988." These two conditions were that "arms, ammunition, weapons, explosives and other military equipment which, on 29.7.1987, were held or under the control of terrorist militants or other groups, having as their objective, the establishment of a separate State, have been surrendered to the Government of Sri Lanka or to authorities designated by it" and that there should be a cessation of hostilities and other acts of violence by such groups in the said Province. Neither of these conditions had been satisfied after the Liberation Tigers of Tamil Eelam (LTTE) violated the Indo-Lanka Accord in October 1987.

³⁶ Consequent to the Indo-Lanka Peace Accord, the 13th Amendment to the Constitution and the Provincial Councils Act were enacted into law. The 13th Amendment introduced a new Chapter XVIIA to the Constitution devolving legislative and executive power to the newly established Provincial Councils, with Article 154A(1) empowering the President to establish such Councils for each of the nine Provinces with effect from 3.2.1988.

Section 37(1)(b) had, however, been amended by the then President through an Emergency Regulation in issue in this case, which imposed a further alternative to the two conditions laid down in that Section. Thereafter the North and East Provincial Councils were merged and though a poll had been statutorily mandated "not later than 31.12.1988," this was continually postponed by emergency regulations issued by successive Presidents from 1988 to 2005 and the poll had effectively never been held.

The respondents, including the Attorney General, pleaded that the conditions as contained in Section 37(1)(b) of the Provincial Councils Act had been validly amended by the said Emergency Regulation and that in any event, the petitioners could not seek a declaration of nullity in respect of either the Regulation or Proclamation due to the immunity enjoyed by the President in terms of Article 35(1) of the Constitution. The time bar imposed in Article 126(2) of the Constitution which stipulated that the jurisdiction of the Court must be invoked within one month of the petitioners' being made aware of the violation was also pleaded as a ground shutting out the petitioners; given that the time limit had long since expired.

3.2.1 Relevant Issues Arising from the Case

The following issues arose in the context of the judicial holding that a violation of Article 12(1) of the Constitution had been established.

- a) Did the President exercise executive power or delegated legislative power when making the Proclamation in terms of Section 37(1) of the Provincial Councils Act?

The Court held that the President, when making a Proclamation in terms of Section 37(1) of the Provincial Councils Act, exercises delegated legislative power rather than executive power with the necessary consequence that the Proclamation that is issued is "subordinate legislation."³⁷

³⁷ At p.13 of the judgment.

The Court considered the impact of Article 76(1) of the Constitution relating to the prohibition *inter alia* on the abdication and/or alienation of legislative power by Parliament as well as Article 76(3), which provides an exception to the above general prohibition by declaring *inter alia*, in sub-section b), that Parliament may however empower subordinate legislation "to make by order any law or any part thereof applicable to any locality or to any class of persons..". The Court stated that the Proclamation issued by the President in this context would come 'fairly and squarely' within the ambit of Article 76(3)(b).³⁸

b) What is the meaning of the term "law" in Article 154A(3) of the Constitution?

Article 154A(3) of the Constitution provides for the merger of two or three adjoining Provinces "to be done by or under any law" to form one administrative unit as an exception to the general rule in Article 154A(1) and (2) that there should be a separate Council for each of the nine Provinces.

In its holding that the Constitution reserves the power of effecting a merger strictly within the legislative power of Parliament in terms of Article 154A (1), the Court preferred a narrow interpretation of the term "law" in that Article, to be limited to the definition of "law" in Article 170 of the Constitution. Article 170 states that "law" means "any Act of Parliament and any law enacted by the legislature at any time prior to the commencement of the Constitution and includes an Order-in-Council." Consequently, it was held that an Emergency Regulation not being "law" within the meaning of Article 170 of the Constitution,³⁹ the relevant Regulation in this case (that amended the two conditions set out in Section 37(1)(b)

³⁸ *Ibid.*

³⁹ This is in contrast to Article 15(1) of the Constitution which stipulates that restrictions on fundamental rights may only be prescribed by "law" and states further "for the purposes of this paragraph, 'law' includes regulations made under the law for the time being relating to public security."

of the Provincial Councils Act and imposed a further alternative condition thereto), was "inconsistent" with Article 154A(3) of the Constitution and was consequently invalid.

In response to the contention by counsel for the intervenient petitioners in this case, that Section 5(2)(d) of the Public Security Ordinance empowers the President to make an Emergency Regulation amending any law, the Chief Justice pointed to Article 155(2) as asserting the principle that an Emergency Regulation cannot override, amend or suspend a provision of the Constitution which, in effect, this Regulation was held to do in relation to Article 154A(3) of the Constitution.

- c) Was the Regulation made for any of the purposes set out in Section 5(1) of the Public Security Ordinance?

This question was also answered in the negative by the Court. The said purposes related to first, public security and the preservation of public order; secondly, the suppression of mutiny, riot or civil commotion and, thirdly, for the maintenance of supplies and services essential to the life of the community. The impugned Regulation was held not to be "reasonably related"⁴⁰ to any of the said purposes. In fact, it was stated to be made for the "collateral purpose of amending another and unrelated law by means of which the President purported to empower himself to act in contravention of specific conditions laid down in the law."⁴¹

- d) Was the Proclamation itself made in terms of Section 37(1)(b) of the Provincial Councils Act invalid?

The Proclamation itself made in September 1988 declaring that the Northern and Eastern Provinces shall form one administrative unit was ruled to be invalid, given that neither of the two conditions

⁴⁰ At p.20 of the judgment.

⁴¹ *Ibid.*

specified as pre-conditions to the issuance of the Proclamation in Section 37(1)(b) of the Provincial Councils Act had been satisfied.⁴²

3.2.2 Critical Analysis of the Decision

It is interesting to analyse the nature and content of the objections raised by the respondents relating to the time bar and the immunity of the President.

The objection as to the time bar was premised on a two-fold basis: first, that the impugned Proclamation and the Regulation had been made as far back as September 1988 and, secondly, that in any event, the most recent of the successive orders postponing the poll to be held in terms of Section 37(2)(a) of the Provincial Councils Act in order to enable the electors of the North and East to decide whether the merged council should be continued, was dated 23 November 2005. Thus, it was contended that the petitioners were shut out on both these two grounds given that Section 126(2) mandates that they should have invoked the jurisdiction of the Court within "one month thereof." This objection was, however, dismissed on a bare judicial acceptance of the argument of the petitioners that the violation in question was a "continuing violation."⁴³

Notwithstanding this delightfully liberal reading of the stipulation contained in Article 126 (2), it may have been useful if the Court had explored the concept of "continuing violation" somewhat further, given the infinite possibilities that this inherently vague term holds out to take a certain class of petitioners outside the ambit of Section 126(2) while subjecting other categories of petitioners to the strict applicability of that section.

⁴² See *Sujeewa Aruna Senasinghe v. Senior Superintendent of Police, Nuwegoda and three others*, [2003] 1 SLR 172, 186), judgment of MDH Fernando J. as another instance where a Presidential proclamation was considered by the Court (this instance being made in terms of the Referendum Act) and ruled to be invalid.

⁴³ At p.22 of the judgment.

The general rule is that time begins to run at the point when the infringement takes place with, however, the exception that where knowledge on the part of the petitioner is required in the circumstances of the case, time would begin to run from the point that the requisite knowledge and intention come together.⁴⁴ It is only in exceptional circumstances that the time limit can be relaxed, including *inter alia*, where there is no delay on the petitioner's part and applying the principle of *lex non cogit ad impossibilia* where, for example, a petitioner has been held *incommunicado*.

While activists have, for long years, agitated against the inclusion of Article 126(2) as an unwarranted technical limitation on the lodging of fundamental rights applications, (with no comparable limitation found anywhere else in the jurisdictions of South Asia), the fact remains that this rule is strictly invoked on many occasions to shut out an ordinary citizen. For example, a citizen is shut out from appealing to the Court in respect of the violation of his right to operate a small boutique and thereby earn enough to feed himself and the members of his family as a result of the arbitrary intimidation and/or threats of police officers in the area if he or she had, by reasons of penury and lack of knowledge, delayed to file an application within the one month period.⁴⁵

Meanwhile, the objection raised by the respondents to the effect that the constitutional immunity of the President precluded judicial review of the Emergency Regulations in question, was given short shrift by the Court. This is in accordance with the *cursus curiae*, whereby the Supreme Court had for the best part of the past decade claimed to itself the power to examine the validity of an Emergency Regulation for its constitutionality.⁴⁶ The raising of

⁴⁴ *Gamaetbigge v. Siriwardene* [1988] 1 SLR, 385. Also, *Hewakuruppu v. GA de Silva, Tea Commissioner et al*, SC(FR) No.118/84 SCM 10.11.1984), *Mahenthiran v. AG* SC(FR) No. 68/1980 SCM 05.08.1980).

⁴⁵ Being a hypothetical example.

⁴⁶ Particularly, *Wickremebandu v. Herath* [1990] 2 SLR, 348, *Joseph Perera v. Attorney General* [1992] 1 SLR 199 and *Karunatileke v. Dissanayake* [1999] 1 SLR 157.

such an objection by the additional solicitor general appearing for the Attorney General was therefore somewhat surprising.

However, the second objection raised by the Attorney General in relation to the immunity of the President precluding judicial review of the Presidential Proclamation, which is a more difficult question, appears not to have been specifically dealt with. Though the Court has, in general, been reluctant to examine the legality of Presidential Proclamations in the past, there is, however, applicable precedent in the case of *Sujeewa Aruna Senasinghe v. Senior Superintendant of Police, Nugegoda and three others*,⁴⁷ where Justice MDH Fernando, writing for the Court, considered whether the Court lacked jurisdiction to determine whether a Proclamation made under the Referendum Act was valid and/or whether the Referendum Proposal had been duly formulated.

The objection to judicial review in this case was formulated on the basis that these were "political questions." However, this objection was firmly rejected on the basis of accepted principles that all powers and discretions conferred upon public authorities are to be used reasonably, in good faith and upon lawful and relevant grounds of public interest. These are therefore not unfettered, absolute or unreviewable and the legality or propriety of their exercise must be judged by reference to the purposes for which they were conferred.

In this regard, Justice Fernando reiterated the principle that such "immunity is a shield for the doer, not for the act" and although legal proceedings cannot be instituted in any court or tribunal against the President, nevertheless such acts are liable to review in proceedings against other persons who rely on such acts in order to justify their own conduct.⁴⁸

⁴⁷ [2003] 1 SLR 172, 186.

⁴⁸ See also in this regard, the discussion in section 5.3 of this chapter

3.3 Principles Arising from Other Cases decided in terms of Article 12(1)

In *Dr. Asoka Somabandu Karunanda v. Open University of Sri Lanka and Others*,⁴⁹ the Supreme Court considered a number of important questions relating to academic freedom in the context of a fundamental rights application filed by a senior lecturer against his non-appointment as a Professor/Associate Professor in Computer Science of the Faculty of Natural Science, Open University of Sri Lanka.

The Court was first called upon to decide the question as to whether an “academic issue” could be subjected to judicial review in terms of Article 126 of the Constitution. Strenuous submissions were made by senior state counsel on behalf of the Attorney General (citing English case law) that the Court cannot step into the shoes of the petitioner’s academic peers to decide whether an evaluation carried out was right or wrong in the absence of allegations of serious *mala fides* or grave procedural impropriety.

In turn, counsel for the petitioner contended that the question in issue was whether the proper procedure laid down for the appointment of a Professor/Associate Professor in the relevant circular issued by the University Grants Commission (UGC) had been followed and that the fact that an application for promotion is evaluated by an academic does not make the assessment/evaluation an academic issue.

The Court distinguished the situation in England where the universities provide for the appointment of a “visitor” for the purpose of administering justice. It was observed that though it has been a *cursus curiae* that if a visitor is appointed and given jurisdiction to inquire into complaints, no action could be instituted in courts

⁴⁹ SC(FR) Application No. 450/2003, SCM 03.08.2006. judgment of Shirani A. Bandaranayake J.

of law, the power of the courts to intervene where the visitorial jurisdiction had been exceeded had been clearly asserted.

In any event, as was judicially stressed, the Universities of Sri Lanka are creatures of statute established under and in terms of Universities Act, No 16 of 1978 (as amended) which does not provide for visitorial jurisdiction. Domestic judicial precedent for judicial review of university administration has been well established.⁵⁰ The following observation is pertinent in this regard:

Therefore, though there may be cautionary remarks indicating reluctance to enter into academic judgment, I am not in agreement with the view that academic decisions are beyond challenge. There is no necessity for the Courts to unnecessarily intervene in matters 'purely of academic nature' since such issues would be best dealt with by academics who are 'fully equipped' to consider the questions in hand. However, if there are allegations against decisions of academic establishments that fall under the category stipulated in terms of Article 126 of the Constitution, there are no provisions to restrain this Court from examining an alleged violation relating to an infringement or imminent infringement irrespective of the fact that the said violation is in relation to the decision of an academic establishment.⁵¹

On the substantive facts of the case, the Court concluded that the procedure followed in the evaluation process of the petitioner's application for the promotion of Professor/Associate professor

⁵⁰ *Manohara v. President, Peradeniya Campus University of Sri Lanka*, BALR [1983] Vol 1, Part 11, p.45, *Chulasubadra v. University of Colombo* [1985] 1 SLR, 244, *Sannasgala v. University of Kelaniya* [1991] 2 SLR 193 and particularly *WKC Perera v. Prof Daya Edirisinghe* [1995] 1 SLR, 148 where the Court looked into the issue as to whether the appellant was entitled to the award of a degree.

⁵¹ At p.34 of the judgment.

had not adhered to the requisite standards of procedural fairness and that the 1st respondent University had acted arbitrarily, unfairly, unreasonably and contrary to the circular issued by the UGC. The members of the Selection Committee and the Vice Chancellor of the University were directed to take all necessary steps in law to reconsider the application made by the Petitioner for his promotion in terms of the UGC circular and the assessments given by the three external experts, according to law.

In *Wickremage Don Rohan Vishvanath v. Divisional Secretary, Madhurawala*,⁵² the petitioner's grievance that a refusal to renew his permit under the Explosives Act and the trade permit in respect of his quarry, occasioned a violation of Article 12(1) was dismissed on the basis that the refusal was a part and as a result of a continuous assessment and monitoring process which should be the accepted norm. It was pointed out that the authorities could not have been satisfied with an initial assessment as the impact of the impugned activities cannot be gauged only at that stage.

In *WMIDB Wijyakoon and Others v. Abeysuriya and Others*,⁵³ the Court refused to accede to the argument of a group of police reservists that the non-addition of salary increments earned by them while in the Reserve after their absorption to the Regular Force violated their right to equal protection of the law.

While their applications were held to be time barred, it was also stated that with the appointment to the Regular Service, the petitioners were absorbed into a new service where they were placed on the initial salary step of their new scale as, indeed, were all police officers who belonged to the Regular Service. Thus, the salary scales were fixed as notified in their letters of appointment. The Petitioners could not therefore be asked to be treated separately

⁵² SC(FR) No. 174/2003, SCM 17.02.2006, judgment of Shirani A. Bandaranayake J.

⁵³ SC(FR) Nos. 512-514/2004, SCM 05.07.2006, judgment of Shirani A. Bandaranayake J.

for this would amount to discriminatory and unequal treatment in terms of Article 12(1) and result in "the creation of two classes of officers within one group of officers who are clubbed together."⁵⁴

4 Judicial Response by the Supreme Court in the Context of Determinations on Bills⁵⁵

4.1 National Authority on Tobacco and Alcohol Bill⁵⁶

This Private Member's Bill sought to establish a National Authority on Tobacco and Alcohol to *inter alia* advise the Government on the implementation of a National Policy on tobacco and alcohol, to recommend measures to minimise the harm arising from the consumption of such products and to make recommendations, to minimise illicit drug use/monitor progress of investigations as well as criminal proceedings relating to alcohol, tobacco and illicit drug trade. The main thrust of the case for the petitions challenging the Bill⁵⁷ was that the production and sale of tobacco and alcohol were lawful trades and distinguished from illicit trade in alcohol and drugs. Consequently, since such lawful trades were sought to be restricted, legislative measures to control the same were both discriminatory (violative of Article 12(1) of the Constitution) as well as restrictive of the freedom of thought and conscience (Article 10 of the Constitution), freedom of speech and expression (Article 14 (1)(a) of the Constitution) and of the freedom to engage in a lawful trade, business or enterprise (Article 14(1)(g) of the Constitution).

In dismissing the above contentions of the petitioners objecting to the Bill, the Supreme Court agreed that illicit trade was *per se* contrary

⁵⁴ At p.16 of the judgment.

⁵⁵ This segment of the chapter deals selectively with a particular Bill assessed as having a specific impact on rights protection and does not look at all the Determinations delivered by Court during the year.

⁵⁶ SC(SD) Nos. 13-22/05, Hansard of 1 February 2006.

⁵⁷ The Bill proposed by a monk-parliamentarian, was opposed by a range of manufacturers and producers of tobacco and alcohol products while being supported by a number of intervenient petitions by members of the clergy.

to law, punishable under various statutes and there is no question of regulating such an illicit trade. However, the Court pointed out that trade that is carried out on the basis of a licence or authority of law, which is found to be harmful to public health, should necessarily be subjected to restraint in order to minimise the consequences thereof. This finding preceded a judicial citation of reports published by specialised agencies of the United Nations testifying to the harmful effects of tobacco and alcohol and requesting that member states develop strategies and programmes aimed at the reduction of such negative consequences.

Dealing next with particular clauses of the Bill argued to be unconstitutional, the Court conceded that the formulation of clause 29 which made it an offence to sell any tobacco or alcohol product within a radius of 100 meters of any premises frequented mainly by children or young adults (which, as the petitioners argued, would make it well nigh impossible to sell such products within the city of Colombo or any other town) was not rationally related to the objective sought to be achieved. It was proposed by Court that the unconstitutional nature of the clause would be rectified if the clause was to be amended not to enforce a total ban on the sale of such products but rather, to impose a total ban on such sales to persons below the age of 21 years.⁵⁸

It is of note that the Court declared that the prohibition on advertising, as sought to be enforced by the Bill,⁵⁹ was a restriction on rights that would be permissible in terms of Article 15(7) of the Constitution and did not, *per se*, constitute an unconstitutional

⁵⁸ An argument that the prohibited age should be defined as 19 years (in accordance with the age at which persons were entitled to the right of franchise) failed with the Court pointing out that different considerations govern the two situations where the situation as contemplated by the Bill related to an activity harmful to health.

⁵⁹ Clause 33. It was however recommended that Clause 33 (2)(f) should be replaced by a clause permitting the publication of material pertaining to tobacco/alcohol products that are beneficial to the public.

restriction of freedom of speech and expression.⁶⁰ Importantly, it was declared that given the health hazards of "passive smoking," suitable provision should be included in the Bill prohibiting smoking in "enclosed public places."

Subsequent to this provision relating to "passive smoking" being added, a group of hotel associations and a tobacco company challenged this added provision, namely clause 40 of the Bill, resulting in a further Determination of Court.⁶¹ It was judicially opined that clause 40, in its application both in regard to the prohibition of any person smoking or allowing any person to smoke within an enclosed public place (clause 40(1)) as well as a general duty imposed on owner, occupier, proprietor, manager trustee or person in charge ensuring that no person smokes within an enclosed public place, (Clause 40(2)) was constitutional. So too was the proviso to clause 40(2) permitting any hotel, guest house or lodge having thirty rooms or more, any restaurant or club having the capacity to accommodate thirty persons or more and any airport to provide an exclusive smokers zone.

The Court recommended however, that the definition of "enclosed public place" in clause 40(5) of the Bill be amended in order that its first part will define "public place" to mean any place to which the public have access, whether as a right or otherwise and the second part to define an "enclosed public place" to include the places already specified in the definition.⁶²

Further, the original formulation of the relevant clause of the Bill defined an alcohol product as a beverage containing a volume of one per centum or more of alcohol. However, on its second perusal

⁶⁰ Citing with approval a similar view held by the Supreme Court of India in *Hamdard Dawakhana v. Union of India* (AIR, 1960 SC, p. 544) which in turn relied on an observation of Justice McKenna in *John W Rast v. Van Deman and Lewis Co*, (1915, 60 US Lawyers Ed. 679, at 690).

⁶¹ SC(SD) Nos 1-6/06, Hansard of 4 July 2006

⁶² It was recommended that the term "kiosk" should be taken out of the list of such places.

by the Court, it was found that this definition of 1 percent had been changed to 4.5 percent, this permitting (as was argued) the sale of beer to be taken out of the ambit of the Bill. It was found that this change had been made to accommodate the interests of the brewery industry and this further amendment was ruled to be inconsistent with Article 12(1) of the Constitution.

5 Judicial Response by the Court of Appeal in Terms of its Jurisdiction under Article 140 of the Constitution

The manner in which the constitutional enshrining of fundamental rights has impacted positively on the writ jurisdiction of the appellate courts has been focused upon in previous chapters on Judicial Protection of Rights.⁶³ The relevant rationale is that constitutional principles and provisions have restricted the area of administrative discretion and immunity, correspondingly expanded the nature and scope of the public duties amenable to Mandamus and the categories of wrongful acts and decisions subject to Certiorari and Prohibition, (in terms of Article 140 of the Constitution) as well as the scope of judicial review and relief. It is in this manner that the exercise of its writ jurisdiction by the Court of Appeal has a profound impact on the judicial protection of rights. This segment of the chapter will selectively examine two important decisions of the Court in this respect.

5.1 *NVKK Weragoda, General Secretary, UNP v. Dissanayake & Others*⁶⁴

This case related to the right to vote and the concomitant duty imposed upon a political party to ensure that its nomination papers

⁶³ See *Sri Lanka: State of Human Rights* for 2004, 2005 and 2006. For relevant cases see *Perera v. Edirisinghe* [1995] 1 SLR 148, 156 and *Heather Mundy v. Central Environmental Authority and Others* SC Appeal 58/03, SC Minutes of 20.01.2004. SC Appeal 58/2003, judgment of Justice Mark Fernando.

⁶⁴ CA/330/2006 – CA Minutes of 24.03.2006 judgment of Sripavan J. (with Sisira de Abrew J agreeing)

were in accordance with the law. It was one of several applications filed in the Court of Appeal in the pre-election period in 2006 concerning nomination papers disqualified by the returning officers, due to technical defects relating to the nomination of one or more candidates, resulting in the entire nomination list being rejected.⁶⁵

5.1.1 Relevant Issues Arising from the Case

The contested rejection was in regard to a disputed question concerning an allegedly underage youth candidate in the nomination list of the opposition United National Party (UNP) for the Colombo Municipal Council. Section 89 of the Local Authorities Elections Ordinance as amended *inter alia* by Act No 24 of 1987 and Act No 25 of 1990 brought in the youth quota for local government polls and stipulated that the nomination list should contain 40 percent of youth (between the ages of 18 and 35) and the rest could be over 35 years of age.

a) Definition of the date in relation to determining "youth"⁶⁶

Was the determinant date of "youth" the date in which revision of the electoral list commences or the date on which it is certified? This question became crucial to the case as one of the candidates so nominated by the UNP was under 18 years of age on June 1st 2004, as calculated from the date in which revision of the electoral list commenced (which was 1 June 2004), but not the date on which the register was certified, that is 1 June 2005. The Court of Appeal affirmed that the Returning Officer's calculation of the age of the impugned candidate from the date in which revision of the electoral list commenced (which was 1 June 2004) and not the date on which the register was certified (which was 1 June 2005) was correct.

⁶⁵ The analysis in this chapter will be limited to this judgment alone given its authoritative effect.

⁶⁶ According to the Local Authorities Elections Ordinance (as amended), a "youth" means a person "not less than eighteen years as at first June of the year in which the revision of the operative electoral register commenced..."

- b) Was the Returning Officer empowered to reject the entire nomination list due to the want of a single candidate?

The respondents, (Attorney General and other political parties supporting the rejection by the returning officer), contended that the rejection of the entire nomination paper by the returning officer was valid as one candidate was underage and the 40 percent component was not in conformity with the stipulation according to Section 31(1) of the Local Authorities Election Ordinance read with the 1990 amendment.

The petitioners' contention, however, was that since the age of candidates was involved, it was a matter relating to qualifications as envisaged in Section 9 of the Local Authorities Elections Ordinance (as amended). The powers of the Returning Officer were limited to a physical check and a headcount of the nominations list and he could not go further to reject the entire list as was done in this case. The counter response of the Respondents was that it was simply a matter of non-compliance, leaving no other option for the Returning Officer but to reject the entire nomination paper in terms of Section 31(1) of the Local Authorities Elections Ordinance as amended by Act, No 25 of 1990.

It was decided that the action of the Respondent returning officer was in conformity with the law, with the Court stating that if the mandatory requirement as to the age is not complied with, then the returning officer has the power to reject the nomination paper in its entirety in terms of Section 31(1)(bb).

5.1.2 Critical Analysis of the Case

The Court of Appeal thus drew a meaningful distinction between a challenge to a candidate's qualifications⁶⁷ on the one hand and

⁶⁷ *Vigneswaran & Stephen v. Dayananda Dissanayake & Others*, [2002] 3, SLR, 59 (CA) re the Parliamentary Elections Act, No.1 of 1981.

rejection of a nomination paper for non-compliance⁶⁸ on the other. This case and the other similar applications filed during this period, illustrated deficiencies in the local government law, particularly regarding the stipulation that the entire list should be rejected due to the fault of a single candidate. In this regard, the following observation remains relevant:

There is no doubt that, in the interests of securing full democratic participation of all parties in the electoral process which would signify that the entire list ought not be rejected for the want of a single candidate, secretaries of parties ought to be given an opportunity to remedy such defects in the nomination papers (once this is brought to their attention) within a period of two days.⁶⁹

5.2 *Seemanmemeru Pathirana Shantha Dharmapriya Pathirana v. DIG, Personnel Training and Others*⁷⁰

This decision is of extreme importance to the question of accountability for rights violators and, particularly, those officers of Sri Lanka's police force indicted for crimes of enforced disappearances during the turbulent eighties and early nineties. The petitioner, whose brother had disappeared in the eighties and who was the general secretary to the Organisation of Parents and Family Members of the Disappeared (OPFMD), filed the application protesting against a circular issued by the 1st respondent DIG (and the current Inspector General of Police, IGP) directing senior police officers to re-instate all officers who had been interdicted following the inquiries conducted by the Disappearances Investigations Unit

⁶⁸ *Ediriweera v. Kapukotuwa* [2003] 1 SLR 228

⁶⁹ See "Representations of the Law & Society Trust to The Select Committee of Parliament on Reforms to Parliamentary, Provincial and Local Government Elections Laws", Law & Society Trust Review, Volume 16 Issue 224, June 2006, p.20.

⁷⁰ CA Writ Application No 1123/2002, CA Minutes 09.10.2006. judgment of Srisikandarajah J.

and charged in courts but subsequently bailed out in these cases. According to statistics then before court, the Attorney General had framed charges against more than 450 police and security force personnel.

5.2.1 Relevant Issues Arising from the Case

- a) Is it Mandatory to Interdict an Officer of State against whom a Criminal Case is filed?

Paragraph 27.10 of the Establishments Code stipulates that any officer of state against whom a criminal case is filed has to be interdicted from service until the conclusion of the case and dismissed if he/she is convicted. The respondents contended, however, that the impugned circular had been issued under paragraph 27.8 and 27.9 of the Code relating to public officers taken into custody by the police/any other statutory authority and released from custody while paragraph 27.9 deals with an officer remanded pending legal proceedings and released on bail.

The Court declared that paragraph 27.10 was the applicable paragraph when criminal proceedings are taken against a public officer. Hence, the police officers contemplated by the impugned circular should have been interdicted from service until the conclusion of the case. It was ruled that the 1st respondent DIG or the 3rd respondent IGP had no authority whatsoever to ignore the mandatory provisions laid down in paragraph 27.10 of the Code. The impugned circular was ruled to be *ultra vires* and writ of *Certiorari* allowed.

- b) Preliminary Objections relating to *Locus Standi* and *Laches*

The Court dismissed two preliminary objections, first relating to the *locus standi* of the petitioner and secondly, in regard to an objection that the application was filed belatedly. First, it was judicially

observed that the rules of standing have been relaxed (even further than fundamental rights applications) where applications for writs are concerned.⁷¹ Secondly, the Court reiterated established case law that *certiorari* will not be refused on ground of delay, if the delay is not attributable to the petitioner⁷² and that such delay could, in any event, be excused if the impugned order is a nullity.⁷³

c) Should the ground of administrative inconvenience weigh with the Court?

A further objection raised at the time of argument that the quashing of the impugned circular will cause administrative inconvenience was also (quite rightly) dismissed.⁷⁴

5.2.2 Critical Analysis of the Decision

The phenomenon of accused state officers being bailed out almost immediately after they are charged with offences committed during periods of conflict in Sri Lanka is extremely common. This is so in relation to the offences committed during the North and East conflict, with members of the Tamil community bearing the brunt of such violations, as well as during the eighties/early nineties period of the armed insurrection by the Janatha Vimukthi Peramuna (JVP), when the victims were thousands of Sinhalese.

⁷¹ However, such liberality of the Court has its limits. See *HW Wanasinghe and Others v. University of Colombo and Others* (CA Writ Application No. 1261/2004, CA Minutes 06.07.2006, judgment of Sriskandarajah J.) for a decision delivered by the Court of Appeal during the year in review which shut out an application filed by office bearers of the Citizens Movement for Good Governance (CIMOGG) on insufficient *locus standi*. In this instance, the Court of Appeal, evaluating the "sufficient interest" shown by the petitioners in intervening in a question of university appointments, (where those personally aggrieved had not themselves come before court but had invoked their right of appeal to the University Services Appeals Board), decided in the negative.

⁷² *Veerakesari Ltd v. Fernando* (6 NLR, 145).

⁷³ *Chas P Hayley and Co. Ltd v. Commercial and Industrial Workers and Others* (1995) 2 SLR 42.

⁷⁴ *Consumer Association of Lanka v. Telecommunications Regulatory Commission of Sri Lanka and three Others* CA Writ Application No. 1776/2003, CA Minutes 25.07.2005 citing *Congreve v. Home Office* (1976) QB 623.

The delay in courts, (with one case pending in the High Court for more than ten years as was evidenced on the documentation of the respondents in the Court of Appeal), is unmistakably a fault of Sri Lanka's legal system. One relevant factor is that while earlier, the rule regarding day-to-day trials was scrupulously observed, this has not been the case for the past decade or more. Postponement of trials is common and at times for the most frivolous of reasons. Indeed, such delays are evidenced even in relation to "ordinary" trials of torture allegedly committed by state officers in terms of the 1994 Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment Act. No. 22 of 1994.

While this is so, the efforts taken by senior police officers to use such delays to justify a spurious argument that the accused police officers in these cases should not be penalized further and should be reinstated, is a pithy illustration of one arm of the system disingenuously using the fault of another arm of the system to benefit itself and to excuse its own fault thereto. The stern attitude of the Court of Appeal in this regard in issuing writ quashing the impugned circular is therefore commendable.

5.3 *Visuvalingam and Another v. Attorney General and Others*⁷⁵

This order, on a prayer for interim relief, put into issue a most vexed question concerning the due implementation of the 17th Amendment to the Constitution. The petitioners had complained that the President had 'sidestepped' the Constitutional Council (CC) and had unilaterally appointed the members of the Public Service Commission and the National Police Commission whereas the 17th Amendment required that the nomination of these appointees should be by the CC. They sought *inter alia*, a writ of *Certiorari* to have the appointments quashed and a writ of *Mandamus* to compel a single nomination to be made to the CC so as to enable the

⁷⁵ Court of Appeal Application No. 668/2006, CA Minutes, 2/06/2006, judgment of Sripavan J.

necessary appointments to the Council in order that it commences functioning. However, even though the Court agreed with the contention that 'that no citizen, including the President, is above the law', it felt itself bound by the immunity constitutionally afforded to the acts of the President in Article 35(1) of the Constitution, to refuse the interim relief pleaded for.⁷⁶

5.3.1 Critical Analysis of the Decision

This complaint had, as its background, a sad history of outright political chicanery regarding a primary constitutional amendment. The 17th Amendment had been passed unanimously by Sri Lanka's legislators in a rare display of political amity in 2001. It stipulated that key appointments in the public service, including that of the Inspector General of Police, the Attorney General and the Chief Justice should be approved by a ten member Constitutional Council (CC). Further, the CC is empowered to nominate appointees to constitutional commissions tasked with crucial monitoring of human rights protections such as the police, elections and public service as well as the National Human Rights Commission. The CC is chaired by the Speaker and consists of six eminent non-political public figures,⁷⁷ the heads of the

⁷⁶ Citing *Public Interest Law Foundation v. The Hon. Attorney General* (CA Appl 1396/ 2003 – C.A Minutes of 17.12.2003). In this case, Article 35(1) of the Constitution was held to confer a 'blanket immunity' on the President from legal action in respect of anything done or omitted to be done in official or private capacity, except in limited circumstances constitutionally specified in relation to *inter alia* ministerial subjects or functions assigned to the President and election petitions. Thus the petition requesting that former President Kumaranatunge be compelled to appoint the members of the Election Commission did not come within the ambit of that exception and the applicability of Section 35(1) was held to make the petition not properly constituted in law.

⁷⁷ Five members of high integrity and standing were nominated (taking into account minority concerns) jointly to the CC by the Prime Minister and the Leader of the Opposition. One member was nominated by the smaller parties in the House, which did not belong to either the party of the Prime Minister or the Leader of the Opposition. All these appointed members held office for three years. They could be removed only on strictly mandated grounds and any individual appointed to vacancies created held office for the un-expired portion of that term.

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government and the opposition parties in the House sitting *ex officio* as well as an appointee of the President.

Yet, this body functioned only during its first three year term, from 2002-2005; new non-political members were not appointed in 2005 despite five nominations being forwarded to President Mahinda Rajapakse, due to members of the smaller political parties refusing to agree on the sixth (and the remaining) nomination to the CC. The President refused, in turn, to make the appointments of the five nominations already sent to him until this one remaining member was nominated, despite persuasive arguments that if the appointments of those nominated are made, the quorum of the CC would be satisfied⁷⁸ and the purpose of the 17th Amendment adhered to. In 2006, the President proceeded to make his own appointments to the constitutional commissions and public service posts, ignoring tremendous public dissatisfaction. It was in this background of the outright negation of a constitutional amendment aimed at restoring good governance to a highly politicised public service, that the writ petition was filed.

Its dismissal on the ground of the immunity afforded to Presidential actions illustrated the manner in which the Constitution is construed to protect the political executive who engages in undermining that very Constitution. Though there is judicial precedent asserting that actions of subordinate officers relying on the orders of the President are within the pale of judicial review,⁷⁹ the situation is more ambiguous where the acts or omissions of the President are directly in issue. In certain instances, the Supreme Court has reviewed such direct actions notwithstanding the bar of constitutional immunity. This was notably the case for example, in

⁷⁸ Article 41E(3) states that the quorum of any meeting of the Council shall be six members.

⁷⁹ *Karunatilleke v. Dissanayake* [1999] 1 SLR, *Senasinghe v. Karunatilleke*, SC 431/2001, SCM 17.3.2003 and recently, *Perera v. Balabatabendi and Others*, SC(FR) No. 27/2002, SCM 19.10.2004. The officers declared judicially incapable of seeking refuge behind illegal presidential directives have included the Commissioner of Elections and the Inspector General of Police (IGP).

an application challenging the appointment of a Supreme Court judge⁸⁰ where, despite Article 107 conferring on the President the power of making appointments to the Supreme Court without expressly specifying any qualifications or restrictions, the majority affirmed that considerations of comity require that, in the exercise of that power, there should be cooperation between the Executive and the Judiciary, in order to fulfil the object of Article 107.

.....the power is neither untrammelled nor unrestrained, and ought to be exercised within limits.....the power is discretionary and not absolute. This is obvious. If, for instance, the President were to appoint a person who, it is later found, had passed the age of retirement laid down in Article 107(5), undoubtedly the appointment would be flawed: because it is the will of the People, which that provision manifests, that such a person cannot hold that office. Article 125 would then require this Court, in appropriate proceedings, to exercise its judicial power in order to determine those questions of age and ineligibility. Other instances which readily come to mind are the appointment of a non-citizen, a minor, a bankrupt, a person of unsound mind, a person who is not an Attorney-at-Law or who has been disbarred, or a person convicted of an offence involving moral turpitude.⁸¹

The above principle of judicial review should have been pre-eminently asserted in the instance of the refusal by the chief executive to abide by his constitutional duty to ensure the implementation of the 17th

⁸⁰ *Silva v. Bandaranayake* [1997] 1 SLR 92. For decisions reflecting a contrary view, see *Victor Ivan v. Sarath Silva* [2001] 1 SLR 309 at p.327 and *Mallikaratchi v. Shiva Pasupati, Attorney General* [1985] 1 SLR 74 at p.80

⁸¹ per Justice MDH Fernando writing for the majority in *Silva v. Bandaranayake* [1997] 1 SLR 92. The minority bench of three justices upheld the immunity principle as barring review.

Amendment to the Constitution. Consequently, the strict judicial upholding of the immunity principle by the Court of Appeal to preclude review of even patently unconstitutional acts in *Visvalingam and Another v. Attorney General and Others* was disappointing and put into issue, a central question for future constitutional reform. Definitively, the very concept of the chief executive being above the law and the Constitution remains one of the deeply subversive features of the current constitutional structure.

6 Communication of Views by the United Nations Human Rights Committee under the ICCPR First Optional Protocol

6.1 Accession to the Protocol

The First Optional Protocol to the ICCPR (the Protocol) established the competence of the Committee to receive and examine individual complaints alleging that the rights recognized under the ICCPR have been violated.⁸² Sri Lanka acceded to the Protocol on 3 October 1997. At that time, the State made a declaration that it recognised the competence of the UNHRC only with respect to events, or decisions relating to events, occurring on or after that date. No reservations were made to the Protocol in that regard.

During the past decade, (and up to the end of 2005), six Communications of Views had been delivered by the Committee finding violations of various ICCPR provisions. None of the recommendations contained in these Views have been implemented.⁸³ A number of other Communications were also

⁸² Optional Protocol to the International Covenant on Civil and Political Rights, Article 4(1) (adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, in accordance with Article 9).

⁸³ Some of these Communications are as follows; *Anthony Michael Emmanuel Fernando v. Sri Lanka*, CCPR/C/83/D/1189/2003, adoption of views, 31.03.2005; *Nallaratnam Singarasa v. Sri Lanka*, CCPR/C/81/D/1033/2001,

declared by the Committee as inadmissible, based primarily on the compulsory rule regarding prior exhaustion of domestic remedies as well as, in some instances, finding that the complaint itself was not justified.

During the year 2006, three Communications of Views were forwarded by the Committee, two of which declared the particular petitions inadmissible.⁸⁴ One petition was declared admissible and a violation of ICCPR rights was proclaimed, making the total of Communications delivered finding ICCPR violations seven in all. It is this latter Communication that will be examined in detail hereafter.

6.2 *Sundara Arachchige Lalith Rajapakse v. Sri Lanka*⁸⁵

6.2.1 Relevant Issues Arising from the Case

Author's Complaint

The author complained that he had been arbitrarily arrested by several police officers and tortured during his subsequent detention,

adoption of views, 21.07.2004; *S. Jegatheeswara Sarma v. Sri Lanka*, CCPR/C/78/D/950/2000, adoption of views, 16.07.2003; *Jayalath Jayawardena v. Sri Lanka*, CCPR/C/75/D/916/2000, adoption of views, 22.07.2002; *Victor Ivan Majuwana Kankanamge v. Sri Lanka*, CCPR/C/81/D/909/2000, adoption of views 27.07.2004 and *Sister Immaculate Joseph and 80 Teaching Sisters of the Holy Cross of the Third Order of Saint Francis in Menzingen of Sri Lanka v. Sri Lanka*, CCPR/C/85/D/1249/2004, adoption of views, 21.10.2005.

⁸⁴ *Susila Malani Dahanayake and Others v. Sri Lanka* CCPR/C/87/D/1331/2004, Decision on admissibility 25 July 2006. Declared inadmissible under Article 2 of the Protocol as authors had not substantiated that their right to life in terms of ICCPR Article 6 was violated because they were deprived of a healthy environment. Also declared inadmissible under Article 1 of the Protocol as authors can no longer be considered a victim with their claim concerning unequal treatment being remedied by the domestic court. *Hiran Ekanayake v. Sri Lanka* CCPR/C/88/D/1201/2003, decision on admissibility, 31.10.2006, inadmissible under Article 5(2)(b) of the Protocol, domestic remedies have not been exhausted/inadmissible under Article 2 of the Protocol, claim concerning ICCPR Article 26 is insufficiently substantiated.

⁸⁵ CCPR/C/87/D/1250/2004, adoption of views, 14 July 2006

which caused serious injuries. The injuries were attested to by the medical reports. He claimed violations of ICCPR Article 2(3), Article 7 and Article 9 and further claimed that the State party's failure to take adequate action to ensure that he was protected from threats issued by police officers violated ICCPR Article 9(1). The State party had moreover failed to ensure that the competent authorities investigate his allegations of torture promptly and impartially, thus violating his right to an effective remedy under ICCPR Article 2(3).

Further factors in his complaint were as follows:

- a) He had tried to obtain legal redress domestically both in the criminal court and in the Supreme Court but these efforts were to no avail;
- b) No criminal investigation was initiated for over three months after the torture, despite the severity of his injuries and the necessity to hospitalise him for over one month;
- c) The alleged perpetrators were neither suspended from their duties nor taken into custody, enabling them to place pressure on and threaten the author, and the investigations were at a standstill;
- d) In any event, criminal procedures for dealing with torture allegations in Sri Lanka have generally been demonstrated to be ineffective and the authorities had shown a lack of diligence in the present case. Thus, the pending criminal or civil procedures cannot be considered to constitute an effective remedy for the alleged violations.

Submissions of the State Party

The State Party submitted that the Attorney General had indicted the Sub-Inspector of Police implicated in the alleged torture under the 1994 Anti Torture Act on 14 July 2004. The trial judge had been

requested to expedite the matter. The application in the Supreme Court had remained pending but the author himself had not claimed undue delay in the matter and had made no attempt to request the Supreme Court to expedite the hearing of this case.

Counter-Response of the Author

The author meanwhile counter-responded that the delay in the Supreme Court was habitual and that insofar as the criminal proceedings were concerned, the trial procedure was deficient, as demonstrated by the fact that only one person had been charged in the criminal case although several were involved in the allegations. The State party's argument that the author only identified one individual in the identification parade was hardly satisfactory, since the author had been in a coma for over two weeks following the alleged torture, and obviously under those circumstances his capacity for identification was limited.

In addition, other evidence existed upon which other officers could have been charged, including documentary evidence submitted by the police officers themselves to the Magistrates Court and Supreme Court. In his view, sole reliance on the author's identification, particularly in the circumstances of this case, had resulted in the complete exoneration of the other perpetrators. The author also argued that the only charge filed against the police officer in the criminal proceedings was that of torture; no charges had been filed regarding the illegal arrest and/or detention. It was observed that the State party offered no information on what measures had been adopted to put a stop to the threats and other measures of intimidation to which he had been subjected in the context of the absence of a witness protection programme.

6.2.2 Determination of the Committee

a) The Question of Admissibility

In determining these contested issues, the Committee noted that the issues raised by the author were still pending before the High Court as well as the Supreme Court, despite nearly three years having passed since their institution. Further, the police officer alleged to have participated in the torture of the author still continued under indictment in the criminal case. The Committee considered it significant that the State party had not provided any reasons why either the fundamental rights case or the indictment against the police officer could not have been considered more expeditiously, nor had it claimed the existence of any elements of the case which should have complicated the investigations and judicial determination of the case, preventing its determination for nearly three years.

The delay in the disposal of the Supreme Court case and the criminal case was found to have amounted to an unreasonably prolonged delay within the meaning of Article 5, paragraph 2 (b) of the Protocol. The Communication was declared admissible.

b) On the Merits

The Committee reiterated its finding that the delay of one and a half years in the disposal of both cases amounted to an unreasonably prolonged delay within the meaning of Article 5 (2) (b) of the Protocol. Its jurisprudence that the Covenant does not provide a right for individuals to require that the State party criminally prosecute another person⁸⁶ was reiterated. However, it was emphasized that the State party is under a duty to investigate thoroughly, alleged violations of human rights and to prosecute and punish those held responsible for such violations.

⁸⁶ Case No. 213/1986, *H.C.M.A. v. the Netherlands*, adopted 30 March 1989; Case No. 275/1988, *S.E. v. Argentina*, adopted 26 March 1990; Case Nos. 343-345/1988, *R.A., V.N. et al. v. Argentina*, adopted 26 March 1990.

The State party's reliance on the High Court's large workload was unequivocally declared not to excuse it from complying with its obligations under the Covenant. The delay was stated to be further compounded by the State party's failure to provide any time frame for the consideration of the case, despite its claim that, following directions from the Attorney General, the prosecutors had requested the trial judge to expedite the case. The Committee found the State party to have violated ICCPR Article 2(3) in connection with ICCPR Article 7.⁸⁷

In regard to the claim of violations of ICCPR Article 9 relating to the circumstances of the arrest, the Committee noted that the State party has not contested that the author was arrested unlawfully, was not informed of the reasons for his arrest or of any charges against him and was not brought promptly before a judge, but merely argued that these claims were made by the author in his fundamental rights application to the Supreme Court, which remains pending. The State Party was thus found to have violated ICCPR 9, paragraphs 1, 2 and 3 alone and together with ICCPR Article 2 (3). The Committee recalled its jurisprudence that ICCPR 9(1) protects the right to security of person also outside the context of formal deprivation of liberty.⁸⁸

The interpretation of article 9 does not allow a State party to ignore threats to the personal security of non-detained persons subject to its jurisdiction. In the current case, it would appear that the author has been repeatedly requested to testify alone at a police station and has been harassed and pressurised to withdraw his complaint to such an extent that he has gone into hiding. The State

⁸⁷ Consequently, the Committee did not consider it necessary, in this particular case, to determine the issue of a possible violation of Article 7 alone of the Covenant.

⁸⁸ Case No. 821/1998, *Chongwe v. Zambia*, Views adopted on 25 October 2000, Case No. 195/1985, *Delgado Paez v. Colombia*, Views adopted on 12 July 1990, Case No. 916/2000, *Jayawardena v. Sri Lanka*, Views adopted on 22 July 2002.

party has merely argued that the author is receiving police protection but has not indicated whether there is any investigation underway with respect to the complaints of harassment nor has it described in any detail how it protected and continues to protect the author from such threats. In addition....the alleged perpetrator is not in custody.

The author was declared entitled, under ICCPR Article 2 (3)(a), to an effective remedy and the State Party was under an obligation to take effective measures to ensure that the pending legal proceedings are expeditiously completed, the author is protected from threats and/or intimidation with respect to the proceedings and is granted effective reparation. The State Party was under an obligation to ensure that similar violations do not occur in the future. The customary notification that the Committee wishes to receive from the State Party, within 90 days, information about the measures taken to give effect to the Committee's Views, was made.⁸⁹

6.2.3 Non-Implementation of the Views

As stated previously, the Views in this Communication as well as the others have not been implemented. In *Fernando v. Sri Lanka*⁹⁰ which involved a violation of ICCPR Article 9(1) as a result of the arbitrary sentencing for contempt by the Supreme Court and where the Committee requested that Sri Lanka enact a Contempt of Court Act, the government's problematic response was that it could not implement the Views since this would be construed as an interference with the judiciary. The country still lacks a contempt

⁸⁹ This was a unanimous decision of the Committee comprising: Mr. Abdel-fattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Maurice Ahanhanizo, Mr. Walter Kahn, Mr. Ahmed Tawfik Khabil, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer and Mr. Hiphito Solari-Yrigoyen.

⁹⁰ *Anthony Michael Emmanuel Fernando v. Sri Lanka*, CCPR/C/83/D/1189/2003, adoption of views, 31.03.2005.

law unlike neighbouring India. However, the irrational defence that the Committee's Views cannot be implemented since they involve a final determination of the judiciary had been jettisoned in General Comment 31 issued by the Committee⁹¹ which stated *inter alia*, as follows;

Para 4

The obligations of the Covenant in general and article 2 in particular are binding on every State Party as a whole. All branches of government (executive, legislative and judicial), and other public or governmental authorities, at whatever level - national, regional or local - are in a position to engage the responsibility of the State Party. The executive branch that usually represents the State Party internationally, including before the Committee, may not point to the fact that an action incompatible with the provisions of the Covenant was carried out by another branch of government as a means of seeking to relieve the State Party from responsibility for the action and consequent incompatibility. This understanding flows directly from the principle contained in article 27 of the Vienna Convention on the Law of Treaties, according to which a State Party "may not invoke the provisions of its internal law as justification for its failure to perform a treaty."

⁹¹ General Comment No. 31 [80] - The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, Adopted on 29 March 2004 (2187th meeting). See also in this regard, Article 4 of the International Law Commission's draft articles on Responsibility of States for Internationally Wrongful Acts

7 The Singarasa Case

7.1 The Factual Background

On 16 August 2006, a petition was filed invoking the powers of revision and/or review of the Supreme Court against a dismissal of an appeal regarding the conviction and sentencing of Nallaratnam Singarasa, a detainee in the Boosa prison who had been convicted on five counts of having unlawfully conspired to overthrow the Government and with that objective in mind, having attacked four army camps. Upon such dismissal, Singarasa filed an individual communication before the UN Human Rights Committee resulting in the Committee declaring that his rights under Article 14, paragraph 3(g) of the Covenant (no one shall "be compelled to testify against himself or confess guilt") had been violated.⁹²

The State was directed to provide Singarasa with an effective and appropriate remedy, including release or retrial and compensation. Sri Lanka was also cautioned to avoid similar violations in the future and to ensure that the impugned sections of the PTA are made compatible with the provisions of the Covenant. Consequent to this Communications of Views, a revision/review application was filed in the Court urging the Court to reconsider its earlier dismissal. The Views of the Committee were cited in this instance as persuasive authority. At no point was there any attempt made to "domestically implement"⁹³ the Views through the mechanism of a revision application.

On 15 September 2006, a Divisional Bench of Sri Lanka's Supreme Court presided over by Chief Justice Sarath Nanda Silva decided that the State's act of accession to the Protocol (which enabled the Committee to receive and consider individual communications from any individual subject to Sri Lanka's jurisdiction) was an

⁹² *Nallaratnam Singarasa v. Sri Lanka*, CCPR/C/81/D/1033/2001, adoption of views, 21.07.2004.

⁹³ To use a common phrase

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⁹² *Nallaratnam Singarasa v. Sri Lanka*, CCPR/C/81/D/1033/2001, adoption of views, 21.07.2004.

⁹³ To use a common phrase

unconstitutional exercise of legislative power as well as an equally unconstitutional conferment of judicial power on the Committee. The constitutional articles found to be violated in this regard were respectively Article 3 read with Article 4(c) read with Article 75 (in regard to the unconstitutional conferment of legislative power) and Article 3 read with Article 4 (c) and Article 105(1) of the Constitution (in regard to the unconstitutional conferment of judicial power).

The State's act of accession to the Covenant itself was held to be constitutional though having no internal effect, given that Sri Lanka embodies a dualist system (which envisages municipal law and international law as being two distinct systems) rather than a monist system (in which international law has direct and immediate internal effect without the necessity of their transformation into municipal law). Consequently, Singarasa's revision application was found to be misconceived and without legal basis.

7.2 Critical Analysis of the Judgment⁹⁴

Any person with ordinary commonsense would query why a State would agree to bind itself in international law to particular commitments while airily disregarding those same commitments within its own country. But this is exactly what Sri Lanka had been doing under the convenient logic of the dualist theory on the basis that international treaties entered into by the executive had to be implemented by domestic legislation to have internal

⁹⁴ Important as this judgment is, it has (singularly) not been subjected to extensive academic discussion as ought to have been the case. For some critiques of the judgment, see articles by senior counsel RKW Goonesekere and Professor of Law/Director of the Center for International Law & Policy, New England School of Law (Boston), John Cerone in *LST Review*, Volume 17 September & October 2006, Joint Issue - 227 & 228, p.25-33. 'A treaty solemnly entered into by the State in the exercise of the executive power and in terms of international law as reflected in the Vienna Convention on Treaties is not, it is submitted with respect, subject to judicial review. There is a procedure in the Protocol for a State Party to denounce the Protocol, but until this is done, the Protocol is in force in the country' in Mr. RKW Goonesekere's article, (*Ibid*).

effect.⁹⁵ The Court, however, in the *Singarasa case*, went even further than reiterating this hoary principle, to state that the very act of accession to the Protocol was unconstitutional, as opposed to merely cautioning that it has no internal force.

a) Does the Human Rights Committee exercise judicial power?

A key assumption of the Court was that the Human Rights Committee had been conferred with "judicial power" as a result of acceding to the Protocol. The following discussion will critically examine the content of the judicial reasoning in this regard.⁹⁶ The reasoning could be summarised as follows:

- a) The President of Sri Lanka acceded to the ICCPR and the Protocol by virtue of the powers in terms of Article 33(f) of the Constitution which allows the President to "do all such acts and things, not being inconsistent with the provisions of the Constitution or written law as by international law, custom or usage he is required or authorised to do;"
- b) This very constitutional article was employed to determine that the accession to the Protocol was unconstitutional as the

⁹⁵ Many jurists have expressed the opinion that contrasting dualist and monist regimes oversimplifies a complex subject. In the Seventh Annual Grotius Lecture delivered to the Annual Meeting of the American Society of International Law, Washington DC., 29 March 2005 Justice Michael Kirby referred to this point before engaging in a particularly entertaining rationalization on why it is important for international human rights standards to be incorporated into domestic law.

⁹⁶ It must be stressed that the present discussion is constrained in its comments within the scope of what has been an excessively conservative formulation of contempt of court by the Sri Lankan courts which precludes a more trenchant critique. As noted previously, Sri Lanka still lacks a Contempt of Court Act similar to legislation in India and the United Kingdom which allows for fair and reasoned critique of a particular decision. In contrast, the definition of what amounts to contempt in Sri Lanka is dangerously imprecise and this lacunae has been used as a none too subtle weapon to stifle criticism of actions of the judiciary as well as their decisions in recent times. See *Contempt of Court – the Need for Substantive cum Procedural Definition and Codification of the Law in Sri Lanka*, Human Rights Commission of Sri Lanka, December 2004.

act of accession was deemed to be "inconsistent" with the Constitution on the basis that the act of accession was held to be "an act of legislative power" (which ought to have been exercised by Parliament), flowing from the conclusion of the Divisional Bench that "judicial power" has been conferred upon the Human Rights Committee thereof, which power could only have been conferred by the legislature.

It is apparent, therefore, that the core of this reasoning was that judicial power had been conferred on the Committee as a result of Sri Lanka's accession to the Protocol. However, the jurisprudence of the Committee as well as the reasoning in its General Comments have proceeded on the basis that the rights in the ICCPR should be given effect to as part of the International Bill of Rights and that the Committee is the appropriate mechanism under the Covenant vested with that authority, internationally. There has never been, at any instance, the claiming of 'judicial power' within a domestic legal system by the Committee.

b) Sovereignty of the People as opposed to Sovereignty of the State

Further questions arise concerning differentiation of the Sovereignty of the People from the Sovereignty of the State. There can be no doubt that the expansion of the rights already included in Sri Lanka's Constitution by reference to international standards in the ICCPR, as interpreted and declared by the Committee, stands to the gain of all those subjected to Sri Lanka's jurisdiction and not to their detriment.

The following observation by a former respected Justice of the Court is pertinent in this regard:

Such rights⁹⁷ even if not expressly incorporated in Chapter III of the Constitution, can be considered

⁹⁷ That is, flowing from the ICCPR.

nevertheless to be fundamental rights. That view is supported by Article 3 which does not purport to vest Sovereignty in the People, or to confer rights on the People. Article 3 instead proceeds on the basis that Sovereignty is already (and independently of the Constitution) vested in the People: accordingly, the People already possess certain rights. Article 3 refers to fundamental rights without any restriction or qualification, unlike Article 4(d) which refers to the narrower category of fundamental rights which are "by the Constitution declared and recognized". Therefore "Sovereignty" does include other rights besides those specifically enumerated, and among them are the ICCPR (and ICESCR) rights. This is no different to the position under the Ninth and Tenth Amendments to the US Constitution, which recognize that the enumeration in the Constitution of certain rights must not be construed to deny that the People do have other rights as well.⁹⁸

Sri Lanka's Supreme Court had earlier engaged in the copious citation of international standards of rights protection to enable the enhancement of existing rights in the Constitution. The interpretation and enhancement of modern international human rights was held to be only right and proper, resulting as it did, in a rich body of jurisprudence conferring further rights upon the individual, who is sovereign in terms of the Constitution itself.

An early example was when the Court of Appeal considered that certain views of the UN Human Rights Committee, together with those of other human rights institutions, as well as a decision of the Supreme Court of India, clearly demonstrate that some affirmative

⁹⁸ "Judicial Development of Human Rights; Some Sri Lankan Decisions," Justice MDH Fernando, *Sri Lanka Journal of International Law*, Vol 16, 2004, Faculty of Law, University of Colombo, also *LST Review*, Vol 15 Issue 211 May 2005, p.15

action was necessary by the court in the context of expansion of the writ of *habeas corpus*.⁹⁹

In a 1991 decision of particular importance, the Supreme Court interpreted Article 13(1) of Sri Lanka's Constitution to hold that an 'arrest' includes not only a deprivation of liberty upon suspicion of having committed an offence but also any arbitrary deprivation of liberty, citing ICCPR Article 9 rights to freedom from arbitrary arrest and detention in support of its view.¹⁰⁰ In *Mediwake v. Dissanayake*,¹⁰¹ ICCPR Article 25 was used by the Supreme Court in affirming the right of Sri Lankan citizens to vote at a provincial council poll in a manner that guarantees a free, equal and secret poll. The duality of the collective as well as individual aspect of the right to vote was emphasized. A similar judicial citation of ICCPR Article 25 was evidenced in *Centre for Policy Alternatives v. Dissanayake*.¹⁰² In *Silva v. Iddamalgoda*,¹⁰³ the Court recognized the petitioner's right to sue and seek compensation for herself as the victim's widow and for the minor child, bringing the law into conformity with international obligations and standards, in this instance, Article 14.1 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.¹⁰⁴

⁹⁹ *Leeda Violet and Others v. Vidanapathirana, Officer in Charge, Police Station, Dickwella and Others* [1994] LKCA 45; [1994] 3 SLR 377 (16 November 1994) per Sarath Nanda Silva J (as he then was). The views of the UN Committee were considered to be persuasive in developing the common law regarding the writ of *habeas corpus*.

¹⁰⁰ *Sirisena v. Perera*, [1991] (2) SLR 97.

¹⁰¹ [2001] 1 SLR 177.

¹⁰² SC 26/2002, SCM 27.5.2003. Note that the judgment incorrectly cites ICESCR Article 25.

¹⁰³ [2003] 2 SLR 63.

¹⁰⁴ The Convention Against Torture was acceded to by Sri Lanka on 3 January 1994. Domestic legislation adopting some of the provisions of the Covenant into law was accomplished by Act No. 22 of 1994. It is notable however that Act No 22 of 1994 does not contain any provision in regard to the right of either the victim or the dependant for compensation. Reliance was placed by the Court in this case primarily on the Article in the Convention itself rather than any provision of domestic law.

In *Wewalage Rani Fernando (wife of deceased Lama Hewage Lal) and others v. OIC, Minor Offences, Seeduwa Police Station, Seeduwa and eight others*¹⁰⁵ the Court, in buttressing its condemnation of the brutal treatment of the deceased by prison officials, laudably referred not only to the applicable domestic law contained in the Prisons Ordinance but also to relevant views of the Committee together with provisions of international treaties and declarations concerned with the rights of prisoners.¹⁰⁶ In *Shahul Hameed Mohammed Nilam and Others v. K Udugampola and Others*,¹⁰⁷ the judges, in finding a violation of the right to freedom from torture, conceded that pain of mind, provided that it is of a sufficiently aggravated degree, would suffice to prove a rights violation. Domestic, regional and international precedent articulating this principle was cited.¹⁰⁸

Citation of international human rights standards by Sri Lankan courts (in regard to which the preceding discussion was only a representative sample) has been evident in the area of economic social and cultural rights as well. For instance, in *Farwin v. Wijeyasiri, Commissioner of Examinations and Others*,¹⁰⁹ the Supreme Court, while recognising the right to higher education (as set out in Article 13 of the International Covenant on Economic, Social and Cultural Rights as well as defined as an objective of Sri Lankan State policy as laid down by Article 27(2)(h) of the Constitution, emphasized the duty

¹⁰⁵ SC(FR) No. 700/2002, SCM 26.07.2004.

¹⁰⁶ *Thomas v. Jamaica* (Communication No. 266/1989, views of UNHRC, 2 November 1993. The Court also considered General Assembly Resolution 43/174 of 9th December, 1988 and the Standard Minimum Rules for the Treatment of Prisoners adopted by the United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Geneva, 1955 and approved by the Economic and Social Council by its resolutions 663 C(XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977.

¹⁰⁷ SC(FR) Application Nos. 68/2002, 73/2002, 74/2002, 75/2002, 76/2002, SCM 29.01.2004.

¹⁰⁸ Jurisprudence of the European Court of Human Rights (EUCT) was considered in this case, specifically *Tyrer v. UK* (1978, 2 EHRR, 1), *The Greek case* (127 B (1969) Com. Rep. 70, *Campbell and Cosans v. UK* (Case law of the EUCT, Vol. 1, p.170).

¹⁰⁹ [2004] 1 SLR 9. Similar citations are evidenced in *Wickremesinghe v. de Silva* (SC 551/98, SCM 31.8.2001) and *Hewage v. UGC*, SC 627/2002, SCM 8.8.2003.

on the part of the officials of the Department of Examinations to conduct examinations with adequate security measures to ensure the integrity of the examination, to ensure that answer scripts are not tampered with and to conduct a full and open investigation in respect of any serious allegation of irregularity.

The question in the *Singarasa case* was whether the Court was justified in using its powers of review and revision to re-examine the affirmation of a conviction that was argued to have been obtained purely through a confession. The views of the Committee in that same instance were cited as persuasive authority, in accordance with the previous citations by the Court, of international human rights standards. It was not contended that Sri Lanka's highest Court could be "compelled" to afford relief as a result of the Committee's Views. This raised a question regarding the important distinction between the two, which question appears not to have been reflected in the *Singarasa case*.

- c) The impact of Article 27(15) [of the Constitution] requiring the State to "endeavour to foster respect for international law and treaty obligations in dealings among nations"

The impact of Article 27(15), (which constitutional article appears not to have been accorded any prominence at all in the *Singarasa* decision), had been pronounced in previous case law of the Court relating to domestic incorporation of international human rights standards. Thus:

Should this Court have regard to the provisions of the Covenant [i.e. the ICCPR]? I think it must. Article 27(15) [of the Sri Lankan Constitution] requires the State to "endeavour to foster respect for international law and treaty obligations in dealings among nations". That implies that the State must likewise respect international law and

treaty obligations in its dealings with its own citizens, particularly when their liberty is involved. The State must afford to them the benefit of the safeguards which international law recognizes.¹¹⁰

These Principles, though non-justiciable in Sri Lanka's constitutional context, have a direct impact on legal policy in the country. Article 27(1) states that:

The Directive Principles of State Policy herein contained shall guide Parliament, the President and the Cabinet of Ministers in the enactment of laws and the governance of Sri Lanka for the establishment of a just and free society.

When called upon to examine the constitutionality of the Provincial Councils Bill and the Thirteenth Amendment to the Constitution Bill,¹¹¹ then Chief Justice Sharvananda pointed out as follows:

True, the principles of State Policy are not enforceable in a court of law but that shortcoming does not detract from their value as projecting the aims and aspirations of a democratic government. The Directive Principles require to be implemented by legislation. In our view, the two Bills represent steps in the direction of implementing the programme envisaged by the Constitution makers to build a social and democratic society.¹¹²

¹¹⁰ *Weerawansa v. Attorney General and Others* [2000] LKSC 27; (2000) 1 SLR. 387 (26 June 2000), per Justice MDH Fernando. Also *Centre for Policy Alternatives v. Dissanayake* (SC.26/2002, SCM 27.5.2003) for a similar citation of the Directive Principles of State Policy in the context of referring to ICCPR, Article 25 in affirming the right to vote, per Justice MDH Fernando.

¹¹¹ [1987] 2 SLR 312, p.326.

¹¹² See similar positions taken by the Supreme Court in *Maithripala Senanayake v. Mahindasoma and Others* SC Appeal No. 41/96 Minutes of 14.12.96 at p.13-14 of the judgment (unreported).

CONCLUSION

The year 2006 was a period during which it became appropriate on more than one occasion to remind ourselves not only of our constitutional provisions protecting rights but also the stipulation laid down by Article 27(15) of the Constitution mandating respect for "international law and treaty obligations in dealings among nations." In what manner are we to respect such laws and norms? Are we embarking on a contrary course to these norms, often referred to as the sum total of the law binding the community of nations? What is the practical effect of Sri Lanka's accession to international human rights conventions and their protocols conferring the right of individual communication? These have now become difficult questions concerning not only the Protocol to the ICCPR but also the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). Campaigns by activists to persuade the State to accede to the Protocol to the Convention Against Torture (CAT) during the year in review, were also put on hold.

Meanwhile, the marked decrease both in the number of fundamental rights applications being filed in Court as well as the substantive jurisprudence thereof in relation to a vital right, namely the right to freedom from torture, cruel, inhuman or degrading treatment, was eminently troublesome. This was in contrast to the robust jurisprudence of the Court in this regard during the mid to late nineties. Undoubtedly, this is a question that must remain of considerable public concern, given the role of the Court as the final arbiter of rights in the domestic sphere.

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IV

EMERGENCY RULE

*Saliya Edirisinghe**

1 Introduction

The "Emergency Rule" regime which commenced in mid-August 2005 following the assassination of Foreign Minister Lakshman Kadirgamar continued throughout 2006. The phrase "Emergency Rule" is used here to mean the invocation of the emergency regulation making power by the President under Part II of the Public Security Ordinance¹ (PSO), which power enables the President to make regulations bypassing Parliament. Emergency regulations have the force of law as soon as they are made by the President,² and have the legal effect of over-riding, amending or suspending the operation of any law except the provisions of the Constitution.³

The chapter on "Emergency Rule" in the previous publication⁴ outlined the basic legal framework that governs the exercise of emergency regulation making power under the PSO, and explained, among other things, the scope of parliamentary control exercised over the emergency regulation making power of the President.⁵ Since a grasp of these issues may be useful to the new reader for

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¹ Public Security Ordinance No. 25 of 1947

² Section 11 of the Public Security Ordinance No. 25 of 1947

³ Article 155(2) of the Constitution of the Democratic Socialist Republic of Sri Lanka

⁴ Saliya Edirisinghe, "Emergency Rule," *Sri Lanka: State of Human Rights 2006* (Law & Society Trust: Colombo, 2006). This chapter covered emergency rule relating to the year 2005.

⁵ *Ibid.*, p.169-172

a better understanding of the subject matter in this chapter, the relevant section from the afore mentioned chapter is appended to this paper as Annex 1.

The Emergency Rule chapter in State of Human Rights (SHR) 2006 publication examined the Emergency (Miscellaneous Provisions and Powers) Regulations⁶ (EMPPR) in some detail, and drew attention to some of its oppressive provisions. These concerns are not repeated here. Newcomers to the subject, or readers wishing to refresh their memories, may refer to the SHR 2006 chapter.

This chapter considers the emergency regulations that were made in 2006, which include the Emergency (Prevention and Prohibition of Terrorism and Specified Terrorist Activities) Regulations No. 7 of 2006. Several other emergency regulations that adversely affect the physical liberty of the individual are also scrutinized.

During the latter part of the year, the Supreme Court struck down an emergency regulation that had been made and had taken effect about eighteen years previously. This decision is analyzed to ascertain its implications for the supremacy of the Constitution and the limitations on the emergency regulation making power of the President.

There seemed to be some confusion regarding the powers exercised by the armed forces, when they are called out by the President to assist the police in the circumstances provided for in Part III of the PSO. This issue is clarified in the latter part of this chapter.

⁶ The Emergency (Miscellaneous Provisions and Powers) Regulations No. 1 of 2005 published in Gazette Extraordinary No. 1405/14 of 13 August 2005 (EMPPR). (Regulations No.1 was already made on 6 January 2005). The EMPPR is a set of regulations usually made when "emergency rule" is invoked, and which set of regulations normally impose restrictions on the enjoyment of certain fundamental rights; create new offences and prescribe punishments; provide for arrest and executive detention; stipulate conditions for bail; prescribe procedure for investigation and trial of offences created by emergency regulations; permit the admission of confessions made to police officers above a certain rank; etc.

The writer has depended on the government gazettes relating to emergency rule and other related material available at the Nadesan Centre for the writing of this chapter. Although the Centre takes particular care to monitor the relevant gazettes, certain gazettes are sometimes not received, and therefore, the existence of certain regulations or orders may have passed unnoticed.

2 Emergency Regulations made in 2006

2.1 Some preliminary observations

Several emergency regulations were made during 2006. Some of these regulations brought back (sometimes in an altered form) some of the regulations in the EMPPR that were repealed or suspended in 2005. The Regulations that were so reintroduced were those which imposed restrictions on the freedom of association and expression, provided for essential services, and permitted the disposal of dead bodies avoiding the normal inquest procedure.

Of the new regulations made in 2006, a regulation which for the first time created an offence called "terrorism" stands out from the rest, and is examined in some detail in section 2.2.5 below.

2.2 Some of the important regulations scrutinized

2.2.1 Prohibition of public meetings and processions (Regulation 13, suspended in 2005 but reintroduced)

The EMPPR of 13 August 2005, provided in Regulation 13 for the President, by order, to prohibit or to regulate public meetings and processions, if these were likely to cause, in the opinion of the President, disturbance of public order or promote disaffection.

This regulation was suspended by a regulation made on 20 September 2005,⁷ but was reintroduced on 25 April 2006 by revoking the above regulation which suspended it.⁸ Thereafter, acting under Regulation 13 of the EMPPR, the President made an order on 27 April 2006,⁹ effective from that date, prohibiting public processions or public meetings in the Western Province without the written permission of the Inspector-General of Police. The May Day public processions and meetings scheduled in the Western Province were affected by this order which remained in force at the end of the year.

2.2.2 Control of publications (Regulation 15, suspended in 2005 but reintroduced)

The EMPPR of 13 August 2005 provided in Regulation 15 for a Competent Authority to make a wide variety of orders including pre-censorship of information relating to the operations of the security forces and sealing of presses. There was provision for the President to revoke orders made by the Competent Authority, and for an Advisory Committee to consider objections of affected persons and to make recommendations to the President.

This regulation was also suspended by the same regulation¹⁰ that suspended the regulation providing for the prohibition of public meetings and processions (Regulation 13). Like Regulation 13, Regulation 15 was reintroduced on 25 April 2006 by revoking the regulation which suspended it.¹¹ It will be noted that one regulation was used to suspend regulations 13 and 15 and then the reintroduction of these two regulations was also effected by one regulation.

⁷ Emergency (Temporary Suspension of Regulation) Regulation, No. 2 of 2005, published in the Gazette Extraordinary No. 1411/14 of 21 September 2005.

⁸ Revoking of the Emergency (Temporary Suspension of Regulation), No. 2 of 2005, published in the Gazette Extraordinary No. 1442/13 of 25 April 2006.

⁹ Published in the Gazette Extraordinary No. 1442/16 of 27 April 2006.

¹⁰ *Supra*, n.7

¹¹ *Supra*, n.8

2.2.3 Essential services (Regulation 40, repealed in 2005 but reintroduced and altered)

Regulation 40 of the EMPPR, the main provision that dealt with essential services, was repealed on 13 October 2005¹² together with a Schedule to that Regulation and other related provisions. A number of services had been listed as essential services in this Schedule and it had ended with an omnibus provision which covered "all services of any description, necessary or required to be done in connection with the sale, supply or distribution, of any article of food or medicine or any other article required by a member of the public."

The President reintroduced Regulation 40 on 3 August 2006 together with its Schedule.¹³ This evoked strong opposition. Possibly as a result of this, on 29 September 2006, the President repealed the Schedule to the Regulations and made other related changes.¹⁴ These changes provided that the Essential Service Regulation would come into operation only on the President declaring any service to be an essential service.

2.2.4 Deaths caused by the police or armed forces in the course of duty or deaths while in custody (Regulations 54 to 58, repealed in 2005 but reintroduced in 2006)

Regulations 54 to 58 inter alia laid down the procedure to be followed when deaths of persons were caused by the police or the armed forces in the course of duty or deaths of persons while in

¹² Emergency (Temporary Suspension of Regulations) Regulations, No. 3 of 2005, published in the Gazette Extraordinary No. 1414/22 of 13 October 2005.

¹³ Amendment to Emergency (Miscellaneous Provisions and Powers) Regulations, No. 1 of 2005 published in the Gazette Extraordinary No. 1456/27 of 3 August 2006.

¹⁴ Amendment to Emergency (Miscellaneous Provisions and Powers) Regulations, No. 1(sic) of 2005 published in the Gazette Extraordinary No. 1464/26 of 29 September 2006.

police or armed forces custody. This procedure circumvented the normal law relating to inquests. A comprehensive analysis of these provisions was provided in the previous edition of this Report.¹⁵

2.2.5 The Emergency (Prevention and Prohibition of Terrorism and Specified Terrorist Activities) Regulations No. 07 of 2006¹⁶ (“Anti-Terrorism Regulation”)

Following the attempted assassination of the Secretary of Defence by suspected LTTE¹⁷ operatives on 1 December 2006, the President promulgated the regulation popularly referred to as the *Anti-Terrorism Regulation* on 6 December 2006. This regulation created for the first time an offence called “terrorism”. Despite the violent conflict that had raged in the country for a good part of two decades, there was no offence called “terrorism”. Even the PTA¹⁸ which was enacted inter alia for the prevention of terrorism did not create an offence called “terrorism”.

The *Anti-Terrorism Regulation* of 6 December 2006 is preceded by a separate Proclamation signed by the Secretary to the President made at the President’s command. This is a feature not known of in previous regulations.

This Proclamation states that the territorial integrity and sovereignty of the Republic continues to be threatened by acts of terrorism by persons and organizations particularly with the intent of establishing a separate state within the territory of Sri Lanka, and that in furtherance of this objective, these persons and groups may unilaterally declare their purported independence. Wherefore, inter alia, for preventing such acts of terrorism, and for giving effect to obligations cast on Sri Lanka by legally binding international legal

¹⁵ *Supra*, n.4

¹⁶ Published in the Gazette Extraordinary No. 1474/5 of 6 December 2006.

¹⁷ Liberation Tigers of Tamil Eelam

¹⁸ Prevention of Terrorism (Temporary Provisions) Act, No. 48 of 1979

instruments wherein it is obligatory to take meaningful measures to prevent and suppress terrorism, the President intends to make emergency regulations under the PSO.

This of course is not a proclamation that was made under Section 2 of the PSO (the mandatory prerequisite to making emergency regulations). There is no other provision in the PSO under which a proclamation could be made.

The substance of the Proclamation is repeated in Regulations 2 to 5. Lawyers will readily recognize these as being in the nature of a preamble to a statute or a recital in a deed. They are "explanatory" or "justificatory" in nature, setting out matters relating to background and intention. Their only legal effect can be to act as an aid to interpretation of the provisions that follow.

Regulation 5 refers to giving effect to the government's international legal obligations through taking meaningful measures to prevent and suppress terrorism. In view of the purposes for which the PSO permits emergency regulations to be made,¹⁹ it may be argued that emergency regulations cannot be made for the purpose of *giving effect to Sri Lanka's international legal obligations*.

Regulation 6 prohibits persons or groups of persons individually or through other persons from engaging in "terrorism", "specified terrorist activity" or "any other activity in furtherance of any act of terrorism or specified terrorist activity committed by any person, group or groups of persons."

The offence of terrorism is defined in Regulation 20 as being certain specified unlawful conduct such as the unlawful use of violence, force, etc; or the unlawful causing of destruction or damage to

¹⁹ Section 5 authorizes the President to make emergency regulations "as appear to him to be necessary or expedient in the interest of public security and the preservation of public order and the suppression of mutiny, riot and civil commotion, or for the maintenance of supplies and services essential to the life of the community."

property; or the unlawful conduct which disrupts or threatens public order, and the maintenance of supplies and services essential to the life of the community; or etc, *"and which unlawful conduct is aimed at or is committed with the object of threatening or endangering the sovereignty or territorial integrity of the Democratic Socialist Republic of Sri Lanka or that of any other recognized sovereign State, or any other political or governmental change, or compelling the government of the Democratic Socialist Republic of Sri Lanka to do or abstain from doing any act, and includes any other unlawful activity which advocates or propagates such unlawful conduct"* (emphasis added).

According to this definition of terrorism, any trade union action which threatens the maintenance of supplies and services essential to the life of the community and where such trade union action is banned and is aimed at compelling the government to do an act, e.g. grant an increase of wages, will be regarded as terrorism!

"Specified terrorist activity" is defined in Regulation 20 as an offence specified in the Prevention of Terrorism Act, No. 48 of 1979, an offence under the Public Security Ordinance, an offence under Section 3 of the Prevention of Money Laundering Act, No. 5 of 2006, an offence under Section 3 of the Convention on the Suppression of Terrorist Financing Act, No. 25 of 2005, and any offence committed under Sections 114, 115 etc (waging war against the State etc) of the Penal Code.

It will be seen that an "offence under the Public Security Ordinance" is included as a "specified terrorist activity", and therefore, the failure of a householder to give a list of inmates as required by Regulation 23 of the EMPPR will fall within "specified terrorist activity" and will be punishable with a minimum term of imprisonment of 10 years, up to a maximum of 20 years.

It is possibly to avoid such bizarre consequences that the *Anti-Terrorism Regulation* contains the preambular regulations referred to above, for the purpose of interpreting the regulations that follow.

Regulation 7 prohibits any person from inter alia taking part in meetings or joining or harbouring or encouraging or advising any persons or groups of persons or organizations that act in contravention of the offences specified in Regulation 6. This regulation appears to prohibit even advice regarding legal rights being given to persons who have contravened Regulation 6.

Regulation 8 prohibits persons from engaging in *any transaction* with persons or groups of persons who contravene Regulations 6 and 7. Transactions include donating, selling, buying, receiving funding, and lending materially or otherwise. However, a proviso to this Regulation allows persons including national or international non-governmental organizations to engage in approved transactions with persons contravening Regulations 6 or 7 with the written approval of the Competent Authority. There is a further proviso which allows "emergency medical treatment or medical assistance" to be given to persons acting in contravention of Regulations 6 and 7 without the Competent Authority's approval. Critics have pointed out that similar exception is needed for all emergency humanitarian assistance, i.e., in case of floods or earthquakes.

Regulation 9 prohibits providing any information which is detrimental or prejudicial to national security to persons or groups or organizations which act in contravention of Regulation 6. This is a provision that has the potential to impose an unreasonable restriction on the freedom of expression. For example, media reports which expose corruption, i.e., purchase of sub-standard or outdated military equipment at exorbitant prices, could fall within the prohibition contained in the Regulation. In any event, this Regulation has the potential of exerting a "chilling effect" on the freedom of expression, especially on media.

Regulation 10 imposes a minimum term of imprisonment of 10 years but not exceeding 20 for contravening Regulation 6, and a minimum term of imprisonment of five years but not exceeding 10 years for contravening Regulations 7 and 9, and a term of

imprisonment of up to 10 years for violating Regulation 8. Conspiracy, attempt, preparation, aiding and abetting offences under these regulations carry a term of imprisonment up to seven years.

Regulation 15 provides for the appointment of a Competent Authority and Regulation 17 provides for appeals against the decision of the Competent Authority to be made within thirty days to an Appeals Tribunal. Regulation 18 establishes the Appeals Tribunal comprising of Secretaries to the Ministries of Defence, Finance, Nation Building, Plan Implementation and Justice, who are empowered to affirm, vary or rescind the decision of the Competent Authority. A competent Authority was appointed on 13 December 2006.²⁰

Since these regulations came to force only in December 2006, there was insufficient time to assess their impact as at the end of the year.

3 Other Regulations in force

At the beginning of 2006, regulations contained in the EMPPR of 13 August 2005 were in force except for certain regulations that had been repealed or suspended in 2005.²¹ However, as mentioned previously, some of the regulations repealed or suspended during 2005 were reintroduced in 2006, sometimes in an altered form. Regulations of the EMPPR that were repealed in 2005 and not re-introduced in 2006 were those relating to the: requisitioning of vehicles²² and requisitioning of personal services.²³

²⁰ See n.36

²¹ The repealed or suspended regulations were: Requisitioning of vehicles (Regulation 9); Requisitioning of personal services (Regulation 10); Provision to appoint Commissioner General of Essential Services (Regulation 11); Essential Services (Regulation 40); Deaths caused by the police or armed forces in the course of duty or while in their custody (Regulations 54 to 58); Prohibition of public meetings, processions (Regulation 13); Control of publications (Regulation 15).

²² Regulation 9 of the EMPPR.

²³ Regulation 10 of the EMPPR.

The provision in the EMPPR to appoint a Commissioner-General of essential services²⁴ whose duty was to execute and coordinate all activities relating to essential services which provision was repealed in October 2005²⁵ was reintroduced in a slightly altered form as an amendment to the EMPPR on 15 August 2006.²⁶ Furthermore, during 2006, Regulation 23 of the EMPPR which required householders to give list of inmates and to inform any changes regarding inmates to the officer in charge of the police station of the area when directed to do so by an officer not below the rank of Assistant Superintendent of Police was repealed and replaced by a new Regulation 23 which required the furnishing of such lists when directed to do so by the officer in charge of the police station of the area.²⁷

New Regulations or appointments in 2006 (other than those provisions in the EMPPR which were reintroduced (sometimes in an amended form or amended during 2006) included: *Emergency (Establishment of a Prohibited Zone) Regulations* No. 1 of 2006²⁸ which inter alia established a prohibited zone and prohibited any vessel from entering or remaining in such zone without the written authority of a competent authority; *Emergency (Administration of Local Authorities) Regulations*, No. 1 of 2006²⁹ appointing Mr. Omar Zuraik Kamil to administer the affairs and to perform the functions of the Colombo Municipal Council till the commencement of the term of office of the newly elected Colombo Municipal Council; *Emergency (Colombo High Security Zone) Regulations* No. 3 of 2006;³⁰ Amendment to *Emergency (Miscellaneous Provisions and Powers) Regulation*, No. 1 of 2005 which introduced a new Regulation 58A which empowered the Secretary of Defence to direct certain measures to be taken where death is caused to

²⁴ Regulation 11 of the EMPPR.

²⁵ *Emergency (Temporary Suspension of Regulations) Regulations*, No. 3 of 2005, published in the Gazette Extraordinary No. 1414/22 of 13 October 2005.

²⁶ Published in the Gazette Extraordinary No. 1458/5 of 15 August 2006.

²⁷ Published in the Gazette Extraordinary No. 1450/18 of 21 June 2006.

²⁸ Published in the Gazette Extraordinary No. 1438/8 of 27 March 2006.

²⁹ Published in the Gazette Extraordinary No. 1441/8 of 19 April 2006.

³⁰ Published in the Gazette Extraordinary No. 1452/28 of 8 July 2006.

a police officer or member of the armed forces;³¹ Appointment of Commissioner General of Rehabilitation;³² Emergency (Port of Colombo) Regulations No. 05 f 2006;³³ Emergency (Restricted Zone) Regulations, No. 6 of 2006;³⁴ Appointment of Competent Authorities under Emergency (Restricted Zone) Regulations, No. 6 of 2006;³⁵ Emergency (Prevention and Prohibition of Terrorism and Specified Terrorist Activities) Regulations, No. 7 of 2006;³⁶ Appointment of Gamini Sedara Senarath as Competent Authority for the purpose of the Emergency (Prevention and Prohibition of Terrorism and Specified Terrorist Activities) Regulations, No. 7 of 2006;³⁷ Emergency (Restricted use of Outboard Motors) Regulations, No. 8 of 2006.³⁸

4 Constitutional protection of the physical liberty of the individual and permitted restrictions

Articles 13(1)³⁹ and 13(2)⁴⁰ of the Constitution provide the basic constitutional safeguards that protect the physical liberty of the individual.⁴¹ However, these constitutional provisions are subject to restrictions on several grounds, including those of national security and public order.⁴²

³¹ Published in the Gazette Extraordinary No. 1456/4 of 31 July 2006.

³² Published in the Gazette Extraordinary No. 1462/9 of 12 September 2006.

³³ Published in the Gazette Extraordinary No. 1468/7 of 25 October 2006.

³⁴ Published in the Gazette Extraordinary No. 1472/27 of 25 November 2006.

³⁵ Published in the Gazette Extraordinary No. 1472/27 of 25 November 2006.

³⁶ Published in the Gazette Extraordinary No. 1474/5 of 6 December 2006.

³⁷ Published in the Gazette Extraordinary No. 1475/13 of 13 December 2006.

³⁸ Published in the Gazette Extraordinary No. 1477/24 of 29 December 2006.

³⁹ "No person shall be arrested except according to procedure established by law. Any person arrested shall be informed of the reason for his arrest."

⁴⁰ "Every person held in custody, detained or otherwise deprived of personal liberty shall be brought before the judge of the nearest competent court according to procedure established by law, and shall not be further held in custody, detained or deprived of personal liberty except upon and in terms of the order of such judge made in accordance with procedure established by law."

⁴¹ There are also other constitutional guarantees that can become relevant in safeguarding the freedom of the individual such as the equality guarantee provided in Article 12.

⁴² Article 15(7) of the Constitution

Restrictions on the physical liberty of an individual can be placed by law⁴³ or by regulations made under the law for the time being relating to public security.⁴⁴ The law relating to public security referred to above has been restrictively interpreted by the Supreme Court⁴⁵ to mean only the regulations made under the PSO⁴⁶ and not regulations made under the Prevention of Terrorism Act.⁴⁷

There are constitutional provisions that enable detained persons to petition the Supreme Court,⁴⁸ the Court of Appeal⁴⁹ and the Provincial High Court⁵⁰ to regain their freedom. However, from the material available, there do not appear to have been many instances where detainees had been successful in obtaining their liberty through judicial intervention.

5 Emergency regulations that adversely affect the physical liberty of the individual

5.1 Some prefatory comments

It has been a common feature of all past emergency regulations to impose some form of restriction on the physical liberty of the individual when emergency rule is invoked. The severity of these restrictions has varied from time to time and has ranged

⁴³ An Act of Parliament or a law enacted by any legislature prior to the commencement of the Constitution (Article 170 of the Constitution).

⁴⁴ Article 15(7) of the Constitution

⁴⁵ *Thavaneethan v. Dayananda Dissanayake Commissioner of Elections and Others* [2003]1 SLR p.74

⁴⁶ *Supra*, n.1

⁴⁷ *Supra*, n.18

⁴⁸ Articles 17 and 126 of the Constitution relating to violation of fundamental rights.

⁴⁹ Articles 140 and 141 of the Constitution, relating to writ jurisdiction which includes habeas corpus.

⁵⁰ Article 154P introduced by the 13th Amendment to the Constitution, which established Provincial High Courts inter alia with the power to exercise writ jurisdiction.

from authorizing the armed forces or private individuals to arrest persons, to restricting the movement of persons including house arrest, to permitting the executive to detain persons for long periods including up to 2 years.

Emergency regulations have often curtailed judicial discretion in regard to the granting of bail to persons suspected of having committed offences under emergency regulations. It is not clear whether the regulations that were in force during 2006 completely ousted judicial discretion in regard to granting bail to person suspected of committing an offence under an emergency regulation, and this matter is examined in this paper.

Although there was provision⁵¹ for an Advisory Committee to receive complaints from detainees and to make recommendations to the Secretary of Defence for their release, no such Committee was appointed by the President during 2006.

Emergency regulations in force during the year 2006 provided for the arrest of persons not only by members of the armed forces but by any person authorized by the President.

Now let us turn to look at the types of detention that were authorized during 2006.

5.2 Restriction of movement (Regulation 18)

This emergency regulation⁵² included provisions which authorized the Secretary to the Ministry of the Minister in charge of the subject of Defence to make order, or for the Secretary to authorize another person or authority to make order, prohibiting a person from being in a specified area. Furthermore, this regulation included a provision empowering the Secretary of Defence to make an order requiring a

⁵¹ Regulation 19(4) of the EMPPR

⁵² Regulation 18 of the EMPPR

person to notify his movements and also to prohibit a person from leaving his residence without obtaining prior permission. This last restriction of freedom is generally referred to as house arrest.

Failure to comply with of an order of restriction is an offence which carries a punishment of rigorous imprisonment ranging from a minimum period of three months to a maximum period of five years and to a minimum fine of five hundred rupees and a maximum of five thousand rupees.⁵³ This is the general punishment for contravention of an emergency regulation where no specific punishment is prescribed for the offence.

5.3 Preventive detention (Regulation 19), arrest (Regulation 20) and detention under Regulation 21

Regulation 19 of the EMPPR authorizes the Secretary to the Ministry of Defence to detain a person for a period of up to one year when the Secretary is of the opinion that it is necessary to detain the person in order to prevent such person from acting in a manner prejudicial to national security, maintenance of public order or the maintenance of essential services, or contravening certain emergency regulations.

As can be seen, this regulation authorizes detention not because a person has committed any offence, but to prevent such person from engaging in certain types of conduct.

However, there was no regulation authorizing the detention of persons suspected of having committed offences under emergency regulations for the purpose of investigation. This omission appears to be a drafting error as explained hereunder.

In the past, where emergency regulations authorized executive detention, there were two types of detention. One was preventive

⁵³ Regulation 45 of the EMPPR

detention, and the other investigative detention. Preventive detention was provided for the purpose of incarcerating a person because it was feared that such person might engage in certain types of conduct if left at liberty. Investigative detention was provided to enable the executive to keep persons suspected of having committed offences under emergency regulations for the purpose of conducting investigations.

An examination of the earlier emergency regulations amply demonstrates that the scheme followed had been to provide for preventive detention first, then to provide for the arrest of persons suspected of having committed offences under emergency regulations, and thereafter, to provide for the detention of suspects for the purpose of investigation.

The present EMPPR regulations also follow this scheme but a wrong reference in the investigative detention regulation (Regulation 21) has resulted in there being no provision to detain persons arrested on suspicion or because they have committed offences under emergency regulations, for the purpose of investigation. This slip-up has happened this way. Preventive detention is provided for in Regulation 19 and the power to arrest a person suspected of having committed an offence under an emergency regulation is provided for in Regulation 20. The next regulation, which is Regulation 21, seems to have been intended to provide for the detention of persons arrested under Regulation 20 for the purpose of investigation. However, it erroneously refers to persons arrested and detained under Regulation 19. Therefore, the resultant strange position is that although there is provision to detain a person in order to prevent such person from engaging in certain types of conduct, there is no provision for the executive to detain a person to investigate an offence which that person is suspected of having committed.

A scrutiny of Regulations 19 and 21 bears out this drafting error in that while Regulation 19 authorizes the Defence Secretary to order a person to be held in preventive detention for a period of

up to one year, Regulation 21 states that a person detained under Regulation 19 shall not be detained for a period exceeding ninety days. Furthermore, Regulation 21(2) stipulates that a person detained under Regulation 19 shall be released at the end of that period by the officer in charge of the place of detention unless such detainee is produced before a "court of competent jurisdiction," in which event, Regulation 21(3) states that the court shall order such detainee into fiscal custody. In the absence of any explanation, one has to assume that this "court of competent jurisdiction" is a court that is vested with jurisdiction to remand persons suspected of having committed offences under emergency regulations.

Therefore, one can see that the initial detention order made under Regulation 19 by the Secretary of Defence which can be for a period of up to one year, undergoes a fundamental alteration in regard to both its duration and tenor.

These contradictions can only be reconciled by treating the reference to Regulation 19 in Regulation 21 as a drafting error.

Surprisingly, no correction of the relevant regulation (Regulation 21) was made, and authorities have been using (or rather misusing) the preventive detention provision to detain persons for the purpose of conducting investigations into offences they are suspected of having committed.

It must be mentioned that there are emergency regulations which provide for the police and armed forces personnel to question persons already in custody⁵⁴ in respect of offences they are

⁵⁴ Regulation 47 gives a right to a police officer investigating an offence under an emergency regulation to orally examine a suspect; Regulation 49 provides for a police officer or authorized person to investigate into offences under any emergency regulation and casts a duty on the suspect to answer questions; Regulation 50 gives a police officer investigating an offence under an emergency regulation a right of access to any person detained for the purpose of investigation; Regulation 52 provides for conferring of police powers under emergency regulations on any commissioned or non-commissioned officer when authorized by the respective commanders; Regulation 68 permits a po-

suspected of having committed. However, these provisions cannot be availed of in situations where a person is held in illegal custody. A person lawfully detained under a preventive detention order may also be suspected of having committed offences under emergency regulations. In such a situation, the detainee can be subjected to interrogation in respect of the offences he is suspected to have committed. But this is not always the case, and those regulations requiring persons in custody to answer questions etc is not a substitute for an emergency regulation empowering detention of a suspect for the purpose of investigation.

5.4 Detention in the context of rehabilitation (Regulation 22)

Regulation 22 of the EMPPR of 13 August 2005 enabled a person to surrender to the police, armed forces etc in connection with specified offences (such as offences under the Explosives Act, Prevention of Terrorism Act, the Firearms Ordinance, emergency regulations, etc) or "through fear of terrorist activities". Upon such a surrender the surrenderee had to be handed over to the officer in charge of the nearest police station, and the officer in charge was required to forthwith produce such surrenderee before a magistrate and obtain an appropriate order. This procedure fitted into the general framework of emergency regulations and made sense. However, on 12 September 2006, this regulation was repealed and a new Regulation 22 took its place.⁵⁵

The changes that were introduced by this new regulation included that any person who surrendered in connection with the above mentioned offences or "through fear of terrorist activities" was automatically subjected to rehabilitation for a minimum period of 12 months, which period could be extended up to two years. This kind of treatment is illogical as well as unjust in regard to both types of surrendeers.

lice officer or a member of the armed forces when authorized by the respective commander to question any person in custody and to take such person into the custody of the police officer or authorized member of the armed forces for a period not exceeding seven days at a time.

⁵⁵ Published in the Gazette Extraordinary No. 1462/8 of 12 September 2006.

A person who surrenders in connection with an offence under the Explosives Act etc, is not necessarily guilty. Persons often surrender because they are suspected of offences or because they come to know that the authorities are looking for them. There should be provision for their involvement to be investigated within a given time frame and where appropriate for them to be released. This is what appears to have been contemplated in the previous (repealed) regulation. Now however there is no such provision. They have to undergo rehabilitation. There can be a police investigation, but strangely this can start only after three months. Furthermore the police investigation does not appear to envisage releasing them if they are cleared but only charging them in a court of law. But whether or not they are charged, they are subjected to rehabilitation, which is in effect detention without trial.

In the case of persons surrendering "through fear of terrorist activities", the word "surrender" is a misnomer. They are not surrendering, they are just seeking protection. This is indeed recognized by designating the Centres "Protective Accommodation and Rehabilitation Centres". Yet such persons also are subjected to rehabilitation for a period of 12 months, which may extend up to two years.

The provisions of the new regulation 22 are relatively easy to follow and are not paraphrased in full here. In outline, a person who surrenders must within 10 days be handed over to the Commissioner-General of Rehabilitation who assigns the surrendee to a Protective Accommodation and Rehabilitation Centre. The Secretary of Defence then "shall make an order authorizing the Commissioner General of Rehabilitation to keep such surrendee for a period not exceeding 12 months in the first instance at the Centre to which he has been assigned." The period is computed from the date of the handing over of the surrendee to the Commissioner-General. Within two months the Commissioner-General reports to the Secretary to the Ministry of Defence indicating the nature of the rehabilitation being carried out. A surrendee may once in two weeks meet his parents, relations or guardians, but this is subject to the permission of the Officer-in-Charge

of the Centre. Prior to the expiry of 12 months the Commissioner-General must send a report to the Secretary, who may then either decide to release the surrendee, or may, with the recommendation of the Commissioner-General and the Advisory Committee,⁵⁶ extend the period of rehabilitation by three months at a time, the aggregate of which extensions shall not exceed 12 months. If the surrendee is tried and convicted the court may, in imposing sentence, take into account the fact of his surrender (but not, apparently, the period spent under rehabilitation). The Court may also where appropriate, order "a further period of rehabilitation" but no maximum term for this is stipulated.

It is possibly due to the strange nature of the consequences that a person surrendering is "required to give a written statement to...the effect that he is surrendering voluntarily." Persons cannot however be expected to anticipate these consequences, and such a statement of voluntariness cannot be taken to legitimize them.

6 Provision for bail

It is convenient to consider the issue of bail regarding persons held under emergency regulations in the context of three categories. Firstly, those under detention; Secondly, persons accused and facing prosecution in the Magistrate's Court, and; Thirdly, persons indicted and facing trial in the High Court.

6.1 Bail in respect of detainees

As mentioned in sub-heading "5.3 Preventive detention (Regulation 19), arrest (Regulation 20) and detention under Regulation 21" above, although there is provision to arrest persons suspected of having committed offences under emergency regulations,⁵⁷ there is no provision to detain such suspects for the purpose of investigation.

⁵⁶ Established under Regulation 19(4) of the EMPPR.

⁵⁷ Regulation 20 of the EMPPR.

However, there is provision to arrest and detain persons to prevent them from engaging in certain types of conduct (Regulation 19 - preventive detention).

Strangely, there is provision in Regulation 21 that imposes on persons under preventive detention consequences that are normally suffered by persons who are suspected of having committed offences, such as the production before a magistrate and then being remanded into fiscal custody.⁵⁸

Regulation 21(1) states that a person arrested and detained under a detention order made under Regulation 19(1) has to be produced before a magistrate within a reasonable time, but not later than 30 days after arrest. A proviso to Regulation 21(1) states, "[T]he Magistrate shall not release any person on bail unless the prior written approval of the Attorney-General has been obtained." A further proviso states, "The production of any person in conformity with these regulations shall not affect the detention of such person under paragraph (2)."⁵⁹

⁵⁸ Regulation 21(3) of the EMPPR

⁵⁹ Paragraph (2) of Regulation 21 states, "Any person detained in pursuance of provisions of regulation 19 in a place authorized by the Inspector-General of Police may be so detained for a period not exceeding ninety days reckoned from the date of his arrest under that regulation, and shall at the end of that period be released by the officer in charge of that place unless such person has been produced by such officer before the expiry of that period before a court of competent jurisdiction; and where such person is so detained in a prison established under the Prisons Ordinance -

(a) all the provisions of that Ordinance other than the provisions of Part IX of that Ordinance, and

(b) all the rules made under that Ordinance other than the rules which relate to visits to and the correspondence of prisoners,

shall apply to such persons as though he was a civil prisoner within the meaning of that Ordinance:

Provided, however, that the Inspector-General of Police may, where he considers it expedient so to do -

(a) [order that the provisions of the said Ordinance and rules made thereunder which applies to such person shall not apply or shall apply subject to modifications]

(b) [permit visits to and correspondence as the Inspector-General of Police may direct]

Regulation 21(3) provides that "Where a person who has been arrested and detained in pursuance of the provisions of Regulation 19 is produced by the officer referred to in paragraph (2) before a court of competent jurisdiction, such court shall order that the (sic) such person be detained in the custody of the Fiscal in a prison established under the Prison Ordinance."

Therefore, it can be seen that the production before a magistrate within one month of detention in terms of Regulation 21(1), where the magistrate has no power to release such detainee on bail without the prior written approval of the Attorney-General, and the production of such detainee before a "court of competent jurisdiction" as provided in Regulation 21(2), are two different exercises. Furthermore, although Regulation 21(3) provides for such person to be detained in fiscal custody in a prison (remanded), there is no provision in that regulation or in any other regulation providing for or prohibiting the release of such remandee on bail.

It may be noted that Regulations 21(2) and 21(3) refer to the production of a detainee before "a court of competent jurisdiction". This seems to imply that such a detainee is a person suspected of having committed an offence under an emergency regulation and not a person detained to prevent him from engaging in certain types of conduct.

Considering these circumstances, it is submitted that the provisions of the Bail Act⁶⁰ will apply, since Section 3(1)⁶¹ of the Bail Act excludes from its ambit only where emergency regulations have made express provision regarding the release on bail of persons suspected, accused or convicted of offences under emergency regulations.

⁶⁰ Bail Act No. 30 of 1997

⁶¹ "Nothing in this Act shall apply to any person accused or suspected of having committed, or convicted of, an offence under, the Prevention of Terrorism (Temporary Provisions) Act, No. 48 of 1979, Regulations made under the Public Security Ordinance or any other written law which makes express provision in respect of the release on bail of persons accused or suspected of having committed, or convicted of, offences under such other written law."

6.2 Bail in respect of persons accused in the Magistrate's Court

In certain circumstances, persons accused of committing offences under Regulation 25⁶² may be prosecuted in the Magistrate's Court.⁶³ There are no emergency regulations relating to the release of such accused on bail, and therefore, on the reasoning explained above, it is submitted that this situation will attract the provisions of Section 3(1) of the Bail Act.⁶⁴ It may be noted that Section 3(2) of the Bail Act provides that any reference in a written law to a provision in the Criminal Procedure Act, No. 15 of 1979 relating to bail shall be deemed to be a reference to the corresponding provision in the Bail Act.

6.3 Bail in respect of persons indicted in the High Court

The position is clear in regard to this category of persons; they can be released on bail only where the Attorney-General consents.⁶⁵

7 The de-merger case⁶⁶

7.1 An outline of the facts

With the hope that the devolution of certain legislative and executive powers to the provinces would help solve the violent conflict that had ravaged the country, Parliament enacted the 13th Amendment

⁶² Offences include those against movable and immovable property.

⁶³ The proviso to Regulation 25(3) provides for the Attorney-General, having regard to the circumstances relating to the commission of an offence specified in Regulation 25, to authorize the institution of proceedings in the Magistrate's Court, where provisions of Chapter XVII of the Code of Criminal Procedure Act, No. 15 of 1979, relating to the trial of such offence shall *mutatis mutandis*, apply.

⁶⁴ *Supra*, n.60

⁶⁵ Regulation 62(2) of the EMPPR

⁶⁶ *N.W. Jayantha Wijesekera and Others v. Attorney-General and Others*, SC(FR) Application Nos. 243/06, 244/06, 245/06, SC Minutes 16 October 2006.

to the Constitution in 1987.⁶⁷ Article 154A(1), introduced by the 13th Amendment, empowered the President to *establish* a Provincial Council in respect of each of the nine provinces⁶⁸ specified in a schedule⁶⁹ to that Article, and Article 154A(2) required that every Provincial Council shall be *constituted* upon the election of members according to the law relating to provincial council elections.⁷⁰

Furthermore, Article 154A(3)⁷¹ provided for Parliament to make provision *by or under any law* for two or three adjoining provinces to form one administrative unit, an act that came to be called the "merger".

Parliament enacted the Provincial Councils Act⁷² (hereinafter sometimes called the "Act") on the same day that the 13th Amendment to the Constitution was enacted, and the Act made provision, *inter alia*, for matters relating to the merging and de-merging of provinces. The President acting under Article 154A(1) of the Constitution *established* separate Provincial Councils for each of the nine provinces (including the north and the east) with effect from 3 February 1988. Thereafter, measures were taken to *constitute* a Provincial Council for each of seven Provincial Councils by election, but not for the northern and eastern provinces. In respect of the northern and eastern provinces, these were merged

⁶⁷ Certified on 14 November 1987.

⁶⁸ Western; North Western; Uva; Sabaragamuwa; Central; Eastern; Southern; North Central, and; Northern.

⁶⁹ Eighth Schedule.

⁷⁰ This law was enacted by Parliament, titled Provincial Councils Elections Act, No. 2 of 1988 on 27 January 1988.

⁷¹ Article 154A(3) states "Notwithstanding anything in the preceding provisions in this Article, Parliament may by, or under, any law provide for two or three adjoining Provinces to form one administrative unit with one elected Provincial Council, one Governor, one Chief Minister and one Board of Ministers and for the manner of determining whether such Provinces should continue to be administered as one administrative unit or whether each such Province should constitute a separate administrative unit with its own Provincial Council, and a separate Governor, Chief Minister and Board of Ministers."

⁷² Provincial Councils Act, No. 42 of 1987, certified on 14 November, 1987, the day the 13 Amendment to the Constitution was also certified.

by a Proclamation made by the President on 8 September 1988. This merger was on the basis of provisions contained in Article 154A(3) of the Constitution and the provisions contained in Section 37 of the Act⁷³ as amended by an emergency regulation,⁷⁴ made on 2 September 1988 under Section 5 of the Public Security Ordinance.⁷⁵

⁷³ According to Section 37 (1)(a): "The President may by Proclamation declare that the provisions of this subsection shall apply to any two or three adjoining Provinces specified in such Proclamation (hereinafter referred to as "the specified Provinces"), and thereupon such Provinces shall form one administrative unit, having one elected Provincial Council, one Governor, one Chief Minister and one Board of Ministers, for the period commencing from the date of the first election to such Provincial Council and ending on the date of the poll referred to in subsection (2) of this section, or if there is more than one date fixed for such poll, the last of such dates. (b) The President shall not make a Proclamation declaring that the provisions of subsection (1)(a) shall apply to the Northern and Eastern Provinces unless he is satisfied that arms, ammunition, weapons, explosives and other military equipment, which on 29th July, 1987, were held or under the control of terrorist militant or other groups having as their objective the establishment of a separate State, have been surrendered to the Government of Sri Lanka or to authorities designated by it, and that there has been a cessation of hostilities and other acts of violence by such groups in the said provinces.

(2)(a) Where a Proclamation is made under the provisions of subsection (1)(a), the President shall by Order published in the Gazette, require a poll, to be held in each of the specified Provinces, and fix a date or dates, not later than 31st day of December, 1988, for such poll, to enable to(sic) the electors of each such specified Province to decide whether –

(i) such province should remain linked with the other specified Province or Provinces as one administrative unit, and continue to be administered together with such Province or Provinces; or

(ii) such Province should constitute a separate administrative unit, having its own distinct Provincial Council, with a separate Governor, Chief Minister and Board of Ministers.

(b) The President may, from time to time, at his discretion, by subsequent Orders published in the Gazette, postpone the date or dates of such poll.

⁷⁴ Published in the Gazette Extraordinary No. 521/27 of 2 September 1988, which stated that "During the continuance in force of these regulations, Paragraph (b) of sub-section (1) of Section 37 of the Provincial Councils Act, No. 42 of 1987, shall have effect as if for the words "by such groups in the said Provinces" appearing in that Paragraph, there were substituted the following : – "by such groups in the said provinces or that operations have been commenced to secure complete surrender of arms, ammunition, weapons, explosives or other military equipment, by such groups." (emphasis added)

⁷⁵ Public Security Ordinance No. 25 of 1947

Section 37(1)(b)⁷⁶ of the Act stipulated that the northern and eastern provinces cannot be merged to form one administrative unit unless two requirements had been satisfied, that is the surrender of weapons and the cessation of hostilities by militant groups in those provinces.

However, the Emergency Regulation of 2 September 1988⁷⁷ had the effect of including an alternative to these two conditions that had been stipulated in Section 37(1)(b),⁷⁸ the alternative condition being "...that operations have been commenced to secure complete surrender of arms, ammunition, weapons, explosives or other military equipment, by such groups."

An election was held for the merged North and Eastern Province in pursuance of a notice dated 19 September 1988 made under Section 10 of the Provincial Councils Election Act.⁷⁹ In March 1990 the Provincial Council proclaimed a "Unilateral Declaration of Independence" and the Chief Minister of the Council and a group of his supporters left the country. The Provincial Council was dissolved and no further election was held for the merged North and East Provincial Council.

Although Section 37(2)(a)⁸⁰ of the Act required a poll to be held in every merged province before 31 December 1988 for electors in a merged province to decide whether or not the respective provinces should remain merged, this poll had been postponed from time to time by order of successive Presidents,⁸¹ the last such order being made on 23 November 2005, postponing the poll in the Eastern Province to 16 November 2006.

⁷⁶ *Supra*, n.73

⁷⁷ *Supra*, n.74

⁷⁸ *Supra*, n.73

⁷⁹ *Supra*, n.74

⁸⁰ *Supra*, n.73

⁸¹ Acting under Section 37(2)(b) of the Act, which gives the President the discretion to postpone the poll.

7.2 The petition to the Supreme Court and the issues involved

The petitioners were three electors from the Eastern Province. Their complaint was not the failure to hold fresh elections to the merged Provincial Council, which, as we have seen, had been dissolved in 1990. Their position was that the Provinces had never been validly merged at all. They claimed that their fundamental rights guaranteed by Article 12(1) of the Constitution⁸² had been infringed by the failure to constitute a provincial council by election for the Eastern Province as required by Article 154A(2) of the Constitution and the continued denial to the electors of the Eastern Province including the petitioners the right to vote at an election for members of such Council, which stems from the invalid merger of the Northern and Eastern provinces.

The petitioners stated that the Proclamation merging the Eastern and Northern provinces as one administrative unit was fatally flawed due to the non-observance of the mandatory conditions stipulated in Section 37(1)(b) of the Act, which is the surrender of weapons and the cessation of hostilities in those provinces, and that the emergency regulation of 2 September 1988 which purported to amend these mandatory conditions in Section 37(1)(b) of the Act rendering those conditions ineffective was *ultra vires* Section 5⁸³ of the PSO.

The petitioners submitted that the regulation of 2 September 1998 was *ultra vires* on two grounds. Firstly, in terms of Article 154A(3),⁸⁴ only Parliament could "...by, or under, any law provide two or three adjoining Provinces to form one administrative unit..." and

⁸² Article 12(1) of the Constitution states, "All persons are equal before the law and are entitled to the equal protection of the law."

⁸³ This Section empowers the President to make emergency regulations for: public security and the preservation of public order; suppression of mutiny, riot or civil commotion; the maintenance of supplies and services essential to the life of the community.

⁸⁴ *Supra*, n.71

therefore, an alternative condition could have been provided only by law,⁸⁵ and not by an emergency regulation. Secondly, Section 5 of the PSO⁸⁶ empowers the President to make emergency regulations only for the purposes stated in that Section, and the Regulation of 2 September 1988 cannot be reasonably related to any of those purposes.

Furthermore, that although there was no legally valid merger, the poll required to be held in terms of section 37(2)(a) of the Act not later than 31 December 1988 to enable electors of each province to decide whether to be merged as one administrative unit has been postponed by successive Presidents,⁸⁷ the last postponement in respect of the Eastern Province being made to 16 November 2006.

The respondents contended that the conditions contained in Section 37(1)(b) of the Act had been validly amended by the Emergency Regulation of 2 September 1988 and that in any event, the petitioners cannot seek a declaration of nullity in respect of the Emergency Regulation of 2 September 1988 or the Proclamation of merger made on 8 September 1988 due to the time bar⁸⁸ and/or the immunity enjoyed by the President under Article 35(1) of the Constitution.⁸⁹ Further, that the poll required to be held in terms of Section 37(2)(a) to enable electors to decide whether the provinces should remain linked had been validly postponed from time to time by orders made under Section 37(2)(b).⁹⁰

⁸⁵ Article 170 defines the term "law" as follows: "law means any Act of Parliament, and any law enacted by any legislature at any time prior to the commencement of the Constitution and includes an Order in Council".

⁸⁶ *Supra*, n.75

⁸⁷ *Supra*, n.85

⁸⁸ Article 126(2) of the Constitution stipulates that petitions regarding infringement or imminent infringement of fundamental rights have to be filed within one month of the infringement or imminent infringement.

⁸⁹ "While any person holds office as President, no proceedings shall be instituted or continued against him in any court or tribunal in respect of anything done or omitted to be done by him either in his official or private capacity".

⁹⁰ *Supra*, n.73

7.3 The Decision of the Supreme Court

The Supreme Court in its judgment agreed with both grounds urged by the petitioners for impugning the Emergency Regulation of 2 September 1988. The Court ruled that the emergency regulation sought to override a provision in the Constitution, i.e., Article 154(A)(3) which laid down that "Parliament may by, or under, any law provide" for the merging of any two or three provinces and the manner of determining whether such merged provinces should continue to be merged or whether they should be separated. And that the term "law" appearing in the Constitution means a law enacted by Parliament or any other legislature⁹¹ but does not include an emergency regulation. Furthermore, the Court asserted that the impugned regulation had no reasonable connection to any of the purposes for which regulations can be made in terms of Section 5 of the PSO, and manifestly, that the regulation had been made for a collateral purpose of amending another and unrelated law to contravene a specific condition laid down in that law.

In regard to the Proclamation made by the President on 8 September 1988 merging the northern and eastern provinces, the Court observed that the merger had been purported to be done when neither of the two conditions specified in Section 37(1)(b) of the Act, i.e., surrender of weapons and cessation of hostilities, had been satisfied. Therefore the Proclamation was invalid.

Regarding the objection of the respondent as to the time bar, the Court explained that the Provincial Council for the Eastern Province had not been constituted by an election of members due to the invalid Proclamation of merger made on 8 September 1988. That the right to have a provincial council constituted by the election of the members of such council pertains to the franchise, which is a part of the sovereignty of the people,⁹² and that its denial is a

⁹¹ *Supra*, n.71

⁹² Article 3 of the Constitution states: "In the Republic of Sri Lanka sovereignty is in the People and is inalienable. Sovereignty includes the powers of government, fundamental rights and the franchise".

continuing infringement of the right to the equal protection of the law guaranteed by Article 12(1) of the Constitution.

In respect of the respondent's contention regarding the immunity from suit enjoyed by the President in terms of Article 35(1)⁹³ of the Constitution, the Court referred to some of its previous decisions which had held that the review of emergency regulations to ascertain whether they were in excess of the powers reposed in the President was not precluded by the immunity from suit enjoyed by an incumbent President.

7.4 Some comments on the decision

The decision of the Court can be considered as one which restrictively interpreted the scope of emergency regulations on one hand, and enhanced the fundamental rights protection provided by the Constitution on the other.

The Court struck down the Emergency Regulation of 2 September 1988 on two grounds. On the first ground, the Court interpreted the provision in Article 154A(3) of the Constitution which stated that "...Parliament may by, or under, any law provide for two or three adjoining Provinces to form one administrative unit..." (emphasis added) as a constitutional provision which excluded provisions being made by emergency regulations on the basis that emergency regulations are not "law".

Article 155 (1)⁹⁴ of the Constitution deems the Public Security Ordinance as existing immediately prior to the commencement of the Constitution as a law enacted by Parliament. In making emergency regulations the President acts *under* the Public Security Ordinance, which is a *law* enacted by Parliament. The making of emergency regulations is an exercise of delegated legislative

⁹³ *Supra*, n.89

⁹⁴ "The Public Security Ordinance as amended and in force immediately prior to the commencement of the Constitution shall be deemed to be a law enacted by Parliament".

power.⁹⁵ Therefore, it may be argued that in making the Emergency Regulation of 2 September 1988, the President acted in terms of Article 154A(3) of the Constitution, i.e., *under, any law*, in this instance, under the PSO. This aspect, that is, provision in Article 154A(3) of the Constitution which permits the merging of provinces "*under, any law*" does not seem to have been considered.

However, the Public Security Ordinance is not a law that Parliament specifically enacted *under* which there is provision for the merging of provinces. It is a general law *under* which there is provision to make emergency regulations which have the force of law and the capacity to amend any law other than the provisions of the Constitution.⁹⁶

On the second ground, the Court ruled that the Emergency Regulation was outside the scope of Section 5 of the Public Security Ordinance. Section 5 authorizes the President to make emergency regulations "as appear to him to be necessary or expedient in the interest of public security and the preservation of public order and the suppression of mutiny, riot and civil commotion, or for the maintenance of supplies and services essential to the life of the community."

It could be argued that the Emergency Regulation was made because it appeared to the President that it was expedient to do so for the preservation of public order and the suppression of civil commotion. The failure to provide an alternative ground to merge the Northern and Eastern provinces might have resulted in public disorder and civil commotion. Various complex issues would be involved in assessing this matter, which is beyond the scope of this paper.

Regarding the issue of the time bar, the acceptance of the doctrine of continuing violation to overcome the problem is of particular

⁹⁵ See *Karunathilaka and Another v. Dayananda Dissanayake, Commissioner of Elections and Others* [1999] 1 SLR 157 at p.180

⁹⁶ *Supra*, n.3

significance. The infringement of the fundamental right took place in 1988, and in terms of Article 126(2) of the Constitution the petitioners should have filed their complaints within one month of the infringement. The Court however considered the infringement (failure to constitute a provincial council for the Eastern Province by an election) as an infringement that pertains to the franchise, which is a part of the sovereignty of the people, and that the denial of the franchise was a continuing violation of the right to equality guaranteed by Article 12(1) of the Constitution. It may be useful to remember that in terms of Article 3 of the Constitution, sovereignty includes not only the franchise but fundamental rights as well. And therefore, it may be contended that any violation of a fundamental right affects sovereignty and consequently attracts the doctrine of continuing violation.

8 Police powers exercised by the armed forces under emergency law

There are two separate provisions in the PSO that enable the President to confer police powers on members of the armed forces. The scope of the powers that can be conferred by each of these provisions is different, and the lack of a proper understanding of this can lead to wrong conclusions.

Firstly, the President can, acting under Section 5 of the PSO, make emergency regulations conferring police powers on the armed forces, or any other person. The EMPPR confers certain police powers on the armed forces, and also makes provision to confer police powers under any emergency regulation on members of the armed forces above a certain rank when so authorized by the respective commanders. These matters will be dealt with shortly.

Secondly, the President can, acting under Section 12 of the PSO, call out the armed forces by Order published in the gazette when public security is endangered and the President is of the opinion

that the police are inadequate to maintain public order. An Order under Section 12 of the PSO has to be published in the gazette, is valid only for a period of one month at a time, and has to be communicated to Parliament.

The existence of a valid Proclamation of emergency is a prerequisite to the making of an emergency regulation under Section 5 of the PSO, which section is contained in Part II of the PSO. However, calling out the armed forces under Section 12 of the PSO, which section is contained in Part III of the PSO is not dependant on such a Proclamation.

The powers that vest in the armed forces when they are called out under Section 12 of the PSO are specifically laid down in Section 12 and other related provisions in Part III of the PSO and are limited to the function of maintaining public order. These powers include those of search and arrest conferred on the police by any written law; dispersal of unlawful assemblies; seizure and removal of offensive weapons and substances from unauthorized persons in public places; and seizure and removal of guns and explosives (when written authority is granted by the President or an authorized person). Only armed forces personnel above a certain rank can exercise some of these powers.

The President cannot confer any additional powers other than those prescribed above. It must also be pointed out that, Section 12 Order specifically prohibits the armed forces from exercising powers under Chapter XI of the Code of Criminal Procedure Act, which chapter provides for the investigation of offences, production of suspects before magistrates etc. Therefore, the powers the armed forces possess upon a Section 12 Order being made are prescribed by law and confined in their ambit to the attainment of a legitimate aim i.e. the maintenance of public order.

Now let us turn to examine the issue of conferment of police powers on the armed forces by regulations in the EMPPR. In terms

of Regulation 20 of the EMPPR, any member of the armed forces can arrest a person suspected of an offence under any emergency regulation, but such person has to be handed over to the nearest police station within 24 hours. However, Regulation 52 is of much wider scope, and provides for the conferring of police powers exercised under any emergency regulation on any commissioned or non-commissioned officer of the armed forces when so authorized by the respective commander. On the face of it, this provision can be considered as excessive, and the respective commanders should exercise utmost circumspection if ever they decide to act under this regulation.

Regulation 68 of the EMPPR permits a member of the armed forces when authorized by the respective commander to question any person in custody, and to *take such person into the custody of the authorized member of the armed forces for a period not exceeding seven days at a time* for the purpose of questioning or for any matter connected to such questioning. Even if special circumstances require that authorized persons of the armed forces question certain persons in custody, there is no need to permit the transfer of custody. It is the provision for transfer of custody to the armed forces that generally leads to concerns regarding "torture chambers".

Allowing the armed forces to conduct investigations is an exercise fraught with danger and should be avoided. The armed forces lack the proper training, experience and investigative skills to engage in such an exercise. Considering the nature of the training they undergo and the experiences of the battlefield, their psychological make-up may not be conducive to the conducting of an effective investigation within the confines of the law.

9 Conclusion

The EMPPR inherited from the previous year continued throughout 2006. Given that the present chapter was confined to examining

certain issues relating to emergency rule during 2006, a reading of the chapter on Emergency Rule in the previous publication⁹⁷ may be necessary for a better understanding of the situation.

Although numerous arrests and detentions were made under emergency regulations, not many had been successful in obtaining their liberty through recourse to judicial intervention. The President failed to appoint an Advisory Committee to consider objections to detention, which was required by an emergency regulation, and this is inexcusable.

The judgment of the Supreme Court in the de-merger case which restricted the scope of emergency regulations and struck down an emergency regulation made about 18 years ago can be considered as a landmark decision that impacted on the fundamental rights jurisprudence of this country.

Long-standing concerns regarding certain aspects of emergency rule including those relating to the inaccessibility of emergency regulations, convoluted regulations and lack of independent review of emergency regulations remained unaddressed.

⁹⁷ *Supra*, n.4

**Annex 1 – Extract from “Emergency Rule in 2005” chapter
from *State of Human Rights 2006* publication**

**2 The legal basis, scope and control of emergency
regulations**

2.1 Enabling legal provisions and their ambit

The Public Security Ordinance⁹⁸ (PSO) and Articles 76⁹⁹ and 155¹⁰⁰ of the Constitution¹⁰¹ provide the legal basis that enables the President to make emergency regulations. The President is empowered to make emergency regulations “as appear to him to be necessary or expedient in the interest of public security and the preservation of public order and the suppression of mutiny, riot or civil commotion, or for the maintenance of supplies and services essential to the life of the community.”¹⁰²

However, before the President can make emergency regulations, s/he has to gazette a Proclamation¹⁰³ informing of the invocation of Part II of the PSO, which contains, among other things, the legal provisions that empower the President to make emergency regulations. A Proclamation serves the salutary purpose of giving public notice of the President’s assumption of emergency regulation making power. Although a Proclamation can invoke Part II of the PSO on a future date, it is usual for a Proclamation to invoke Part II

⁹⁸ Public Security Ordinance No. 25 of 1947

⁹⁹ *Inter alia*, empowers Parliament to confer on the President the power to make emergency regulations.

¹⁰⁰ Keeps in force the Public Security Ordinance No. 25 of 1947 as amended, and provides *inter alia*, that the power to make emergency regulations under the Public Security Ordinance shall include the power to make regulations having the legal effect of over-riding, amending or suspending the operation of any law except the provisions of the Constitution.

¹⁰¹ The Constitution of the Democratic Socialist Republic of Sri Lanka

¹⁰² Section 5(1), contained in Part II of the Public Security Ordinance No. 25 of 1947

¹⁰³ Section 2 of the Public Security Ordinance No. 25 of 1947.

of the PSO from the same date as of the Proclamation. The issuing of this Proclamation is commonly referred to as a declaration of emergency.

Emergency regulations come into force the moment they are made by the President,¹⁰⁴ and have the legal effect of overriding or amending all laws except the provisions of the Constitution.¹⁰⁵ However, the Constitution permits emergency regulations to restrict certain constitutional provisions (ie. fundamental rights) in specified circumstances, except the constitutional guarantees to freedom of thought, conscience and religion;¹⁰⁶ freedom from torture or to cruel, inhuman or degrading treatment or punishment;¹⁰⁷ right to a fair trial;¹⁰⁸ prohibition of punishment by way of death or imprisonment except by an order of a competent Court,¹⁰⁹ and right to a remedy for the violation of a fundamental right by executive or administrative action.¹¹⁰

2.2 Parliamentary control of Proclamation

Law making powers are vested in Parliament, and although it can delegate this power to the President in exceptional circumstances, Parliament cannot abdicate or alienate this power. In issuing a Proclamation and making emergency regulations thereunder, the President exercises the legislative power delegated by Parliament. Therefore, provisions exist to retain Parliamentary control over both the Proclamation and the content of emergency regulations.

A Proclamation made by the President must immediately be communicated to Parliament, and if at the date of the Proclamation Parliament is adjourned or prorogued, as it will not expire within

¹⁰⁴ Section 11 of the Public Security Ordinance No. 25 of 1947

¹⁰⁵ See Article 155(2) of the Constitution.

¹⁰⁶ Article 10 of the Constitution

¹⁰⁷ Article 11 of the Constitution

¹⁰⁸ Article 13(3) of the Constitution

¹⁰⁹ Article 13(4) of the Constitution

¹¹⁰ Article 17 of the Constitution

10 days, the President is required to summon Parliament to meet within 10 days of the Proclamation.

A Proclamation is valid for a period of one month (at a time) and expires thereafter, provided it is approved by Parliament within 14 days of the provisions of Part II of the PSO coming into force. If the Proclamation is not so approved, then it expires at the end of 14 days.¹¹¹ If revoked by Parliament, the Proclamation expires upon such revocation.¹¹² The non-approval or revocation of a Proclamation by Parliament will result in any emergency regulation made under such Proclamation ceasing to have legal force, but anything validly done in the past under such a regulation remains unaffected.¹¹³ Furthermore, Parliament can revoke or alter any emergency regulation.¹¹⁴

Most importantly the non-approval or revocation of a Proclamation by Parliament places a fetter, for a limited time, on the President's power to make a further Proclamation. Then again, the resort to emergency rule places restrictions on the President's power to prorogue Parliament. These stipulations which reflect parliamentary control over emergency rule are dealt with in some detail below.¹¹⁵

2.3 Ouster clauses

The PSO contains provisions that seek to prevent the courts from examining the validity of a Proclamation¹¹⁶ or an emergency regulation.¹¹⁷ These provisions are commonly referred to as "ouster clauses".

¹¹¹ Article 155(6) of the Constitution

¹¹² Article 155(8) of the Constitution

¹¹³ Section 4 of the Public Security Ordinance No. 25 of 1947

¹¹⁴ Section 5(3) of the Public Security Ordinance No. 25 of 1947

¹¹⁵ See "9. Validity of second Proclamation and EMPPR" and "17. A new President, Prorogation of Parliament and its validity," respectively.

¹¹⁶ Section 3 of the Public Security Ordinance No. 25 of 1947

¹¹⁷ Section 8 of the Public Security Ordinance No. 25 of 1947

The Supreme Court has not yet ruled on the validity of the ouster clause in the PSO in respect of the Proclamation, but in regard to the ouster clause in respect of emergency regulations, the Supreme Court has ruled that it has the power to strike down emergency regulations and in fact has struck down emergency regulations on the basis that they violate fundamental rights.¹¹⁸

The Constitution also contains an ouster clause¹¹⁹ in regard to a Proclamation, which clause was brought in with the 13th Amendment to the Constitution. However, this ouster appears to apply where the President uses a Proclamation made under the PSO to issue directions to a Governor of a Province regarding the exercise of the Governor's powers in the Province in certain situations.

In the *Provincial Councils* case,¹²⁰ the petitioners challenged the validity of an extension of a Proclamation to a wider area, but the Supreme Court declined to review this issue, citing among other reasons, that it had not had the benefit of a full argument on that matter.

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¹¹⁸ *Joseph Perera Alias Brutten Perera v. The Attorney-General* ([1992] 1 SLR 199); *Karunathilaka and Another v. Dayananda Dissanayake, Commissioner of Elections and Others* ([1999] 1 SLR 157); *Lilanthi De Silva v. Attorney-General and Others* ([2000] 3 SLR 155)

¹¹⁹ Article 154J

¹²⁰ *Karunathilaka and Another v. Dayananda Dissanayake, Commissioner of Elections and Others* [1999] 1 SLR 157

IDPS AND CIVILIAN PROTECTION

*Bhavani Fonseka**

1 Introduction

Since December 2005 there has been an increase in hostilities in the North and East, resulting in threats to human security of civilians and communities. There has been a rise in killings, disappearances, abductions, and threats in most parts of Sri Lanka, with a large concentration in the North and East. The increasing hostilities and threats to security have created uncertainty, fear and tension among the civilian population, and as seen with incidents in April 2006 in Trincomalee, heightened ethnic polarization among the communities. Such a context leads to migration of civilians and communities from their homes and villages to areas perceived as safe, either within the district or to other districts. There are others who have sought safety as refugees in Southern India, a significant number of refugees reaching India in 2006. The timeframe covered in this chapter, January-December 2006, maps out displacement trends and key issues related to displacement and the humanitarian situation.

2 Dynamic Nature of Displacement

2.1 The definition of an Internally Displaced Person (IDP)

According to the Guiding Principles on Internal Displacement, IDPs are:

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“persons or groups of persons who have been forced or obliged to flee or to 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”.¹

2.2 The Sri Lankan context

Both man made and natural disasters have contributed to internal displacement in Sri Lanka. Reports state that an estimated 800,000 civilians have been periodically displaced due to the protracted conflict in the island.² With the signing of the Ceasefire Agreement (CFA) in 2002, many IDPs and refugees were able to return to their homes in the North and East of the island, and many relief, rehabilitation, resettlement and reconstruction projects were initiated by the government and by international and national organizations (INGOs). The December 2004 tsunami displaced around 1,000,000 persons³. Many IDPs have experienced displacement multiple times.

The increase in hostilities from January 2006 onwards has led to new waves of displacement. Many who were previously settled in the North and East have fled to other parts of the country or to South India. UNHCR figures dated 11 October 2006 showed 207,564 IDPs for the period April-August 2006.⁴ By December 18,

¹ Guiding Principles on Internally Displaced Persons, www.unhcr.ch

² Land and Property Rights of Internally Displaced Persons, CPA 2003

³ Post-Tsunami Recovery and Reconstruction- Joint Report of the Government of Sri Lanka and Development Partners, December 2005

⁴ Information on IDPs in each GS division is collected by the respective GS's who forwards it to their respective DS offices. The DS offices collect and compile the information on IDPs in their respective DS division and forwards it to the GA's office. At this stage, information from all the DS divisions are compiled to create information on IDPs in each District. This is forwarded to the relevant Ministries and other actors.

2006, the figure for new displacements (since April 2006) stood at 212,759 according to UNHCR, and as verified by the Government Agents (GAs) of respective districts.

These figures unfortunately only reflect the IDPs who are registered with the government. Absent from the official figures are those who live with family and friends, those who have rented out their own accommodation in a new location and those who seek shelter in public buildings and schools during the night, also known as the 'night time IDPs'.⁵ Though there is increasing recognition of the fact that some IDPs live outside of the welfare camp structures, and though more donors and agencies are now looking at the situation of these groups of IDPs, there is still no systematic process of addressing the needs of all IDPs. An added problem is that due to the dynamic and varied nature of displacement, and the fluidity of movement, it is in certain cases difficult to register particular groups of IDPs.

As research demonstrates, there are different levels of understanding of who constitutes an IDP and what constitutes a host family.⁶ For example, many long term IDPs who have now integrated into the local communities dislike being labelled as IDPs and therefore may not be registered as IDPs. In contrast, there are particular long term IDPs who are still dependant on assistance by the government and other actors and living either in welfare camps or with host families. Such diversity in notions of displacement, and in perceptions of IDPs regarding themselves have a further impact on recorded numbers of IDPs in a country like Sri Lanka.

2.3 Reasons for Displacement

Examining reasons for internal displacement in Sri Lanka show that most displacement takes place due to real and perceived threats

⁵ Night Time IDPs are generally civilians who stay the night in common buildings and religious buildings and return to their homes during the day.

⁶ Bhavani Fonseka, "A Profile on Internally Displaced Persons Living with Host Families", at www.cpalanka.org

to human security. People have fled their homes due to being directly affected by the conflict, or when they feared they would be caught up in the conflict. Continued attacks in a particular area or even a single incident with multiple casualties would result in heightening anxieties of the civilians in the area. Military operations including aerial and artillery bombardments have resulted in entire communities fleeing their homes and villages in the North and East, throughout the period under review. Increased ethnic tensions and polarization between the diverse ethnic and religious communities that live in conflict-affected areas of the island are other factors that influence decisions regarding flight.

Many have fled with little preparation, leaving behind their homes, villages, livelihoods and property with no idea of when they could return and reclaim their belongings. There are also cases of IDPs risking their lives to flee, with reported cases of IDPs being caught in the crossfire. For example, IDPs fleeing Mutur to Kantalai in August 2006 encountered shelling en route⁷; Muslim IDPs were also subject to intimidation and some people allegedly disappeared during flight. Similar trends were evident with the residents of Sampur having to flee their homes, seeking refuge in other parts of the Trincomalee District and subsequently fleeing to Batticaloa District.⁸ Tamil civilians fleeing Vaharai to government controlled areas in December 2006 and January 2007 had to flee through the jungle.⁹ Some resorted to fleeing from Vaharai to Pethalai by boat, with several capsizing at sea and at least 5 deaths by drowning being reported.¹⁰ In other instances, mass displacement followed particular incidents, such as the claymore attack in Kebethigollewa in June 2006 that killed 61 people, which led to the mass flight of communities in the area.¹¹

⁷ CPA, IMADR and INFORM, "Report on Field Visit to Kantalai and Serunuwara, 25 August 2006"

⁸ Information gathered during a CPA field visit to Batticaloa, January 2007

⁹ Information gathered during a CPA field visit to Batticaloa, January 2007

¹⁰ CPA and IMADR, "Batticaloa Fact Finding Report," January 2007, p.4

¹¹ AFHRD, CPA, INFORM, and Citizens' Commission for the Right to Life of Border Villagers, "Fact Finding Mission to Kebethigollawa" 18 June 2006, p.2

2.4 Multiple Displacements

Many Sri Lankan IDPs have been displaced multiple times. There are IDPs who were displaced by both the conflict and the tsunami, primarily from Trincomalee and Batticaloa. The multiple displacements highlight the human security threats faced by many of the civilians in the North and East. For example, from April 2006 there have been heightened security threats faced by civilians in the Trincomalee area, who have had to face claymore attacks, shootings, aerial and artillery attacks. Such incidents have resulted in many civilians having to move several times. For example, the Tamil population of the Mutur area first fled to Eachalampattu in March/April 2006; from there, as the offensive advanced, they fled to Vaharai; from Vaharai they later fled to the government-controlled areas of Batticaloa.¹² There are others, for example, in the Mannar and Vanni areas, who have also been displaced several times within Sri Lanka due to the changing nature of the conflict; some of them have fled to India as refugees,¹³ returned from India and then fled back to India as the situation in Sri Lanka worsened.

The increased hostilities, fear and the sense of insecurity has not only resulted in displacement but has also affected the daily life and livelihoods of all communities in the North, East and surrounding areas. Restrictions on movement, including the movement of goods and supplies, have affected livelihoods such as fishing and farming, as well as fertilizer, spare parts for tractors, and fishing engines and fuel being in short supply. The situation has also led to increased prices of essential items, and shortages of goods and skilled labour. The closure of roads such as the A-9 and the other roads to LTTE controlled areas have sharpened these difficulties. A grave consequence has been that many poor families find it increasingly difficult to feed themselves. Malnutrition and increased poverty has

¹² UTHR (J), Information Bulletin no:45 – “Sri Lanka’s Humanitarian Crisis or the Crisis of a Majoritarian Polity?”, 27 March 2007

¹³ CPA, “War, Peace and Governance: Overview and Trends 2006”, www.cpalanka.org

been reported in these areas, with the media reporting at least one instance of death due to "starvation."¹⁴ The restricted access to LTTE controlled areas to humanitarian agencies has created yet another obstacle to civilians and IDPs living in these areas having access to much-needed relief and humanitarian assistance. With no prospect of the cessation of hostilities, the prognosis for the immediate future seems bleak, with civilians and IDPs having to bear the brunt of it.

3 National Framework

3.1 Laws and Policies

Sri Lanka does not have specific legislation focusing on IDPs or civilians caught in a situation that calls for humanitarian assistance. The Ministry of Social Welfare has traditionally had a mandate and an allocation of funds for providing relief to those who confront temporary displacement due to natural disasters such as floods or storms. Despite the long-term conflict, few policies and institutions were put in place to provide assistance and redress for IDPs. Several institutions including the Rehabilitation of Persons, Properties and Industries Authority (REPPIA)¹⁵ and the Resettlement and Rehabilitation Authority of the North (RRAN)¹⁶ The Ceasefire Agreement of 2002 led to the creation of new institutions such as the Subcommittee for Immediate Humanitarian and Rehabilitation Needs (SIHRN) which floundered along with the peace process. Even the tsunami of December 2004, which affected people around the island, did not lead to the development of a clear policy and legal focus on internal displacement.

¹⁴ Reuters, "Man starves to death in Jaffna, first on record," 16 November 2006. (there are counter claims to say he did not die due to food shortages)

¹⁵ Established by an Act of Parliament No. 29 of 1987

¹⁶ RRAN was established in 1995 by a special Gazette Notification to cover the five Districts of the Northern Province namely Jaffna, Mullaithivu, Kilinochchi, Mannar and Vauniya whilst the rest of the island with 20 Districts continued to be with REPPIA.

The Constitution of Sri Lanka includes a fundamental rights chapter that protects the rights of all citizens including the right to equal protection, freedom of movement, right to choose one's residence, freedom of expression, freedom from cruel, inhuman treatment to name a few. These rights can be restricted in certain situations including in the interest of national security, public order and the protection of public health or morality by invoking the Public Security Ordinance (PSO), which empowers the President to declare a State of Emergency and adopt Emergency Regulations if s/he believes they are necessary "in the interests of public security and the preservation of public order". A State of Emergency was declared in Sri Lanka in August 2005 following the assassination of Foreign Minister Lakshman Kadirgamar. Emergency Regulations were brought into force at that time and have been renewed on a monthly basis ever since. There are several Emergency Regulations that have an impact on the rights of civilians including IDPs such as those that permit cordon and search operations, detention and arrest and those that provide excessive powers to the security forces.

Sri Lanka is a signatory to several international treaties and declarations on human rights and humanitarian issues including the International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic Social and Cultural Rights (ICESCR) and the four Geneva Conventions. In addition, it has acknowledged the Guiding Principles on Internal Displacement, and the Pinheiro Principles on Housing and Restitution for Refugees and IDPs. Though the applicability of international law in Sri Lanka was questioned by the Supreme Court in the *Singarasa* case,¹⁷ it is accepted practice

¹⁷ On 16 September 2006 the Supreme Court headed by the Chief Justice ruled that the Sri Lankan Government's accession to the Optional Protocol of the International Covenant on Civil and Political Rights was inconsistent with the Constitution of Sri Lanka. In the case in question, the Petitioner, Nallaratnam Singarasa, had made an application to the Supreme Court to effectuate, on the basis of the Court's "inherent powers", the findings of the United Nations Human Rights Committee at Geneva established under the International Covenant on Civil and Political Rights in Communication No. 1033 of 2000 which found the Sri Lankan State responsible for violations of Singarasa's human rights in the conduct of his initial arrest, prosecution and

that certain basic principles contained in customary international law apply in the Sri Lankan context regardless of ratification and accession.

It is generally accepted that international human rights and humanitarian law provide the broad framework for the protection of IDPs, even though there is no specific international treaty focusing on IDP rights. The Geneva Conventions and the Additional Protocols provide the basis for the protection of civilians, humanitarian, medical and religious actors during conflicts and provides the framework for their continuous unhindered work in difficult situations, including the establishment of peace zones and humanitarian corridors. Further, customary international legal norms recognise and provide protection for vulnerable persons and actors involved in humanitarian interventions. The Guiding Principles on Internal Displacement provide specific recognition to certain groups with special needs including children, especially unaccompanied minors, expectant mothers, mothers with young children, female heads of household, persons with disabilities and elderly persons.

International and national norms provide that all are treated equally and ensure that there is no discrimination towards a particular group including IDPs. International norms do not merely provide for equal treatment, but go one step further by creating special categories that require special attention including women and children. Beyond accepting such norms and standards at a normative level they need to be implemented and incorporated into policies and practices to ensure that the rights of IDPs are respected, promoted and protected.

conviction in 1995. The court held that the accession was unconstitutional and invalid, on the grounds that the treaty conferred a public law right which was a purported exercise of the legislative power and therefore was within the realm of Parliament and the people at a referendum. The Court further held that the Optional Protocol also amounted to a purported conferment of 'judicial power' on the Committee in violation of Articles 3 and 4 of the Constitution, which reposed 'judicial sovereignty' in the people.

3.2 Structures

The main coordinating actor for human rights and humanitarian issues of the Government of Sri Lanka is the Minister of Disaster Management and Human Rights. There are also several other actors that play a key role in relief, resettlement and reconstruction initiatives. These include the Ministry of Resettlement and Disaster Relief Services, Ministry of Nation Building as well as subjects coming under non-Cabinet Ministers such as the Minister of Disaster Relief Services. There is also the Resettlement Authority, the Commissioner General for Essential Services and the special IDP Unit of the National Human Rights Commission.

The multiplicity of ministries and agencies with overlapping mandates and duties, as well as the many layers of bureaucracy at times leads to delayed responses, inefficiency, lack of coordination and duplication. Parallel to this there is also centralised decision making in this regard, with many of the decisions made in Colombo and then communicated to local actors with limited or no consultation taking place.

The Inter-Agency Standing Committee (IASC), consisting of donors, and the International Committee of the Red Cross (ICRC) maintain regular contact with the Government of Sri Lanka (GoSL) for the shipment of relief supplies and facilitating humanitarian access. The GAs, the Ministry of Disaster Management and Human Rights (MDMHR), and the Consultative Committee on Humanitarian Assistance (CCHA) are key institutions engaged in the process. The CCHA is a new structure established to address the increasing humanitarian crisis and includes the Commissioner General of Essential Services, the Secretary to the Ministry of Foreign Affairs, the Secretary of Defense, the UN agencies with a humanitarian and protection mandate, representatives from the Consortium of Humanitarian Agencies (CHA) and a number of key Ambassadors. This forum was created to enable better dialogue between senior officials of the Government and key non-state and

international actors. However, it remains to be seen whether such a mechanism would be able to address the practical difficulties faced by humanitarian actors working in the affected areas.

4 Security Issues in a Humanitarian Crisis

A key issue relating to internal displacement in Sri Lanka has been the insecurity of civilians who have fled their homes due to fear. Many face security threats either during flight and while moving to safer areas or in welfare camps and places where they have sought protection and which are perceived as 'safe'.

There have also been cases of civilians and IDPs being prevented from fleeing their villages, and used as human shields. For example, civilians in LTTE-controlled Vanni have often been trapped there, as the LTTE did not allow the free movement of civilians even when the entry/exit points were open.¹⁸ If civilians do manage to flee LTTE-controlled areas, their security is not guaranteed as the Security Forces and the paramilitaries view them as LTTE suspects.¹⁹ Tamils from the North and East are finding it increasingly difficult to find refuge in the rest of Sri Lanka and many risk the dangers of illegal travel by sea and flee to India. The deteriorating human rights situation in the island, coupled with growing mistrust and suspicion of persons from the North and East due to the 'national security' framework led to the increased vulnerability of all IDPs, but particularly of Tamils.

4.1 Security Incidents in Camps

Incidents in 2006 demonstrate that even welfare camps and other displacement sites do not necessarily provide protection to the displaced. On 8 November 2006 the Kathiraveli School in Vakara which was serving as a welfare camp for IDPs came under artillery

¹⁸ BBC, South Asia, "Civilians' Plight in Sri Lanka", 24 October 2006

¹⁹ CPA and IMADR, "Batticaloa Fact Finding Report", January 2007

attack, killing 62 people.²⁰ Other public buildings and sites where people had sought refuge in times of attacks have also been shelled, such as the schools caught up in the Mutur offensive of August 2006, in which several thousands Muslims and Tamils had sought shelter in the schools and other public buildings. Three shells hit the Arabic College and its vicinity, killing 19 civilians on the spot and injuring several others.²¹ The residents of Allaipiddy, in Jaffna, fled to the local church which was hit by artillery on 14 August 2006; 15 civilians died and more than 50 were injured.²² While there has been some discussion about declaring some sites such as the Madhu Church in Mannar 'Peace Zones', neither side engaged in the conflict have yet committed to such a proposal.

In addition to shelling and artillery attacks, IDPs also face other forms of threats. For instance IDPs in welfare camps in Valaichchenai, for example at Vinayagapuram, were subjected to security round ups, extortion, abductions including of children, disappearances and killings.²³ There were also several reported killings of IDPs when they had returned to their villages to check on their livestock and property. While these incidents were often attributed to the political affiliations or former affiliations of the IDPs, there were also cases of mistaken identity and of random attacks aimed at intimidating the IDP community as a whole.

4.2 Consideration to Special Groups

Displacement also has special impacts on particular groups such as women, children and the differently abled. Displacement and living in temporary shelters create numerous problems. Due to overcrowding in welfare camps and lack of sufficient planning within welfare camps, there are often problems related to privacy

²⁰ UTHR (J), Information Bulletin no:45 – "Sri Lanka's Humanitarian Crisis or the Crisis of a Majoritarian Polity?", 27 March 2007

²¹ HRW, "Improving Civilian Protection", September 2006, p33, UTHR(J), "Hubris and Humanitarian Catastrophe", August 2006

²² HRW, "Improving civilian protection in Sri Lanka", September 2006, p.41

²³ CPA and IMADR, "Fact Finding visit to Batticaloa", January 2007

and security issues that contribute to a prevalence of gender based violence. In some situations, there are either limited toilets, no toilets set aside for women or no toilets in and near the welfare camps. Sometimes there are no covered bathing spaces. This leads to women having to use a nearby jungle area or having to travel far, in areas with poor lighting and where armed men may be around, all of which puts them in dangerous and vulnerable situations.

Conflict also creates further hardships for women including through pushing them into situations in which they must become the main bread winner of the family, assuming roles of care-taker and bearing responsibility for sustaining family life. All conflicts lead to an increase in the numbers of female headed households, and Sri Lanka is no exception.

As stated in the Guiding Principles, children in conflict situations and in situations of displacement require special attention. Children have been affected in multiple ways by the conflict including killings, recruitment as combatants, assault and abductions. In addition, conflict has affected their chances of attending school and limited their access to sufficient food, medicine and healthcare. Children living in displacement are also affected psychologically and emotionally. Having witnessed the loss of one's home, land, loved ones, and being reduced to living in welfare camps and with host families, the uncertainty and insecurity create a significant impact on the life of an IDP child. Their rights also could be curtailed during displacement when restrictions are imposed on their mobility, or when they do not have adequate food and shelter.

A new trend in 2006 has been the increased security threats faced by humanitarian, religious and medical actors. This has been discussed more in detail below.

5 Restrictions and obstacles in Movement

There were various forms of curtailment of the freedom of movement experienced in 2006. Restrictions in movement and forced movement were not only limited to IDPs but affected civilians and entire communities in most parts of Sri Lanka but largely in the North and East.

5.1 Road Closures and Impact on Communities

Restrictions on movement have been brought about through the actions of the LTTE and the Government. The LTTE has created situations where movement had to be restricted, for example by targeting ships carrying goods to Jaffna.²⁴ It has also backed up its demand that the A9 be re-opened²⁵ by refusing to guarantee security to boats carrying civilians and goods to Jaffna under the ICRC flag.²⁶

In August 2006 the A-9 road, which was the main link between the South and the North, including Jaffna, was closed at points in the North, namely at Muhamalai and Omanthai. Later, the Omanthai check point in Vavuniya, which allows people from the South to access the LTTE-controlled Vanni was opened but remained subject to severe restrictions and frequent closures. The closure of the Omanthai checkpoint also led to civilians being trapped on both sides of the line of control.²⁷ Similarly, roads entering Vakarai

²⁴ SCOPP, SCOPP Report, "Ship carrying essential food to Jaffna attacked by LTTE", "LTTE continues with acts of piracy", 23 January 2007.

²⁵ *Daily Mirror*, Easwaran Rutnam, "Geneva Talks break down on A 9 highway", 30 October 2006

²⁶ "Humanitarian Situation in Sri Lanka – an Update" SCOPP Report, 8 March 2007

²⁷ ACHR Weekly Review, "Don't make another Dafur: Geneva talks for peace", 25 October 2006, <http://www.achrweb.org/Review/2006/138-06.htm>, CPA. War, Peace and Governance in Sri Lanka – Overview and Trends 2006, pp.27-29, <http://www.cpalanka.org>, Tamil Net, SLA closes Vavuniya, Uyilankulam, Madhu checkpoints, 12 August 2006

were shut for a certain period in late 2006.²⁸ The Jaffna Peninsula is currently cut off by land, and can only be accessed by air or sea.

With the closure of certain roads and restrictions on movement, civilians and communities in the affected areas have had to face severe hardship including shortages of essential goods such as essential food items, medicine and fuel. As already mentioned, these restrictions and security threats have led to steep price increases and resulted in many civilians being unable to purchase their daily needs. A high incidence of anemia in young children has been reported, with reports of under-nutrition, malnutrition and starvation as well. There have been instances of medical emergencies and needs not being addressed due to restrictions. The Jaffna hospital reportedly experiences shortages of essential drugs and medical equipment due to restrictions in bringing goods in to the Peninsula. There were also reports that with restrictions on sea transport, there was a shortage of oxygen for the Jaffna hospital.

5.2 Using Restrictions as a Tool: At What Cost?

The above demonstrates that both the Government and the LTTE have imposed restrictions on movement and transport as a form of pressure and as a tool of war to bring pressure to bear on the other party. Both actors are guilty of using such tactics. However, the Government of Sri Lanka, as the democratically elected representative of the people, has the primary responsibility of protecting and providing for the citizens of Sri Lanka, and therefore has to take measures to address the growing humanitarian crisis and the human rights situation.

Just as movement across the lines of control has become more difficult, so has moving within and to and from the North and the East. In the previous phase of the war in the 1990s and early 2000, the movement of Sri Lankan citizen's movements from the North

²⁸ Tamilnet, "Vaharai IDPs rally, demand International relief, re-opening of A-15", 29 December 2006.

and East was curtailed through the practice of issuing a pass for civilians to move from the North and East to the South. Though this was established as a security measure, this created massive hardships to the affected communities. In November 2001 and January 2002 fundamental rights petitions challenging the pass system in operation in Vavuniya were filed in the Supreme Court. The Supreme Court held that the practice of the pass system was a violation of one's right of movement and ordered the authorities to do away with it.²⁹ Currently, there is no pass system but vehicles from the North and East have to obtain a vehicle pass and to undergo security checks. Many civilians traveling from the North and East have complained about the increasing hardships faced in traveling to the rest of the country, with increased security checks and bureaucracies.

5.3 Livelihood Restrictions

The conflict has also disrupted people's livelihoods in ways that critically affect their capacity to earn their living and meet the costs of their daily needs. The security forces have imposed specific restrictions on fishing in the North and the East, for example. These restrictions vary from place to place. In most areas there is a complete ban on night-time fishing. Following specific incidents, a complete ban on fishing is sometimes introduced as in the case of the fishing community of Pesalai in June 2006 in the wake of a Sea Tiger attack in the area. There are also limits placed on the distance one can move into sea from the shore, and limits on the use of engines. Day time fishing has its own problems as the fishermen have restricted times when they can be at sea, and must spend some time going through security checks both when going out to sea and coming back to shore.

²⁹ For more information- www.cpalanka.org

All these measures clearly demonstrate that the voluntary nature of resettlement is clearly in question.³⁶

The displaced were not consulted as to whether they wished to return and did not have the opportunity to object but were merely informed when they would be resettled. Restrictions on humanitarian agencies accessing resettlement sites only intensified the displaced community's apprehensions of return.³⁷ While there is no doubt that other 'push' factors such as the poor conditions within the camp, including over crowding, poor sanitation and flooding made the conditions of displacement increasingly unliveable, lack of attention to these problems was also due to the desire of the government to resettle these persons in their places of origin as a public declaration of the return of 'normalcy' to the East.

There continue to be concerns with regard to the security in the areas of resettlement, with incomplete de-mining and the presence of armed paramilitary groups and incidents of recurring violence. For example, Mutur residents who were displaced in August 2006 and were coerced in returning back to their homes were yet again displaced in September 2006 when handbills were circulated asking them to leave.

6.3 High Security Zones and Restrictions

The establishment of High Security Zones (HSZs) in Jaffna and in Trincomalee is another extreme example of restrictions on people's access to land and restrictions on their movement. In Jaffna, many thousands of people have lost their lands, homes and livelihoods due to the demarcation of particular areas as off limit to civilian access. HSZs account for some 18 percent of the entire Jaffna Peninsula, including most of the arable land, and are the primary cause for the non return of the majority of IDPs in Jaffna's welfare centres.³⁸ In

³⁶ CPA, IMADR and INFORM, "Report on Field Visit to Kantalai and Serunuwara, 25 August 2006

³⁷ *Ibid*

³⁸ HRW, "Return to war – Human Rights under Siege", August 2007, pp.34-37

Trincomalee, the declaration of a HSZ around Sampur/Mutur area has prevented the re-settlement of IDPs from those areas.

The HSZs have been challenged in court. Though the judiciary was positive and recognised the infringement of the right to movement in the two previous cases mentioned, there have been instances where national security has been held as paramount, even at the expense of fundamental rights. In 2003 the Jaffna HSZ was challenged in the Supreme Court by a petition filed by Tamil National Alliance (TNA) MP Mavai Senathirajah and others. The case is still pending though the Chief Justice has requested that an arrangement is reached with the military commander of the area and the Government Agent in Jaffna to ensure that the HSZ is reduced and some of the land returned to the civilians.

7 Is there Disaster Preparedness?

The responses to displacement in 2006 clearly demonstrate that much more needs to be done to address the delays and other problems in providing assistance to IDPs. This is despite Sri Lanka having experienced multiple disasters, man-made and natural, and being the recipient of capacity building trainings on disaster preparedness. In both the case of Muslim IDPs from Mutur who were displaced to Kantalai in August 2006 and the Tamil IDPs from Vaharai and Eastern Trincomalee who fled to Batticaloa, there were delays in providing assistance by the State authorities. The disaster response also demonstrated that there were serious shortfalls of trained and experienced personnel to handle the massive humanitarian crisis, thereby delaying and hampering the provision of humanitarian assistance to affected communities. This raised concerns with regard to the resources and time spent on developing capacity of local actors since the Tsunami of 2004, raising questions as to the long-term benefits of such programs.

7.1 Trends: Role of State and Non State Actors

A critical gap in the disaster response is the lack of preparedness by state actors. This is seen most vividly in the State's response to the humanitarian consequences of military operations. While the armed forces intensified the military campaign and encouraged civilians to flee the LTTE's control in the East, it became clear that there was little planning as to how the displaced were going to be sheltered or fed. There seemed to be little coordination between the military and civilian authorities or line ministries as the army provided some assistance such as petrol for vehicles coming via Riditenna but had to flag down vehicles going to Batticaloa so that the displaced could be transported.³⁹ Even the identification of sites for establishing welfare centres took time, even though it was clear that a mass influx into Batticaloa was likely in the wake of such a massive offensive.

A further trend evident in 2006 was the increasing dependency on INGOs to provide for the IDPs and affected communities. Though the primary goal is to provide for the affected communities speedily and effectively, the Government is the primary duty bearer in providing for citizens of Sri Lanka and should not be shirking their responsibility. With the numerous capacity building programmes and training in disaster management in the recent past, questions need to be raised as to the slow and lethargic role played by certain actors in providing assistance.

The humanitarian agencies also revealed their limitations in disaster preparedness as seen with the mass displacement from Mutur. The international agencies appeared to be caught off guard by the sheer scale of displacement even though the agencies had access to statistics.⁴⁰ This resulted in camps being over crowded, a lack of adequate shelter and sanitation facilities, and poor

³⁹ CPA and IMADR, "Batticaloa Fact Finding Report," January 2007, p.4

⁴⁰ *Ibid*

camp organization.⁴¹ It should be noted in the response to the displacement of Muslims from Mutur many local Muslim NGOs played a primary role in running the welfare camps in Kantalai. The experience of dealing with the tsunami seemed to have improved both the speed of the response and the manner in which some of the non-government agencies responded.

Looking at a local level, the response to the second wave of displacement to Kantalai in December 2006 by the Government officials in the D.S. office however suggested that there were lessons learnt and procedures fine tuned. Though positive signs were evident with the response in December 2006 in Kantalai, the events of August and December 2006 raises the question whether the speed and quality of the response depends on other aspects including ethnicity.

8 Equity

Equity is a central principle in ensuring that affected communities and persons are treated fairly and are not made more vulnerable through assistance schemes and policies that could be discriminatory, and that could create tension and resentment among different groups. Equity ensures that people affected by similar circumstances and situations, are treated equally and are not put in a position where they have to compete with each other. Equity also ensures that people's rights are respected and protected, through measures that are non discriminatory, participatory, transparent and accountable.

Humanitarian interest in the principle of equity intensified in the post-tsunami context. The unprecedented amounts of money that came in to Sri Lanka after the tsunami, with little or no funding restrictions, left many agencies and actors with considerable

⁴¹ *Ibid*, p.5 The same report documents incidents where camps had no water or toilets including the Sathurukondan Camp which was in existence for over a month with no toilets being installed.

flexibility as to how that money could be used. By comparison, by 2006, practical challenges and funding constraints and restrictions resulted in limited assistance to conflict affected communities. This resulted in inequitable treatment between the tsunami and the conflict affected IDPs. For example, the tsunami affected families were provided with a weekly food ration worth Rs.375 per person, Rs.5,000 cash per family whose home was destroyed and Rs.2,500 per family for the purchase of kitchen utensils.⁴² Compared to this, the conflict affected received far less: a conflict affected person receives rations of Rs.336 per month and a family of five or more receives only Rs.1,260 per month based on prices fixed by a circular formulated in 1995. It needs to be noted that there are disparities even among particular sets of conflict IDPs as 'older' caseload receive the Government rations based on the 1995 formula while newer IDPs receive World Food Programme (WFP) rations – rice, wheat flour, dhal, sugar and oil - set on calorific terms.⁴³

The housing programmes for tsunami affected persons and conflict affected persons also raise concerns of equity. Many conflict affected IDPs are still living in temporary shelters more than a decade after being displaced, such as in areas of Puttalam and Jaffna, whereas the tsunami affected are already residing in permanent houses. There are also equity concerns within the tsunami housing construction, with questions being raised as to why the Hambantota District received better assistance compared to the other affected districts and even has a surplus of houses.⁴⁴ In areas such as Amparai, however, there are still areas where permanent houses for tsunami-affected persons have not been completed. There are also disparities between the amounts allotted between various housing projects because there were a number of humanitarian agencies with tsunami funding who provided additional 'top up' grants of up to Rs.550,000 to selected families.

⁴² Ministry of Relief, Rehabilitation and Reconciliation, 7 April 2005

⁴³ CPA, "Puttalam Fact Finding Report," 19 July 2006

⁴⁴ *Sunday Leader*, "New circular, new hopes and new fears", 11 June 2006

In addition to the speed of building housing, the tsunami affected also received better assistance in rebuilding their houses. A grant of Rs.250,000 was given in instalments to those whose houses have been destroyed outside the buffer zone and a Rs.100,000 grant given in instalments for those whose houses have been partially destroyed. In response, the amounts for the conflict affected under the North East Housing Reconstruction Programme (NEHRP) were increased to the same amounts.⁴⁵

The tsunami and conflict disparity reflected a previous debate regarding conflict and host communities. The Government and agencies would attempt to rehabilitate conflict-affected communities in close proximity to poor host communities. In some cases, the construction of permanent houses with toilets and access to water for the IDPs caused tension with poor local communities living in thatch or wattle and daub houses. In Puttlam, tension had emerged around the provision of electricity, with original inhabitants alleging that the IDP housing units got electricity connections while they had been waiting years for their own connections. Some agencies have become more sensitive to this issue and have designed their programs accordingly. For example, the World Bank housing project in Puttalam makes provision for housing and infrastructure assistance to the host community in order to off-set problems that could hamper the implementation of the project and to aid the overall development of a border district affected by the conflict.

Programmes for conflict IDPs have been largely focused on providing them with the minimum rather than assisting them in establishing their livelihoods and making them self-sufficient. Compared to this, the tsunami response has been more comprehensive and more focused on long term recovery, assisting with livelihoods, houses and ensuring people and communities are less dependent on assistance and capable of income generation. There appears to be a very distinct shift in approaches and responses to the two disasters. The

⁴⁵ TAFREN, Report on Housing and Township Development, 15 March 2005.

phrase used by the Government in tsunami response, "Build back better" clearly demonstrates the intention to provide for a better living condition for affected communities with long term interest in hand. This approach needs to be extended to the conflict affected areas not just in terms of macro-infrastructure projects but also in terms of family livelihoods and local economies.

9 Humanitarian Assistance: Evolving Trends

The recent displacement and the response towards assisting IDPs and affected communities have demonstrated the varying roles played by Government actors, INGOs and local actors. As already pointed out, the recent responses have indicated a shift from Government actors to a greater dependency on INGOs to provide for IDPs and affected communities.

Humanitarian situations and assistance schemes have increasingly becoming politicized. The handling of questions relating to displacement and recurring disputes over the figure of IDPs at any given time by the Government seems to point to a political agenda in which the Government seems to want to downplay displacement and the impact of the conflict particularly on minority communities. The speed and scale of the resettlement drives in 2006, with reports of force being used in some cases, also indicate an agenda to reduce IDP figures and demonstrate to the international community that displacement is not as significant as it is portrayed to be.

9.1 Politicization of Humanitarian Assistance

The politicization of the humanitarian situation has other facets. Various political actors with particular agendas are involved in interventions around particular sites of displacement, making equitable treatment of IDPs more difficult. For instance the number of visits by Ministers to Kebetigollewa and Kanthale, both majority Sinhala areas, as opposed to similar visits to Batticaloa, where the

majority of recent IDPs were Tamils, may be symbolic of this situation. This level of politicization also leads to widespread media coverage and public concern of the plight of one lot of IDPs over another.

The politicization of humanitarian activities also makes it difficult for humanitarian and community activists to carry out their work without bias and prejudice. For example, the presence and involvement of Red Star, the relief wing of the JVP, in Serunuwara to assist Muslim IDPs who fled Mutur has been documented,⁴⁶ and understood as part of the JVP's political agenda in the area. This incident demonstrates how a politically backed relief entity can play a crucial role in displaced communities, creating a dependency and trust among affected communities as well as creating the space for affected communities to critique the role of other political actors.

9.2 Centralization

In addition to politicization of humanitarian activities, there is also increasing signs of centralization of decision making and planning. Though this is a trend that is not limited to humanitarian situations and is a trend cross cutting other areas, there are increasing signs of local actors being left out in the disaster response and management phase. The Central Government needs to play a more vigilant monitoring role and step in when it is clear that none of the actors are taking responsibility for completing tasks. This became apparent during the tsunami recovery process where there were multiple and successive institutions to deal with the housing issue but two years later, when problems emerged, particularly with donor built relocation sites, there was no one to take responsibility. The centralized approach can result in projects being designed at the District Secretary's office or even Colombo with little or no consultation of the beneficiaries. Thus issues of transparency,

⁴⁶ CPA, IMADR and INFORM, "Kanthale and Serunuwara Fact Finding Report", August 2006, p.9

consultation and peoples' participation in projects are a key priority for agencies and an issue of concern particularly with some of the current humanitarian and development projects.

9.3 Lack of Consultation and Participation

The lack of public consultation and participation on numerous issues is a key problem faced by the displaced people. The lack of consideration for the affected people was demonstrated most vividly during the Government's resettlement when people were not asked whether they would like to return but in most cases were not even provided information regarding their return. In some cases, such as for people from Mutur and Vakarai, IDPs were told that they were being re-settled only on the day of return, while in others they were merely informed of the date of return (Western Batticaloa). The lack of 'go and see' visits and other measures to allay people's fears of returning were among the factors that led to allegations of 'forced' resettlement during this phase. These processes of consultation and participation were used in tsunami reconstruction projects but during the conflict displacement and resettlement they have been perceived as problematic by the authorities.

9.4 Increased Militarization

Increasing militarization in the North and East has also had an impact on the regular and systematic delivery of humanitarian assistance, and of resettlement, reconstruction and development initiatives. For example the appointments of former military officials as the Governor of the North and East Province, as Government Agent of Trincomalee District, as officials of the Resettlement Authority raises concern about the increased military role in affairs that previously were within the ambit of the civilian administration. The increased military role in governance and in providing humanitarian assistance has resulted in INGOs having to go through the military establishment and former military personnel for approval and continuation of their projects and

programmes. Much of the process of resettlement of IDPs in 2006 was carried out with the supervision of the army and the STF with officials of the civilian administration taking the backseat. Arguably the militarization has made it more difficult for a return to normalization and a strengthening of civilian rule. The military presence and increased powers they wield in the areas, also raises concern in the future plans in store for the areas.

Increased militarization of humanitarian activities is not limited to the security forces. In the east, armed paramilitary groups have also taken on a role in providing humanitarian assistance. For example, in Batticaloa, the TMVP has assumed a role in managing humanitarian assistance and has tried to influence local government servants and humanitarian actors in the East to work with particular communities and not with others. It has also played on the ethnic dimension and played a role in encouraging the construction of shelters on lands in Arayampathy and Alankulam which are claimed by Muslims.⁴⁷

9.5 Ethnicization of Humanitarian Assistance

Charges of ethnicization of humanitarian assistance emerged when observing differential treatment of IDPs particularly in noting the speed of the response and the quality of services provided to the affected persons when they belonged to a specific ethnic group or community. For instance Kanthale saw repeated waves of displacement, with civilians from various parts of Trincomalee seeking shelter in late 2006.⁴⁸ While the response to the Muslim influx from Mutur in August 2006 was poor and witnessed mainly Muslim relief organisations playing a primary role in providing emergency relief, the assistance to the Sinhala displaced from Serunuwara in December 2006 seemed better coordinated.⁴⁹

⁴⁷ CPA and IMADR, Batticaloa Fact Finding Report, January 2007

⁴⁸ CPA and IMADR, "Trincomalee Fact Finding Report", 23-27 April 2007, p.7

⁴⁹ CPA, IMADR and INFORM, "Kanthale and Serunuwara Fact Finding Report", 21 August 2006, p.5

Media reports have questioned why Tamil people displaced in Trincomalee town have been sidelined and not received assistance compared to the influx of assistance for the Sinhala IDPs of Kebethigollewa.⁵⁰ The displaced in Kebethigollewa received temporary shelter within a month, compared to many in the North and East including areas such as Trincomalee where IDPs were residing in schools and religious buildings for many months. Additionally, there has been a continued effort to provide assistance to the IDPs in Kebethigollewa, with the Government deciding to continue the supply of monthly dry rations in addition to the bag of food items provided by the World Food Programme.⁵¹ This should be compared with the plight of displaced Tamils in parts of the North and East including in some areas of Trincomalee, Batticaloa and Pesalai where there was no sustained effort to address the needs of the IDPs nor provide dry rations.⁵² These issues raises concerns on the unequal treatment provided to the IDPs due the recent hostilities, with concern over better treatment being given based largely due to ethnicity.

The differential treatment to various sets of IDPs is also related to the scale of displacement, accessibility and quality of the displacement sites. For example, IDPs in sites close to main road and in main towns have almost always received better relief and assistance especially from NGOs than those who were placed in welfare centres that were a distance away from a road and from public view.

The ethnicized targeting of communities through violence also needs to be taken note of. While it is primarily the Tamil community in the North and East that is most affected by the violence and most likely to be displaced, other communities such as the Sinhalese

⁵⁰ Tamilnet, "Trincomalee displaced suffer discrimination in provision of relief- Elilan", 6 July 2006

⁵¹ Rupavahini, 16 July 2006

⁵² CPA and INFORM, "Fact Finding Mission to Pesalai", 28 June 2006, p.5; and CPA, INFORM, WMC and LST, "Batticaloa Fact Finding Report", 10 April 2007, p.3

in the border villages and Muslim communities in the North and East have also experienced violence and displacement in the last few years. Not taking into account the ethnicized violence that is a defining aspect of the conflict into the design of humanitarian response is dangerous and has severe repercussions. For instance offering relocation as a durable solution can be politically charged depending on the site of relocation, given that both sides in the conflict have attempted to alter demographic balances through a series of colonization and development schemes and through the use of violence. The involvement of humanitarian agencies in schemes of resettling forcibly expelled communities in particular such as the Tamils from HSZs or Northern Muslims must, at the very least, make clear to the authorities and the beneficiaries that the right of voluntary return needs to be adhered to. The failure to do so could result in the neutrality of agencies being called into question and challenges accepted guiding principles of humanitarian agencies such as conflict sensitivity.

10 Shrinking Humanitarian Space

10.1 Threats to Humanitarian Actors

An evolving trend in 2006 has been the increase of obstacles and threats to humanitarian actors, and to humanitarian space. Human security threats towards humanitarian actors has been in the rise, with increasing threats, assaults and killings, with the killing of the 17 local staff of the international agency Action Contre La Faim (ACF) in Mutur in August 2006 being the low point. While the attacks against humanitarian actors are numerous, a key point is that all of those killed and abducted have been locals, majority being Tamil, mostly young Tamil males. This reflects the general pattern of human rights violations in the context of the conflict. Some of these killings may be due to humanitarian workers getting 'caught in the crossfire' of the conflict, such as claymore attacks, but in other cases, it is very clear that the killings have been of specific

targets, in execution type killings. The killings could be the result of multiple factors such as the targeting of particular INGOs, as well as other factors such as ethnicity and individual reasons such as the political associations of the victims, or personal disputes.

All the incidents - especially of killings and disappearances - demonstrate a clear disregard by the Government of Sri Lanka and the Liberation Tigers of Tamil Eelam (LTTE) for International Humanitarian Law (IHL), including the provisions guaranteeing the protection and neutrality of humanitarian actors. According to common Article 3 of the Geneva Conventions, which specifically applies to internal armed conflicts, civilians must be treated humanely and must not be subjected to violence to their life and person. Even though Sri Lanka has not signed up to Protocol II of the Geneva Conventions, including Article 18 which deals specifically with humanitarian workers and has not included common Article 3 in the national enabling legislation for the Geneva Conventions,⁵³ it can be argued that it is still bound by customary international law.⁵⁴ Intentional attacks on civilians, including humanitarian workers constitute war crimes. States are therefore required to prosecute those responsible for such crimes.⁵⁵

The violence against humanitarian agencies has resulted in many of them curtailing their movements, suspending projects in certain areas and even withdrawing from particular areas. All this has a direct and negative impact on affected communities. Although both the Government and the LTTE condemned specific incidents

⁵³ Geneva Conventions Act 2006

⁵⁴ Action Against Hunger, "Action Against Hunger International Network mourns and demands full inquiry into Muttur 'war crime'," 10 August 2006. As the Honorary President of ACF declared "this [the ACF massacre] is an appalling crime, a deliberate murder of employees of Action Against Hunger (ACF) who have been massacred intentionally. They were victims of a double violation: of their lives and of the "sacred" space that a humanitarian officer represents."

⁵⁵ ICRC, Extract from the Finnish Red Cross publication, Alexandre Faite, "Legal considerations regarding the protection of humanitarian workers in the field," June 2002, p.38.

of violence, especially against humanitarian workers, in none of the cases has there been a satisfactory investigation, nor have the perpetrators of the crimes been indicted, let alone prosecuted.

10.2 Restrictions Placed on Humanitarian Actors

In addition to security threats, there are obstacles faced by the humanitarian agencies in carrying out their duties. As already discussed, there are various forms of restrictions placed on movement from road closures to restrictions in moving items and goods. Security and safe access of humanitarian actors is accepted in international humanitarian law and dealt specifically with the Geneva Conventions and Additional Protocols. Access to conflict-affected areas by humanitarian actors has been restricted largely on security grounds by various armed actors. This has been particularly pertinent with regard to the LTTE-controlled areas. As military operations have intensified in particular areas, access was restricted to areas such as Sampur, Vakarai, Western Batticaloa and Wanni. With the commencement of hostilities including artillery exchanges, aerial bombardment and other forms of violence, it is essential that space is provided for humanitarian actors to function and address the needs of the affected communities. The Government and the LTTE can take certain measures such as the establishment of a humanitarian corridor to ensure safe passage to humanitarian actors and their vehicles. For such an exercise to be effective, both parties need to agree on the modalities and restrain from hostilities during the given time frame. For example, following the intensification of violence in Vaharai in August 2006 access was highly restricted. During one rare instance when the UN convoy received the approval of both parties the fighting resumed putting the convoy at risk.

The Government has also established more stringent regulations for INGOs in Sri Lanka. In 2006 all international aid agencies were called to register with the Ministry of Social Welfare. Subsequently international aid workers had to register with the Ministry of

Defence. The registration process was for individuals rather than agencies but given the type of information required it was clear that this was a way of monitoring INGOs especially in the North and East.⁵⁶ INGOs had to obtain new work visas for their expatriate workers. Personnel who did not receive work permits faced possible arrest.⁵⁷ Although the majority of agencies received their work permits, many faced delays in obtaining them. Restrictions were also imposed on the geographic areas of operation with a time limit for the duration of the visa.

The rise in violence against humanitarian actors coupled with the increasing constraints and security restrictions imposed by the authorities and the armed actors have had a dramatic impact on the space for humanitarian actors. This has resulted in the redesign of certain programmes and curtailment of work in certain areas. The various threats, restrictions and obstacles faced by humanitarian actors ultimately affect the communities who most need their interventions and assistance. As already discussed, in disaster settings there is evidence to demonstrate the slow and ineffective response by the State with a greater dependency on INGOs. With restrictions placed on operations in certain areas, agencies are unable to address the needs of the affected communities with the possibility of deepening the humanitarian crisis. The Government and the LTTE need to take all steps to ensure the safety of humanitarian actors and reduce any unnecessary obstacles imposed on them.

11 Conclusion

The year in focus witnessed grave human rights humanitarian violations, with limited initiatives taken by the Government to address the growing crisis. Though several of the areas covered in this chapter are not new to Sri Lanka, having experienced

⁵⁶ HRW, "Improving Civilian Protection in Sri Lanka", September 2006, p.25

⁵⁷ AFHRD, "Sri Lankan government and LTTE must ..." 21 August 2006

displacement both with the conflict and tsunami, there has been a slow and lethargic response in addressing humanitarian needs such as providing food, shelter, sanitation and security in camps, reducing security threats to IDPs and affected communities and addressing long term issues such as livelihoods, education and health care. 2006 also witnessed new trends such as the shrinking space for humanitarian interventions due to security or administrative practices, militarization and ethnicization of humanitarian response. As the chapter highlights, key issues in relation to displacement needs to be tackled by all stakeholders but the primary responsibility lies with the Government of Sri Lanka. It is hoped that speedy and effective steps are taken by all stakeholders to address the deteriorating situation and the plight of IDPs and affected communities.

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VI

THE ROLE OF COMMISSIONS OF INQUIRY IN THE PROSECUTORIAL SYSTEM OF SRI LANKA

*Dr. J. de Almeida Guneratne**

1 Introduction

Originally, Commissions of Inquiry were appointed by the Governor in Chief during the time when Sri Lanka was a Crown Colony under Article VII of "the Letters Patent," which executive fiat was legislatively acknowledged in the year 1872.¹ After the country gained independence in the year 1948, one of the first Parliamentary Acts to be passed by the legislature of independent Ceylon (as Sri Lanka was then called) was the Commissions of Inquiry Act, No. 17 of 1948² which may be regarded as the legislative successor to the 1872 Ordinance with the conceptual difference that the Governor General³ derived power to set in motion Commissions of Inquiry solely under the provisions of the said Act. Following the first Republican Constitution of Sri Lanka in 1972, the President as the nominal Head of State, and presently under the second Republican Constitution, the Executive President, is vested with power to appoint such Commissions of Inquiry.⁴

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¹ Commissions of Inquiry Ordinance No. 9 of 1872

² Articles 16(1) and Article 33 of the Constitution read with Section 2(1) of the Commissions of Inquiry Act, No. 17 of 1948 (as amended)

³ Constitutional successor to the office of Governor prior to independence

⁴ Articles 16(1) and Article 33 of the Constitution read with Section 2(1) of the Commissions of Inquiry Act, No. 17 of 1948 (as amended)

2 Scope and Nature of Commissions Envisaged under the Commissions of Inquiry Act⁵

Section 2(1) of the Act contemplates the obtaining of information in regard to:

- a) the administration of any department of government or of any public or local authority or institution; or
- b) the conduct of any member of the public service; or
- c) any matter in the interests of public safety or welfare.

Consonant with what the Act decrees, several Commissions have been appointed over the years to inquire into and obtain information in regard to such matters as the working of public institutions and conduct of public officers, allegations of bribery and corruption,⁶ administration in local authorities,⁷ abuses relating to government tender contracts⁸ and conduct of a naval officer.⁹

3 Brief Reflections on the Practice of Appointing Commissions to Inquire into Human Rights Violations, Enforced Disappearances and Extra-Judicial Killings

Appointing Commissions to inquire into human rights violations including extra-judicial killings and enforced disappearances is not expressly contemplated by Section 2(1) of the Act. Bringing those who are responsible for such violations to book must surely fall fairly and squarely in the hands of established law enforcement agencies. Where such agencies fail, the flaws in their administration and the

⁵ Hereinafter referred to as the Act

⁶ *De Mel v. De Silva*, 51 NLR 105 (DB) and *The Mayor of Colombo v. CMC Bribery Commissioner*, 41 CLW 28. Also *The Mayor of Colombo v. CMC Bribery Commissioner*, 41 CLW 33.

⁷ *Silva and others v. Siddique* (1978-79) 1 SLR 166

⁸ *In re Ratnagopal*, 70 NLR 409

⁹ *AG v. Channugam*, 71 NLR 78

conduct of their personnel ought to be investigated. Consequently, Commission of Inquiry should ascertain the causes and reasons for the failure of such law enforcement agencies in the discharge of their public functions and take remedial measures for public safety and welfare.

The question then arises as to whether any useful purpose is served by employing Commissions of Inquiry to inquire into human rights violations, including enforced disappearances and extra-judicial killings. The work and functions of such Commissions cannot substitute for the public duties of law enforcement agencies for logistical as well as institutional reasons. Nor could any findings of such Commissions *ipso facto* entail in any penal consequences, even if such findings reveal the identities of perpetrators of rights violations. Any such findings would necessarily involve the same law enforcement agencies being called upon to discharge their public functions. Yet if they had properly discharged these functions in the first instance, there would not have been a need to appoint a Commission of Inquiry. It is this apparent contradiction that raises serious questions about the whole exercise of appointing commissions to inquire into acts of grave human rights violations.

The Commission of Inquiry appointed by President Ranasinghe Premadasa to inquire into violations of human rights in Sri Lanka in 1993 was evidently owing to local as well as international pressure on account of mass scale disappearances and extra-judicial killings that had taken place between 1987 and 1990 (what has come to be known as the period of the second Southern Insurrection). However, this Commission was only mandated to cover a period beginning in January 1991, after the large scale violations had come to an end, thus putting the seriousness of the initiative in doubt. In addition, no attempt was made to address what had taken place between 1979 and 1987 in the North and East of the country.

Consequent to a change in the political regime, President Chandrika Kumaranatunge (in 1994) appointed the "Disappearances

Commissions" to examine the involuntary removal or enforced disappearances of persons.¹⁰ The mandate of these Commissions covered the crucial period left out by President Ranasinghe Premadasa earlier.¹¹

This paper examines the relevance and adequacy of the provisions of Act No. 17 of 1948 in the context of establishing Commissions of Inquiry to deal with human rights violations, in the light of the *modus operandi* adopted by the "Disappearances Commissions" mandated in 1994 to inquire into such human rights violations from 1987 to 1990 with particular reference to the Western, Southern and Sabaragamuwa provinces (hereafter referred to as the Western, Southern and Sabaragamuwa Disappearances Commission of 1994).

It is hoped that this exercise may help identify indicators in regard to the functioning of the current Commission of Inquiry appointed by the President in October 2006 to inquire into "Alleged Serious Violations of Human Rights arising since 1 August 2005", specifically including the several incidents set out in the schedule to the Presidential warrant, hereafter referred to as the Commission of Inquiry (2006).

¹⁰ Appointed on 30 November 1994 by the President in terms of the *Act of 1948* to inquire into *inter alia*, the involuntary disappearance of persons after 1 January 1988, the persons responsible, the legal proceedings that can be taken, the measures necessary to prevent the re-occurrence of such activities, and the relief, if any, that should be afforded to the family members and dependants of the disappeared. See Interim and Final Reports of the Western, Southern and Sabaragamuwa Provinces, respectively Sessional Papers No. 11 and No. V – 1997, Interim Report/Final Report/the Report containing the Annexures of the Central, North Western, North Central and Uva Provinces, respectively Sessional Papers No. III and VI – 1997 and Interim and Final Reports of the Northern and Eastern Provinces, respectively, Sessional Papers No. II and No. V – 1997.

¹¹ A requested expansion of the 1993 Commission's mandate was also resisted by President Premadasa's successor, President DB Wijetunga (Reported in *Daily News*, 14 October 1994).

4 Specific Analysis of Certain Aspects of the Functioning of Commissions of Inquiry

4.1 Broad Purposes of the Mandate of the Commission of Inquiry (2006) in comparison with the Mandate of the "Disappearances Commissions" of 1994

The two mandates are comparable with regard to the broad purposes for which they were appointed, namely:

- (i) to establish the identities etc: of those responsible for the alleged violations;
- (ii) to recommend measures that should be taken in accordance with the laws of Sri Lanka against those perpetrators and
- (iii) to recommend appropriate measures of reparation to the victims and to their next of kin.

4.2 The Question of Public or *in camera* proceedings

The warrants issued to the Disappearances Commissions (1994) has directed that, "any inquiry to the aforesaid matters, as you may in your discretion determine, shall not be held in Public."

The warrant issued to the Commission of Inquiry (2006) directed that:

either that, the entirety of parts of the inquiries into the aforesaid matters ... shall in the discretion of the Commissioners be not held in Public or that any section of the public be excluded from the relevant inquiries.

However, this direction is prefaced by the further direction that:

sessions of inquiries of the Commissioners of Inquiry, shall be open to the public only to be dispensed with having due regard to the sensitive

nature of the information and material that may be received and/or adduced at the inquiries, the disclosure of which may be prejudicial to national security, public safety or well being.

It will be noted that, even at a glance, these prefatory terms were not present in the terms of the 1994 Commissions, and moreover there was no reference to the press in either warrant. Yet, the Western, Southern and Sabaragamuwa Disappearances Commission of 1994 made a ruling, before commencing its inquiries, to exclude the public as well as the press having "regard to the sensitive nature of the matters to be inquired into in terms of our mandate".¹² Given the fact that the Presidential warrant had preserved the Commission's discretion to admit or exclude the public from hearings and it had made no reference to the press, the Commission resorted to the provisions of Act, No. 17 of 1948 in making the said ruling, namely, Section 7(e) of the said Act which conferred power on the Commission:

"Subject to any direction contained in the warrant –

- (i) to admit or exclude the public from the inquiry or any part thereof;¹³
- (ii) to admit or exclude the press from the inquiry or any part thereof."¹⁴

Two preliminary issues may be identified in this context:

- (a) Reference to "the sensitive nature of the information and material that may be received and/or adduced at the inquiries" in the Commission of Inquiry (2006)'s warrant

¹² See the said Commission's Report (1997) in Chapter Two headed "Principles Adopted by the Commission In Relation to Procedure and Terms of the Mandate" at Paragraph 3 thereof titled "Decision to hold hearings *in Camera*."

¹³ Section 7(e)(i)

¹⁴ Section 7(e)(ii) *Contra* Section 2(2)(d) of the Special Presidential Commissions of Inquiry Law No. 7 of 1978 (as amended by Act, No. 4 of 1978)

appears to have been influenced by the ruling of the 1994 Commission, elaborated further by the current Presidential warrant contained in the terms, "the disclosure of which may be prejudicial to national security public safety or well being;"

- (b) Competence or otherwise of a Commission of Inquiry to exercise discretion "in the interest of national security, public safety or well being" as stated in the warrant cited above;

Some principles that are relevant in this context will now be dealt with.

(A) The Doctrine of Public Trust

Article 155 of the Constitution of Sri Lanka read with the Public Security Ordinance¹⁵ would vest with the President, and the President only,¹⁶ the question of determining what is best in the interests of national security, public safety, etc. Could such a decision then be left in the hands of a Commission of Inquiry? Would it offend the principle *delegatus non potest delegare* firmly established in the realm of Public Law?

Further, the impact of the Public Trust doctrine is important in this regard. True, that Section 7(C) confers on a Commission of Inquiry the power to admit or exclude the public and the press. But power statutorily conferred is power held in Public Trust, which demands accountability and transparency in relation to the public.¹⁷

¹⁵ Vol III, Chapter 51, (LECSL) (1980 Revised)

¹⁶ Subject to judicial limitations imposed in decisions of the highest Court of the land.

¹⁷ *de Silva v. Atukorale* (1993)1 SLR 283 per MDH Fernando, J. (SC); *Bandara v. Premachandra* (1994)1 SLR 301, at p.312 per GPS de Silva, C.J. *Heather Mundy v. CBA and Others* SC/58/03 (unreported) – SC Minutes of 20 January 2004, per MDH Fernando J. (*Dr Kunanandan v. University of Jaffna*, Appellate Law Recorder (2006-1)ALR per Justice Sri Skandarajah (CA) and (*Dr Shiranthi Perera v. University of Colombo* (2006-2)ALR per Justice K Sripavan.

If so, what would be the justification to exclude the public and the press from a Commission's hearings? The doctrine of Public Trust has been applied to decisions of statutory authorities making their decisions amenable to judicial review in matters such as those pertaining to national and natural resources such as air waves¹⁸ and mineral deposits.¹⁹ If so, should transparency and accountability be denied to the public and the press in relation to the conduct of inquiries by a Commission in such a serious matter as human rights violations?

(B) Impact of Public Law principles in relation to Power, Discretion and Public Duty

It is also an established principle in Public Law that whenever power is conferred on a statutory body, such power, though vesting discretion to act in a particular manner, imposes a duty to exercise such discretion properly and not arbitrarily.²⁰ Would it not be an arbitrary exercise of discretion to exclude the public and the press from hearings of a Commission inquiring into grave human rights violations?

As noted above, the Western, Southern and Sabaragamuwa Disappearances Commission of 1994, in making the said impugned ruling,²¹ escaped censure. A future Commission, if it were to adopt the same principle of exclusion may, however, not be able to escape such censure given the development of public law principles as highlighted above.²² In so far as the Commission of Inquiry (2006) is concerned, it is moreover relevant that an "International Independent Group of Eminent Persons" (IIGEP) has been authorized by warrant "to be present and observe throughout all

¹⁸ *Fernando v. SLBC* [1996] 1 SLR 157 (SC) per Justice ARB Amerasinghe

¹⁹ *Bulankulame v. Secretary, Ministry of Industrial Development* [2000] 3 SLR 243 (SC) per Justice ARB Amerasinghe

²⁰ *Premachandra v. Jayawickrema* [1994] 2 SLR 90, (SC) per Justice GPS de Silva; *Mediwake v. Dissanayake* [2001] 1 SLR 177 (SC) per Justice MDH Fernando.

²¹ *Supra*, n.12

²² *Supra*, nn 17-20

investigations and sessions of inquiries” of the Commission.²³ While this initiative on the part of the President in inviting international observers must be commended, if only for the reason that it is unprecedented, a few queries arise.

- a) Given the right of audience and observance afforded to the IIGEP, what would be the consequence of the Commission of Inquiry (2006) making a ruling that the public and the press of sovereign Sri Lanka should be excluded from its hearings, whether this pertains to investigations or inquiries? None of the members of the IIGEP, individually or collectively, would be in a position to take any legal measures in consequence of such a ruling, whether in pursuance of a fundamental rights application (given the limitations linked thereto in regard to the concept of *locus standi*) or even for an order in the nature of a writ (under Article 140 of the Constitution), for no right of theirs (in the *Ridge v. Baldwin* sense²⁴ which is established jurisprudence in Sri Lanka)²⁵ would be affected;
- b) On the other hand, affording the IIGEP a right of audience while excluding that right to the sovereign public of the country and the press would, to say the least, amount to a contradiction in constitutional terms in as much as the Constitution confers sovereignty on the people of the Republic of Sri Lanka,²⁶ which principle has been upheld in a series of judicial decisions culminating in the recent Supreme Court ruling in the *Singarasa Case*.²⁷ Further, though the Right to Information is not recognized

²³ See Annexure III to the Terms of Reference of the Commission of Inquiry (2006).

²⁴ 1964 (AC)(HL), 40

²⁵ *Fernandopulle v. M/Lands & Agriculture* (79 1 NLR); *Fernando v. Jayaratne* (78 WLR); *Jayasena v. Panchi Appuhamy* [1980] 1 SLR; *Sundarkeeran v. Bharathi* [1989] 2 SLR serving as examples.

²⁶ Article 3 of the Constitution

²⁷ SC (Spl) L.A. No. 182/99 SCM 15.09.2006 (per Chief Justice Sarath Silva) which has gone to the extent of questioning the Presidential act of accession to a protocol to an international treaty in the face of that sovereignty, whatever the merits and the demerits of that decision may be. See chapter on

in explicit form by the Constitution of Sri Lanka unlike, for instance, in India,²⁸ it is implied in the existing constitutional provisions as judicially articulated by the Supreme Court.²⁹ It is consequently, a relevant question as to whether the Right to Information is infringed by the denial of public access to Commission sittings;

- c) Given the paucity in the law of Sri Lanka in regard to witness protection,³⁰ it may be argued that, if at all, public access to commission sittings should be restricted having regard to "the sensitive nature of the information and material that may be received and/or adduced at the inquiries" and that the Commission should have the discretion to admit or exclude the public and the press from hearings "in the interest or protection of witnesses summoned before the Commission".³¹ This contention is dealt with in detail later but it may suffice to state at this stage that it is not a justifiable argument in order to preclude public access and information to its functioning;
- d) The present *modus operandi* of the Commission of Inquiry (2006) in separating its sittings into two stages, investigation and inquiry, and permitting public access to the latter but not the former, distinguishes its functioning from the Disappearance Commission of 1994. It is unclear as to the rationale of such a separation, notwithstanding the fact that the mandate of the Commission appears to have been amended for that purpose,

Judicial Protection of Human Rights in this publication for a fuller discussion of this decision.

²⁸ "Right to Information: Illusionary Court Victories and its Continuing Denial", Kishali Pinto-Jayawardena, LST Review, Volume 17 Issue 229, November 2006.

²⁹ *Fernando v. Sri Lanka Broadcasting Corporation* [1996] 1 SLR 157. per Justice MDH Fernando; *Environmental Foundation Ltd v. Urban Development Authority of Sri Lanka and Others* SC (FR) Application 47/2004, SCM 28.11.2005. per Chief Justice Sarath Silva

³⁰ Which amounts to an admission that the State is unable to provide an adequate witness protection mechanism.

³¹ *Supra*, n.12

and indeed, a question arises as to whether the Act as it presently stands lends legitimacy to such a two staged process. There is no doubt, however, that any rule barring public access to the inquiry would be subjected to judicial review on the presently developed principles in Public Law as highlighted above.

- e) In any event, on the reasoning advanced above, it is submitted that the legislature itself is best advised to repeal the entirety of section 7(e) of the Commission of Inquiry Act, No. 17 of 1948.
- f) Consequently, for the same reasons adduced above, it is submitted with the highest respect that the Presidential Mandate (Terms of Reference) given to the Commission of Inquiry (2006) suffers from a drawback by leaving this question in the hands of the Commission, which may hinder effective execution of its functions.³² As referred to earlier, such restrictions, if arbitrarily imposed, may subject the relevant decision to judicial review.³³

4.3 The Duty to Act Fairly – A Minimum Prescription for Due Procedure

As revealed from the Mandate of the 2006 Commission, the primary purpose of the Commission is to establish the identities etc. of those responsible for the alleged violations. The incidents cover several killings and one disappearance.³⁴ Given the fact that the Commission is not a Court of Law (though with some trappings

³² See *AG v. Ratnagopal* 72 NLR 145 (Privy Council) in this context.

³³ For such discretion could well be exposed to judicial review on the principles discussed in this paper, *Ibid*, which principles mark the progressive development in the context of the present Republican Constitution of Sri Lanka as judicially expanded (See nn.17-20 above) distancing as they do from the restrictive judicial approach reflected in decisions such as *Mayor of Colombo v. CMC Bribery Commission* (41 CLW 30) and *de Mel v. de Silva* (51 NLR 105) that unless the decision of a Commission of Inquiry under Act, No. 17 of 1948 taken into the fold of its decision what is decreed under a pre-existing statute or its report is given ipso facto legal consequences affecting rights of parties, decisions of such Commissions are not amenable to judicial review.

³⁴ Schedule to the Commission's Mandate

of a Court),³⁵ it can only report and make recommendations to the President as to what measures he may be advised to take: in the main, how to initiate prosecutions against perpetrators, which would depend on the nature of the evidence of witnesses summoned before the Commission.

One question that the Commission would be required to address in that connection would be the following: where an alleged perpetrator's name recurs in the evidence of witnesses or even an isolated name transpires through two or several witnesses, should such person be afforded an opportunity at a subsequent stage of the hearings to answer such allegation?

This question is raised for the reason that the Western, Southern and Sabaragamuwa Disappearances Commission of 1994 had not gone to that second stage. Instead, the said Commission sent the names of alleged perpetrators under separate cover recommending further investigations in regard to those persons wherever the Commission was of the view that there was credible (*prima facie*) evidence against them, "being mindful of the adverse effect publicity could have on their character and reputation".³⁶

The principle that named perpetrators need not be called to state their case could, however, be subjected to criticism.³⁷ It could be

³⁵ See powers of the Commission as stipulated in sections 7(a) to (c) and 8 of the Act.

³⁶ See p. 37 of the Southern, Western and Sabaragamuwa Commission Report (1997), taking a hint from the Court of Appeal decision in *Mendis, Fowzie & Others v. Goonewardene*, GPA Silva (1978-79 (2) SLR 322) which had held that for that reason, the Commission's findings in that case were amenable to judicial review under Article 140 of the Constitution but which decision was reversed by the Supreme Court in appeal (1978-79-80 (1) SLR 166).

³⁷ In *Wickremesinghe v. Tambiah* (46 NLR 105), the question concerned the functioning of a Commission of Inquiry appointed under Ordinance No. 9 of 1872, the legislative precursor to the present Act of 1948 where it was stated that "there could have been no reasonable objection to the Commission interviewing witnesses or reading documents with a view to ascertaining whether the material so elicited is of sufficient materiality to be adduced at a formal sitting. What the petitioner objected to in that case was the use of the facts so elicited in compiling the Report without having such matters tested at a formal sitting."

said that the vast numbers of complaints that were filed before the 1994 Disappearances Commissions precluded extensive inquiry at the second stage. However, given the fact that the Commission of Inquiry (2006) has been mandated to inquire into 302 killings and one disappearance, this rationale would apply less in the later instance. A two stage procedure – an informal stage to receive and procure evidence where identities of alleged perpetrators may transpire, and a formal sitting to afford an opportunity to state their case should such identities transpire before reporting and recommending to the President – is therefore highly recommended. Nothing more nor less would respond to the duty to act fairly as would be required from a Commission of Inquiry as articulated in the Supreme Court decision in *Fernando v. Jayaratne*.³⁸

4.4 Brief Reflections on Practical Realities and the Utility Value in Appointing Commissions of Inquiry

So far, in the context of identifying perpetrators, this chapter has been concerned with the Disappearance Commissions' Mandate, role and actions. One would be justified in asking whether the drawing of such analogies with the Commission of Inquiry (2006) is pertinent. That justification probably would not need further impetus if one were to take a cursory glance at the incidents that the President has mandated the Commission of Inquiry (2006) to inquire into.³⁹

In regard to items 1, 3, 4, 6, 11, 12, 13, 14 and 15, who might have been the perpetrators? Undeniably, surmise cannot be a substitute for evidence. In regard to items 2, 5, 7, 8, 9, and 10, even surmise or conjecture stands defied, thus justifying the President's action in appointing the Commission of Inquiry (2006) "to procure and receive all such evidence",⁴⁰ notwithstanding any provision of the Evidence Ordinance.⁴¹

³⁸ 78 NLR 123

³⁹ See the Schedule to the warrant issued by him.

⁴⁰ As empowered by Section 7(a) of Act No. 17 of 1948.

⁴¹ *Ibid*, Section 7(d)

Appointment of a Commission of this nature would also provide an opportunity for the next of kin of victims to express their grievances, particularly regarding those whom they perceive to be the perpetrators, which would then be a matter of socio-historical record. Establishing individual identities of perpetrators may, however, well be a near impossible task when one reflects on the nature of the incidents that the Commission has been mandated to inquire into, save for perhaps item 2 and item 8.

The Report of the Truth Commission on Ethnic Violence (1981-1984) appointed by the President in July, 2001⁴² in some instances, named the alleged perpetrators.⁴³ The Western, Southern and Sabaragamuwa Disappearances Commission of 1994⁴⁴ recommended initiation of criminal prosecutions by the Attorney General where the Commissions found credible and sufficient evidence against police officers and army officials in particular⁴⁵ and further investigations into the conduct of other such officials by a special Civil Authority investigation unit where more evidence was required.⁴⁶

⁴² Comprising S Sharvananda (Retired Chief Justice as Chairman) and Messrs SS Sahbandu and MM Zuhair (Presidents' Counsel) as members.

⁴³ See: pp.23-24 and 43-48 in particular and in general Chapter 3 of the Report (Sessional Paper No. III - 2003), published in Government Gazette of 24.04.2003

⁴⁴ Comprising Manouri Muttetuwegama (Chairperson, Attorney-at-Law), Prof. Amal Jayawardene (University of Colombo) and Jayantha de Almeida Gunaratne.

⁴⁵ The number of such prosecutions actually launched in consequence of the findings of these Commissions are relatively small. The other two Disappearances Commissions were headed by K. Palakidner (Retd. Court of Appeal President) and T Sundaralingam (Retd. High Court Judge). An All Island Commission headed by Manouri Muttetuwegama in March 2001 also examined the incidents left un-examined by the previous Commissions due to want of time and the expiry of their mandates. See Sessional Paper No. 1- 2001.

⁴⁶ A recommendation which does not appear to have been acted upon by the government from accessible official records.

The Batalanda Commission appointed in 1995⁴⁷ to inquire into the establishment and maintenance of places of unlawful detention and torture chambers made findings against several law enforcement officers,⁴⁸ eventually recommending that the Supreme Court be vested with additional jurisdiction to impose suitable sanctions in the deprivation of civil rights on persons who are found to have repeatedly violated basic fundamental rights of citizens.⁴⁹ There is no evidence to speak of the government having taken viable action in regard to any of these recommendations, excepting a few prosecutions launched in the wake of the findings of the 1994 Disappearances Commissions and the payment of some compensation.

4.5 The Powers and Obligations of Commissions of Inquiry

Earlier in this paper it was submitted that inquiries under the Act ought to be conducted at two stages, i.e.: an initial sitting, where witnesses may be summoned and evidence recorded, which would be primarily to ascertain whether there is credible evidence transpiring against any person or group whose conduct forms the subject of the inquiry, and a subsequent sitting, affording an opportunity to those alleged to have been responsible to state their defence should the Commission find the evidence against them to be credible.

The principles emanating from the decided case law in Sri Lanka may be conveniently classified in that light as Powers of the Commission and Obligations of the Commission.

⁴⁷ Comprising D Jayawickrema (Chairman) and NE Dissanayake (Member), High Court Judges at the time.

⁴⁸ Sessional Paper No. 1-2000, pp.113-122, published in Government Gazette of 19 February 2000.

⁴⁹ *Ibid.*, p.124

4.5.1 Powers of the Commission in the Conduct of its Proceedings

(a) Summoning of Witnesses

In *Re Ratnagopal*,⁵⁰ it was held by the Supreme Court that powers of a Commission appointed under the Act to summon witnesses extended to a person permanently resident in England but who was a citizen of Sri Lanka, and having business connections and family ties which made him pay regular visits to the country, as being "a person residing in Ceylon" within the meaning of Section 7(c) of the Act. Consequently, it was held that the witness was liable for contempt under Section 12(1)(b) of the Act for refusing to take an oath before the Commission which it was empowered to administer under Section 7(b).

However, in appeal to the Privy Council,⁵¹ the judgment of the Supreme Court was set aside on the ground that

In as much as the scope of the inquiry was not limited by the governor-general⁵² and was to be decided by the Commissioner, the appointment of the Commission in terms of the warrant was ultra vires and invalid having regard to the powers of the governor general under Section 2 of the Act.

Incidentally, the Privy Council also observed (though obiter) that:

No intention of permanently residing in Ceylon is necessary in order that a person may be liable to be summoned under section 7 of the Act to give evidence at a meeting of the Commission.⁵³

⁵⁰ 70 NLR 409

⁵¹ Being the highest judicial body at the time. See 72 NLR 145.

⁵² Being the Executive authority at the time.

⁵³ Sessional Paper No. 1-2000, p.151

Given the above, it would be necessary for the effective functioning of Commissions under the Act to amend Section 7(c) of the Act by adding the words, "any citizen of Sri Lanka or" after the words "to summon" as presently contained in the Act, given the fact that the Supreme Court itself had noted that, "The Commission has no power to compel the attendance of a witness by issuing a warrant or proclamation against him or by causing him to be detained".⁵⁴

If the suggested amendments to the Act are adopted, a Commission under the Act would be possessed of the necessary armoury for its effective functioning, in so far as witnesses a Commission desires to summon are concerned.

(b) To remit to the Court of Appeal⁵⁵ to be charged for contempt⁵⁶

The Act, as it presently stands, restricts the Commission's powers to remit a matter to be charged for contempt in regard to witnesses who fail without reasonable cause to answer a summons⁵⁷ or refuse to be sworn,⁵⁸ or fail without reasonable cause to answer any question put to such witness⁵⁹ or without reasonable cause refuse to produce any document called for by the Commission.⁶⁰ The limited scope of a Commission's power to remit a matter as constituting contempt is thus evident as the Act presently stands. In the Case of *In Re Wijetunge*, the Supreme Court was pleased to note this wherein it was held that:

the person who writes an article in the newspaper in disrespect of the Commission of Inquiry cannot be punished for an offence of contempt.⁶¹

⁵⁴ *Re Ratnagopal*, 70 NLR 409

⁵⁵ In terms of Article 105(3) of the Constitution of Sri Lanka

⁵⁶ Section 10 of the Act

⁵⁷ Section 12(1)(a)

⁵⁸ As in the *Ratnagopal Case*.

⁵⁹ Section 12(1)(b)

⁶⁰ Section 12(1)(c)

⁶¹ 72 NLR 514

In consequence, this would amount to saying that neither such a writer (whether he or she is a journalist or a member of the public) nor the publishing press would be liable for an "article in the newspaper in disrespect of the Commission of Inquiry".⁶² The passage in the impugned article was to the effect that, "A Commission is inquiring into the affairs of the CWE just now. But we fear that the Commission will unduly drag out the inquiry until another election is on the way".⁶³

This particular article may not have been, on its apparent facts, so problematic as to deserve to be cited for contempt. However, the principle that newspaper publications, even if they exceed beyond the boundaries of reasonable and justifiable comment and criticism, are not subjected to the ambit of this section, highlights a lacunae that ought to be addressed.

The inadequacy of the scope of Section 12 of the Act, which gives restrictive power or authority to a Commission appointed under the Act to remit the matter to the Court of Appeal for contempt of its authority, is therefore apparent. It is suggested that Section 12 as it presently stands be amended by the addition of a new provision empowering a Commission appointed under the Act to remit the case to be tried by the Court of Appeal on the ground of contempt of its authority and functioning on the specified basis that "any newspaper article whether by an individual or a reporter published in disrespect of the Commission of Inquiry without reasonable cause shall be an offence as constituting an offence of contempt as envisaged in Section 10 of the Act".⁶⁴

Such an amendment should be accompanied by the repeal of Section 7(e)(i) and (ii) of the Act in its entirety as recommended above.⁶⁵ It is worth re-iterating that both the public and the press

⁶² *Ibid*, per T.S. Fernando, J.

⁶³ As set out in the facts of the case.

⁶⁴ Which would be a legislative response to the decision of the Court in *In Re Wijetunge*, *supra* n.61

⁶⁵ See section 4.2 above.

must not be excluded from commission proceedings in order to satisfy the demands of maintaining transparency and accountability of the workings of the Commission.

It is submitted that these amendments are imperative if any Commission of Inquiry appointed under the Act is to function without fear and favour, thus guaranteeing its independence and credibility. This would consequently not leave room for the allegation that the Commission is operating without transparency. To exclude the press and the public from sittings of the Commission in the name of witness protection cannot be the answer in as much as:

Responsibility for the absence of a witness protection scheme speaks to the responsibility of the (Attorney General's) Department itself and the commitment of the State to ensuring justice. The extent to which this (absence of a witness protection system) has been a factor in crippling the criminal justice process is clear.⁶⁶

Indeed, a former Attorney General of Sri Lanka had spoken clearly to this need in recent times as illustrated by the following comment:

Another important feature that requires consideration is the need for an efficient witness protection scheme that would ensure that witnesses are not intimidated and threatened. No doubt this would involve heavy expenses for the State and amendments to the law. I will only pose a simple question. Is it more important in a civilized society to build roads to match with international standards spending literally millions of dollars rather than to

⁶⁶ See Kishali Pinto-Jayawardena, "A 'Praxis' Perspective on Subverted Justice and the Breakdown of the Rule of Law in Sri Lanka," *LST Review*, Volume 17, April-May 2007 Joint Issue 234-235, p.23

have a peaceful and law abiding society where the rule of law prevails?⁶⁷

The lack of an effective witness protection scheme in this country has also drawn international censure.⁶⁸ At times, witnesses have been threatened and even killed.⁶⁹ Though the Government of Sri Lanka has reportedly drafted a witness protection law,⁷⁰ public consultations on the same have been inadequate. It is clear, therefore, that the responsibility of establishing an effective witness protection system is the responsibility of the State and this cannot be a ground for shutting out public scrutiny of commission sittings.

4.5.2 Obligations of the Commission in the Conduct of its Proceedings

A Commission of Inquiry appointed under Act No. 17 of 1948, not being a court and its findings being recommendatory and therefore not resulting in a definitive order affecting the rights of any subject *proprio vigore*, will thus not be amenable to judicial review,⁷¹ although the report or a recommendation of such Commission forms an integral or necessary part of a statutory process or scheme which may terminate in action adverse or prejudicial to the rights or interests of individuals.⁷²

⁶⁷ Remarks made during the 13th Kanchana Abhayapala Memorial Lecture, Basil Fernando, *The Right to Speak Loudly - Essays on law and human rights*, Asian Legal Resource Centre, 2004.

⁶⁸ "The authorities should diligently enquire into all cases of suspected intimidation of witnesses and establish a witness protection program in order to put an end to the climate of fear that plagues the investigation and prosecution of such cases." Concluding Observation No. 9 (CCPR/CO/79/LKA) Human Rights Committee, seventy ninth session, November 2003.

⁶⁹ As illustrated by torture victim Gerald Perera who, after obtaining compensation in the Supreme Court (*Sanjeeva v. Suraweera* [2003] 1 SLR 317, was killed days before he was due to give evidence in a trial in the High Court where his alleged torturers had been indicted.

⁷⁰ See the Draft Witness Protection Law, *LST Review*, Volume 17, April-May 2007 Joint Issue 234-235, p.58

⁷¹ *De Mel v. de Silva* (51 NLR 282) (a single Judge decision of the Supreme Court and *Dias v. Abeywardene* (68 NLR 109)

⁷² *De Mel v. de Silva* (DB) (51 NLR 105) reversing in effect the decision of the single Judge in 52 NLR 282 (*Ibid*).

This is the premise on which the law in Sri Lanka (as judicially approached) has proceeded, holding in the process that the full scope and content of natural justice principles need not be adhered to but that there is the duty to act fairly, as laid down in the Supreme Court decision of *Fernando v. Jayaratne*.⁷³ The facts of that case would reveal whether any duty at all had been discharged by the Commission in that case. The Commission had been mandated to inquire into the conduct of the Board of Directors or officials and employees of the Ceylon Fisheries Corporation. In its Report, the Commission had noted findings against a witness who had not been informed that his conduct was under inquiry; several witnesses had implicated him, who had been heard in his absence.

The application for writ against the said findings failed on the reasoning of the Court that the functions of the Commission were neither judicial nor quasi-judicial in the sense that no definitive order, conclusive or binding, results from findings of such a Commission impacting on rights. Yet, it was on the basis of the Commission's report that the petitioner's employment was prematurely terminated. However, the Court's reliance on the Privy Council decision in *Nakkuda Ali v. Jayaratne*,⁷⁴ which had followed English precedents around that time,⁷⁵ and which latter decision was responsible for the doctrine of classification of functions later discredited and rejected by the House of Lords in *Ridge v. Baldwin*,⁷⁶ may justify the questioning of the judicial approach in *Fernando v. Jayaratne*. What good could paying lip service to a conceptual duty to act fairly do if a person whose employment is terminated (and whose rights are therefore affected) on the basis of a Commission's report (though *not proprio vigore*) cannot put in review such a report?

It is in the light of these comments that the Court of Appeal decision in *Mendis, Fowzie & Others v. Goonewardena, GPA Silva*⁷⁷ must

⁷³ 78 NLR 123

⁷⁴ 51 NLR 457

⁷⁵ For example, *Ex p-Parker* 1953 (1) WLR 1150

⁷⁶ 1964 AC

⁷⁷ 1978-79 (II) SLR 322

be viewed. In that case, the President under warrant had appointed two one man Commissions under the 1948 Act to inquire into and report with recommendations on whether there had been incompetence, mismanagement, abuse of power, corruption and irregularities in the conduct of affairs of twelve Municipalities specified in the schedule to the warrant. Upon receiving the reports, Imposition of Civic Disabilities Laws No. 38 and 39 were passed imposing civil disabilities on certain persons specified in the schedules to the two laws against whom findings had been made by the two Commissions. Some of them then sought certiorari to quash the findings of the said two Commissions.

Overruling the preliminary objection that the proceedings of the Commissions were not amenable to the writ jurisdiction, the Court of Appeal held that in the case of the imposition of civic disabilities, the findings and determinations of the Commissions were a necessary and integral part of the proceedings which culminated in the rights of subjects being affected. In this case, the character and reputation of the persons concerned had been directly affected by the very force, *proprio vigore*, of their decisions and determinations. In reaching this conclusion, the Court disapproved of the decision⁷⁸ of the Supreme Court in *Fernando v. Jayaratne*.⁷⁹ The apparent distinction drawn between "duty to act fairly"⁸⁰ and "the duty to observe the rules of natural justice"⁸¹ in *Fernando v. Jayaratne* was departed from when the Court (in *Mendis, Fowzie and Others v. Goonewardena, GPA Silva*) held that:

The requirement of acting judicially in essence is nothing but a requirement to act justly and fairly and not arbitrarily and capriciously. The Commissioners had a duty to act fairly by observing the rules of natural justice.

⁷⁸ Sessional Paper 1-2000, p.314, per Vythialingam, J.

⁷⁹ *Supra* n.73

⁸⁰ Where rights are not directly affected.

⁸¹ In judicial or quasi judicial acts affecting rights.

4.6 The Abduction and Disappearance of 53 Embilipitiya School Boys and 11 Others

In its report on the abductions and disappearances at Embilipitiya,⁸² the Commission found that:

- (a) the police had refused to record statements;
- (b) abductions had been carried out by army officers sometimes identified by name, and sometimes by reference to the particular regiment or battalion to which they were attached;
- (c) some of the abducted children had been seen in a particular army detention camp and later disappeared without further trace.⁸³

4.6.1 Refusal on the part of the police to record statements

The refusal to record statements was seen by the Commission as a common feature where it appeared that the complaint was against a police officer.⁸⁴ This situation is bound to visit the work of the current Presidential Commission as well as any future "fact finding Commission" and needs detailed examination.

The Lodging of a First Information

It is imperative that any inquiry in regard to the commission of an offence must commence with the lodging of a first information.⁸⁵ However, such safeguards are rendered useless when the police refuse to record the first information, resulting in the denial of any inquiry or investigation into the reported crime.⁸⁶

⁸² Special Report on the Disappearances of School Children in the Embilipitiya Area During the Period 1989-1990 (of the Presidential Commission of Inquiry Into Involuntary Removal or Disappearances in the Western, Southern and Sabaragamuwa Provinces) dated 3 January 1996.

⁸³ Notably the notorious "Sevana Camp".

⁸⁴ Sessional, p.6

⁸⁵ Section 109(1) of Code of Criminal Procedure Act, No. 15 of 1979 (as amended)

⁸⁶ *Ibid.*

Given the pattern of refusal by the police to record a first information in cases of this kind, there is an urgent need for the law to be amended to enable the first information to be recorded by other public interest groups concerned with human rights violations, including non-governmental organisations (NGOs) and international non-governmental organisations (INGOs). The Western, Southern and Sabaragamuwa Disappearances Commission of 1994⁸⁷ acted mainly on information provided to it by the International Committee of the Red Cross (ICRC)⁸⁸ and the Parents/Children Front (1991).⁸⁹ Established, reputed and *bona fide* public interest groups should also be given latitude in accepting a first information, particularly in situations where mass crimes of enforced disappearances have been committed. Given the fact that it is the first information envisaged in Section 109(1) that can lead to proceedings in Court in the first instance, as decreed in Section 136(1)(b) of the said Act, (Section 109(1)) may usefully be amended to read as follows:

Every information relating to the commission of an offence may be given in writing to a police officer or inquirer or a body whether statutorily or voluntarily established for the purpose of and/or committed to receiving such information.⁹⁰

4.6.2 The Subsequent Investigation Process

However, amending the law on first information reports would not be sufficient in itself to ensure the full investigation of crimes of this type. Even if the law is amended as suggested above, the process of investigation (as the law stands) would still be in the control of the police. If the police, in the first instance, has refused to even

⁸⁷ Interim and Final Reports contained in Sessional Papers No. 11 and No. V - 1997.

⁸⁸ Which had been most diligent in pursuing the cases at that time.

⁸⁹ Initiated, by no less than the present President of Sri Lanka who was, at that time, an opposition member of Parliament.

⁹⁰ Preferably so by a separate enactment.

record information, could it be relied on to conduct investigations on such information recorded by other sources?

With this in mind, the Western, Southern and Sabaragamuwa Disappearances Commission of 1994 recommended that such investigations ought to be conducted by the Criminal Investigation Department (CID).⁹¹ But, what is the "CID"? Given that it comprises of police officers of various ranks drawn from the existing police force,⁹² could the public be expected to trust the CID to conduct unbiased investigations? Given the fact that the Attorney General's eventual decision to proceed to indictment would, by and large, depend on those investigations, it is not acceptable to leave such investigations in the hands of the CID.

What, then, is the solution to this problem?

a) Serious Commitment to the 17th Amendment – Imperative Need of the Hour

It is submitted that the investigation of such human rights violations must be conducted by an independent statutory body established by Parliament, the members of which must be nominated by the Constitutional Council in terms of the 17th Amendment of the Constitution, which Council presently stands non-functional. Two possibilities that come to mind in this respect are an independently functioning Department of Public Prosecutions that would supervise the police investigations or the National Police Commission (NPC). However, public trust in the NPC has been eroded as a result of the mandatory provisions of the 17th Amendment not being followed in respect of the appointment of their members. The fundamental issue of the non-implementation of the 17th Amendment, therefore, must be addressed by the government, if it is serious in its commitment to the prosecutorial system of the country.

⁹¹ Report of the Western, Southern and Sabaragamuwa Disappearances Commission of 1994, p.7

⁹² See the Police Ordinance.

b) Composition of a "Police Council" as an Amendment to the Existing Law

Once, and if, the Constitutional Council is put in place, if it is found that the National Police Commission is not equipped to take on such powers of investigation or the concept of a Department of Public Prosecutions is found to be untenable, a third option may be to amend the 17th Amendment to establish a "Police Council" comprising retired police personnel of proven ability and integrity above the rank of a Senior Superintendent of Police (SSP), with supporting staff to be recruited to the said proposed Council, independently of the existing police cadre but in keeping with the criteria laid down in the Police Ordinance in relation to the recruitment of personnel, for which purpose the Police Ordinance itself may have to be amended in conjunction with the proposed amendment to the 17th Amendment to the Constitution.

4.7 The Prosecutorial System and the Role of the Attorney General

4.7.1 Concept of a Preliminary Inquiry (Non Summary Procedure)

In the normal run of cases – that is, where an accused appears or is brought before the Magistrate's Court – the Magistrate's Court is mandated to hold the preliminary inquiry in two situations presently contemplated by the law.⁹³ The Attorney General features in the second situation:

where the Attorney General being of opinion that evidence recorded at the preliminary inquiry will be necessary for preparing an indictment, within three months of the date of the commission of the offence so direct ...⁹⁴

⁹³ Section 145 of the CCP Act of 1979

⁹⁴ Section 145 (b) of the Act

a) Considerations ensuing from a Commission's finding that any person has been involved in the commission of offences of abduction, involuntary removals or disappearances or killing

A finding on the part of a Commission that any person has been involved in the commission of any offence under scrutiny must be deemed to satisfy the requirement of a preliminary inquiry for the Attorney General to form an opinion whether or not to proceed with the preparation of the indictment.

It is submitted that unless such a finding of a Commission is regarded as satisfying the requirement of a preliminary inquiry, the whole purpose of appointing such Commissions is rendered meaningless. It may be noted that when and if a Commission arrives at such a finding, it would be after overcoming the present inhibitions regarding the lodging of a first information and consequential investigations, in which context amendments to the existing law have already been suggested.⁹⁵ The following views are expressed on the presupposition that the suggested reforms to the existing law are in place.

b) Consequences upon the Attorney General refusing to indict

It appears to be settled law in the country that, in general, when an accused person is taken before the Magistrate's Court, under Section 136(1)(a) of the Code of Criminal Procedure Act (hereafter the CCP Act), if the magistrate discharges such accused person and the aggrieved party seeks the sanction of the Attorney General under Section 393 of the Act but the Attorney General refuses to intervene, the matter would be concluded for all intents and purposes.

⁹⁵ See above section 4.6

Two aspects warrant reflection in that context:

- (i) An aggrieved party who is confronted with a magisterial discharge of a named perpetrator (accused) must seek the sanction of the Attorney General to compel such a perpetrator (virtual accused) to be committed to stand trial.⁹⁶ Given the fact that the Attorney General is the principal law officer of the State, one cannot fault that legal position as long as it is regarded only as a procedural pre-requirement in the sense that the sanction of the Attorney General must be sought first.
- (ii) But what if the Attorney General refuses to intervene and a person is aggrieved by the said refusal? Should he not be entitled to have the decision of the Attorney General reviewed?

c) Relevant judicial precedents in this context

In one instance,⁹⁷ the then Supreme Court acknowledged its power to act in revision⁹⁸ where the Attorney General had refused to sanction an appeal from an acquittal. However, the Court refused to actually exercise those powers while casting a heavy burden on the appellant to establish a strong case amounting to a positive miscarriage of justice in regard to "either the law or the judge's application of the facts".⁹⁹

In another instance,¹⁰⁰ the nature and scope of the powers of the Attorney General were emphasized, the Court going to the extent of saying that, at the non-summary stage, "it is not open to the magistrate to do anything but carry out the instructions of the

⁹⁶ Section 393

⁹⁷ *King v. Noordeen* (13 NLR 115)

⁹⁸ *Ibid.*, per Wood Renton J, p.117

⁹⁹ *Ibid.*, at p.118

¹⁰⁰ *Attorney General v. Kanagaratnam* (52 NLR 121)

Attorney General".¹⁰¹ That was a case where the Attorney General had moved in revision against an order of the magistrate directing the prosecution to furnish particulars in order to amplify certain charges. The Attorney General had taken the initiative to direct the magistrate to proceed with the charges in the form in which they had been read out to the accused initially. It is also to be noted that, in that case, the Supreme Court exercised its powers of revision,¹⁰² wherein it was specifically held that such powers of revision of orders made by the magistrate in the course of non-summary proceedings would be exercised, whether such orders were made prior to or subsequent to the presentation of the indictment against the accused.

However, it is also to be noted that the Court felt free to revise magisterial orders in the light of the Attorney General's instructions to the magistrate, while not commenting on its powers of revision in relation to the exercise of statutorily conferred power on the Attorney General himself.¹⁰³

*Attorney General v. Don Sirisena*¹⁰⁴ is another case in point. This was where the magistrate had discharged the accused (on the basis that there was insufficient evidence) without proceeding to read the charge and, on the Attorney General's intervention directing that certain provisions of the Criminal Procedure Code be complied with, had again discharged the accused after such compliance. This led to another direction by the Attorney General to commit the accused for trial. It was upon the magistrate's refusal to comply with that direction that the Attorney General had moved the Supreme Court in revision of that order of non-compliance.

¹⁰¹ *Ibid*, per Nagalingam, J

¹⁰² In terms of Section 356 of the Criminal Procedure Code which was then the law.

¹⁰³ Section 390(2) of the said Code

¹⁰⁴ 70 NLR 347

A perusal of the judgment in this case reveals three broad grounds made out by the magistrate in refusing to comply with the Attorney General's direction, namely:

1. the prosecution witnesses contradicted each other
2. their evidence was to some extent contradicted by their previous statements, and
3. the witnesses had failed or delayed to make statements incriminating the accused.

Reflecting on these grounds and their relevance to inquiries conducted by Commissions of Inquiry, the experience of the Disappearance Commissions appointed in 1994¹⁰⁵ may be recounted. An aggrieved mother, father or spouse of a victim frequently contradicted each other in their evidence. In addition, the Report of the Western, Southern and Sabaragamuwa Disappearances Commission of 1994 referred to several instances where complainants (mostly aggrieved mothers of abducted sons) had been advised by state authorities to make a statement to the police, even belatedly, that it was either unknown persons or insurgents who had abducted the victim, for otherwise "there would be the problem in obtaining compensation".¹⁰⁶

Given this background, the *ex facie* contradictory nature of statements to the Commission are clear, with the Commission being told that a police officer or armed personnel at the investigation of a politician (or otherwise), had abducted his or her son or husband (as the case may have been). However, this would contradict the statement made to the police some time after the abduction, where the aggrieved person was found to have stated that, "an unknown and/or unidentified person or a group of persons had taken away the corpus". The experience of the Commissions revealed that

¹⁰⁵ See n.10 above

¹⁰⁶ *Ibid.* The personal recollection of this writer who was one of the Commissioners, is also to this effect.

the reason for such inconsistent evidence was the offer of compensation held out by the state for the disappearance consequent to an abduction.

How could a magistrate, a High Court judge and the Attorney General be expected to proceed in the face of such contradictions? How could the Magistrate have committed any perpetrator (notwithstanding that he might have been named at the Commission stage) to trial, or a High Court have proceeded to convict (notwithstanding an indictment presented by the Attorney-General) in the face such inconsistent evidence? If an explanation is needed for the several discharges or acquittals in the context of the limited number of prosecutions following upon the recommendations made by the Disappearance Commission of 1994, this might provide it. The Attorney General himself must surely have faced such problems at the stage of deciding whether to indict a named perpetrator or not.

Coming back to the Supreme Court decision in *AG v. Don Sirisena*¹⁰⁷ it was notwithstanding the grounds made out by the Magistrate in discharging the accused that the Attorney General had directed that the accused be committed to trial, which direction the Magistrate had refused to comply with. The Supreme Court in holding that the Magistrate's refusal was unlawful, allowed the Attorney General's application for revision against the magisterial order. Note, however, the view expressed by the Court that, "A Magistrate does not exercise a judicial function when he conducts a preliminary inquiry for the purpose of deciding whether or not a person is to be committed for trial." It is submitted with respect that this view must be regarded as *obiter* particularly in view of the further view expressed by the Court that the Attorney General's powers in that context are quasi-judicial.

It is submitted further, in view of later developments in the realm of public law,¹⁰⁸ that it is doubtful whether the view that

¹⁰⁷ 70 NLR 347

¹⁰⁸ See Section 4.2 of this chapter on the Impact of Public Law principles in

"the magistrate does not exercise a judicial function" could be regarded as sound, given the fact that Commissions of Inquiry generally proceed on the basis that they are holding an inquiry of a preliminary nature, as being on par with a non-summary inquiry conducted by a magistrate. Given the primary objective of appointing such Commissions, amendments to the prosecutorial system must be effected as suggested earlier in this paper.

d) Consideration of the converse situation where the Magistrate commits the person to trial but the Attorney-General intervenes to quash such committal

That this course of action is available to the Attorney General was judicially acknowledged by the then Supreme Court interpreting Section 388 of the former Criminal Procedure Code.¹⁰⁹ The same provision is contained in the present law.¹¹⁰ Would an aggrieved party who has given evidence before a Magistrate and indeed supplemented by evidence furnished to the Magistrate by a Commission of Inquiry be entitled in law to have such a decision of the Attorney General revised by the Court of Appeal under Chapter XXVIII of the present Act of 1979 read with Article 138 of the Constitution of Sri Lanka? This would presumably be with the recommendation that the named perpetrator of an offence, which has been the subject of its inquiries, be committed to trial.

Past judicial rulings in this regard have been reluctant to exercise such powers of revision.¹¹¹ The refusal of an application for revision,¹¹² with the then Supreme Court declaring that the Attorney General enjoys "a concurrent jurisdiction",¹¹³ may be subjected to the following critique. Analysis of that decision reveals three possible grounds for refusal:

relation to Power, Discretion and Public Duty

¹⁰⁹ AG v. Kanagaratnam, *supra* n.100, at p.129

¹¹⁰ Section 396 of the Code of Criminal Procedure Act No. 15 of 1979

¹¹¹ Velu v. Velu (76 NLR 21)

¹¹² Which the Court acknowledged as possessing, in theory, *ibid*, p.22

¹¹³ Per Justice Weeramantry at p.22, *supra* n.111

1. That such powers of revision would only be exercised where a positive miscarriage of justice "would otherwise result".¹¹⁴ However, a perusal of the judgment reveals that there was no discussion of the attendant circumstances and facts.
2. The second ground for the refusal on the Court's part to act by way of revision is contained in the view that, "In view however of the Attorney General's powers and functions in this respect, there can be no doubt that through their exercise, *such cases of positive miscarriage of justice will not arise*" (emphasis added). This view apparently explains why the Court had not inquired as to whether in fact the proceedings in question would amount to a miscarriage of justice.

Consequently, it is submitted with the highest respect that the said second ground in refusing the application for revision amounts to an abdication of the Court's discretionary powers by way of revision, the said discretion being surrendered in favour of the *ipse dixit* of the Attorney General.¹¹⁵ True, that the high office of the Attorney General must be accorded due respect but the fact that the said high office has not always commanded public confidence was an aspect brushed aside by the then Supreme Court.¹¹⁶ What remedy could an aggrieved person seek against a decision of the Attorney General directing a Magistrate to enter an order of non-committal? The Supreme Court opined that, "The subject is therefore not lacking in a remedy against orders of discharge or committal with which he is dissatisfied ...".¹¹⁷ However, in the same breath the Supreme Court said, "... and in the result it ought never to be necessary for this Court to be called upon to exercise its powers".¹¹⁸

¹¹⁴ *Supra* n.111, p.23 .

¹¹⁵ *AG v. Don Sirisena*, 70 NLR, p.356

¹¹⁶ *Ibid*, per HNG Fernando, CJ, wherein His Lordship had said: "Indeed, the arguments of Counsel who appeared in this case for the respondents actually involved the alarming proposition (which I am certain none of them would concede in a different situation) that the Attorney General may not lawfully direct the discharge of the person whom the Magistrate commits for trial."

¹¹⁷ *Velu's Case*, p.23

¹¹⁸ *Ibid*.

As the Supreme Court derived its revisionary powers from a statute, namely the Criminal Procedure Code, it is submitted with respect that those precedents must be regarded as being of academic value, given the fact that the present revisionary jurisdiction of the Court of Appeal flows from a constitutional conferment¹¹⁹ exercisable on behalf of the people of Sri Lanka in whom sovereignty resides.¹²⁰ That conceptual cum constitutional shift demands therefore a fresh judicial approach in regard to the duties and obligations of magistrates vis-à-vis the Attorney General's powers contained in statutory provisions, which must give way to the said constitutionally conferred power by way of revision in the Court of Appeal in terms of Article 138 of the Constitution, being the higher norm.¹²¹

3. The third ground (implicitly) that appears to have influenced the Court is the Attorney General's power to enter a *nolle prosequi* at any stage of the subsequent proceedings. As had been pointed out by the Attorney General in *The King v. Noordeen*¹²² and noted by the Court in the instant case under consideration, even if the then Supreme Court (presently the Court of Appeal) were to revise an order or discretion of the Attorney General, it would be a mere *brutum fulmen* since it would be open to the Attorney General to enter a *nolle prosequi* at any stage of the subsequent proceedings.¹²³

However, the Supreme Court in *King v. Noordeen* felt "quite sure that no Attorney General would feel himself justified in exercising [such] powers." The Court remarked thus: "and I desire to guard myself expressly from being supposed to hold that in such a case where the

¹¹⁹ By virtue of Article 138 of the Republican Constitution of Sri Lanka

¹²⁰ Article 3 read with Article 4 (c) of the Constitution

¹²¹ *Atapattu v. Peoples Bank* (SC) [1997] 1 SLR at p.221 per MDH Fernando J, approved in *Moosajee v. Arthur & Others* 2004-2 ALR 1, per Weerasuriya J (SC).

¹²² 13 NLR 115

¹²³ *Velu's Case*, pp.22-23, referring to the Attorney General's powers contained in Section 202 of the former code and presently contained in section 194 (1) of the Code of Criminal Procedure Act No.15 of 1979.

legislature has itself conferred jurisdiction on the Supreme Court, it would be competent for the Attorney General to override that jurisdiction..."¹²⁴ under his powers to enter a *nolle prosequi*.

At the same time, it is important to note the judicial view expressed in regard to the Attorney General giving instructions, in effect, to review a magistrate's action in either committing or discharging an accused: "It is inconceivable that any Attorney General would issue instructions that would be so palpably illegal".¹²⁵

e) The Resulting Position on the Basis of the Above Survey of Judicial Decisions and the Need for Amendment of the Existing Law

- i) In regard to a magistrate's decision whether to discharge or commit an accused, where an aggrieved person seeks the Attorney General's intervention, the magistrate would have no option but to carry out any contrary direction given by the Attorney General;
- ii) Although in theory, an accused person or an aggrieved person could invoke the revisionary powers of the Supreme Court against an ensuing decision of the Attorney General, the Supreme Court has shown an inhibition to do so. However, the present Supreme Court in the context of a Fundamental Rights application has observed thus:

The Attorney-General's power to file (or not file) an indictment for criminal defamation is a discretionary power, which is neither absolute nor unfettered. Where such a power or discretion is exercised in violation of a fundamental right, it can be reviewed in proceedings under Article 126.¹²⁶

¹²⁴ See *King v. Noordeen*, per Wood Renton, J. at p.117-118.

¹²⁵ Nagalingam, J. in *Attorney General v. Kanagaratnam*, 52 NLR 121 at p.130

¹²⁶ *Victor Ivan v. Sarath Nanda Silva, Attorney General and another* 1998 (1) SLR 340

- iii) However, given the fact that the present Court of Appeal is conferred with powers of revision under the Constitution itself,¹²⁷ any statutory provision that may seem to derogate there from (including any order, instruction, direction or decision of the Attorney General) must give way to the said constitutional jurisdiction.
- iv) Consequently, in the exercise of its said jurisdiction, where any person is aggrieved by an order of committal or discharge of a magistrate and the Attorney General affirms or reverses or refuses to intervene upon being requested to do so (as the case may be), the Attorney General must be cast with the burden of ascertaining the correctness of his order, direction, interdiction or decision which would thus circumvent the need for any aggrieved person invoking the revisionary powers of the Court of Appeal to "pursue any (other) legal remedy".¹²⁸
- v) In order to give effect to the thinking articulated above, it is proposed that the Code of Criminal Procedure Act No. 15 of 1979 be amended by adding a new section numbered as section 401A in the following terms: "The powers of the Attorney General hereinbefore contained shall be subject to the revisionary jurisdiction of the Court of Appeal conferred by Article 138 of the Constitution of Sri Lanka".

5 Recommendations for Amendments to the Law in Summary

To re-iterate a concern expressed earlier in this paper, if appointments of Commissions of Inquiry to inquire into human rights violations are to serve any realistic purpose, it is proposed that the following amendments be made to the Commissions of Inquiry Act no.17 of 1948:

¹²⁷ Article 138

¹²⁸ Suggested in *Attorney General v. Kanagaratnam*, *supra* n.125

a) Repeal of Section 7(e) of the Act

In the public interest and in keeping with the dictates of public accountability and transparency, the sittings of Commissions of Inquiry must be open to the public and the press. The discretion presently vested in Commissions of Inquiry in this regard must be removed, for which purpose the entirety of Section 7 (e) of the Act must be repealed, which would effectively prevent the President from leaving such discretion in the hands of the Commission, given the fact that, if it were to be done in terms of a mandate, it would attract the principles of *ultra vires*.

b) Amendment of Section 7(c) of the Act

For the effective functioning of Commissions of Inquiry, powers of the Commission in regard to the summoning of witnesses must be extended, for which purpose Section 7 (c) of the Act must be amended by adding the words "any citizen of Sri Lanka" after the words "to summon" as presently contained in the Act.

c) Amendment of Section 12 of the Act

This section, as it presently stands, confers on a Commission restrictive power or authority to remit a matter to the Court of Appeal for contempt of its authority. The Act may be amended by the addition of a new provision empowering any Commission appointed under the Act to remit the case to trial by the Court of Appeal on the ground of contempt of its authority and functioning on the specified basis that any newspaper article or publication, whether by an individual or a reporter, published in disrespect of the Commission without reasonable cause, shall constitute an offence of contempt as envisaged in Section 10 of the Act.

d) Amendment to encompass both the scope and context of the principle of natural justice

The prevailing legal position is that a Commission's proceedings culminating in a Report do not directly and conclusively affect the rights of a person in the sense of a person's liberty, office or property. However, there are other rights that may be affected in the process such as reputation, dignity and standing in the public eye. Consequently, it is necessary that a Commission should comply with both the scope and content of the principles of natural justice and not merely "a duty to act fairly". The principle appears to have been judicially decreed and settled, drawing in the wake of the said judicial decree, a distinction between the duty to conform to the principles of natural justice and "a duty to act fairly", the scope and content of which has not been spelt out and therefore remains vague. Accordingly, the overturned view expressed by the Court of Appeal,¹²⁹ that a Commission "had a duty to act fairly by observing the rules of natural justice" is to be preferred, for which purpose express provision is warranted. Accordingly, it is proposed that the Act as it presently stands be amended by adding a new provision to the effect that:

Whenever a Commission appointed under this Act summons before it any person who has been implicated in the subject matter of its inquiries, the Commission shall inform such person of that fact and apprise such person of his or her rights to a fair hearing.

This provision, in this writer's view, would be adequate to encompass the scope and content of the principles of natural justice, including such basic rights that ought to be afforded to a person whose conduct is under inquiry, such as the right to legal representation and the right to cross-examination of witnesses who may have given evidence adverse to such person.

¹²⁹ Per Vythilingam J, *supra*, n.36

e) The First Information

In as much as the lodging of the first information is related to Section 136 (1) (b) of the CCP Act, which forms the basis of investigation, Section 109 (1) of the CCP Act should be amended as follows:

Every information relating to the commission of an offence may be given in writing to a police officer or inquirer or a body whether statutorily or voluntarily established for the purpose of and/or committed to receiving such information.

The Commissions of Inquiry Act of 1948 should also be amended by adding a new provision to the effect that,

“Every information relating to the commission of an offence may be given in writing to a police officer, inquirer or a body, whether statutorily or voluntarily established for the purpose and/or committed to receiving such information which information would be deemed as a first information for the purposes of Section 109(1) of the CCP Act.” with the additional words “Notwithstanding the provisions of the Evidence Ordinance...”¹³⁰

f) Consequent investigations

Even if the said amendment to the Commissions of Inquiry Act is effected, still the investigation process would be in the hands of the police, including the CID.¹³¹ It is proposed, therefore, that if the

¹³⁰ Vol 1 (LESL) 1980 (Revised)

¹³¹ An aspect clearly surfacing in judicial proceedings regarding the disappearances of the Embilipitiya youth, see page 46 of the judgment of the Court of Appeal, CA 93-99/99. HC Ratnapura 121/94. *Lokugalapathi and others v. The State*. See also p. 73 of the CA judgment where the Court of Appeal approved the trial judge's reliance on the statement of a witness (against an identified abductor) who had not made a complaint either to the police or the CID.

investigations are not put within the purview of the National Police Commission or an independent Department of Public Prosecutions, an independent Police Council be established, preferably under the 17th Amendment to the Constitution or by special legislation to that effect. Such a Council should comprise retired police personnel of proven ability and integrity (preferably above the rank of SSP) with supporting staff for purposes of conducting such investigation; contingent amendments may be called for in regard to the existing provisions of the police ordinance as it presently stands.¹³²

g) Findings of the Commissions for the purposes of Section 145 of the CCP Act

For purposes of indictment by the Attorney General, a finding by a Commission that any person has been involved in conduct which may be the subject of inquiry by such Commission must be deemed to be a finding held at a preliminary inquiry envisaged under Section 145 of the CCP Act sans the time limit of three months presently contained in the said provision. It is proposed that the Commissions of Inquiry Act be amended, adding a new provision to this effect. Such an amendment would render meaningful the very exercise of appointing such commissions.

h) The powers of the Attorney General

Judicial precedents reveal that, in theory, the Attorney General's decisions to intervene by quashing a committal by a magistrate or by directing such committal where the magistrate has made an order of discharge can be made subject of a revision application. However, inhibition on the part of the courts to exercise such powers of revision has been apparent.¹³³ Whatever may have been the legal position in regard to magistrates' powers vis-à-vis the powers of the Attorney General, in as much as those powers were contained in statutory provisions as opposed to the revisionary powers presently

¹³² Which would also belong to the same category as "police force".

¹³³ See discussion above

vested in the Court of Appeal which is a constitutionally conferred jurisdiction in terms of Article 138 of the Constitution of Sri Lanka, it is proposed that the CCP Act be amended by adding a new section¹³⁴ to the effect that, "the powers of the Attorney General hereinbefore contained shall be subject to the revisionary jurisdiction of the Court of Appeal conferred by Article 138 of the Constitution of Sri Lanka".

Such an amendment read in the light of the amendment proposed to the Commissions of Inquiry Act with regard to the Commission's findings as satisfying the requirements of a preliminary inquiry contemplated by Section 145 of the CCP Act should, it is hoped, repose confidence in the public regarding the practical purpose of the appointment of Commissions of Inquiry.

Furthermore, in the event of an intervention on the part of the Attorney General in reviewing a magistrate's decision to commit to trial or discharge, the Attorney General must be required to give reasons for his order, decision, direction or instructions given to such magistrate, which requirement should find expression statutorily in the CCP Act as well as the Commissions of Inquiry Act.

i) Amendments to address inconsistent and belated complaints

Finally, while this writer is aware of the fact that it is well nigh impossible to legislate for every contingent situation and eventuality, yet, given the material revealed from the experience of past Commissions of Inquiry in regard to contradictory statements made by witnesses in the context of identities of alleged perpetrators,¹³⁵ controversial as it may seem, the law must be amended to regard

¹³⁴ As Section 401A

¹³⁵ A named perpetrator revealed in a statement proximate to the incident made to human rights organizations on the basis of which a Commission of Inquiry recommends indictment by the Attorney General and the Attorney General is faced with another statement (subsequent or otherwise) made to the police when the witness has said that he/she is unable to identify the perpetrator, for the purposes of and/or motivated by the payment of monetary compensation.

any statement made to a commission as a valid first information (in regard to which proposed amendments to the existing law have already been made), which would then effectively deprive a defence advanced on behalf of a named perpetrator on the basis of allegedly contradictory statements.¹³⁶ Should the government amend the existing law to give effect to this recommendation, it is recognised that such an amendment would not only be controversial in that the Evidence Ordinance as well as the Code of Criminal Procedure Act would be asked to stand on their heads, but also the whole prosecutorial system in the country would stand altered.

Nevertheless, such legislative initiatives would be less controversial than their alternative, which would be to alter the whole law relating to the burden of proof and the long established principle of "proof beyond reasonable doubt" in criminal cases, a principle which, though not finding explicit expression in the Evidence Ordinance, found its way to the legal jurisprudence of Sri Lanka through the conduit of Section 100 of the Evidence Ordinance, taking in the English approach. This principle is a firmly established part of the law of Sri Lanka, in diametrically opposed terms to the French legal system, for instance.

j) Need to Establish a Witness Protection Scheme

Over and above all the aforesaid reforms, a viable witness protection mechanism must be established which would enable witnesses possessed with knowledge of perpetration of any crime to depose to the same without fear and intimidation.

6 Conclusion

One is looking at a situation where the Government of the day is having to grapple with terrorist activity. But, being the custodian of the state in a working democracy, committed as it must be to the

¹³⁶ And even on the ground of "belated statements".

rule of law and the protection of human rights, the Government is expected to conduct its affairs within such precepts.

Against the background of those imperative principles, one has also to look at the practical realities faced by former Commissions of Inquiry where the police had blatantly refused to record complaints against abductions when the complaints were against police officers or armed personnel. Thus, there is no first information to start investigations of any nature as contemplated by the current criminal procedure law (the Code of Criminal Procedure Act of 1979). At the outset, this exposes the paucity of the whole prosecutorial system when it comes to matters in respect of which commissions of inquiry are subsequently appointed to inquire into the conduct of such state officials themselves. Other serious problems with the criminal investigations process have been highlighted in this chapter along with lacunae in the Commissions of Inquiry Act itself.

If the appointment of Commissions of Inquiry under the 1948 Act is to be taken as a serious commitment on the part of any government of the day to effectively address human rights violations, and not as a mere political ploy to appease the public and the international community, it is the view of this writer that the specific amendments proposed in this paper, being reforms to the existing prosecutorial system, must be implemented sooner than later. Indeed, no more would be necessary and no less would be acceptable.

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VII

PUBLIC INSTITUTIONS AND DE-POLITICISATION: RISE AND FALL OF THE 17th AMENDMENT

*Cyrene Siriwardhana**

1 Introduction

The significance of Parliament passing the 17th Amendment to the Constitution in 2001 cannot be overstated. "In a House consisting of parliamentarians otherwise bitterly divided on party political lines, this constitutional amendment was passed without opposition with one singular purpose in mind – to restore public confidence in the rule of law."¹ Barely six years later, the expectations for good governance and independence in public appointments created by the 17th Amendment have been all but dashed.

The 17th Amendment was the answer put together with the agreement of all political parties, to the unbridled power to make key public appointments reposed in the President, and to a lesser extent in the Cabinet of ministers which is headed by the President. The simple logic was that as long as a purely political entity had sole discretion to make appointments, these appointments would themselves be political and not merit-based or transparent; consequently the power that such appointees themselves exercised such as appointing others below them, would also lack objectivity and transparency. This was the malaise commonly complained about as the politicisation of the public service.

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¹ Centre for Policy Alternatives (CPA), *The Law Making Process of Sri Lanka: Selected Case Studies*, resource material for seminar on "The Law Making Process," 29 November 2006.

The scheme of the 17th Amendment was to create a Constitutional Council whose members were appointed with a broad consensus across the political spectrum in Parliament. This Council would recommend or approve the persons to be appointed by the President to the apex public institutions having control over different aspects of the public sector such as the judicial, administrative and police services, as well as important individual offices such as the Attorney General and the Auditor General. The President remained the appointing authority, but he or she could not make any appointments without the recommendation or approval of the Constitutional Council.

The Constitutional Council is to consist of:

- the Prime Minister
- the Speaker
- the Leader of the Opposition
- one person appointed by the President
- five persons appointed by the President on the *nomination of the Prime Minister and Leader of the Opposition* – This should be in consultation with leaders of parties in Parliament, and three of these appointees will *represent minority interests* following consultation with minority community MPs
- one person nominated upon agreement by the majority of the MPs who do not belong to the parties of either the Prime Minister or the Leader of the Opposition, and appointed by the President.²

Apart from the ex-officio members (Prime Minister, Speaker, Opposition Leader), the others should be persons of eminence and integrity who have “distinguished themselves in public life” and do not belong to any political party (Article 41A(4)). These members (the “appointed” or “nominated” members) would hold office for a period of three years.

² Article 41A(1)

The Constitutional Council was first established in March 2002. Thus the term of office of the appointed members expired by March 2005. Since then, however, no new members have been appointed to the Council. The reason given by the government for the non-appointment is that the President has not received the nomination of the member who needs to be agreed upon by the smaller parties (i.e. the person to be agreed upon by the majority of the MPs not belonging to the ruling party or the opposition, see above). The argument went that without such a nomination the President cannot appoint this member, and without such appointment the Council cannot be constituted.

The continuing failure to appoint members to the Constitutional Council has resulted in a governance crisis of severe proportions. On the one hand is the absence of the Council itself, which is a serious lacuna in the structure of governance. On the other hand is the consequent problem of appointing persons to the bodies and offices to which appointment must be made with the recommendation or approval of the Council. Against a maelstrom of protests by civil society groups and concerned members of the public, the government's method of resolving the issue has been for the President to make direct appointments to those bodies and offices, contrary to the express provisions of the Constitution.

This chapter will begin by setting out some key aspects relating to the operation of the Constitutional Council on paper, and go on to critically examine the various arguments in relation to the non-functioning of the Council. It will also discuss some of the legal challenges which have been made in the courts in this regard. It will conclude by arguing that the Constitutional Council proved its rationale during its brief period of operation while we are now seeing the adverse consequences of its deactivation, and suggest some ways forward for stronger advocacy on implementation of the 17th Amendment.

2 Some Key Operational Features of the Constitutional Council

The 17th Amendment sets out two slightly different modalities for the engagement of the Constitutional Council in appointments. Certain appointments require the recommendation of the Council and others the approval of the Council. This difference makes no substantial impact in practice since they are both simply ways of fettering the discretion of the President.

Article 41B(1) states that no person shall be appointed by the President to the following Commissions except on a recommendation of the Council:

- Elections Commission
- Public Service Commission
- National Police Commission
- Human Rights Commission
- Commission to Investigate Allegations of Bribery or Corruption
- Finance Commission
- Delimitation Commission

Article 41C(2) states that no person shall be appointed by the President to the following offices unless the President has recommended such person for such appointment to the Council and the Council has approved the appointment:

- Chief Justice
- Supreme Court judges
- President and judges of the Court of Appeal
- Members of the Judicial Service Commission (other than the Chairman, who is always the Chief Justice)
- Attorney General
- Auditor General

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- Inspector General of Police
- Parliamentary Commissioner for Administration (Ombudsman)
- Secretary General of Parliament

As described above, some members of the Constitutional Council are *ex officio*, one is directly appointed by the President, and the others are appointed by the President after nomination in the manner prescribed. With regard to this last category of nominated members, the President is to appoint them forthwith upon receiving a written communication of the nominations.

Where there is a vacancy among the members appointed on nomination (two possible categories, see above), the President shall, within two weeks of the vacancy, appoint "another person to succeed such member" having regard to the provisions governing such appointments. In order to ensure that there will never be a vacancy of the *ex officio* members, the 17th Amendment provides for the legal fiction that when Parliament stands dissolved (and ordinarily there would be no Speaker and Opposition Leader) the Speaker and Leader of the Opposition are deemed to hold their respective offices until persons for these posts are selected by the new Parliament.³

The Speaker is the Chairman of the Constitutional Council. The Council is empowered to appoint a Secretary to the Council and other officers to discharge the functions of the Council. Meetings of the Council shall be summoned by the Secretary to the Council on the direction of the Chairman, who will preside at the meetings. The quorum of a meeting of the Council shall be six members.

³ For a criticism of this position, see MCM Iqbal, "17th Amendment to the Constitution: a Review of Some Institutions under it", Law & Society Trust (LST), *Sri Lanka: State of Human Rights 2005*, p.100

3 Failure to Appoint Constitutional Council Members

In March 2002 the members required to be appointed were duly appointed to the Constitutional Council. The initial nominee of the President, Mr H L De Silva, resigned after a period and the Council continued to function with nine members, until the President appointed another nominee, Dr Colvin Gunaratne, to fill this vacancy. The Council discharged its functions as envisaged with the appointed and the other ex officio members under the Chairmanship of the Speaker. Persons recommended by the Council were appointed to the Human Rights Commission, the National Police Commission and the Public Service Commission. While it made recommendations for appointments to the Election Commission, this Commission was not appointed, for reasons discussed later in this chapter.

As the term of office for appointed members is three years, by March 2005 the term of the originally appointed members, bar one, expired. It is not clear when Dr Gunaratne's term expired (as he was appointed later than the original members), but it may be assumed that this occurred fairly soon after the expiry of the other terms. This was when the 17th Amendment crisis began. Following the expiry of the appointed members' terms of office, no new appointments were made to the Constitutional Council. This section will examine the reasons for this impasse, and consider whether these reasons are valid or not.

When it became apparent that the Constitutional Council had ceased to function on the expiry of the terms of office of the originally appointed members, questions were quickly raised by civil society and the concerned public as to why this was so. Initially the reason appeared to be that the five members to be appointed under the fifth category of members (see above) could not be finalised due to the inability on the part of the Muslim parties to agree on the representative from the Muslim

community.⁴ It is reported that the office of the Constitutional Council sought an opinion from the Attorney General as to whether the four agreed appointments could go ahead. The Attorney General is reported to have advised that the four members may be appointed but that the Constitutional Council cannot function until all members "are in place".⁵ The Muslim parties appear to have finally agreed on a nominee towards the end of 2005.

Thereafter the new appointments seemed to be further stalled by a dispute with regard to appointment under the sixth category of member (see above), who had to be nominated with agreement amongst the majority of MPs belonging to the smaller parties in Parliament. The Janatha Vimukthi Peramuna (JVP) claimed that it was a smaller party entitled to nominate a member under this category. The question was whether the JVP could validly claim to be a smaller party in view of the fact that it had come into Parliament as part of the United People's Freedom Alliance (UPFA) which formed the government, even though it had broken rank with the government thereafter. The Attorney General's opinion on this question was that the JVP could not nominate a member since it must be considered as a political party to which the Prime Minister belonged on the basis of the nomination list on which JVP members were elected to Parliament.⁶ At the time the JVP objected to this ruling and expressed its intention to seek the opinion of the Supreme Court.⁷ But this does not appear to have been followed through, and JVP interest in this matter seems to be waning.⁸

⁴ Serving Sri Lanka, "Both terms expire in early November – Presidential Polls sans National Police and PSC?" at <http://servesrilanka.blogspot.com/2005/09/both-terms-expire-in-early-november.html>

⁵ *Ibid.*

⁶ *Daily Mirror*, Denith Chintaka Karunaratne, "Attorney General says JVP has no right to nominate CC member," 26 May 2006.

⁷ BBC, "JVP rejects AG's opinion", at http://www.bbc.co.uk/sinhala/news/story/2006/05/060526_jvp_ag.shtml

⁸ *The Nation*, Political Affairs by 'Ravana', "UNP in turmoil over CMC," 28 May 2006.

The current—and it seems the most intractable—“obstacle” identified by the Government, to the appointment of members to the Constitutional Council, is that the MPs of the parties not belonging to the Government party or the Opposition (i.e. the smaller parties) could not agree on a nominee as stipulated under the last category of member (see above). According to the relevant provisions, this person must be nominated upon agreement by the majority of MPs belonging to the smaller parties.

At one time it appeared that the Government was taking some steps to get these parties to agree on a nominee. News reports indicate that the President wrote to the Speaker urging him to get an agreed nomination. However the Speaker reportedly replied that after three sessions in Parliament concerning the nomination of this member, he could not get the smaller parties to agree.⁹ It may be noted, however, that this was just prior to the Attorney General's opinion that the JVP was not entitled to participate in the process of nomination because, for this purpose, it is to be considered as part of the Government.

In the absence of any formal challenge to it, the Attorney General's ruling may be considered definitive, leading to a legal position where the nomination of the sixth member should take place with the agreement of the other smaller parties in Parliament barring the JVP. It was reported thereafter that three of the smaller parties had agreed on a nominee,¹⁰ but there were other smaller parties which objected to this appointment. A deadlock arose again, which is yet to be resolved. In the meantime, the Government's response was to say that the 17th Amendment is flawed, and that a Select Committee of Parliament should be appointed to examine the 17th Amendment and propose changes to it.

⁹ *Daily Mirror*, Poorna Rodrigo, “Constitutional Council sixth member still elusive,” 10 April 2006.

¹⁰ Transparency International, “TISL writes to political parties to break deadlock and not to resort to political tactics to delay appointment of the 17th Amendment”, at <http://www.tisrilanka.org/?p=278>, posted on 22 June 2006.

4 Deadlock or Opportunism?

4.1 The legal position

Before coming to a view on the correct course of action to be followed in the current situation, it would be useful to look again at the process which the Constitution envisaged will lead to appointments of nominated members to the Constitutional Council.

The President is bound to appoint these members forthwith upon receiving a written communication of the nominations.

This process encompasses the following elements:

- A nominee has to be selected
- A written communication of the nomination must be given to the President
- The President must appoint the nominee communicated to him/her *forthwith*

If all the smaller parties agree on one nominee then the position is clear. His or her name must be communicated to the President in writing, whereupon the President must forthwith appoint the nominee to the Constitutional Council. The current impasse purportedly arises from the fact that the smaller parties have failed or are unable to agree on one person. The key question then is: does this result in the entire appointment process coming to a standstill? The answer is, clearly not.

The constitutional provision plainly says that this one person is nominated upon agreement by *the majority* of the MPs belonging to the smaller parties (Article 41A(1)(f)). The 17th Amendment thereby recognised that the smaller parties may not be able to unanimously agree on this one nominee, and that the nominee could be decided on by majority agreement. If therefore a person can be found who is considered suitable by a majority of the smaller party MPs,

the issue could be resolved. The name of such person must be communicated in writing to the President, who will in turn make the appointment as stipulated.

The question of the MPs of the smaller parties selecting the nominee by a majority decision has not been much discussed. It may be assumed by this that even a majority decision is not currently possible.¹¹ This would occur where any person whose name is put forward fails to obtain the support of the majority of the smaller party MPs.

One solution proposed to this problem is to appoint the 10th member on a rotational basis so that the different smaller parties would have the chance of having the nominee of their choice on the Constitutional Council for a part of the term of three years, which would be equally divided between the nominees. This may however be too much of a deviation from the express constitutional scheme to be considered legally valid.

What then should be the proper course of action in this situation?

Before attempting to answer that question, it will help set matters in context if we look briefly at what did in fact happen. As mentioned above, some effort appeared to have been made to get the smaller parties to come to some level of agreement on a nominee, but this effort failed. In the meantime, the periods of office of the existing members of the independent Commissions and of the specified officials were expiring. The President then began making direct appointments to these Commissions and offices, notable amongst them the Human Rights Commission, the National Police Commission, the Public Service Commission, judges of the Court of Appeal and the Supreme Court, the Attorney General and the Auditor General. According to the 17th Amendment the President cannot make direct appointments to these offices, but can make

¹¹ But see *Sunday Times*, Kishali Pinto-Jayawardena, "Focus on Rights: Dealing with Terror and Democratic Dissent," 13 August 2006.

such appointments only on the recommendation or approval of the Constitutional Council.

The State's argument for making the direct appointments was that in the absence of a functioning Constitutional Council the President had to make these appointments. Its position was that if the President did not appoint persons to these bodies and offices they would gradually cease to function, and the ultimate loser would be the public for whose protection and benefit they exist. This has been considered as an attempt invoke the doctrine of necessity, a principle of law which has fallen out of favour except to justify undemocratic actions, such as interference with the judiciary by the executive in Pakistan. This argument also spectacularly ignores the question of why the Constitutional Council is not functioning in the first place. Clearly, if there was something the State could lawfully do to get the Council to function, then the issue of direct appointments by the President would not arise. Furthermore, it makes the doctrine of necessity inapplicable to the circumstances.

The simple argument of the State in this regard is that the Constitutional Council cannot be constituted without the smaller parties agreeing (whether by a majority or not) on their nominee. Critics strongly repudiate this position. They contend that there is nothing to prevent the Constitutional Council from functioning since nine of the 10 members have been decided on, and the quorum is six. The President should simply appoint those nine members immediately. This non-appointment is the only obstacle to the functioning of the Council. Even if there was any ambiguity with regard to the correct course of action to be taken, it is a universally recognised constitutional principle that the course which best promotes the spirit of the Constitution should be followed and not one which contravenes it. The singular objective of the 17th Amendment was to dilute the power of the executive and depoliticise key public appointments. There is no question that direct appointment by the President clearly goes against the spirit and purpose of the Constitution.

It may be noted here that the use of the word "constituting" the Constitutional Council is apt to mislead. The Constitutional Council was constituted when it was initially established in 2002 with the specified ten members. When vacancies occur new members must be appointed to fill such vacancies, for which provision is found in Article 41A(8). Indeed in the first year of the Council being constituted a vacancy did arise (of the President's nominee), which was filled. When terms of members expire after the initial establishment of the Council, the issue which arises is one of *appointing a new member to the Council*, and not really a question of constituting the Council.

There is little information in the public domain on whether final decisions have been taken with regard to the other members of the Constitutional Council who need to be appointed. The focus has been on the smaller parties' nominee, or rather the absence thereof.

It may, however, be useful to go through the list of other members for the sake of completeness. The first three are the ex-officio members. The fourth is the person appointed by the President. While one may assume that the President has someone in mind for this appointment, this has not been confirmed. The category of five persons who must be nominated by the Prime Minister and the Leader of the Opposition and whose nominations must be communicated to the President, may be broken down as: a) the nominee of the Prime Minister, b) the nominee of the Leader of the Opposition¹² and c) the three nominees belonging to minority communities. After a long delay, the minority communities' nominees appear to have been settled on (see above) and presumably communicated to the President as required. Reports in January 2006 indicated that the Leader of the Opposition had also, after a long

¹² While there is nothing in Article 41A to indicate that these nominees should be "divided up" between the Prime Minister and the Leader of the Opposition, and in fact suggests joint nominations by these two, in practice it appears that the two nominees are decided on by the Prime Minister and the Leader of the Opposition separately. The Supreme Court determination on the 17th Amendment Bill, discussed later, also indicates such a division.

and unexplained delay, made his nomination.¹³ No information appeared to be available about the Prime Minister's nominee.

While there are certain gaps in the information regarding the remaining nine potential appointees to the Constitutional Council, the State's express concern has reportedly been only over the one person to be nominated by the smaller parties under category (f) of Article 41A(1). It is therefore assumed for the purposes of this chapter that there is currently no dispute with regard to the remaining nine members to be appointed. If so, the simple and obvious way out of the supposed deadlock is to appoint the nine members to the Council, upon which the Council could be expected to function according to the procedures contained in the 17th Amendment.

This analysis exposes a number of factors. Foremost among them is that the inability of the smaller parties to agree is a red herring. Firstly, the Attorney General has given an unambiguous ruling that the JVP is not entitled to participate in nominating the smaller parties' appointee. That confusion is therefore now out of the way and the legal position is clear. Whether the Government will ensure that the consequences of this decision will flow and firmly disallow JVP participation in nominating the appointee is another matter, which is more political than legal. Secondly, even if the question of JVP participation is removed, it is a fact that the other smaller parties appear to be genuinely unable to agree on a nominee. Thirdly, and most importantly, neither of these should ultimately affect the functioning of the Constitutional Council. Even today nine members could be appointed to the Council and it could carry on its work as quorum would be met under the terms of the Amendment.

It is pertinent to make brief mention here of the Supreme Court determination on the 17th Amendment, when the Amendment was

¹³ *Sunday Times*, Kishali Pinto-Jayawardena, "Focus on Rights: Presidential Immunity, the Constitutional Council and the Cabinet of Ministers", 29 January 2006.

referred to the Supreme Court at Bill stage, prior to its enactment.¹⁴ The determination was made on a reference by the President in terms of Article 122(1)(b) of the Constitution, whereby the President may request a determination of the Supreme Court as to the constitutionality of any Bill, including a Bill to amend the Constitution. The question was whether the Bill was inconsistent with the provisions of the Constitution, namely Articles 3 and 4(b) according to which the executive power of the People is reposed in the President. If the Bill was inconsistent with the Constitution it would require approval by the public at a referendum. The Supreme Court ruled that the 17th Amendment Bill was not inconsistent with these provisions and therefore did not require a referendum.

A careful reading of this determination indicates that there is no residual power in the President to make appointments outside of the 17th Amendment process. The Supreme Court had to consider whether the subjection of the discretion of the President to the recommendation and approval of the Constitutional Council would amount to an effective removal of the President's executive powers in relation to appointments. The Court held that while the 17th Amendment imposed certain restrictions on the President's discretion, such a restriction was not an erosion of the President's executive power as to be inconsistent with Article 3 read with Article 4(b). The Court pointed to a number of factors in the 17th Amendment scheme which sustain and are consistent with the exercise of executive power by the President. For instance, the President was empowered to nominate one member to the Council, which member would constitute the link between the President and the Council. Hence the President was not removed from the Constitutional Council process. Furthermore, the actual appointments would be made by the President. "Therefore," the Court observed, "although there is a restriction on the discretion of [the] President, the appointments as such would be act and deed of the President." The tenor of the Supreme Court determination,

¹⁴ SC Determination No. 6/2001 - 21.09.2001, *Parliamentary Debates (Hansard)* 24.09.2001.

therefore, is that a limitation on the executive power of the President such as is imposed by the 17th Amendment, is squarely within the scheme of the Constitution. The logical conclusion is that there is no need or room for any residual power to be left with the President, in terms of the Constitution, for the carrying out of the functions (ie, the appointments) covered by the Constitutional Council process.

A matter rarely referred to in the current debate but interesting to note is that there is indeed an express prohibition on direct appointments to the relevant bodies and offices by the President in Articles 41B(1) and 41C(1) of the Constitution. Article 41B(1) says that no person shall be appointed by the President to any of the Commissions specified except on a recommendation of the Council. Article 41C(1) similarly provides that no person shall be appointed by the President to any of the specified offices unless such appointment has been approved by the Council upon a recommendation made to the Council by the President. This makes it unequivocally clear that the President's appointments to the Council are unconstitutional. The blanket of Presidential immunity however shields the President in any legal proceedings which seek to challenge the validity or legality of appointment made by him or her (see below).

4.2 The political position

Many commentators point out that the non-functioning of the Constitutional Council is more to do with the lack of political will to make the 17th Amendment work, than with any legal flaws in it. This is somewhat of a dilemma. Going back to the enactment of the 17th Amendment, it was a rare piece of legislation on important governance issues which had support across the political spectrum in Parliament. It is considered that the government of the time particularly wanted to push through the 17th Amendment because the JVP had made this a condition of their support for that government. It is ironic then that the JVP first provided this

Government with an excuse not to implement the 17th Amendment, and now appears to have lost interest in it altogether.

Clearly the primary responsibility for implementing the Constitution and laws of the country fall on the government of the day. The discussion above showed a path the Government could have followed, and could follow even now, to enable the Constitutional Council and the 17th Amendment to function. The Government sometimes cites "flaws" in the 17th Amendment as a reason why it cannot be implemented. While it may have certain defects, no defect can be pointed out which prevents the appointment of the Constitutional Council nor has the Government been able to identify such a defect.

As commentators observe, a law cannot be refused to be implemented or enforced because it has certain flaws.¹⁵ No law is perfect, yet all laws must be followed. Even if changes to the law are needed, the law as it exists must be implemented until such time as the changes are made. This is a basic principle by which society abides. Therefore citing the flaws of the 17th Amendment as a reason for not implementing it, when there is a way forward for implementation, is not acceptable.

If the Government wished to appear more cautious, there were other options it could have pursued. The President could have referred the question of whether the Constitutional Council can or cannot function without a tenth member in place, to the Supreme Court in terms of Article 129 of the Constitution. This Article vests the Supreme Court with a consultative jurisdiction, whereby the President can refer questions of public importance to the Court and obtain its opinion on such questions.¹⁶

¹⁵ For example, Rohan Edrisinha, addressing a seminar on "Implementation of the 17th Amendment," Organisation of Professional Associations (OPA), 3 August 2007.

¹⁶ It is reported that there is a previous opinion by the Attorney General which suggests that the Constitutional Council cannot function without all its members in place (above). However, little is known about this opinion,

Commentators point out that there is no will on the part of the Government to activate the 17th Amendment, because the objective of the 17th Amendment was to weaken the power of politicians.¹⁷ The underlying assumption is that we possess a culture of governance where there is no genuine acceptance of the need for checks and balances on the exercise of political power.

The Opposition too has a major role to play in implementing the 17th Amendment, which it has not fulfilled. As there seems to be little possibility of a legal remedy in this instance (see below), a significant responsibility lies on the Opposition to agitate for a solution, using a variety of means including calling for a full debate in Parliament on this issue.¹⁸ This has not been done. During a debate in Parliament the UNP is reported to have suggested to the Speaker that he should take a decision on the question of the tenth member to the Council, to which the Speaker responded by promising to consult the Attorney General on the matter.¹⁹ But the Speaker has not done so. Neither has he referred to this possibility in his letter to the President informing the President that he has not been able to get the smaller parties to agree on a nominee.²⁰ On available information, the UNP does not appear to have followed up on this suggestion, or put any meaningful pressure on the Government to resolve the issue.

The Leader of the Opposition only made his nomination to the Constitutional Council reportedly in December 2005/January 2006. He should in fact have made the nomination as soon as the first term of the Council expired, in March 2003.²¹ This would also

if indeed it does exist, and in any event an opinion of the Supreme Court would override it.

¹⁷ Rohan Edrisinha, "Implementation of the 17th Amendment" seminar, n.15 above

¹⁸ *Ibid.*

¹⁹ *Daily Mirror*, "Constitutional Council sixth member still elusive," see n.9 above

²⁰ *Ibid.*

²¹ Kishali Pinto-Jayawardena, "Focus on Rights: Presidential Immunity," see n.13 above

have been an indication of his commitment to the 17th Amendment process, and willingness to do what is necessary on his part even where others are dragging their feet. Even when the nomination was made, there was no public statement that it was done, which would at least have helped to keep the issue in the limelight. It is also pointed out that the responsibility for all the five members under category (e) falls ultimately and jointly on the Prime Minister and the Leader of the Opposition, implying that they should do their best to get agreement on the three minority community members.²² There is no indication that such effort was made.

No one comes out of the 17th Amendment debacle in a positive light. The Government could clearly have taken a variety of steps to show its *bona fides* with regard to appointing members to the Constitutional Council. The Opposition failed both in its part in nominating members to the Council and in its role as watchdog over the Government. The other parties in Parliament displayed a characteristic inability to come together to decide on a nominee. In this way they gave the Government an excuse to dispense with fundamental safeguards of good governance.

The problem of the 17th Amendment also highlights the lack of transparency and openness in the executive, the legislature and the political process. The procedure for appointments to Constitutional Council is clear and consists of a series of steps which need to be followed as identified above. However, for anyone to find out whether these steps had in fact been taken, e.g. communication of nominations to the President, is difficult. Information is obtained by chance, and the accuracy of such information is sometimes doubtful. So not only is the public deprived of a vital pillar of good governance, it is also denied information as to how and why this happened. It gives the impression of a government deliberately keeping people in the dark in order to encourage confusion and speculation.

²² *Ibid.*

The State's answer to the 17th Amendment impasse was to appoint a Parliamentary Select Committee to go into its defects and to propose amendments to it. Given past experience with Select Committees and the fate of their recommendations this was seen by many as a delaying tactic, or worse, an attempt to bury the problem. Appointing a Select Committee nevertheless provided the Government with a ready response to national and at times international pressure concerning the non-implementation of the 17th Amendment.

The Select Committee process has been beset with problems. The two representatives of the UNP (Opposition party) on the Select Committee joined the government, whereupon the UNP requested the Speaker to appoint two other members to represent the Opposition. It was reported that the UNP was awaiting the Speaker's response to this request before participating in Committee meetings or making proposals.²³ At the time of writing this chapter, no public statement had been made on the position, nor had any proposals for changes to the 17th Amendment emanated from the Committee.

There is no doubt that there are certain shortcomings in the 17th Amendment. It was rushed through Parliament on political imperatives with no proper consultation. Several criticisms have been made of the 17th Amendment, including that the composition of the Constitutional Council itself is overly political, with its members having no binding interest in the institution.²⁴ However, no analyst has proposed that the 17th Amendment not be implemented due to any of its flaws. Indeed the clear message from the public has been that it must be implemented despite any flaws.

On the other hand, it would have been perfectly acceptable for a Select Committee to be appointed to look into the 17th Amendment

²³ *Daily Mirror*, Kelum Bandara, "Changes to 17th Amendment Select Committee to meet", 15 March 2007.

²⁴ "17th Amendment to the Constitution: a Review," p.102, see n.3 above

with a view to proposing changes to it, but parallel to it being implemented as it now stands. Some of the issues which have come up in the operation of the 17th Amendment could be examined, with a view to preventing their recurrence.

One major failure which is now all but forgotten and pales into insignificance against the collapse of the entire 17th Amendment mechanism, is the non-appointment of the Election Commission. This Commission was to be established under the 17th Amendment, following the procedure for appointment to the other independent Commissions. But it was never established, because the then President rejected the Constitutional Council's recommendation for the chairman to the Commission. The question arose whether the President had the discretion to reject a recommendation by the Constitutional Council. Any change to the 17th Amendment could address this question, and expressly provide that the President must appoint persons recommended by the Council. If the President has a discretion in this regard, it would clearly undermine the operation of the system since the entire rationale of the 17th Amendment was to fetter executive discretion in public appointments.

The current issue of getting political parties to agree on nominees to the Constitutional Council could also be an area in which an amendment could be considered. Although to many the correct course is clear as the provisions currently stand, it may be sensible to make explicit provision for this type of situation for the future, given the present impasse.

5 Legal Challenges to the Non-implementation of the 17th Amendment

There have been several legal challenges against the failure to implement the 17th Amendment, none of which have been successful. Generally they all fall at the hurdle of Presidential immunity from suit, since in one way or another they all involve getting the

President to do something or refrain from doing something. Most of the cases taken were by civil society organisations, exemplifying the use of public interest litigation. The legal challenges fall broadly into two categories: litigation to compel appointment of members to the Constitutional Council; and litigation against appointment of members to independent commissions bypassing the Constitutional Council process.

The case on non-appointment of Constitutional Council members went on the basis that it was the collective responsibility of Parliament to ensure these appointments. It made all the Members of Parliament respondents to an application for judicial review to compel the legislature to appoint members to the Council. This was an attempt, reflected in all the cases taken, to avoid directly bringing into question the acts of the President by placing responsibility elsewhere.

The strategy did not work. The Court of Appeal took the view that it had no powers to review a matter under the purview of the Parliament and it could not interfere with the workings of the legislature. It further considered that it had no powers to compel either the Attorney General or the Secretary to the President to cause the Council to be appointed.²⁵

After the term of office of the Constitutional Council ended and before the President began making direct appointments to the independent commissions and offices, the powers of the commissions whose terms had expired were allowed to be assumed by public officials according to a Cabinet decision. For instance, the powers of the National Police Commission were assumed by the Inspector General of Police (IGP) and those of the Public Service Commission by Ministry Secretaries and Departmental Heads.²⁶

²⁵ CA (Writ) No. 668/2006. Also CA (Writ) No. 184/2006.

²⁶ Kishali Pinto-Jayawardena, "Focus on Rights: Presidential Immunity," see n.13 above

The vesting of the powers of the National Police Commission with the IGP was challenged in the Court of Appeal. The petition stated that the IGP had acted under these purported powers to transfer several police personnel.²⁷ The petitioner sought writs to prevent the IGP from acting under these purported powers, on the basis that such powers could not properly be vested in the IGP and should be exercised by a Committee to which the National Police Commission had already delegated its powers before the expiry of its term of office.²⁸ Before this case was decided, members were appointed to the National Police Commission directly by the President, so that the questions it raised became redundant.

The making of direct appointments to independent commissions by the President, also came under legal challenge. Judicial review was sought of the appointment of members to the Human Rights Commission in May 2006.²⁹ Once again, in a bid to circumvent the problem of Presidential immunity, the petition asked for writs of *quo warranto* on the new members of the Human Rights Commission. This form of writ in effect challenges holders of office to demonstrate that they hold such office validly. The idea is, for purposes of the litigation, to shift the responsibility onto the appointees to show the validity of their appointments rather than directly question the appointing authority who is the President. The case is ongoing, with the State still not having filed its objections to the petition.

In the meantime the newly appointed Chairman of the Human Rights Commission has justified the direct Presidential appointments to the Commission by reference to the Human Rights Commission Act.³⁰

²⁷ CA (Writ) No. 555/2006.

²⁸ For a brief period there was a view that this might be the way forward for the other independent commissions too, to delegate their powers to named Committees before the expiry of their term, and thereby pre-empt their powers being vested in other officials. This however would not have been a viable solution in the long term.

²⁹ CA (Writ) No. 890/2006.

³⁰ No.21 of 1996.

The Chairman refers to section 3(2) of the Act which says that the members of the Commission shall be appointed by the President on the recommendation of the Constitutional Council, provided however that during the period between the Act coming into force and the establishment of the Constitutional Council, the members shall be appointed by the President on the recommendation of the Prime Minister in consultation with the Speaker and Leader of the Opposition. The Chairman argues that the President had the power to appoint members to the Human Rights Commission under this proviso. However, this proviso cannot in any way be taken to justify the current appointments, since it is clearly a transitional provision meant to cover appointments until the Constitutional Council is first established and not thereafter.³¹

It is safe to say that no litigation on this issue stands much chance of success in view of the principle of Presidential immunity as applied in Sri Lanka. Article 35 of the Constitution states that no proceedings shall be instituted in any court or tribunal against any person holding the office of President, in respect of anything done or omitted to be done by him either in his official or private capacity (this does not apply to acts done in his capacity as Minister in charge of any subject). This clause has been widely interpreted as providing the President with blanket immunity from having his or her actions questioned in a court of law.

There is one view that the Sri Lankan law does not accept blanket Presidential immunity but permits the acts of the President to be questioned. The case of *Visuvalingam v. Liyanage*³² is cited in support of this position. Others however take the view that the statements on Presidential immunity in that case are not applicable to cases such as those on the 17th Amendment, where the remedy sought involves requiring the President to do something or invalidating

³¹ "Focus on Rights: The HRC's justification of their appointments; a continuation of the farce?", Kishali Pinto-Jayawardena, *The Sunday Times*, 13 May 2007.

³² [1983] 1 SLR 203.

something the President has already done. Certainly the experience with the 17th Amendment litigation has borne out the latter.

6 Conclusion

For the brief period that it was in operation there is no doubt that the 17th Amendment infused a new sense of accountability and transparency into the process of governance. The constitution of the Human Rights Commission and the National Police Commission during this period testifies to the fact that mere political appointments were not made to these important bodies, or were not allowed to be made by the 17th Amendment system. For instance, the Human Rights Commission commenced a much needed zero tolerance policy on torture and carrying out spot checks on places of detention, while the Police Commission took impartial action in relation to mass transfers within the police force, risking a collision with the then-IGP. Public confidence in these institutions was gradually rising. The members of these two Commissions now in place, appointed without the sanction of the Constitutional Council, have yet to prove their independence and commitment to the areas coming under their purview.

The question of political will is linked to these phenomena. Could the reason for effectively discarding the 17th Amendment simply be that it was achieving its intended goal? In other words, having seen the 17th Amendment in operation, the Government and others who would be in Government did not like what they saw, and therefore grasped the first opportunity to render it ineffective. This may seem excessively cynical. But it may be true. Whatever the reasons for the non-implementation of the 17th Amendment, there is no doubt that efforts must continue to reactivate it. Legal strategies have been found to be ineffective. Pressure on the Government must therefore be brought to bear in other ways. Lobbying for the international community to put pressure on the Government may be one track to pursue. International donors are affected by

this issue, since they fund many of the institutions under the 17th Amendment. They therefore face the constant dilemma of whether they are seen as legitimising an unlawful situation by continuing to fund programmes of these institutions. On the other hand, ceasing to support these institutions would negatively impact what good work they were doing.³³

There is a definite need for greater pressure on the Government nationally to implement the 17th Amendment. It is observed that in the absence of a viable political process and Opposition voice to exert pressure, civil society should strive harder to make this a national campaign. Instead of restricting the discussions to English-speaking Colombo dwellers, the problem should be highlighted across the country and in all languages.³⁴ This would involve repackaging the issues in a way which is more accessible and strikes a chord with the public. To many, talking about "implementation of the 17th Amendment" may have no resonance, unless and until it can be shown how this question touches their lives. This can only be done by closely connecting it to issues such as protection from torture, equal opportunity in employment, public service delivery and others which constitute the gamut of human rights which the State owes to everyone.

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³³ *Daily Mirror*, Ayesha Zuhair, "The dilemma of 'Rights' and the 17th Amendment," 28 April 2007.

³⁴ "Implementation of the 17th Amendment" seminar, in discussion, see n.15 above

VIII

WOMEN'S RIGHTS

*Kumudini Samuel**

1 Introduction

The Human Development Index (HDI), which incorporates a composite measure of life expectancy, literacy and enrolment in primary, secondary and tertiary levels of education, has long given Sri Lanka a comparatively high ranking among developing countries.¹ In 2004, Sri Lanka had a value of 0.755 and was ranked 93 out of 177 countries. The Gender Development Index (GDI)² – which measures achievements in the same dimensions using the same indicators as the HDI but captures inequalities in achievement between women and men – also gives Sri Lanka a favourable value of 0.749.

These correspondingly high indicators for women have promoted the notion that women enjoy equal status with men in Sri Lanka. However, the HDI and the GDI conceal gender inequality in economic and political life. The Gender Empowerment Measure (GEM),³ which takes these criteria into account, gives Sri Lanka a

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¹ The Human Development Index (HDI) is a comparative measure of life expectancy, literacy, education, and standard of living for countries worldwide. It is a standard means of measuring well-being, and is used by the United Nations Development Programme in its annual Human Development Report.

² The Gender-related Development Index (GDI) is one of the five indicators used by the United Nations Development Programme in its annual Human Development Report.

³ The Gender Empowerment Measure (GEM) is a measure of inequalities between men's and women's opportunities in a country. It combines inequalities in three areas: political participation and decision making, economic par-

much lower value of 0.372, or a ranking of 69 out of 75 countries for which data was available in 2004. Differing from the GDI, the GEM exposes an inequality in opportunities in selected strategic areas.⁴

Progressive social welfare policies such as equal access to free education and health services, in place for over six decades, have benefited women by increasing life expectancy and decreasing maternal mortality. However, these positive indicators need to be interrogated at two levels – one, the larger context of norms and practices pertaining to women's exercise of socio, economic and political power which prevents equitable access to resources and limits quality of life⁵ and two, the manner in which the universality of the indicators serves to mask the high levels of disparity pertaining to economically depressed districts and in particular to the areas affected by conflict and war.

The gendered socialisation process also ensures that women not only have differential and often unequal access to and control of resources but are placed in a position of powerlessness, resulting in their being more susceptible to all forms of violence and intimidation both in the home as well as outside it. Critically, unemployment among women has persistently been double that of men, and women continue to have unequal access to employment opportunities. There is a concentration of women in low paid, unskilled and semi-skilled employment in the formal sector and women also make up the bulk of the informal sector engaged in home-based economic activities and in small-scale self-employment ventures that have no legal protection. Lack of skills and employment opportunities

icipation and decision making, and power over economic resources. It is one of the five indicators used by the United Nations Development Programme in its annual Human Development Report.

⁴ United Nations Development Programme (UNDP), *Human Development Report 2006* (New York: UNDP). Available online at: <http://hdr.undp.org/hdr2006/statistics/>

⁵ Sepali Kottegoda, *Gender Power and Politics in Sri Lanka*, In *Sri Lankan Power and Politics*, Swedish International Development Agency, Colombo, 2006 (forthcoming).

locally have pushed women into an exploitative overseas labour market as domestic workers.

Persistently high levels of poverty also affect women in low income groups, particularly those who are *de facto* or *de jure* heads of household. Protracted conflict – with attendant high levels of displacement, destruction of infrastructure and disruption of services, lack of access to livelihoods and goods embargoes – has also increased women's vulnerability to poverty, while the gendered nature of conflict has increased discrimination suffered by women at a social and cultural level.

In relation to violence against women and sexual crimes, despite amendments to the Penal Code in 1995 and 1998 and the enactment of domestic violence legislation in 2005, a persistently high level of violence against women continues to impede their enjoyment of a range of rights guaranteed by international human rights law.

Women in professional, administrative and service sector jobs have less access to promotions and positions of decision making due to the operation of a rigid glass ceiling. They therefore have less economic mobility than men.⁶

In addition, women's access to formal institutions of political power are severely undermined by patriarchal structures and attitudes within political parties and electoral processes that have served persistently to limit women's representation in Parliament to less than 5 percent, with an even lower percentage in Provincial and Local Government.⁷

Patriarchal values and gendered norms continue to inform state policies both at the level of design as well as implementation, serving

⁶ Maithree Wickramasinghe and Wijaya Jayatilake, *Beyond Glass Ceilings and Brick Walls: Gender at the Workplace* (Colombo: International Labour Organisation, 2006).

⁷ The percentage of women in the current Parliament is 4.8 and at Provincial level is 3.69 percent.

to further marginalise women and reinforce inequalities. While women are constitutionally guaranteed equal rights, discriminatory provisions in family law deny women equal rights in relation to marriage, divorce, inheritance and property. They are also denied equal rights to land in State-assisted settlements.⁸

The Sri Lankan Constitution guarantees equality to women by Article 12, which states that all persons are equal before the law and are entitled to equal protection of the law. Article 12 also provides that no citizen shall be discriminated against on specified grounds, including that of sex. However, Article 12 (4), which allows for special provision to be made by law or executive action for the advancement of women, places women in the same category as children and disabled persons, giving expression to a patriarchal ideology that perceives women as weak and in need of protection rather than as a category of persons who have been subject to systemic, historic discrimination that requires affirmative corrective action.

Article 2 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) requires States to "pursue by all means and without delay a policy of eliminating discrimination against women" which includes the duty to "refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation." It also requires States to "take all appropriate measures including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women." As a signatory to CEDAW, Sri Lanka is thus required not merely to achieve formal equality, but also ensure that women's position in society is improved through the enjoyment of substantive equality.

⁸ Sri Lanka Shadow Report on the Convention on the Elimination of All Forms of Discrimination Against Women, prepared by the Centre for Women's Research, December 2001.

In their concluding comments to the Sri Lankan government following the submission of the 3rd and 4th periodic report to CEDAW, the CEDAW Committee recommended *inter alia*, that the State amend discriminatory provisions in personal laws; guarantee that constitutional rights apply to non-State actors and the private sector; give legal force to the Women's Charter; expedite the establishment of the National Commission on Women and ensure sufficient human and financial resources for the implementation of the National Plan of Action; take all necessary measures to increase the representation of women in politics and public life at local, provincial and national levels, including through the implementation of temporary special measures; permit abortion in cases of rape, incest and congenital abnormalities; and amend the Land Development Ordinance so that it is compatible with the Convention.⁹ However as at 2007, apart from changes to Nationality Laws and the enactment of legislation to deal with domestic violence, none of these have been fulfilled.

2 Mahinda Chinthanaya

The regime of President Mahinda Rajapakse sought to consolidate itself in 2006 with a series of cabinet reshuffles and a substantial increase in the number of cabinet and non-cabinet portfolios to accommodate new coalition partners. There were also corresponding changes in key civil service positions and appointments. Sumeda N. Jayasena, the Minister for Women's Affairs under the regime of President Chandrika Kumaratunga, retained a Cabinet portfolio as Minister of the newly-created Ministry of Women's Empowerment and Child Development. The subject of Women's Affairs, elevated to cabinet status in 1978 has, over the years, acquired varied appendages from Social Services to Child Development. While the "add on" subjects have at times outstripped the importance and resource allocation given to women's affairs, under the current

⁹ CEDAW/C/2002/1/CRP.3/Add.5 (Concluding Observations/Comments)

regime the portfolio has also been framed within the narrow ideological confines of "motherhood" and the family. The *Mahinda Chinthanaya*, foregrounded on the concept of wisdom and virtue, emphasizes spiritual devotion and promotes favourable and fruitful bonds between parents and children. It promises to work towards eliminating child abuse and rape by "restructuring legal frameworks". A number of flaws – such as the continued requirement in judicial practice for corroboration of rape, inconsistencies between the age of consent and the age of marriage, delays in the legal remedies, and so on – require legal reform and may have informed this desire for restructuring legal frameworks. However, no legal reform was initiated in 2006.

Other *de facto* concerns – such as the under-reporting of the crime of rape, the lack of convictions, the stigma attached to rape victims, and the re-victimization due to adversarial legal and law enforcement systems – have not been addressed in the manifesto. The continuing high rates of sexual violence against women have to be dealt with through a comprehensive and holistic set of reforms, yet the government has not proposed any such measures.

The lack of serious attention to violent crimes against women is manifest in the claim that institutionalized arrangements will be fully strengthened for law enforcement in relation to road safety rather than the safety of women.

The year 2006 was also marked by gradual shifts in policy with regard to gender concerns as the electoral manifesto of President Rajapakse, the *Mahinda Chinthanaya*, took effect. The *Mahinda Chinthanaya* places inordinate emphasis on the role of the mother in the family, while the family is seen as the foundation of society. As a consequence, the manifesto's policy interventions with regard to women are almost totally focused on motherhood. This is reflected in the basket of nutritional food promised to pregnant mothers who cannot afford proper nutrition, maternity clinics in every village with medical advice and related services, milk food subsidies

for children under the age of five and so on. As a corollary to this thinking, the Ministry of Women's Affairs has now been linked to a new subject area dealing with children and reconstituted as the Ministry of Children and Women's Empowerment. The Ministry has thus lost its independent status and, more disturbingly, has been linked to children's affairs, reinforcing women's role as mothers. It acknowledges almost no other significant role for women.

The *Diriya Kantha* Programme unveiled in the *Mahinda Chinthanaya* is explicitly intended for the purpose of providing "solid foundation to the family as well as society". The role of women in society is essentialised, as reflected in the statement "she devotes her life to raise children, manage the family budget and ensure peace in the family". The "empowerment of women" is expected to lead to the "empowerment of the family," leading to stability and peace in the family. The *Diriya Kantha* Programme therefore proposes self-employment and home-based work for women, limiting its vision of empowerment to reinforcing a woman's role of motherhood and her secondary status in the home.

While the expanded Cabinet also included Ferial Ashraff as Minister of Housing and Common Amenities and gave Pavitra Wanniarachchi the portfolio of Youth Affairs, there are just three women with Ministerial functions in the vastly expanded Cabinet of 52, while there are no women among the 35 Ministerial posts of non Cabinet rank and no women Deputy Ministers among the slate of 20.

3 Political Representation

Sri Lanka has a particularly poor record of women's political representation at both local and national levels. Women have never exceeded 6 percent in Parliament and the current representation at local and provincial government is under 3 percent. A multi-party Parliamentary Select Committee on Electoral Reform (the Select

Committee) established in 2003 was presented with submissions calling for affirmative action in favour of women so that the percentage of women's representation in formal politics could be increased. The Select Committee, however, refrained from making any recommendations on this crucial issue in its interim report released in January 2004.

The Select Committee was reconstituted in 2005 but it has made no substantive recommendations to increase women's political representation, despite the positive duty of the Sri Lankan government to "take appropriate measures to eliminate discrimination against women in the political and public life in the country" (Articles 7 and 8 CEDAW). Citing the Concluding Comments of the CEDAW Committee on Sri Lanka's third and fourth periodic reports, which urged the government to "take all necessary measures to increase representation of women in politics ... including through the implementation of temporary special measures," women's groups urged the Select Committee to introduce a system of quotas which would ensure that at least a 30 percent ratio of women are elected at national and local levels. They made a series of recommendations for quotas, mindful of the ongoing discussion for reforms centred on a mixed electoral system. They also called for the abolition of the current system of preferential voting. Apart from proposing affirmative action to eliminate the discrimination suffered by women in electoral politics, the groups made recommendations with regard to the misuse of state resources, limits to campaign expenditure, responsibility of political parties for the misconduct of candidates and discriminatory political party structures. In addition, they made special recommendations regarding the enabling of voting rights to migrant workers, the majority of whom are women.¹⁰

¹⁰ *Political Representation of Women*, Submission to the Parliamentary Select Committee on Electoral Reform, 13 October 2003, International Centre for Ethnic Studies, Muslim Women's Research and Action Forum, Women and Media Collective and 23 May 2005 by 25 women's groups and other civil society organizations.

The concept of affirmative action is new to Sri Lanka, and not enough work has been done to promote its acceptance. There is also resistance from political hierarchies and male leaderships within political parties to commit themselves to legally binding measures such as quotas, reserved seats or a compulsory threshold for nominations.

Facing these obstacles, perceiving a lack of political will and dealing with abysmal levels of internal democracy within political parties, women have begun to explore other avenues of representation. These include the possibility of setting up lists of women contesting as independents; an independent women's political party; a women's political manifesto or agenda that can further gender concerns; the possibility of women drafting an interim Constitution; a code of conduct and a human rights framework for the peace process.¹¹

It was in this climate of continued political marginalization and discrimination that an independent group of 28 women contested the Kurunegala Pradeshiya Sabha elections in April 2006. Members of the group, all of whom were active in village level social service organisations such as women's societies, death donation societies and co-operatives, hailed from villages such as Barnunugedara, Mahiella, Boyagane, Ranawana, Malpitiya, Doratiyawa, Thorayaya, Wilbawa, Keliyagoda and Alakoladeniya in the Kurunegala Pradeshiya Sabha area. Facilitated by the Women's Resource Centre, Kurunegala, they prepared a women's manifesto based on local concerns such as easy access to potable water, sufficient maternity clinics, formal sector employment opportunities for women and adequate street lighting.¹²

The group, the first of its kind to contest a Pradeshiya Sabha, created some consternation among mainstream political parties. Its leaders were offered individual nominations on party tickets and a number

¹¹ Kumudini Samuel, *A Hidden History, Women's Activism for Peace in Sri Lanka - 1982 to 2002*, Social Scientists Association, Colombo, 2006.

¹² Leaflet distributed by the Independent Women's Group at a press conference in Colombo on 1 March 2006.

of their members were at times threatened and at others cajoled and promised money to withdraw their list.¹³ However, the women stood together, declaring that this was a first step towards preparing themselves to enter politics at the local level. As the group's deputy leader noted, "people in the Kurunegala Pradeshiya Sabha area are curious about our plans because we are quite different from other political parties and independent groups. Even if we fail this time we'll never lose hope. We will continue to train young women and make our group a force to be reckoned with."¹⁴ The Independent Women's Group did not win any seats, but gained invaluable experience in contesting elections as women and without recourse to political party patronage. Members of the group continue to watch the activities of the Kurunegala Pradeshiya Sabha and hope to link Pradeshiya Sabha members with community based organisations to ensure that community and gender concerns are addressed. The group, together with other independent women's groups in the districts of Monaragala and Badulla, are currently engaged in strengthening the capacity of community based women activists both to understand the workings of local government institutions as well as to contest the next local government elections scheduled for 2010. However, the debate continues, given the primacy of party politics, as to whether independent lists can attract votes from constituencies familiar with voting for candidates representing political parties. While many women's groups supported the independent women's list as a means of profiling women's candidature at local government, some women activists continued to canvass political parties for candidature. A few women who received party nominations and had strong women's agendas were supported by women's groups. A number of these women won the seats contested, while others, mainly first time contestants, indicated that a strong support group was essential both during the campaign as well as on the day of the poll. Of particular concern was the need to ensure the presence of

¹³ Surnika Perera, Women's Resource Centre, Kurunegala, personal communication, June 2006.

¹⁴ Nadia Fazlulhaq, "The Roar of Rural Women," *Sunday Times*, 5 March 2006.

agents at counting centres. Women contestants allege irregularities at counting centres and note that the entire electoral process from the handing in of nominations to the counting of polls is very male centred, leaving little space for and recognition of the requirements of women candidates.

The difficulties faced by women candidates, including successful women candidates, are illustrated in the experience of Nawalapitiya UC member and former Mayor Nirupa Karunaratne's experience at the 2006 Pradeshiya Sabha election. She was threatened physically and harassed and prevented from effectively campaigning.¹⁵

Despite the paucity of women candidates and political party reluctance to nominate competitive slates of women to contest at local government, six women topped their lists and were elected Majors/Chairpersons in the important Municipal and Urban Councils of Kotte, Dehiwala/Mt. Lavana, Maharagama and Embilipitiya and Chairpersons of the Pradeshiya Sabhas of Gomarankadawala and Kebethigollawa, belying patriarchal attitudes within political parties that women are uninterested in formal politics and were a poor risk at the polls.

The reluctance of political parties and parliamentarians to take any positive steps to increase women's representation in formal political institutions shows that the patriarchal state is primarily identified with men and masculine power dynamics. This serves to exclude women as political actors and denies them political representation, preventing their entry into positions of political decision making, thus denying them both political citizenship and political agency. This exclusion has served to maintain a gender division of power and labour where men dominate the political institutions of the state and women are relegated to the service and social sectors through discriminatory protectionist laws, policies and attitudes promoted

¹⁵ Letter to the President and Press Release issued by the Women and Media Collective, 20 April 2006.

through patriarchal ideology such as the *Mabinda Chinthanaya* and reinforced by the state.

4 The Impact of Conflict

Under international humanitarian law, there are clear rules on the conduct of hostilities that are designed to protect civilian lives to the highest level possible. Common Article 3 to the Geneva Conventions applies "in the case of armed conflict not of an international character" and is binding on all parties to a conflict. It provides for the protection of persons taking no active part in the hostilities, including members of the armed forces who have laid down their arms and those placed "hors de combat" by sickness, wounds, detention, or any other cause.

Despite this, and the promise of talks, 2006 began with a series of infringements of the ceasefire which endangered and displaced civilians. Civilians were also killed, notably in Mutur, in the crossfire between Government and LTTE forces. This situation continued to worsen during the year, prompting women to raise serious concerns about the violation of human rights by both the state and the LTTE.¹⁶

By May, Amnesty International indicated that at least 200 persons had been killed due to the escalating violence. By the end of the year unlawful killings, abductions, enforced disappearances and child recruitment had increased. Hundreds of civilians were killed and injured and more than 215,000 people displaced.¹⁷ Investigations into killings, abductions and illegal arrests continued to be ineffective, perpetuating a sense of fear and uncertainty among civilians and entrenching a culture of impunity among perpetrators.

¹⁶ Press Release signed by 100 women titled "Sri Lanka: Women Say No To War Call For Responsible Behaviour From The State And The LTTE," 15 May 2006.

¹⁷ Amnesty International, *State of the World's Human Rights, Annual Report* 2007.

4.1 Impact on women

Women were affected by the escalating armed conflict in particularly gendered ways. Since women have specific responsibilities for care and nurturing, they have fewer opportunities - or are the last - to flee, often being compelled to stay back and support families and communities. They thus have to deal with the day to day trauma of armed conflict - to seek secure places of refuge when combat begins and to live, when forced to flee, as displaced persons in camps and with host families. An intensification of armed conflict has also meant increased threats to physical and mental integrity, including conflict-related, community-based and domestic violence. Thus women living in conflict affected areas suffer a variety of human rights violations, including serious violence and widespread denial of economic and social rights. Not only are they often more vulnerable to gender specific human rights violations, they are also less able to access legal and other remedies.

4.2 War casualties

Conflict-related violence, for example, at times claimed disproportionately more lives of women and children, such as in the instance of the explosion at Kebitigollewa where a claymore mine destroyed an overcrowded bus killing at least 67 civilians, including 15 children and pregnant mothers in June 2006. This excerpt from a fact finding report illustrates some of the gendered concerns:

Perhaps the most tragic piece of information we received during our visit was that the bus that fell victim to the claymore mine was full of mothers with infants and pregnant women travelling to the clinic in Vavuniya for their regular inoculations and vaccines only because the Medical Health Office did not possess a vehicle. If the vehicle had been available to the MOH ... women and children could have availed themselves of the vaccination services

in Kebitigollewa, as they are supposed to be able to do... Given the conditions and the circumstances prevailing in the area, it seems imperative that the MOH office in Kebitigollewa has a vehicle. Yet they have not had one for over two years.¹⁸

Of grave concern was the Air Force bombing of the Senchola Centre, which was allegedly used by the LTTE as a training camp for youth, in August 2006. At the time of the bombing, a group of young A/Level women students were at the premises, with an estimated 61 killed and over 100 injured. Three of the injured girls were first admitted to the Kilinochchi Hospital and later taken to the Vavuniya hospital by the ICRC. From there they were transferred to Kandy hospital. The girls were subsequently shown on national television, recounting the attack and alleging that the LTTE had coerced them into attending the training at Senchola. Despite the sensitivity of the charges and the danger to which the girls were exposed by high profile media coverage, they were detained under Emergency Regulations. By October one of the girls, T. Dayalini, was reportedly re-transferred to the Vavuniya hospital and died under mysterious circumstances, with the Vavuniya District Court Judge M. Ilanchelian ordering the police to investigate the death. The whereabouts of the other girls, who had been discharged from the Kandy hospital, were unknown.¹⁹ There has been a serious lack of progress in this investigation.

4.3 Enforced displacement

The tragedy of inter-ethnic hostilities, deaths, killings, displacement and forced return, together with their gendered impact and consequences, are illustrated in this account of enforced flight from

¹⁸ Report of Fact Finding Mission to Udappuwa and Kebitigollewa dated 18 June 2006, INFORM, CPA, Asian Forum for Human Rights and Development and the Citizen's Commission for the Right to Life of Border Villagers.

¹⁹ Asian Tribune, "Mystery surrounds the death of Senchola victim Dayalini," 1 October 2006.

a predominantly Muslim village in the Mutur district. The village has been described as being "unable to recover, unable to recuperate in the continuing condition of war and instability".²⁰

We walked all the way to Thoppur. There was no water anywhere. We dipped the ends of our sarees in puddles on the way and squeezed the water out. The cloth was a filter for the mud. This is the tale we will tell our children... So many pregnant women lost their babies. We are afraid now to have babies: If we have to run again?

The report details other gender-specific quandaries:

[A] six month pregnant woman cannot feel life in her tummy. Her husband had disappeared, given up for dead at the hands of the LTTE. But he appears one day, with injuries that he doesn't want to talk about. In her sorrow of her missing husband, she had not thought of looking to her own welfare. In any case there is no gynaecologist, nor any facilities in her area. How can she go to Trinco given the way things are in this area?²¹

As the authors of the report note, though the tragedy of Mutur is a very specific one, it is at the same time the tragedy of war and peace in Sri Lanka. The story is repeated in Sampur, where Tamil women walked miles seeking a safe refuge, and again in Mavil Aru, where Sinhala women fled the terror in April. The stories of how women had to cope with children, the elderly, the disabled and their own pregnancies in the course of flight abound, from Trincomalee to Batticaloa, Mannar and Welikanda. The violence has also had a direct

²⁰ Coalition of Muslims and Tamils for Peace and Co-existence in the East, "Impressions: War and Peace in Mutur," 23 October 2006, available at www.ctmpc.blogspot.com.

²¹ *Ibid.*

impact on inter-ethnic relations in the multi-ethnic communities of the east, with heightened levels of fear, insecurity and suspicion and the flaring up of much feared communal rioting. Women have had to deal with this communal violence and its repercussions. For instance, Tamil doctors are afraid to travel into predominantly Muslim Mutur, "fearing danger from the armed forces and perhaps reprisals from Muslims in the area".²² The impact of the current outbreak of war cannot be fathomed by mere statistics of the numbers displaced, disappeared, abducted or killed, however damning these may be. The impact must also be measured in the destruction it brings to everyday life of communities that have no place to run to – the nights they fear to sleep in their own homes; the number of times they congregate together as a community to seek refuge in a "safe" place in the village; the many restrictions on farming, fishing or trading in the name of security; food and drug embargoes and so on. The list is endless.

4.3.1 Camps for the displaced

In 2006 women continued to face a range of problems in camps for the displaced. They were often forced to live in cramped and crowded conditions with little or no privacy and compelled to use public spaces that are not well lit or secure. They were frequently subject to sexual harassment or live in fear of abuse. Women from many camps for the displaced reported high levels of domestic and sexual violence while women's groups in the north and east claim that decades of conflict and resultant poverty, unemployment and despair lead to alcohol abuse and domestic violence.²³ The cultural stigma and lack of appropriate services also prevented women from reporting sexual and domestic violence, which in turn perpetuated the problem. As a result many young and under-aged girls were compelled to marry in haste, compounding the problems of displacement and having to deal with early and unsafe pregnancies

²² *Ibid.*

²³ Amnesty International, "Sri Lanka: Waiting to go home – the plight of the internally displaced," 29 June 2006.

and child birth. Also of concern has been the uncoordinated response to the sudden movement of large populations and, in particular, the continued inadequacy of a gender sensitive response. In many camps, women's specific sanitary and clothing needs were not dealt with systematically, special measures were not in place to deal with the needs of pregnant and lactating mothers, and women's reproductive health needs such as access to contraception were not adequately dealt with.

4.4 Under-age marriage

A common practice in conflict-affected communities is the marriage of under-age girls, both to provide the "security" of marriage to girls who may be subject to sexual violence in the upheavals of displacement and dislocation, and to prevent their recruitment by armed militant groups. Married early to safeguard virginity and family honour, these young girls are gravely discriminated against, deprived of education and skills that could make them economically independent and left prey to early and unsafe pregnancy and early motherhood while still in their teens.

4.5 Rape and murder

While rape during wartime is prohibited by Rome Statute of the International Criminal Court, Sri Lanka has not ratified the Statute. Rape in wartime continues to be one of the least prosecuted crimes and perpetrators go unpunished, according them impunity.

A tragic manifestation of the insecurity of civilians and the gendered nature of the impact of conflict on women was the brutal slaying of a family of four in Vankalai, Mannar. The family, Sinniah Moorthy (38), Anthony Mary Madeleine (27), Anne Lakshika (9) and Anne Dilakshan (7) had failed to seek refuge at St. Anne's Church on the night of 1 August 2006, as was the custom of the people of Vankalai since it was not safe to stay at home during the night due to the prevailing security situation in the area. They were

found "hacked, beaten, tortured and hung" while the "vaginal area of the twenty - seven year old mother and nine year old daughter were extremely bloody" and they appeared to have been "violated sexually". The Bishop of Mannar, Joseph Rayappu, indicated "that those responsible for security were behind the massacre".²⁴

The victims of the Vankalai massacre were refugees who had returned from India following the ceasefire of February 2002 and re-settled in their village. However, as the security situation deteriorated with the resumption of hostilities between the state and the LTTE and postings of security personnel increased in the area, civilians began to report undisciplined behaviour and sexual harassment of women and girls. Security personnel were reportedly "uttering obscenities and engaging in indecent gestures. Their favourite target was the school girl population of Vankalai. One act was to exhibit condoms to the girls." A few days before the rapes and slayings, the LTTE had detonated a claymore mine, killing a soldier, which resulted in retaliatory firing by the military, compelling civilians to seek shelter away from the area. Expecting more retaliation, civilians avoided staying at home at night and sought refuge in the churches. Mary Madeleine's family, according to her sister-in-law, had not been able to get to the church on time since her husband had not returned home early enough.

Efforts by the group Mannar Women for Human Rights and Democracy to have the case investigated by an independent and impartial group of human rights advocates were not successful, and the group fears that this will be yet another case of rape and murder that will not be adequately investigated. In their statement of 22 June 2006, the group also refers to the murder and alleged rapes of Ida Camelita (July 1999), Kantharasa Jeyamalar and Bahiya Ummah, none of which resulted in convictions. They further trace the legal action taken by two other women from Mannar-Ehambaram Nanthakumar Wijikala and Sinnathamby Sivamani-

²⁴ DBS Jeyaraj, "Vicious Violence wipes out family of four in Vankalai," 13 June 2006. Available at www.tamilnation.org.

who, despite threats to their lives, filed fundamental rights cases for unlawful arrest and detention and custodial rape. They identified three police officers and nine navy personnel as the perpetrators. Illustrating the difficulty and danger of prosecuting custodial rape, the group records that "the case dragged on for over four years, in the course of which Wijakala has gone missing and Sivamani received many threats to the effect that she will be killed if she comes to Anuradhapura for the court hearings. The case was listed to be heard in Anuradhapura High Court on September 21, 2005 but Sivamani did not turn up."²⁵

5 Freedom of Movement

Women have to subject themselves to the indignity of body searches and sexual harassment at checkpoints and during cordon and search operations. Young girls fear to travel past military checkpoints, curtailing their movements, particularly in relation to extra curricular activities and tuition (Amnesty International, 2006). Women have made complaints of night-time searches conducted by policemen and detentions in facilities without the presence of policewomen, provoking the call for gender sensitive safeguards at checkpoints and during cordon and search operations, arrests and detentions.²⁶

Another major impediment to freedom of movement resulted from attempts to prevent women working for non governmental organisations (NGOs) in the Eastern Province. A speech by TNA MP Ariyanethiran alleging "sexual misconduct" of women NGO workers in the East led to the circulation of anonymous leaflets accusing women of contributing to cultural degradation by behaving in culturally inappropriate ways. The leaflets also alleged sexual abuse and exploitation of women NGO workers and was followed

²⁵ Mannar Women for Human Rights and Democracy, "Rape and Murder of a Young Mother in Mannar," Statement, 22 June 2006. Available at mwfhird@yahoo.com.

²⁶ ICES, WMC, 2006.

by a demand that women stop working for NGOs. It also called for the moral policing of women and resulted in the harassment of women in public places. There were also cases of men visiting the homes of women and threatening them not to go to work. By conflating the issue of violence against women and culturally appropriate behaviour, the authors sought to reinforce the gender biased view that women experience violence due to culturally inappropriate behaviour. They thus blamed/punished the victims and took no measures to deal with the perpetrators of the alleged violence against women NGO workers, leading to understandable concern for the personal security of these workers.²⁷

6 Migrant Workers

Sri Lanka is a signatory to the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, which came into force in July 2003. Although Sri Lanka was due to report before the Committee monitoring the implementation of the Convention in 2006, it had not completed its report by the end of the year. The Migrant Workers Convention sets standards for the laws and the judicial and administrative procedures of individual States. Sri Lanka thus must adopt the necessary measures to ensure that the rights of migrant workers and their families, as set out in the Convention, are protected. While no receiving country has as yet ratified the Convention, Sri Lanka continues to be bound by its responsibilities as a labour sending country. The Sri Lanka Bureau of Foreign Employment (SLBFE) is the lead agency responsible for migrant workers and is governed by SLBFE Act No. 21 of 1985 and amended Act No.4 of 1994. While the government has introduced many policies to improve the protection of migrant workers there remain serious gaps in implementation and discriminatory procedures in certain areas that need to be addressed.

²⁷ Ambika Satkunanathan, "Sri Lanka: Curtailing choice in the guise of preserving culture," *Daily Mirror*, 4 June 2006.

According to the Sri Lanka Bureau of Foreign Employment (SLBFE), 230,963 migrant workers secured employment overseas in 2005 and overseas migration continued to record an overall increase. However, provisional figures for 2005 indicate that female participation rates have decreased by 3 percent while male participation rates increased by a similar percentage, continuing the trend of gradual decrease apparent since 2001. The recruitment of male-dominated categories of workers increased by 16.44 percent over the previous year.

The SLBFE observes that the decrease in female migration is in keeping with government aspirations to "reduce social cost of female migration" and notes that more attention must be paid by policy planners to male migration. This is a clear indication that a reduction in female migration rates is seen as desirable and that policy will shift to promote male migration. The preoccupation with the "social cost of female migration" fits in with the *Mahinda Chintanaya*, which seeks to reinforce women's role of mother and her primary responsibility to the family.

However, the number of women migrating for foreign employment continues to be greater than the number of men. In 2005, 136,998 (59.32 percent) women as compared to 93,965 (40.68 percent) men migrated for employment; over 90 percent of these women were employed as housemaids. The SLBFE noted that the recruitment of housemaids increased by 9 percent, indicating a continued demand for female domestic workers, particularly in Middle Eastern countries. However, it is also notable that female recruitment in other categories dropped in 2005. These included "clerical and related services," "skilled work and unskilled work," while professional and middle level employment for women rose marginally. Conversely, male employment in all these categories increased. Sri Lanka is heavily dependent on foreign remittances from migrant workers to service its balance of payments deficit. In 2005, these remittances totalled Rs. 191,800 million, with

approximately 57 percent remitted from the Middle East.²⁸ Since women make up 800,000 of the total migrant workforce and men only 420,000, the remittances of female domestic workers make up a significant percentage of this total.²⁹

Despite the significant level of policy intervention, support and monitoring of labour migration, the introduction of model employment contracts and the enhanced role of consular and diplomatic missions in receiving countries, a considerable percentage of women migrant workers continue to suffer human rights abuses. According to information collected by the SLBFE, 1,807 women and 142 men had complained of physical and sexual abuse in 2005. Other complaints included the non payment of wages, labour exploitation by employers and unscrupulous foreign employment agents.³⁰

Penal Code amendments on trafficking were strengthened in 2006 and this, together with the Immigrants and Emigrants (Amendment) Act,³¹ introduced stringent measures to prevent the trafficking of persons for foreign employment, paying special attention to the illegal recruitment of persons on a promise of securing employment outside Sri Lanka.³² The Sri Lanka Bureau of Foreign Employment Act³³ also came under scrutiny in 2006 by the SLBFE, with Migrant Rights groups such as the Migrant Services Centre and the Action Network for Migrant Workers (ACTFORM) working on draft amendments. Among the suggested recommendations were that representatives of migrant workers organisations be part of the Board of Directors of the SLBFE; that representatives of the SLBFE who are posted in labour-receiving countries be

²⁸ Central Bank of Sri Lanka Annual Report 2005.

²⁹ Sri Lanka Bureau of Foreign Employment (SLBFE), Information Technology Division.

³⁰ SLBFE, Annual Statistical Report of Foreign Employment 2005.

³¹ Act No. 31 of 2006

³² Action Network for Migrant Workers (ACTFORM), UN Migrant Workers Convention Sri Lanka Draft Alternate Report 2007.

³³ Act No. 21 of 1985

accountable to the Bureau for safeguarding the interests of migrant workers; and that a comprehensive and gender disaggregated database on international labour migration from Sri Lanka be established and available to public access. The groups also continued to advocate that amendments to the Sri Lanka Bureau of Foreign Employment Act should be in compliance with the Migrant Workers Convention and that a monitoring authority be established to ensure the effective implementation of the Act.³⁴

6.1 Migrant workers' health rights

HIV testing in Sri Lanka is a purely voluntary process and the Government does not follow a policy of mandatory testing. Confidentiality is maintained on a person's identity and testing is done with informed consent, with all clinics providing both pre- and post-test counselling.³⁵ However, migrant workers, particularly those travelling to Gulf Co-operation Council Countries and other popular destinations such as the Republic of Korea, Malaysia, the Maldives, Singapore and Cyprus, have to undergo mandatory testing procedures carried out by designated testing clinics in Sri Lanka. Testing is repeated in the receiving countries prior to a worker assuming employment duties. These agencies are not obliged to furnish information to the Ministry of Health, Ministry of Labour or the SLBFE. As a consequence, the government has no information on the testing carried out, the results, or the fate of anyone testing positive to HIV. Neither do the migrant workers have control over the testing: they have no free choice since the tests are mandatory and are not apprised of the results. Employment can be rejected on the results of such testing, which also includes tests for a range of other diseases. The migrant worker is also bound by the pricing policy at the centres and a recent study found that

³⁴ ACTFORM, UN Migrant Workers Convention Sri Lanka Draft Alternate Report 2007.

³⁵ Andrew Samuel, *State of Health of Migrants: A Qualitative Action Research on Migrant Friendly Testing*, CARAM Asia, 2007. Sri Lanka research in collaboration with Community Development Services and Migrant Services Centre, Colombo, Sri Lanka.

most migrants favoured standardized testing through a government agency such as the Ministry of Health or the SLBFE.³⁶

The study also found that all female migrants have to undergo a mandatory pregnancy test and are subjected to a nude physical examination to ensure there are no serious scars, skin rashes, boils, lumps and the like. Here again, the testing centre has the authority to accept or reject a migrant on external body appearance. They are not required to provide the migrant worker any reason for rejection, a practice in total violation of a migrant's right to secure employment. While the migrant worker is provided with a consent form for signature, since the testing is mandatory the migrant has no actual choice. Further, in most instances the forms are available only in English and occasionally in Sinhala, presenting no options for migrants who do not speak Sinhala or English. The study also found that female migrant workers were injected with Depo-provera as a precaution against pregnancy but that at no stage were the women consulted on past and current contraception use nor tested for compatibility or informed of after-effects. Thus powerless, disadvantaged and poor women migrants, desperately in need of employment due to their economic situation, adhere to these requirements under duress since they have already incurred the financial costs of migration – that is, they have more often than not got into debt or spent money they have to recoup with their future earnings.³⁷

7 Violence Against Women

Despite far reaching legislation in 1995 which enhanced the Penal Code, creating new offences, such as sexual harassment and incest, and introducing higher levels of mandatory punishment in the case of sexual offences, Sri Lanka continues to have significantly high rates of violence against women. Women are vulnerable to

³⁶ *Ibid.*

³⁷ *Ibid.*

violence at every stage of their lives due to patriarchal cultural practices and the entrenched nature of discriminatory structures that allow for a lifecycle of violence that begins with malnutrition of pregnant mothers. Girls are subject to incest, son preference, sexual harassment and abuse as adolescents and as older women.

The CEDAW Committee, in its concluding comments to the State's 3rd and 4th periodic reports, urged the Government of Sri Lanka to ensure the full implementation of all legal and other measures relating to violence against women, to monitor the impact of those measures and to provide women victims of violence with accessible and effective means of redress and protection. It also recommended that the Government devise a structure for systematic data collection on violence against women, including domestic violence, disaggregated by sex and ethnic group. The Committee further urged the Government to consider recognizing marital rape in all circumstances as a crime and recommended that the Government provide comprehensive training to the judiciary, police, medical personnel and other relevant groups on all forms of violence against women.

A significantly high incidence of violence against women continued to be recorded during 2006. According to figures available with the Women and Children's Desks, a total of 3,485 incidents were recorded in 2006. These included rape, grave sexual abuse, sexual harassment, domestic violence, grievous hurt, simple hurt, murder and incest. The highest number of reports related to domestic violence.

Statistics on violence against women continue to be collected by different agencies, both governmental and non governmental – the Women and Children's Desks at the Department of Police, the National Committee on Women (NCW)'s Gender Complaints Unit, Diru Piyasa, NGOs such as the Women's Development Centre and Women in Need. Despite this, as the Plan of Action Supporting the

Prevention of Domestic Violence Act recognizes, "while estimates of the prevalence of VAW in Sri Lanka are high, reliable information is not available".³⁸

According to UN standards, Sri Lanka has put in place both legislative and policy level implementing strategies, such as national plans of action to deal with violence against women. However, the occurrence of violent offences against women continues to be high and women seeking redress have to overcome many obstacles. The state needs to ensure a trained and sensitive criminal justice system to operationalise this legislation effectively. The legislation has also to be carefully monitored to ensure that it is effective in preventing violence as well as protecting women from it. It is equally important that women be made aware of their rights and have the ability and the support to access legal remedies.

Sri Lanka's recently enacted legislation on the prevention of domestic violence incorporates civil remedies to complement criminal remedies included in the Penal Code.³⁹ The Act, however, deals in the main with the issuance of protection orders and is envisaged as a preventative mechanism. The National Plan of Action on Domestic Violence (the Plan), prepared in 2005 by the NCW, seeks to strengthen the operational aspects of the Act. Three priority areas – protection, provision and prevention – underpin the Plan and it has five focus areas: Community Education and Awareness Raising; Training and Capacity Building; Infrastructure and Support Services; Media; Monitoring and Implementation; Co-ordination and Collaboration; Maintenance of Records and Research; Policy and Policy Makers.⁴⁰ The Plan seeks to remedy a lacuna in the current legislation which provides little social and institutional support for women seeking redress from domestic violence.

³⁸ National Committee on Women, Plan of Action Supporting the Prevention of Domestic Violence Act, 2005, Colombo, p.13, available at www.apwld.org

³⁹ Prevention of Domestic Violence Act, No. 34 of 2005.

⁴⁰ National Committee on Women, Sri Lanka, Plan of Action Supporting the Prevention of Domestic Violence Act, 2005.

7.1 Rape

Rape remains a significant concern, and it is acknowledged that rape and incest continue to be among the most under-reported of crimes in Sri Lanka. Official records available from the Women and Children's Desks indicate that 353 complaints of rape were recorded in 2006. However, rape and incest are also offences that result in the least number of convictions. Despite this number of complaints, neither the Police Department nor the Attorney General's Department was able to confirm the number of cases filed or the number of indictments and convictions made. This indicates a serious gap in documentation and the tracking of cases, preventing the making of relevant and necessary policy changes. The lack of prosecutions leading to convictions, delays in the law, the re-victimisation of the woman by the judicial process, the sensationalising of rape trials and the blatant bias in an adversarial criminal justice system in a very patriarchal society often call into question the effectiveness of the law as a remedy in itself. Most women continue to be silent when they are victims of sexual violence, particularly rape, also because of the stigma attached to rape.

While no definitive research has as yet been done, there are fears that the enhanced minimum mandatory sentencing introduced to punish rape and incest through the 1995 Penal Code reforms have acted more as a deterrent to convictions instead of helping to reduce the number of violations.

Marital rape, except in cases of judicial separation, is still not accepted as a crime in Sri Lanka despite its continued occurrence and its adverse impact on marital relationships and the subjection of women to degrading and humiliating treatment throughout their marriages.

7.2 Sexual harassment

Sri Lankan women are also subject to sexual harassment in public as well as in public and private sector workplaces. Despite legislation

adopted in 1995 that criminalized sexual harassment, this remains one of the least prosecuted crimes. Women's Rights Watch in its 1999 year report indicated --- the press in 2006 reported a few cases of sexual harassment.

Sri Lanka has no binding provisions requiring public and private sector employers to include the prohibition of sexual harassment in their service rules and set up gender sensitive mechanisms to deal with these complaints. This is unlike India, where the judgement in the Visaka case led to the Sexual Harassment of Women in the Workplace (Prevention) Act in 2004, giving effect to the decision of the Supreme Court that the lack of sexual harassment legislation violated the equality provisions of the Indian Constitution.

Despite attempts to create a normative framework that deals with violence against women, if no attempts are made to shift the patriarchal ideological frame that accepts and perpetuates the normalization of violence against women – for example, that corrective violence against wives is alright, as was argued during the debate to enact domestic violence legislation in 2005 - the prevention of violence against women through mere legislative means will continue to be ineffective. Such normalization prevents men from accepting that violence against women is a crime and prevents women from asserting their right to be free from violence.⁴¹ While it has been argued that a lack of economic independence and economic security keeps women locked into situations of domestic violence, changing gender roles that provide women with employment opportunities and access to economic recourses can also challenge traditional sexual roles within the home and family and result in violence against women.

It can be argued that in conflict situations women's lack of economic security, lack of access to economic resources such as land and

⁴¹ The Varied Contours of Violence Against Women in South Asia, Government of Pakistan and UNIFEM South Asia Regional Office, May 2005 (Fifth South Asia Regional Ministerial Conference, Celebrating Beijing Plus Ten)

credit, lack of education and denial of mobility will make them more vulnerable to situations of domestic violence.

In conflict affected areas of the Eastern and Northern districts, law enforcement is severely hampered by the insecurity faced by the police. Women's groups from these areas indicate that in the current situation of conflict, police rarely investigate complaints of violence against women outside the immediate environs of police stations and military camps because their movements are restricted to these "safe areas" making it impossible to investigate the majority of civilian complaints. In such situations, the enforcement of protection orders, monitoring of implementation, etc. become near impossible, presenting a different set of issues with regard to the operationalizing domestic violence legislation.

Women who are perceived to challenge patriarchal norms and expectations, who deal a blow to masculine status and honour, are those most likely to be subjected to violence. Therefore, perceptions of masculine status and masculinity can have the effect of controlling the behaviour patterns and sexuality of women. Thus, remedies for women centred violence must include creative and modern "masculine non-violent traditions that capture the imagination of young men".⁴²

8 Reproductive Health and Rights

It is extremely important to understand the links between violence and women's reproductive health and rights to create conditions for women to be free from the fear of violence.⁴³

Rape and sexual harassment are linked to sexual violence; trafficking is often linked to enforced sex work and marital rape and some

⁴² *Ibid.*, p.14

⁴³ *Sepali Kottegoda, Kumudini Samuel and Sarala Emmanuel, Reproductive Health Concerns and Related Violence against Women in Conflict Affected Areas in Sri Lanka (The Women and Media Collective: Colombo), 2007*

incidence of domestic violence are linked to a woman's refusal to have sex with her husband. Therefore, the protection of women from violence must also recognize women's right to sexual and reproductive rights and freedoms. In Sri Lanka there is fairly good access to contraceptives and reproductive health services in the areas not affected by the conflict and this situation is reflected in the overall indicators for fertility and contraceptive use. However, there are indications that these statistics mask serious reproductive health problems. For instance, the rate of abortion continues to be very high at approximately 800 terminations a day. Since abortion is a criminal offence, these terminations are conducted by private institutions with varying degrees of medical care and protection. The high incidence of abortion is attributed to non-availability of contraception and contraceptive failure, and studies have found that the majority of women seeking termination are married women.⁴⁴ While lack of access to contraception is obviously a reason, male attitudes towards contraceptive use, male reluctance to use condoms, women's inability to exercise free and informed choice and strong cultural barriers to engage in sex education or discuss sexual concerns of young adults, seriously affect the reproductive and sexual rights of women. In addition, the situation for women in the conflict affected north east is extremely serious, with contraceptive access and use very low and resultant fertility rates more than double the national averages.⁴⁵

The prevalence of HIV/AIDS and its impact on women is also a serious concern that impacts on women's exercise and enjoyment of reproductive rights. UNAIDS statistics indicate that there are an estimated 7,500 persons living with HIV/AIDS in Sri Lanka. However only 3,800 cases had been recorded as at 2006. There are also indications that the rate of transmission is highest among women. Sexual behavioural patterns among males practicing unsafe sex with multiple partners and the reluctance of men to use condoms

⁴⁴ *Ibid.*

⁴⁵ Asian Development Bank, United Nations, World Bank, *Assessment of Needs in the Conflict Affected Areas of the North East*, May 2003.

are contributing factors. The incidence of domestic violence and marital rape and the cultural disregard for women's choice of when and how to have sex are also contributory factors. Women are also vulnerable to HIV infection due to poverty. Many women are forced to out-migrate in search of work, often to situations that are not protective of their rights, such as domestic labour overseas. The significant incidence of sexual assault and rape among women migrant workers exposes them to the risk of HIV infection.

There is also the movement of women into the cities for sex work. While no comprehensive studies have been conducted on trafficking in Sri Lanka, there is nevertheless significant anecdotal evidence to suggest that women and girls are trafficked and subject to unsafe sexual practices which can leave them vulnerable to STD and HIV infections. Given the disparity between recorded cases and projected infections, it is also safe to assume that many women have no knowledge of the disease, no access to appropriate information, no means of protecting themselves and cannot get proper testing done. Testing for HIV/AIDS is not mandatory and there is a good policy in place that ensures confidentiality in testing. However, there is as yet no clear understanding of how to deal with protecting women from HIV transmission via husbands or partners who are HIV-positive, the rights of HIV-positive women and the issue of mother child transmissions.

9 Freedom of Expression and Women

A number of women assumed key positions in the media during 2006, breaking the stranglehold in a very male dominated industry. As the presence of women has gradually increased in news rooms, print, broadcasting and online media covering issues from education to war to human rights, defence journalism and news and analysis, key newspaper groups have appointed women editors. These include Hannah Ibrahim, Editor of the *Sunday Standard*, and Champika Liyanarachchi, Editor of the *Daily Mirror*, who were preceded

by Sonali Samarasinghe, Editor, *Morning Leader* and *Lankadeepa's* women's news editor, Indrani Peiris.

However, the number of women in decision making positions in media continues to be disproportionately low, and sexist and discriminatory reporting and advertising as regards women and gender concerns remains a major concern.

The Free Media Movement was also headed by Seetha Ranjani in 2006, allowing for a comparatively high profile of women's presence in the media and in media activism. With the intensification of the war, a number of journalists were questioned, detained or arrested in 2006 as media freedom and the freedom of expression suffered curbs and restrictions. A number of women journalists were among the detained. Parameswary Maunasami, a reporter for the Sinhala language weekly *Mawbima*, was arrested November 24 at her home in Colombo and held without charge or trial under the Prevention of Terrorism Act. Parameswary worked as both a reporter and a translator for the *Mawbima* and had written a series of articles on alleged abductions and harassment of Tamils by paramilitary groups. Subsequent to her arrest, the police reportedly alleged that she had links with women suicide cadres and had been found with explosives in her possession. However, no charges were brought against her and she was released after the Free Media Movement, together with a broad range of civil society organisations, mounted a campaign for her release. The use of anti-terrorism laws to detain journalists without trial continues to pose a serious threat to freedom of expression in the country.

10 Commercial Sex Work and Trafficking

Sri Lankan law does not criminalise prostitution in itself. It follows an "abolitionist model," in which those who exploit a woman's prostitution are criminalised. The law relating to this is found in the Brothels Ordinance which makes it an offence to live off the

earnings of prostitution.⁴⁶ However, the law found in the Vagrants Ordinance makes provision to arrest those soliciting on the public roads,⁴⁷ and the criminal justice system - an integral part of this legal regime - together with inherent corruption and abuse in the system, often victimise the woman. Women found soliciting are detained and fined; if they are unable to pay, they are sent to State detention homes. Similarly, the police raid brothels and take the women into custody rather than the owners and others involved in procuring. This happens in spite of the fact that the law is intended to penalise the brothel owners rather than those working in them. These laws are also not subject to judicial review and require legislative amendments to make them consistent with the principles of equality in CEDAW.

Despite the lack of formal statistics, media reports continue to reflect instances of trafficking of women - both internally and externally - as linked to prostitution, including conflict linked prostitution as well as labour exploitation. Sri Lanka is considered a source country for women who are trafficked to Lebanon, Saudi Arabia, Kuwait, the United Arab Emirates, Bahrain and Qatar for the purposes of coerced labour and sexual exploitation.⁴⁸

Sri Lanka has ratified the SAARC Convention on Trafficking⁴⁹ which deals with Trafficking only in the limited context of prostitution and sexual exploitation. It is important to keep in mind that trafficking is perhaps most complicated by its link to migration. It is therefore commendable that Sri Lanka took steps to amend its Penal Code in 2006, defining trafficking in conformity with the Protocol to the

⁴⁶ Brothels Ordinance, Section 2, 1889 (although section 9 (1) (a) of the Vagrants Ordinance refers more specifically to "any person who lives wholly or in part on the earnings of prostitution").

⁴⁷ Vagrants Ordinance, Section 7(a), 1842.

⁴⁸ Press Release - Consultation against Trafficking in Persons and the SAARC Convention against Trafficking in Persons and its Implementation, organised by the Women's Education and Research Centre, Colombo and the Centre for Social Research, New Delhi. 9 December 2005.

⁴⁹ 2002, ratified by Sri Lanka in May 2005.

UN Convention on Trafficking which recognises trafficking for purposes of migration as well as prostitution.

11 Tsunami Response and Gender Discrimination

In November 2005 the Reconstruction and Development Agency (RADA) was established as the lead agency for tsunami recovery. It was intended that RADA combine the work of the separate task forces in one agency, responsible for all reconstruction and development activities in post-tsunami and post-conflict areas. However, despite this initiative to provide housing, livelihood, social services, infrastructure and development assistance without discrimination for both the conflict and tsunami-displaced, there continued to be serious inconsistencies between different districts due to lack of co-ordination, political interference and the escalation of violence in the north eastern districts.

Women's organisations and networks such as the Coalition for Assisting Tsunami Affected Women (CATAW) continued to highlight gender-based discrimination in the tsunami recovery response in 2006. Of particular concern has been the allocation of state land for re-settlement where title vests in the name of male heads of household unless women are explicitly named as heads of household. The existing legal framework on land rights in the context of State grants of public land to citizens discriminates against women both in law and in practice.⁵⁰

CATAW was also concerned that the traditional practice in parts of the east where women inherited land in their own right may be jeopardised with the grants of state land to male heads of household. This move, it was felt, would effectively erode women's rights to land and property and make them dependent on male heads of household. CATAW continued to advocate for joint property ownership and for the abolition of the clause in the Land

⁵⁰ See also Chapter XI in this volume, "Post-tsunami Housing Rights."

Development Ordinance that was discriminatory against women. Though the laws on land rights pre-date the Constitution they remain valid in spite of their inconsistency with the constitutional provisions on equality. Since they cannot be challenged in Court, it is imperative that the state takes immediate action to bring the law in line with international standards and Constitutional provisions.

In December 2005, the government acknowledged that title deeds for re-location property and benefits (including cash and housing grants) had been given to male heads of household and agreed to consider taking measures to ensure that this anomaly would be corrected.

There was also continued concern that women were discriminated against in the payment of compensation for lost livelihoods. Women's livelihood needs were given little attention in the recovery process by authorities who considered the rehabilitation of traditional male occupations, such as fishing, of greater importance.

A report issued by Action Aid, reiterating the findings of the Women's Coalition for Disaster Management in the East and CATAW in the South, found that there was very little involvement of tsunami affected women and girls in decision-making processes and noted that this gap had fuelled an increase in violence against women.⁵¹ The report, based on interviews and discussions with women in six districts covering 247 villages, found that six out of ten women experienced violence in the aftermath of disaster, mainly at the hands of their husbands. "Women felt vulnerable in their own homes, in camps, and even in the public places. They were bodily assaulted, verbally abused, emotionally disturbed but only a few reported the incidents to the authorities." The report also documented structural violence that resulted in the systematic violation of women's right to information, food, water and sanitation, health, education, livelihood, land, housing and decision-making, hampering recovery and denying them dignity and security.

⁵¹ Action Aid, *Violence against women in the post-tsunami context*, 10 April 2007.

12 Women and Peace Activism

Peace activism by women increased in 2006 led by the campaign on the theme "Life not Death; Peace not War," launched in December 2005 by the coalition Sri Lankan Women for Peace and Democracy (SLWPD). The campaign demanded that the Government of Sri Lanka and the LTTE resume negotiations and put an end to the escalating violence and the disruption of the ceasefire agreement.

In January 2006, coinciding with the visit of Norwegian Facilitator Erik Solheim's visit to Jaffna, over 300 women from different districts, including Kurunegala, Puttalam, Kandy, Polonnaruwa, Anuradhapura, gathered at the Viharamaha Devi Park and marched to Lipton Circus, calling for a resumption of negotiations and the protection of the ceasefire agreement.

Throughout February, with the promise of talks between the government and the LTTE, the SLWPD commenced a Monday to Friday peace vigil at the Lipton Circus roundabout between 12.30 pm and 1.00 pm, with about 10-12 women from a number of Colombo-based civil society organizations attending, carrying placards on the theme of "Life not Death; Peace not War."

In the lead up to the Geneva talks, the SLWPD also submitted a Memorandum to President Mahinda Rajapakse and the Leader of the LTTE, calling for "A Secure Ceasefire and the Resumption of Peace Talks". This was followed up with a peace vigil on 20 February 2006 at 1.30 am on the Negombo Road at the turn off to the Katunayake Airport to wish the two delegations success at the Geneva talks. About 200 women from organizations across the country, including women clergy, took part in this torch-lit night vigil. These actions were supplemented by television advertisements in Sinhala, Tamil and English calling for "peace through dialogue and an end to the war". On 22 February, commemorating the anniversary of the ceasefire agreement, the Women and Media Collective broadcast radio spots with the message:

The Ceasefire agreement is four years old

No more war!

Let's strengthen the ceasefire

Peace – not war

Life – not death

This is an appeal from the women of Sri Lanka

In the month of May, a Vesak banner campaign was launched in Colombo, Katunayaka, Galle, Anuradhapura, Polonnaruwa, Mihintale, Habarana, Minneriya, Medirigiriya, Hingurakgoda, Kaduruwela, Dibulagala, Manampitiya and Welikanda. This was supplemented by 378 spot ads on popular radio channels during the week of Vesak by the Women and Media Collective.

On 21 May, 100 women professionals, academics and activists issued a public statement, "Women say no to War," in the form of a paid advertisement which received wide coverage and subsequent comment. The SLWPD also issued a number of statements condemning the attacks at Kebetigollawa, Senchola, Mutur, amongst others.

Women's groups also joined the broader human rights community in a series of peace actions and participated in a weekly peace demonstration at Lipton Circus every Wednesday as the conflict intensified and human rights were being violated with impunity by both the state and the LTTE.

On 21 September 2006, the SLWPD mobilised a large contingent of women from many districts islandwide – Batticaloa, Polonnaruwa, Kandy, Puttlam, Kurunegala, Balangoda, Galewela, Galle, Buttala, Badulla, Hatton, Mahiyanganaya, Jaela and Colombo – to a peace demonstration at Lipton Circus to commemorate International Peace Day, and to convey to the Government, the LTTE and the Co-Chairs to the Peace Process an urgent demand from women affected by conflict that a return to negotiation was imperative and that human rights and humanitarian norms had to be respected and protected.

By the end of the year, as the closure of the A9 road and the threats to sea transport increased the vulnerability of the northern populations, and humanitarian access was systematically curtailed, women's groups joined religious institutions in posting dry rations to Jaffna, as a gesture of humanitarian assistance as well as a mark of civilian protest against the enforced embargo on food and non-food items to the Jaffna peninsula.

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IX

MEDIA FREEDOM AND FREEDOM OF EXPRESSION: HEADING FOR A CRISIS

*Sunila Abeysekera**

1 Background

After the collapse of the peace talks in 2003, the security situation in Sri Lanka deteriorated and a high level of militarization prevailed. Arguments based on concerns regarding "national security" created an environment conducive to the imposition of a range of restrictions on the civil and political rights of citizens of Sri Lanka, including censorship and limitations on access to information. The expansion of the Emergency Regulations and the introduction of anti-democratic laws and policies in the name of confronting "terrorism" reinforced the fear psychosis and the culture of silence that became dominant features of the daily life of all Sri Lankans. The rapid escalation of the war in the second half of 2006 and the blatant disregard displayed by the State in particular, but also by the LTTE, to humanitarian norms and human rights standards, led to the destruction of lives and property, widespread displacement and the literal collapse of law and order in many parts of the island.

Throughout the years of conflict in Sri Lanka, issues of media freedom and freedom of expression have remained a priority area of concern for all those working on issues of human rights and human freedom. High levels of harassment of media personnel, including abduction, torture and murder, have brought Sri Lanka

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to the attention of media freedom organizations and human rights defenders throughout the world. The culture of impunity has led to a loss of confidence in the law enforcement agencies and in the institutions of the judiciary. None of the cases of murder and harassment that have been brought to the attention of the law enforcement agencies and of the Ministry of Media and Information have been adequately investigated. No perpetrators have been brought to justice, even where there has been clear evidence and testimony available.

In 2006, the Sri Lankan Government carried out a range of measures that impeded media freedom in the country. The Liberation Tigers of Tamil Eelam (LTTE), the Government's main antagonist in the ethnic conflict, also acted in often brutal ways to curb the free flow of ideas and opinions through the media, in areas under its control. The situation was further complicated by the presence of a range of armed groups and extremist political actors who spared no opportunity to attack and intimidate media professionals.

The State acts through imposition of censorship and control to restrict access of media persons to events and to certain geographic regions of the country. This has become a common practice over the years, through the enactment of various regulations (such as the Emergency Regulations) under the Public Security Ordinance, in the guise of "protecting national security". Criminal defamation laws are also often used to control investigative journalism, as are laws pertaining to issues of parliamentary privilege. Imposition of heavy taxes and customs duties on paper, ink and other material required for printing and publication of books, journals and newspapers, as well as embargoes placed on the transport of these materials to the conflict-affected areas, also proved to be a major obstacle to those engaged in the dissemination of information in the country.

Ownership of the electronic media with the widest transmission outreach remains in the hands of the State, as does the ownership of the largest newspaper publishing company, the Associated

Newspapers of Ceylon Ltd. Appointment to decision-making positions in these State-owned media institutions is done on the basis of political favour rather than on the basis of expertise or professional qualifications. The private media institutions almost all continue to be guided by the commercial and political interests of the family or enterprise that owns the institution. There is a proliferation of FM radio stations in all three national languages, as well as of several satellite-based television channels. A new aspect of communication and information that has grown in Sri Lanka in the most recent years is the widespread use of websites and blog sites to share information and exchange ideas relating to Sri Lankan issues.

The LTTE and other armed groups, including paramilitary groups, have issued threats and carried out various acts of intimidation of media persons over the years. The International Mission on media freedom that visited the island from 9 – 11 October 2006 concluded that “the LTTE were guilty of a number of serious press freedom violations,” including one murder, abduction and harassment, and extra-legal pressure.¹ In the North and East, the distribution of Tamil national newspapers ground to a virtual halt due to attacks and intimidation of newspaper vendors and distributors. Newspaper offices were attacked and burned down. Some journalists were assassinated; others were abducted. Media professionals have been indicted on a range of charges from contempt of court to defamation. Many journalists have been harassed and assaulted while carrying out their job, covering public events. Some have fled the country in the face of these acts of intimidation².

In addition, as the context of ethnic conflict has grown, Sri Lanka has seen the emergence of a broader range of non-state actors, primarily from conservative and sectarian ethnic and religious

¹ International Press Freedom and Freedom of Expression mission to Sri Lanka, *Press Freedom and Freedom of Expression in Sri Lanka: Struggle for Survival*, January 2007

² International Press Freedom and Freedom of Expression Mission to SL, *Press Freedom and Freedom of Expression in Sri Lanka: Struggle for Survival*, January 2007.

communities, who promote "purity" and traditionalism defined within narrow ethnic and religious confines at the cost of moving forward towards a plural and multi-cultural society. This extremism is most often demonstrated through speeches made by ideologues of this point of view at public meetings, through posters and leaflets, and through intense lobbying and advocacy with the government and state institutions.

The repression and intimidation has in some ways strengthened the struggle for media freedom. It has also led to the creation of constructive alliances and coalitions among media groups both within the country and abroad. It has, for instance, led to strong collaborative lobbying and advocacy on media freedom issues nationally and internationally. It has also enabled the building of some institutions such as the Sri Lanka Press Institute, the National College of Journalism and the Press Complaints Commission as collaborative efforts between the government, media institutions and media personnel.

2 Current Context

With the intensification of the conflict and the deterioration of the security situation in 2006, Sri Lanka experienced many inroads on the freedom of expression, including murder and abduction of journalists, and harassment and assault of journalists while discharging their responsibilities.

The State displayed little sensitivity to its national and international obligations to respect and promote media freedom and the freedom of expression. Rather, it acted to control and curb media freedom. In so doing, the State and State agencies including the security forces engaged in their own brand of intimidation of journalists and media professionals. The LTTE also restricted access to information to the communities that live in areas under its control in the North and East of the country, as well as engaged in intimidation of

journalists, media persons and distributors and sellers of newspapers and journals. The presence of armed paramilitary groups that carried out their own campaigns of intimidation and harassment of specific newspapers and media persons who they identified as being critical of their activities, added a further layer of complexity to the situation.

The often biased coverage of incidents related to the conflict as well as media blackouts on the fall-out of the hostilities eroded public confidence in the media throughout the country. While the security forces began to take selected pro-government journalists with them on military operations, following a policy of "embedded journalism," access to areas in the North and East, even to parts of the region in which security operations were concluded, were denied by the military time and again to independent media teams. The LTTE used its own media unit to document and disseminate their own information regarding the conflict which is biased in their favour, and denied access to other media.

The introduction of new Emergency Regulations on the Prevention and Prohibition of Terrorism and Specified Terrorist Activities No. 7 of 2006, enacted on 6 December, contained several features that led to concern regarding their impact on freedom of expression, and on whether the appropriate balance between freedom of expression and its limitations on the grounds of national security and the prevention of terrorism had been maintained.³ While there is general acceptance that the prevention of terrorism is a legitimate aim for any democratic government, and that the process of legally defining terrorism and specifying terrorist activities that necessitate penal sanctions is, in principle, justified and necessary, there is also recognition that extreme caution must be exercised to ensure that such measures are not so broad that they may be open to misuse and abuse. In particular, the wide scope of activities

³ "Statement on the New Emergency Measures", Free Media Movement 2006 Available from http://www.freemediasrilanka.org/index.php?action=con_all_full&id=37§ion=news_press

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prohibited by Regulations 2, 3 and 4 and the definition of terrorism in Regulation 16 (i) are dangerously vague and allow for the possible criminalization of democratically legitimate activities, including the activities of the media and of civil society.⁴

The prohibition on “transactions” with persons or organisations identified as terrorists by the new regulations, unless such transactions have been approved by, and written permission obtained from, the Competent Authority (appointed under Regulation 11), could also serve to limit access to information from non-governmental sources. Similarly, the new feature of an Appeals Tribunal (Regulations 13 and 14) cannot be expected to perform the role of an independent reviewer of executive action, given that the body is composed of Secretaries to specified Ministries.⁵

Media organizations expressed their grave concern regarding these Regulations, which had the potential of leading to censorship and self-censorship within the media community. This was borne out by the column in the *Sunday Times* of 17 December 2006 written by Iqbal Athas, one of the best known and widely read defence columnists in Sri Lanka. Athas censored himself twice in his column:

The LTTE was stepping up its military offensives in the recent weeks. The Security Forces have evolved their own counter measures. A fuller discussion on this issue, which is of public interest, is not possible in the light of the newly-introduced Prevention and Prohibition of Terrorism and Specified Terrorist Activities Regulations.

⁴ “Statement on the Introduction of Emergency (Prevention and Prohibition of Terrorism) Regulations”, Centre for Policy Alternatives 2006. Available from http://www.cpalanka.org/psg/STATEMENT_on_Emergency_Regulations2006.pdf

⁵ *Emergency (Prevention and Prohibition of Terrorism and Specified Terrorist Activities) Regulations*, Act No. 7 of 2006

The Sunday Times will not disclose casualty counts in the light of the new Emergency Regulations. Wounded soldiers were airlifted from the area to Colombo both on Sunday and Monday nights for immediate medical attention.⁶

On 20 December, two senior journalists Ranga Jayasuriya (News Editor, *The Sunday Observer*) and Lionel Yodasinghe (Associate Editor, *The Sunday Observer*) were summoned to the headquarters of the Criminal Investigation Division (CID) of the police and questioned under the newly enacted anti-terror laws regarding a report related to defence matters published in *The Sunday Observer* of 17 December. Prasanna Fonseka (Senior Journalist, *Silumina*) was summoned to the CID on 23 December on the same issue. Notably, all three journalists work for the State-owned Lake House newspaper group. The investigating officers told the journalists they had to disclose their sources to the police, and if they did not do so they could be detained under these laws⁷.

Following the offensive against the LTTE that was launched by the Sri Lankan security forces in August 2006, there were many restrictions placed on access by media persons to conflict areas. Army roadblocks also prevented media persons from reaching places in the East that were far away from any fighting. Even when official passes were obtained, after a wait of a few days, completely free movement was not allowed. Journalists complained that the restrictions made it very hard to report on the fighting and have access to the victims. It was only on 5 August that the Sri Lankan Navy took journalists to Mutur from Trincomalee. This was the day after the LTTE had pulled out and Government troops moved in.

⁶ "Country at a Cross Roads for Christmas," I. Athas, *Sunday Times*, 17 December 2006.

⁷ http://www.freemediasrilanka.org/English/arc_news.php?year=2006&month=12

The general climate of fear also generates its own modes of self-censorship within the media community that has devastating effects on their credibility and on their capacity to be seen as purveyors of balanced information.

Following years of pressure from journalists' groups and media advocacy groups, the Government instituted a Social Security Benefits Scheme for media practitioners. The Defence Ministry also made available to media personnel an emergency telephone line for immediate responses to urgent issues.

3 Restrictions on media freedom

While the Government imposed a range of restrictions on the media without any consultation with media associations, the security forces and police also used their own powers to impose limitations on access and on coverage of certain aspects of the situation in the country.

The trend to deny access to information was reinforced on 6 June by the Government's decision to seal the premises of the private satellite broadcasting station CBN Sat over a year after the company began broadcasting in Sri Lanka. The services offered by CBN Sat had been publicly advertised and the company had enrolled many Sri Lankan subscribers who wished to watch satellite broadcast programmes, including foreign news and entertainment. On 15 June 2006, the Government arbitrarily closed down yet another satellite server, LBN services. It was only after appealing to the Supreme Court that CBN Sat was able to resume transmission on 2 December 2006.⁸

On 23 June, Minister of Information Mr. Anura Priyadarshana Yapa announced that the cabinet had approved the restoration

⁸ See *Sonic Net Technologies (Pvt.) Ltd v. Mahindadasa, Vaidyalankara and others* (2006) SC (FR) Application No. 236/2006.

of the Sri Lanka Press Council and the re-introduction of State-controlled regulation of the media. He said that appointments to the Press Council would be made in the next weeks. This created concern among human rights defenders as well as media persons. Throughout the past twenty years, international press freedom groups and human rights organizations, as well as local and national groups, have highlighted the fact that the Press Council Law⁹ has penal provisions that are in direct violation of the principles of freedom of expression, and therefore needs major revision. Although no steps were taken in this direction in 2006, the fact that the Minister held out the possibility of restoring the Press Council was in itself a veiled threat.

In July, without any dialogue or consultation with the media community, the Government decided that with effect from 15 July 2006, a new levy would be imposed on foreign films and teledramas. This makes it almost impossible for these to be broadcast on television in Sri Lanka. As a consequence, television stations have to pay Rs. 75,000 to Rs. 90,000 (approximately US\$725 to 870) per half an hour for broadcast of foreign films or teledramas. A levy of one million rupees (approx. US\$9,680) is also imposed, as a consequence of the Act, on any foreign commercials shown on local television. According to the Act, educational, children's or award winning films will be exempt from the tax.¹⁰

On 20 September, the Ministry of Defence, Public Security, Law and Order sent a letter to media institutions, indirectly requesting that all news related to national security be submitted to the Media Centre for National Security (MCNS) before publication, telecast or broadcast. The letter clarified the role of the MCNS: "to ensure that all national security and defence-related news is disseminated to local and international media promptly and accurately without censoring." It further stated: "Please be advised that any news gathered by your institution through your own sources with regard

⁹ Sri Lanka Press Council Law No. 5 of 1973

¹⁰ *Ibid.*

to national security and defence should be subjected to clarification and confirmation from the MCNS in order to ensure that correct information is published, telecast or broadcast.”

Responding to this letter, the Free Media Movement said that the request that every news item be cleared by the MCNS was “impractical, unnecessary and tantamount to government censorship” and challenged the Defence Ministry’s assumption that only MCNS would have accurate and impartial knowledge of the situation, given that experience of over two decades proves that in a context of heightened violence, no party to the conflict gives accurate news related to wrong-doings by themselves.¹¹

3.1 Censorship of the arts and culture

The Public Performances Board (PPB) is responsible for reviewing every public performance – stage and screen – and granting certification for universal or restricted performance. The PPB has the authority to ban any public performance as being a serious challenge to existing legal norms and standards in Sri Lanka. The PPB is appointed by the Ministry of Defence, with reference to the President.

Guidelines to prevent the exposure of children to scenes that may have an adverse impact on their development as well as to prevent the depiction of extreme violence and brutality form a part of the framework of these mechanisms in almost every country. The existence of such a mechanism provides accountability and avenues for redress to those who may feel their artistic freedom has been curtailed by the decision to restrict viewing of certain public performances for children. However, in 2006, there were several instances in which the authority of the PPB was undermined by groups promoting specific religious or cultural interests. This has

¹¹ “Defence Ministry imposes unofficial censorship”, Free Media Movement, 29 September 2006. Available at http://www.freemediasrilanka.org/index.php?action=con_news_full&id=328§ion=news

been seen by human rights defenders as creating a very dangerous precedent in terms of all the performing arts.

3.1.1 *Da Vinci Code*

In May 2006, newspapers reported that the President had called on the Public Performances Board to ban the film "*Da Vinci Code*" in response to an appeal by the Catholic Bishops' Conference of Sri Lanka. "Ordering" the Board to act in a particular way, even before the film had been submitted by the distributors for a licence, was viewed as excessive use of the executive powers granted to the President.

3.1.2 *Aksharaya* (Letter of Fire)

In April 2006, a controversy emerged around the film *Aksharaya*, directed by award-winning Sri Lankan film director Asoka Handagama, with a declaration by the Minister for Cultural Affairs that the film would not be permitted to be screened in Sri Lanka.

The fact that *Aksharaya* had been screened before the Public Performances Board – the only body in the country mandated by law to review and certify films for public screening – and had already been granted an X (Adults Only) certificate when the furore broke out and its screening was prohibited, is the most disturbing feature of this controversy. *The National Film Corporation* and the Ministry of Cultural Affairs and National Heritage were instrumental in overriding the PPB in this regard.

The film was surrounded by controversy regarding its contents, although most people who criticize it have not seen the film in its entirety. On 28 April 2006, responding to the campaign to prohibit screening of the film, the Free Media Movement said, "The film is an unflinching look at the darker side of humanity, exploring relationships between mother and son, father and daughter, gender

and society, morality and sexuality, of those in positions of power and those excluded from it.”

Both the National Film Corporation and the Ministry of Cultural Affairs and National Heritage displayed a strong streak of authoritarianism in this matter, disrespecting a State institution such as the PPB and bringing in a range of “moral” arguments against the film that in fact speak to cultural extremism and bigotry. Among other matters, director Handagama was accused of child abuse on the basis that the child actor in the film was exposed to situations which would allegedly do him harm. Words like sexual exploitation, incest, depravity, obscenity, pornography were freely thrown around in the press and the child and his parents were subjected to persecution of the worst kind. In response, Handagama filed a fundamental rights petition and on May 25 his leave to proceed was granted by the Supreme Court in a bench led by Justice Shirani Bandaranayake.

3.2 Hate speech

There were also all-out and often vituperative attacks, including extremely personal attacks, on journalists and on media personnel, led by activists of various ultra-nationalist groups that functioned under the rubric of anti-terrorism. Statements made by responsible Government officials often reinforced the tone of these attacks. Those who support a negotiated settlement of the conflict were labelled as “traitors” and LTTE supporters.

On 1 February 2006, the Propaganda Secretary of the Peoples’ Liberation Front (JVP), Mr. Wimal Weerawansa, speaking in Parliament, accused Mr. Lasanatha Wickremetunge, the editor of *The Sunday Leader*, of supporting the terrorism actions of the LTTE and being a traitor to Sri Lanka. On 25 May, speaking in Parliament, MP Weerawansa accused some southern journalists of serving as spies and agents of the LTTE. Referring to Lake House and to the Sri Lanka Broadcasting Corporation, both State-owned

and controlled institutions, he levelled the most serious of charges against media persons employed by them.

Among those he named was Priyani Gunaratne, a woman broadcaster working at the Sri Lanka Broadcasting Corporation (SLBC), whose name had already appeared in the *Lanka Truth* website a few days earlier. She was accused of reporting immediately to the LTTE on whatever takes place in Colombo, using the computers at the SLBC. Ms Gunaratna, mother of two, has worked at the SLBC for many years. For the last several years, she has been the producer in charge of the very popular early morning radio programme, *Subharati*, which often focused on issues relating to peace in Sri Lanka. Because of the nature of these programmes, and in keeping with the demands of her profession, she had established links with the LTTE as the second party to the peace process.

In May, the website *Lanka Truth* as well as the newspaper *Lanka* published several reports that supported Mr. Weerawansa's statements. The journal *Muragala*, published by the Patriotic People's Movement, of which Wimal Weerawansa is a leader, has also been publishing similar reports from a different perspective.

In its comment on the visit made by representatives of five media organizations to Kilinochchi on 16 May, *Lanka Truth* said that the LTTE leader they met, Mr. Tamilchelvam, appealed to the group to expose journalists and media institutions that are engaged in campaigning against the LTTE and that Mr. Sunanda Deshapriya, the Convenor of the Free Media Movement, assured Tamilchelvam that they would try to do so. According to *Lanka Truth*, "This situation can be extremely dangerous for those media persons in the south who are against terrorism. Political analysts say this situation also poses a grave danger to the country."

On 2 September, the *Lanka* newspaper carried a full page article accusing some prominent journalists working in the State-owned newspaper institution Lake House as LTTE sympathizers and NGO

agents. On 9 September, JVP Propaganda Secretary Weerawansa accused the Wijeya group of newspapers and the MBC/MTV network of being supportive of the LTTE. He called on journalists working in these institutions to resign and find other jobs. On 15 September, posters for *Lanka* appeared in Colombo and other areas carrying an accusation of MTV/MBC *Sirasa* TV being a "Tiger" *Sirasa*. On 17 September, the *Lanka* carried a two-page article, with photographs of the owner of MTV/MBC network, accusing him of using his network to promote the LTTE.

On 6 November, in an interview given to the *Daily News*, the new IGP Victor Perera accused the media of publishing false information about a wave of kidnappings of Tamils in the country. George David of Reuters, also working for the broadcast group *Sirasa*, was threatened by soldiers in Trincomalee, eastern Sri Lanka on the basis that he looked "suspicious", and was told: "We have the power and we can do what we want".¹²

During the peace talks held in Geneva at the end of October, the head of the Government delegation, Health Minister Nimal Siripala de Silva, accused the Sinhalese section of the BBC World Service of supporting the LTTE and said that a BBC reporter was on the payroll of the LTTE.¹³

4 The Tamil Media

It is important to place on record here the particular difficulties confronting media persons who are Tamil and who work in the Tamil language, in the present context of intensified conflict. The report of the International Mission on Media Freedom in October 2006 pointed out that they found "extreme differences" in the experiences of journalists working in the different languages, and

¹² http://www.rsf.org/article.php3?id_article=19659 (Reporters sans Frontières)

¹³ <http://www.lankanewspapers.com/news/2006/11/9187.html>

remarked that the Sinhala and English language media persons "functioned within a comparatively less constricted and dangerous environment than the Tamil language media".¹⁴ Since the murder of Rohana Kumara, editor of *Satana*, in 2001, every single journalist and media person murdered in Sri Lanka has been a Tamil, except for Sampath Lakmal in July 2006. Nine media practitioners were killed in the period from August 2005 to October 2006. The majority of media persons who have been subject to intimidation in one way or the other are also Tamil. The media institutions that have been bombed, set on fire and attacked are also almost all those engaged in publishing and broadcasting in Tamil. Tamil media persons in the North, in particular, have faced tremendous pressure in the form of intimidation, killings and physical attacks. Regular curfews and imposition of embargoes on the transport of newsprint has rendered their professional lives literally impossible. From both the East and the North, media persons have sought refuge in countries outside Sri Lanka due to the life-threatening nature of their profession. In this environment, when presenting the various views and opinions in Tamil society becomes imperative in the search for a just and sustainable peace in Sri Lanka, the silencing of alternate voices from within Tamil society represents a slide down the path to sustained discrimination and hostility between the communities.

The year 2006 saw a marked increase in search operations at media institutions, the arrest and other forms of harassment of journalists, once again with a particular focus on Tamil media institutions and media workers. The refusal of members of the security forces and of the security personnel in charge of special security for key politicians and government officials to respect media accreditation cards issued by the Department of Information has created many problems for media professionals, especially for those working in the Tamil language.

¹⁴ <http://www.freemediasrilanka.org/English/files/2151final%20report%20feb%202007.pdf> (Press Freedom & Freedom of Expression in SL: Struggle for survival, International Press Freedom & Freedom of Expression Mission to SL., Jan. 2007, p.12.)

An incident that occurred in May 2006 is a good example of the complexity of the situation. On 3 May, World Press Freedom Day, two Tamil websites, *Sangati* and *Pidau* carried a statement from a source identifying itself as the "Ravana Force,"¹⁵ calling on Tamil journalists working in media institutions owned or controlled by the State to resign from their jobs immediately. The statement argued that Tamil journalists should not be working in the service of a Government that is murdering media persons who work in the defence of the Tamil homeland. The statement was re-posted on the same sites on 7 May. The official website of the Liberation Tigers of Tamil Eelam, *Nidarshanam*, carried the statement on 6 May. The Sri Lanka Working Journalists' Association (SLWJA), the Federation of Media Employees Trade Unions (FMEATU) the Sri Lanka Muslim Media Forum (SLMMF) and the Free Media Movement (FMM) issued a joint statement condemning this act of intimidation.

On 16 May, representatives of the Working Journalists' Association, the Media Workers Trade Union Federation, the Free Media Movement, the Tamil Journalists' Forum and the Muslim Media Forum, travelled to Kilinochchi and met with Mr. Tamilchelvam, head of the Political Wing of the LTTE, to express their concern regarding this statement and to explore its veracity. The delegation was able to obtain his commitment that the LTTE had nothing to do with this statement. However, Tamil media persons working in State institutions felt the statement to be a direct threat to their lives. Two weeks after the visits to Kilinochchi, leading members of the delegation were summoned by the Police and were required to make a statement regarding their visit. This incident demonstrates the environment of fear and danger that pervades journalists' lives and work in Sri Lanka today.

The Tamil newspaper *Uthayan*, published from Jaffna, has perhaps been the worst affected, and provides a case study for the types of problems faced by the media in conflict areas of the country. In

¹⁵ In the Tamil epic poem the Ramayana, Ravana is the demon king of Lanka.

May, five masked gunmen killed two employees and wounded at least two others, one seriously, when they sprayed the paper's Jaffna office with automatic weapons fire. On 15 August 2006, the *Uthayan* driver was killed as he was distributing newspapers. On 19 August, warehouses containing their paper stocks and printing equipment were burned to the ground. In September, armed men stormed the offices of the paper and demanded that a statement they brought with them be printed in the next day's edition¹⁶.

Managing Director Saravanapavan received no assistance from the State though he repeatedly asked the Government for protection for his staff. He himself moved to Colombo for security reasons, while some *Uthayan* staffers, fearing for their lives, began living in the newspaper's offices. When Saravanapavan reported the September incident – which had taken place during curfew hours in a high security area in the Jaffna peninsula – to the Civil Affairs Office in Jaffna, saying that given the circumstances he suspected the involvement of State agents in the incident, he received no response.¹⁷

On 23 October, a group of 10 to 15 armed men stopped a private bus and a van transporting the Tamil daily *Veerakesari* at Kiran on the road to Batticaloa and burned nearly 10,000 copies of the paper. Three months earlier, the shop of the newspaper's agent, Murugesu & Sons, located on the Main Street in Batticaloa, was burned down by an armed gang. Sales of two other Tamil dailies, *Sudar Oli* and *Thinakkural*, were "banned" at the beginning of the year in Batticaloa and Amparai. The circumstances in which these incidents have taken place – time, place etc. – have led to speculation that the Karuna faction is responsible. Despite a Government statement condemning this act as a violation of press freedom and

¹⁶ <http://www.mail-archive.com/zestmedia@yahooogroups.com/msg02163.html> (Zestmedia, Sri Lanka: Tamil newspaper pleads for protection from attacks, by Tarun Udwal, Sat. 9 Sep. 2006)

¹⁷ <http://cpj.org/2006/09/sri-lanka-tamil-newspaper-pleads-for-protection-fr.php> (Committee to Protect Journalists, "Sri Lanka: Tamil newspaper pleads for protection from attacks," 8 September 2006.)

an order from the President himself to the IGP to prevent further attacks on Tamil newspapers on 27 October, the restrictions on sales continue to be operative in Batticaloa in particular.¹⁸

On November 6, the commander of the Army's 512 Brigade in Jaffna summoned the editors of three Jaffna dailies, *Uthayan*, *Walampuri*, and *Yarl Thinankkural*, and warned them against publishing any news critical of the military in Jaffna. They were also asked not to carry any LTTE-related news, including messages and speeches related to the LTTE Heroes' Week in November. In particular, they were asked not to print a message from LTTE leader, Veluppillai Prabhakaran, on "Heroes Day," 27 November. These three newspapers had recently published an interview with the former Jaffna district political leader of LTTE, Eelamparthi, in which he was critical of the military presence in Jaffna and of the State's response to the severe humanitarian crisis in the Jaffna peninsula.

The Free Media Movement pointed out that these veiled threats were in spite of assurances given to the International Mission on Media Freedom in October 2006, by Defence Spokesperson and Minister Keheliya Rambukwella, that no military/police officer has any right to censor or threaten the media, and would not be allowed to do so.

5 The *Ravaya* Complaint

In the case which the Editor of the Sinhala weekly tabloid, *Ravaya*, Victor Ivan, submitted a petition to the Human Rights Committee (established under Article 28 of the International Covenant on Civil and Political Rights), the Committee found the Sri Lankan State in violation of the rights guaranteed to Mr. Ivan under Articles 14. 3 (c) and Article 19 of the Covenant and called upon the Government

¹⁸ <http://www.asiantribune.com/index.php?q=node\2837> (LTTE's legacy of banning opposition, Asian Tribune, 28 Oct. 2006) :

to compensate him, publish this judgment in full and provide a response within 90 days.

Victor Ivan had claimed that he had been indicted several times for alleged defamation of Ministers and high level officials, and that these indictments had been indiscriminately and arbitrarily transmitted by then Attorney General, Sarath Silva, to Sri Lanka's High Court, without proper assessment of the facts as required under Sri Lankan legislation, and that they had been designed to harass him. As a result of these prosecutions, Ivan claimed he had been intimidated, his freedom of expression restricted and the publication of his newspaper obstructed.

At the time he made his submission to the CCPR, three indictments had been delivered against him, dated 26 June 1996, 31 March 1997 and 30 September 1997 (Case Nr. 9128/97). All were pending before the High Court. The National Human Rights Commission in April recommended payment of Rs. 800,000 to Victor Ivan.

The Supreme Court decision in the Singarasa case, which challenged Sri Lanka's accession to the Optional Protocol to the Covenant on Civil and Political Rights on technical grounds, called into question the ruling of the Human Rights Committee on the complaint of Victor Ivan as well.¹⁹

6 Media Resistance

Throughout the year, the Sri Lanka Working Journalists' Association, the Sri Lanka Tamil Media Alliance, the Sri Lanka Muslim Media Forum, the Media Employees Trade Union Federation and the Free Media Movement organized demonstrations and meetings aimed at drawing public attention to the deteriorating situation with regard to media freedom and the freedom of expression.

¹⁹ *Singarasa v. Attorney General*, SCM 15.09.2006

From 9 to 11 October, a high-level International Mission on Media Freedom consisting of five persons undertook a fact-finding and advocacy visit to Sri Lanka. The Mission was supported by international media freedom organizations including Article XIX, the Committee to Protect Journalists (CPJ), FreeVoice, International Federation of Journalists (IFJ), International Media Support (IMS), International Press Institute (IPI), International News Safety Institute (INSI), Reporters without Borders (RSF), South Asia Press Commission (SAPC), UN Educational, Scientific and Cultural Organization (UNESCO), World Association of Community Radio Broadcasters (AMARC), World Association of Newspapers (WAN) and World Press Freedom Committee (WPFC). The five member team represented the IFJ, IMS, IPI, INSI and UNESCO.²⁰

One month prior to this high level visit, a group of Sri Lankan media practitioners, scholars and other concerned activists drafted a declaration on the theme of "The Role of Media in National Unity" in an effort to combat the shrinking space for media and other forms of expression. This was an initial attempt at bringing these actors together and while there were no immediate outcomes, the effort provided an important platform for future collective action.²¹

7 Key Issues for the Future

Media freedom and freedom of expression were under serious threat in 2006. The following areas were of particular concern, and

²⁰ See footnote 1 above for report.

²¹ The Weligama Declaration was drafted on 9-10 September 2006 and signed by the following organizations: Sri Lanka Working Journalists Association, Federation of Media Employees Trade Unions, Sri Lanka Muslim Media Forum, Sri Lanka Tamil Media Forum, Free Media Movement, Editors Guild of Sri Lanka, Newspaper Society of Sri Lanka, Sri Lanka Photo Journalists' Association, Sri Lanka Environment Journalists' Association, South Asia Free Media Association. The full text of the Declaration can be found at <http://www.ifex.org/en/content/view/full/78541/f>

will require careful monitoring to prevent the further erosion of media freedom:

1. The lack of adequate and satisfactory investigations into complaints of murder, assault and intimidation of journalists and media persons is a part of the prevailing environment of impunity which leads to silencing and self-censorship within the media community.
2. The hate speech campaign has targeted individuals as well as civil society organizations, people actively working for peace in Sri Lanka and journalists covering the conflict who advocate a negotiated political resolution of the conflict. The identification of these people as anti-national, traitors, and a social menace who should be eliminated, in the language of war and hate, means silencing through death.

The leading media institutions in the country, as well as international media freedom watchdogs, have soundly condemned the campaign of hate speech which intimidates media persons who are trying to present objective and unbiased views of the present situation and sends out a clear message to the public that the principle of freedom of expression is not recognized by mainstream political players and partners of the government.

The attempt to denounce as a traitor anyone who meets with, or writes about, the LTTE opposes a key principle of conflict reporting and is contrary to all tenets on media freedom, as has been pointed out by the Free Media Movement in various statements it has issued regarding this situation.

3. The harassment and intimidation of journalists in general inhibit the media's responsibility to hold authorities accountable, by obstructing critical reporting and hindering the media's capacity

to question the government, the opposition, the LTTE and any other party regarding allegations of abuse, violations, violence and corruption. Furthermore, such accusations may result in threats to the life of the journalist, thus contributing to the declining levels of safety for journalists in Sri Lanka.

4. The censorship of films, teledramas, FM radio stations and satellite/cable television servers points to growing trends of conservatism and extremism that are used to justify the violation of the freedom of expression of cultural workers including film-makers and artists, while at the same infringing on the right of people to have access to information and entertainment of their choice, bound only by regulations pertaining to the rights and dignity of all communities. The arbitrary nature of the impositions of prohibition and sanction in all these cases which took place in May and June 2006 pointed to a growing trend towards undemocratic and autocratic procedures by those in power and authority and lack of regard for principles and standards of the freedom of expression.

8 Chronology of Events: Violations of Media Freedom and the Freedom of Expression in 2006

January 12: The editor of the *Sunday Leader* newspaper, Lasantha Wickrematunga, complained to the Inspector General of Police (IGP) that President Mahinda Rajapakse threatened him on the telephone using abusive language, on the grounds that the *Sunday Leader* newspaper had mentioned his wife.

January 24: Freelance journalist and photographer Sugirdharajan, an employee of the Trincomalee harbour, was shot dead as he waited for a bus to go to work in the morning. He had published photographs and news reports critical of the army and of paramilitary groups active in Trincomalee, in the newspaper *Sudar Oli*. His photographs

of the five students killed in Trincomalee on January 2, 2006, had helped contest the original reports that they had been killed by grenades.

February 1: In Parliament, the Propaganda Secretary of the JVP (People's Liberation Front), Wimal Weerawansa, launched into a scathing attack on *Sunday Leader* Editor, Lasantha Wickrematunge, branding him a traitor and accusing the *Sunday Leader* of conspiring with the LTTE to promote terrorism.

February 10: Police summoned and interrogated members of the Sinhala-language weekly *Irudina*, and its English counterpart, *The Sunday Leader*, on February 10, 2006, following an article on claymore mines published by *Irudina* on January 22, 2006.

February 11: Srilal Priyantha, Sub-editor of *Sathdina* Sinhala weekly newspaper and other members of the staff along with the proprietor Ramanayake, were brutally attacked after being mistaken as *Irudina* employees, while they were putting up promotional posters for the newspaper near the old Police station at Welikada, Rajagiriya. They identified Janaka Ranawake, opposition leader of the Kotte Urban Council, as leading the gang of attackers.

February 16: Prasad Purnamal, a provincial journalist working for MTV television network and ANCL newspapers, was assaulted, his video camera worth Rs. 100,000 (approx. US\$979) was smashed and his still camera worth Rs.30,000 (approx. US\$294) taken away by supporters of the ruling political party (the SLFP) in Puttalam, a town on the north-western coast, while he was covering a clash between two groups of ruling party supporters, who had submitted nominations for the local government elections, scheduled for 30 March 2006. He incurred minor injuries and made a complaint to the police

February 26: journalist Claude Gurubavila and lawyer Manoj Thilanga, who present a weekly political review called "*Deshapalana*

Sathiya on *Sawarnavahini* TV were threatened around midnight by two armed persons who emerged from a black van at a stop light, aiming a pistol at them and mentioning the program they presented, which had been suspended by the station a few weeks prior to this incident.

Late February 2006: two Tamil-speaking provincial journalists, Shashi Kumar of Sooriyan FM radio and Sali Mohamed of *Sudar Oli* newspaper, complained of receiving regular death threats for over a month.

May 3: a group of unidentified men attacked the office of the *Uthayan* newspaper in the northern city of Jaffna. Suresh Kumar, the Marketing Manager and Ranjithkumar, working in the Circulation Department, were killed. Five others were injured and the office damaged. The Police took six persons into custody in this regard but allowed bail. Some sources in Jaffna have alleged that these persons were not involved in the incident at all.

Sivanandan Sivaramya, a relief Tamil news announcer of the Sri Lanka Broadcasting Corporation (the State radio station) was arrested while trying to enter the premises of the Bandaranaike Convention Centre where the international conference to mark World Press Freedom Day was being held.

May 24: Three Tamil-language trainee journalists of the Sri Lanka College of Journalism (SLCJ) were harassed by students protesting against the Liberation Tigers of the Tamil Eelam (LTTE) while carrying out a field-work assignment from the College. The trainees were detained and questioned by the Police on the basis of a complaint made by the organizers of the demonstration against video filming by the trainees. The protest was organised by the Inter-University Students Union and Inter-University Bhikku Union.

May 23: the President was reported as having "ordered" the Public Performances Board to "ban" the film *Da Vinci Code* in response to an appeal by the Catholic Bishops' Conference.

June 6: Private satellite broadcasting station CBN Sat sealed and denied permission to transmit.

June 7: a Supreme Court bench, comprising of Chief Justice Sarath Silva and Justices Nihal Jayasinghe and Shiranee Thilakawardena, terminated the proceedings in five contempt of court charges against the editor-in-chief of *Sunday Leader* Lasantha Wickrematunge and two of its journalists, Amantha Perera and Frederica Jansz. Contempt of court charges had been filed against the journalists following a reference by the Permanent Commission to Investigate Allegations of Bribery and Corruption that a series of articles relating to the Commission, published in the *Sunday Leader*, were in contempt of the Commission and thereby in contempt of the Court.

June 17: a media team from BBC comprising Andrew Harding (Correspondent), Chang Chun Yuen (Cameraman), Shelley Thakral (Producer), Dushiyanthini Kanagasabapathipillai (Producer), Rajeev Bernard (Producer) and Dumeetha Luthra (Correspondent) were denied access to the northern district of Mannar where a series of violent incidents had taken place during the preceding days.

June 23: Mass Media and Information Minister Anura Priyadarshana Yapa announced that the Cabinet had approved the restoration of the Press Council, a media regulatory body with the authority to penalize news outlets and journalists. The Sri Lanka Press Council, established under a 1973 law, became dormant in 2002 after local media organizations formed an independent Press Complaints Commission. The law prohibits publication of cabinet decisions and some defence and fiscal matters.

July 2: Freelance journalist Sampath Lakmal de Silva was shot dead by an unknown group after leaving his home in Boralesgamuwa,

a suburb of Colombo, at about 5 a.m. His body was found about three kilometres away. His mother said he went out to meet some military operatives, known to him for some time.

July 25: Distribution of Tamil newspapers *Sudar Oli* and *Thinakkural* came to a halt in Batticaloa, following threats from armed paramilitaries. According to the management of *Sudar Oli*, on 24 July 2006 their transport agent received a threatening telephone call saying that he would be shot dead if he did not stop distributing the newspapers.

July 27: Newspaper vendor Mariathas Manojanraj was killed by a mine that was set off as he was going to Jaffna town to collect newspapers for distribution.

August 8: Reporters Without Borders called on both sides in Sri Lanka's civil war to allow journalists access to conflict areas. Several Sri Lankan and foreign journalists, including some from the BBC, were refused access to Mutur by the Sri Lankan army on August 7. The LTTE has also not allowed independent journalists to report from the areas under their control.

August 16: Sathasivam Baskaran (44), driver cum distributor of the Jaffna based newspaper *Uthayan*, was shot dead in his delivery vehicle, which was clearly marked, in an area under control of the Sri Lankan security forces. He had been taking advantage of the temporary lifting of an army curfew to deliver copies of the newspaper.

On the same day at about 4 pm, the offices of the newspaper *Sudar Oli* in Colombo were searched by armed state security personnel, without advance warning. *Sudar Oli* is a Tamil-language daily published by the Uthayan group. Security personnel directly approached staff without informing the Managing Director, despite his presence. They searched the office thoroughly, including

the printing press area, the finance section, the circulation section, and the editorial and pre-press sections. They demanded to see the national identity cards of editorial staff, even though the staff possessed media identity cards provided by the Information Department.

August 18: Two warehouses belonging to the Jaffna based Tamil newspaper *Uthayan* were burned down by four persons who entered the warehouses forcibly, chased away the security guards and set fire to the news print. The buildings were damaged completely.

August 21: Sinnathamby Sivamaharajah, managing director of the Jaffna-based Tamil-language *Namathu Eelanadu* newspaper, was shot dead in Vellippalai, Jaffna. Police are investigating the murder. Subsequent to this, the paper was closed down.

September 7: Six armed persons on motor bicycles arrived at the *Uthayan* office in Jaffna during curfew hours, according to Managing Director E. Saravanapavan. Two men, one brandishing a pistol, entered the premises, threatened the staff and handed over a statement to be published in the newspaper. The statement called on students in Jaffna to call off a boycott planned for the next day. The men warned the editorial staff of dire consequences if the statement is not published immediately. *Uthayan* chief editor M.V. Kamalnathan said he had no choice but to carry the statement.

September 10: Two gunmen entered the *Uthayan* office in Jaffna and were arrested by the policemen guarding the building before they could attack the staff; they were released a few hours later.

September 10: The Government-controlled Sri Lanka Rupavahini Corporation (SLRC) stopped broadcasting the teledrama *Sudu Kapuru Pethi*, which told the story of a romance between a Tamil boy and a Sinhala girl. It was produced by Athula Peiris, an award winning dramatist working with SLRC as a producer, and ten episodes had

been broadcast on prime time (8.30 p.m.) on the Rupavahini channel when it came to an abrupt halt. The producer was not given any official justification. Earlier, in the ninth episode, the phrase "Jaffna tears are as cold as tears in Hambantota" had been deleted from the programme without consulting the producer.

September 10: Rajpal Abenayaka, editor of the *Sunday Observer*, published by the State-owned newspaper house Associated Newspapers of Ceylon Ltd (ANCL) was asked by the management to submit a resignation letter, citing his column published on 8 October which was critical of the President's speech to Sri Lankan diplomats the previous week. When he did not tender his resignation, the Board appointed a new editor.

September 14: A small group of peace activists who were demonstrating against the war at Lipton Circus in Colombo were abused in public and had their camera snatched away forcefully by a group of extremist Sinhala activists.

October 23: The International Federation of Journalists condemned the bombing of the official radio station of the Liberation Tigers of Tamil Eelam (LTTE), the *Voice of Tigers* (VOT), by the Sri Lankan Air Force in Kilinochchi, an LTTE-held town in Northern Sri Lanka on October 17. According to IFJ, the attack destroyed the broadcasting towers of the VOT and injured two workers. "While the IFJ does not endorse or support the views of any particular media organisation, we maintain that all media should be treated as non-combatants and we strongly denounce the bombing of the VOT. An attack on a media outlet, regardless of viewpoint, is an attack on freedom of speech and a serious violation of international law," said IFJ President Christopher Warren.

November 9: Broadcasting of Raja FM, a radio channel of the AEP radio and television network, was stopped based on an allegation of "indecenty" by the Department of Information. The suspension order warned that all the network's radio channels may eventually

be banned. Two weeks prior to this, an e-mail campaign was launched by extreme nationalist forces against Raja FM on the same grounds.

November 16: Deputy Inspector General of Police in charge of Colombo, Pujitha Jayasundara, informed the MTV/MBC network that J. Sri Ranga, the head of *Shakthi* TV, is facing death threats. *Shakthi* is the Tamil language TV channel of MTV/MBC network. J. Sri Ranga has worked at *Shakthi* for many years and presents the weekly popular talk show "*Minnal*," covering many political issues of a sensitive nature.

It was after the broadcast of *Minnal* on 12 November 2006, in which the assassination of Tamil National Alliance parliamentarian Nadraja Raviraj was discussed, that Sri Ranga received the threat.

November 19: Mrs. Anoma Wattaladeniya, Director of Education for the Sri Lanka Rupavahini Corporation (SLRC), was sent on compulsory leave in response to her involvement in the programme "*Udavena Wasanthaya*," a programme on adolescent health that also touches on sexuality-related matters. The programme in question was produced with a script written, co-coordinated and guided by the Health Education Section of the Health Ministry and sponsored by UNICEF and UNFPA. The reason the Director General of SLRC, Mr. Sisira Kothalawala, gave for the decision was that showing the anatomy, including the genitals, of a youth, as the programme did, was "indecent" and had been brought to the President's notice.

Mrs. Wattaladeniya had been an employee of SLRC since its inception and would have completed 25 years of service in February 2007.

November 19: Chandrasiri Dodawatta, chief editor of the-Sinhala daily *Dinamina*, published by the state-owned newspaper company, ANCL, was removed from his editorship without being given any reasons for his removal. He is the third chief editor removed from the post within a year.

November 24: Parameswaree Maunasámi, a Tamil woman journalist working as a freelance reporter at the Sinhala weekly *Mawbima*, was remanded on a detention order by the Terrorist Investigation Division. She was taken into custody from her rooms in Wellawatta (Colombo 6) along with another Tamil woman suspect by Special Police Task Force.

November 28: Asoka Fernando, the deputy photo editor of the *Sunday Leader*, was assaulted and had his digital camera (value approx. US \$ 1848) smashed by police officers at a temple in Pannipitiya, while he was photographing a clash between police and civilians inside the temple.

December 5: Saman Janaka and Jayasiri Wikramasingha, two journalists from the Sinhala weekly *Sathdina* were taken into custody by military personnel, while meeting with union leaders of Sri Lanka Telecom HQ, situated in a high security zone. The military took them to a Police Station where they were questioned for five hours. Their cameras were stripped of film and their photos of a picketing campaign by Telecom employees were confiscated. They were released after their editor, Sri Lal Priyantha, intervened.

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OFFICIAL LANGUAGES POLICY & MINORITY RIGHTS

B. Skanthakumar*

1 Introduction

Linguistic discrimination has generally been accepted as a key grievance of the North-Eastern Tamil community, contributing to their demand for self-determination.¹ Consequent to the 'Indo-Lanka Accord' in 1987 between the Governments of India and Sri Lanka, the Thirteenth Amendment to the Constitution elevated Tamil to an official language on a par with Sinhala (while granting English the nebulous status of "link language"). The Amendment conceded too late the formal equality of status between the two national languages which had been demanded since before decolonisation.

Two decades on, this core issue remains insincerely addressed by government. The self-same State now charged with constitutional protection of Tamil as an official language persists in its daily denial to

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¹ See more generally, Robert N. Kearney, *Communalism and language in the politics of Ceylon*, Durham, N.C.: Duke University Press 1967; Robert Kearney, "Language and the Rise of Tamil Separatism in Sri Lanka", *Asian Survey*, Vol. 18, No. 5 (May 1978), pp.521-534; Neil De Votta, *Blowback: Linguistic Nationalism, Institutional Decay, and Ethnic Conflict in Sri Lanka*, Stanford: Stanford University Press 2004; Neil De Votta, "From ethnic outbidding to ethnic conflict: the institutional bases for Sri Lanka's separatist war", *Nations and Nationalism*, Vol. 11, No. 1 (2005), pp.141-159; Devanesan Nesiah, "The claim to self-determination: a Sri Lankan Tamil perspective", *Contemporary South Asia*, Vol. 10, No. 1 (2001), pp.55-71.

denial to Tamil speakers, whose numbers include two other minority groups, Muslims² and Up-Country (*Malaiyaha*)³ Tamils. The non-implementation of the official languages policy is perceived in particular by North-Eastern origin Tamils as expressive of state racism towards them, aimed at eroding Tamil language and culture, thereby erasing Tamil identity and inexorably assimilating Tamils into the majority Sinhala community.⁴

Within the North and East where Tamil speakers are numerically predominant, Tamil is widely used in official communication and transaction of official business between public institutions and citizens. It is Sinhala speakers constituting a local minority who are often disadvantaged in this regard. The problem arises for Tamil speakers, within and outside the North and East, through misfortune of interaction with central government authorities. Some common issues include the:

receipt of government communications in Sinhala, inability to communicate in writing or verbally in Tamil, inability to fill forms in Tamil, inability to file cases in court in Tamil, untold delays in the conduct of trials due to the dearth of interpreters from Tamil to Sinhala and unavailability of translators, the need to sign police entries written in Sinhala without being provided a translation.⁵

² On Muslim socio-linguistic issues see M. A. Nuhman, *Sri Lankan Muslims: Ethnic Identity within Cultural Diversity*, Colombo: International Centre for Ethnic Studies Colombo 2007, pp. 50-91.

³ This self-description refers to origin or cultural affinity rather than territorial residence, cf. Daniel Bass, *Landscapes of Malaiyaha Tamil Identity*, (Marga Monograph Series on Ethnic Reconciliation, No. 8), Colombo: Marga Institute 2001.

⁴ This anxiety is echoed by no less than a former Supreme Court Justice, see C. V. Wigneswaran, 'Language – Catalyst for the Present Impasse?' in A. R. B. Amerasinghe and S. S. Wijeratne (eds.), *Human Rights: Theory to Practice – Essays in Honour of Deshamanya R. K. W. Goonesekere*, Colombo: Legal Aid Commission & Human Rights Commission 2005, esp. pp. 320-322.

⁵ Kanya Champion, 'Minority Rights and the Ethnic Conflict' in *Sri Lanka: State of Human Rights 1994*, Colombo: Law & Society Trust 1995, p.211.

Following enhancement of the constitutional status of Tamil in 1987 there was little discernible change in the attitude of the state bureaucracy towards use of Tamil in official business outside the North and East. Therefore, the Official Languages Commission (OLC) was created in 1991, belatedly honouring the undertaking in the Thirteenth Amendment that "Parliament shall by law provide for the implementation of the provisions"⁶ of the Official Languages Policy contained in Chapter IV of the Constitution.⁷

The Commission itself, and not without cause, has subsequently been faulted for its lethargy and ineffectiveness and has been characterised as "an embellishment and an impotent agent of the State as far as checking violation of language rights is concerned".⁸ However, the OLC's 2005 'Memorandum of Recommendations for the Proper Implementation of the Policy on the Official Languages' has had some resonance in government leading to the implementation of some of its proposals as discussed below.

1.1 Context

There are three distinct Tamil speaking communities in Sri Lanka: Tamils originating in the North and East, Muslims, and Up-Country Tamils, albeit with their internal differentiations. The majority of Tamil speakers (some 61 percent or 2,937,558 of the total number) ordinarily live outside of the North and East in areas where Sinhala is the language of administration.

⁶ A. 18 (4), *Constitution of the Democratic Socialist Republic of Sri Lanka 1978, as amended by s. 2 (b), Thirteenth Amendment to the Constitution 1987.*

⁷ This institutional and legislative advance, modelled on the Canadian Office of the Commissioner of Official Languages, may be attributed to concerted efforts by the late Dr Neelan Tiruchelvam and his colleagues at the International Centre for Ethnic Studies Colombo, including a joint workshop with the Official Languages Department in July 1989, where the creation and contours of the Commission was mooted, see International Centre for Ethnic Studies Colombo, "Language Policy and Bilingualism", *The Thatched Patio*, Vol. 2, No. 5 (October 1989), p.9

⁸ M. C. M. Iqbal, "Securing Language Rights – Key Elements in the Peace Process", *LST Review*, Vol. 12, Issue 176 (June 2002), p.8

Meanwhile, of the public administration cadre of some 900,000 persons, a mere 8.31 percent are Tamil speaking and presumably the majority of them work in the North and East, whereas Tamil speakers form around 25 percent⁹ of the total population of the country and the majority reside outside of the North and East.

The non-implementation of the official languages policy denies Tamil speakers, particularly but not exclusively outside of the North and East, access to public services and institutions in their own language. It affects also the quality and treatment of mono-lingual Tamil speakers whose verbal enquiries or written correspondence are unaddressed for want of competent Tamil speaking public officers beginning with the *grama niladhari* (village officer) through local and provincial authorities to central government. The gravity of the contemporary situation was underlined by a language audit conducted for the Foundation for Co-Existence in 2006.

TABLE 1: ETHNIC COMPOSITION OF SELECTED MULTI-LINGUAL AREAS¹⁰

AREA	SINHALA	% TOTAL	TAMIL	% TOTAL	MUSLIM	% TOTAL	OTHER	% TOTAL
Badulla Municipal Council	29,960	73.2	4,706	11.5	6,025	14.7	229	0.6
Colombo Municipal Council	265,657	41.4	199,640	31.1	164,448	25.6	12,418	1.9
Hatton-Dickoya Urban Council	3,752	26.3	7,991	56.1	2,450	17.2	62	0.4
Kandy District	942,038	74	155,546	12.2	171,239	13.5	3,640	0.3
Nuwara Eliya Municipal Council	13,568	54.2	9,033	36	2,220	8.9	228	0.9
Ratnapura District	837,265	86.6	112,916	11.2	21,116	2.1	867	0.1

⁹ In the last all-island census in 1981, North-Eastern Tamils comprised 12.7 percent; Muslims (excluding Malays) 7.0 percent and Up-Country Tamils 5.5 percent of the population.

¹⁰ This is a slightly modified version of Table No. 2 in *Language Discrimination to Language Equality*, Colombo: Foundation for Co-Existence, 2006, p.10

The areas surveyed above are outside of the North and East but where Tamil speakers form a substantial proportion of the local population, and in some districts, such as Colombo and Nuwara Eliya, are numerically predominant.

However, the table below illustrates the gross under-representation of Tamil speakers within key public institutions in those localities.

TABLE 2: TAMIL SPEAKERS IN PUBLIC INSTITUTIONS IN MULTI-LINGUAL AREAS¹¹

PUBLIC INSTITUTION	STAFF CADRE	NO. OF TAMIL SPEAKERS
Badulla Municipal Council	450	1
Colombo Municipal Council	12,000	100
Hatton Police Station	250	10-20
Kandy Registrar's Office	60	0
Nuwara Eliya Base Hospital	450	85
Ratnapura High Courts	60	0

There is plainly institutionalised and structural discrimination against minorities such that they are not recruited into public sector employment even in districts where they constitute the majority of the local population. Where Tamil speakers are represented in the staff cadre, they are concentrated in non-managerial and largely manual or minor staff categories and are therefore unavailable or unsuited to handle public enquiries and issues.

This bleak situation is aggravated by the ongoing war where ethnic Tamils, particularly those originating from or living in the North and East, are treated with suspicion and are liable under the Prevention of Terrorism Act and emergency regulations to be questioned, searched and detained without charge. The mutual incomprehension between suspect and security forces personnel,

¹¹ *Ibid* p.15

and absence of interpreters, does not assist in establishing proof of innocence or securing humane treatment and prompt release.¹²

Miscarriages of justice are not uncommon as demonstrated in the *Nallaratnam Singarasa* case. The accused was coerced into placing his thumbprint on a statement written for him in Sinhala, a language he could not understand let alone read, admitting to acts of terrorism.¹³ No translation in Tamil was provided to him, nor was he provided with an external interpreter. This statement formed the basis for his conviction and continuing imprisonment.

Recently, with the resumption of armed hostilities, Tamils living in some areas outside the North and East have once again been required to register themselves with the local police station to legitimise their presence in those parts. However, the official registration form is often available only in Sinhala and English! This is but one among the many instances of insult added to injury experienced by Tamils in the context of conflict.

2 Constitutional Provisions

In chapter IV (on language) of the 1978 Constitution, Sinhala alone was retained as the Official Language.¹⁴ In addition, a new category of national languages was created with Tamil granted the same status as Sinhala¹⁵ in this regard. The importance of this provision

¹² For instance, in a recent audit of a police station in conflict-torn and ethnic Tamil majority Jaffna, the Official Languages Commission discovered that only two officers were conversant in Tamil and statements and complaints were always recorded in Sinhala, see "Tamil an official language only in name", *Sunday Times*, 2 December 2006.

¹³ Para 2.5, *Nallaratnam Singarasa v. Sri Lanka*, Views of the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights, Communication No. 1033/2001: Sri Lanka. 23.08.2004. CCPR/C/81/D/1033/2001. (Jurisprudence); reprinted in *LST Review* Vol. 15, Issue No. 202 (August 2004), pp.17-30 at p.19

¹⁴ Article 18, *Constitution of the Democratic Socialist Republic of Sri Lanka*, 1978 as unamended.

¹⁵ *Ibid*, Article 19

on national languages was limited by its secondary status to the sole official language. Thus, Sinhala alone was conferred the status of language of administration throughout Sri Lanka.¹⁶ However, Tamil "shall also be used" as the language of administration in the North and East.¹⁷

The freedom of a citizen or in concert with others, to enjoy and promote her/his culture and to use her/his own language is recognised and protected.¹⁸ Any person whose fundamental right in this respect is infringed by executive or administrative action or under threat of imminent infringement may apply to the Supreme Court for relief or redress.¹⁹

The right to equality before the law and its equal protection expressly includes language as among one of the grounds of discrimination that is prohibited.²⁰ Additionally, no person shall on grounds of *inter alia* language be subject to any disability, liability, restriction or condition regarding access to shops, public restaurants, hotels, place of public entertainment and place of public worship of his own religion.²¹ The non-justiciable chapter on 'Directive Principles of State Policy and Fundamental Duties' pledges the State to ensure equality of opportunity to citizens, "so that no citizen shall suffer any disability on the ground of [*inter alia*] ... language."²²

¹⁶ *Ibid*, Article 22(1)

¹⁷ *Ibid*

¹⁸ Art. 14(1)(f), *Constitution of the Democratic Socialist Republic of Sri Lanka*, 1978. The exercise and operation of this fundamental right, similarly to others, is subject to restrictions as per A. 15 (7), "as may be prescribed by law in the interests of national security, public order and the protection of public health or morality or for the purpose of securing due recognition and respect for the rights and freedoms of others, or of meeting the just requirements of the general welfare of a democratic society". To date this clause has not been invoked to limit the linguistic rights of Tamil-speakers nonetheless its very existence in its present over-broad form is a matter of extreme concern.

¹⁹ Art. 17 read with Art. 126, *Constitution of the Democratic Socialist Republic of Sri Lanka*, 1978.

²⁰ *Ibid*, Article 12(2)

²¹ *Ibid*, Article 12(3)

²² *Ibid*, Article 27(6)

However, it is lawful to require a person to acquire "sufficient knowledge of any language" and "within a reasonable time" as a qualification for employment or office in the public, judicial or local government service or in the service of any public corporation where such knowledge is reasonably necessary for the discharge of duties of such employment or office. Likewise it is lawful to require a person to have "sufficient knowledge of any language" as prerequisite for any employment or office where no function can be discharged without such knowledge.²³

In *K. C. Adiopathen v. Attorney-General*, a Tamil speaker sought to enforce his right to receive a cheque issued by the Central Bank, which he argued to be an official communication from the State, in Tamil rather than in Sinhala as was originally despatched to him. Here was an opportunity for the Supreme Court to recognise and rectify the anomaly of according Tamil the status of 'national language' while denying Tamil speakers the facility of transacting official business with the State in their own language as assured to them in A. 22 (2) (a) of the 1978 Constitution (as unamended).

Instead, Samarawickrema, J. on behalf of the bench confined himself to the nature of a cheque which he held not to be an official communication but rather an enclosure,²⁴ thereby exempting the matter from the fundamental rights jurisdiction of the Supreme Court and skirting the larger issue.

This case among others underlines how, "Sri Lanka's higher judiciary has been slow in evolving itself into an institution of (sic) constitutionally defining the public policy framework for pluralism and multi-culturalism ... reluctant to play the role of an assertive arbiter ... when encountering violation of rights on the basis of ethnic discrimination".²⁵

²³ *Ibid*, Article 12(2)

²⁴ *K. C. Adiopathen v. Attorney-General*, SC Application No. 17 of 1979 in *Fundamental Rights: Decisions of the Supreme Court of Sri Lanka (April 1979 to December 1981)*, Vol. 1, Colombo: Lake House Investments, 1984, pp.59-62 at p.61

²⁵ Jayadeva Uyangoda, *Questions of Sri Lanka's Minority Rights*, International Centre for Ethnic Studies Colombo, 2001, pp.58 & 66.

2.1 Thirteenth and Sixteenth Amendments

External pressure from India for satisfaction of Tamil grievances resulted in the Indo-Lanka Accord of 1987,²⁶ committing the Government of Sri Lanka to recognise Tamil (in fact, also English) as an official language in addition to Sinhala.²⁷ The present official languages policy of Sri Lanka is therefore Chapter IV of the 1978 Constitution as modified by the Thirteenth Amendment in 1987 and Sixteenth Amendment in 1988.

Therefore the Constitution now reads that, "Tamil shall also be an official language."²⁸ The awkwardness of the phrasing, albeit inherited from the Indo-Lanka Accord, and the arrangement of the new clause in a distinct hierarchically sub(ordinate) section, rather than as part of the same provision²⁹ declaring Sinhala to be Sri Lanka's official language, is illuminative of official attitudes. A further sub-section states, "English, shall be the link language".³⁰

The Constitutional provisions on language are deemed to prevail over any law in the event of inconsistency.³¹ On this basis, the Official Language ('Sinhala Only') Act of 1956, though curiously

²⁶ See generally, Shelton U. Kodikara (ed.), *Indo-Sri Lanka Agreement of July 1987*, Colombo: International Relations Programme, University of Colombo 1989.

²⁷ P.2.18: "The official language of Sri Lanka shall be Sinhala. Tamil and English will also be official languages", 'Indo-Sri Lanka Agreement to establish Peace and Normalcy in Sri Lanka', 26 *International Legal Materials* 1175 (1987) at 1181.

²⁸ Art. 18(2), *Constitution of the Democratic Socialist Republic of Sri Lanka*, 1978 as amended by Section 2(b), Thirteenth Amendment to the Constitution, 1987.

²⁹ Art. 18(1), *Constitution of the Democratic Socialist Republic of Sri Lanka*, 1978 as amended by Section 2(a), Thirteenth Amendment to the Constitution, 1987.

³⁰ Art. 18(3), *Constitution of the Democratic Socialist Republic of Sri Lanka*, 1978 as amended by Section 2(b), Thirteenth Amendment to the Constitution, 1987. For some reflections on the ambiguities of English as "link language", undefined as it is by the Constitution or in statute or case law, see International Centre for Ethnic Studies Colombo, "Language Policy and Bilingualism", *The Thatched Patio*, Vol. 2, No. 5 (October 1989), pp.4-6.

³¹ Art. 25A, *Constitution of the Democratic Socialist Republic of Sri Lanka*, 1978 as amended by Section 5, Sixteenth Amendment to the Constitution, 1988.

neither amended nor repealed by the Thirteenth Amendment and therefore still on the statute books, is no longer in force.

The original architecture of the 1978 Constitution exerts its influence through retention of the distinction between official and national languages such that Sinhala and Tamil alone are "national languages".³² Members of the national legislature, provincial councils and local authorities are entitled to perform their duties and discharge their functions in either of the national languages.³³

Tamil is raised to the language of administration throughout the island in addition to Sinhala whereas earlier it was confined to the North and East.³⁴ However that same unwieldy sub-section retains Sinhala alone as language of record and medium for transaction of business by public institutions outside the North and East and therefore withdraws in practice what has been promised in principle.

The pacifier to Tamil speakers is the proviso that the President may authorise both national languages to be used in an administrative (assistant government agent) division having regard to the proportion of the linguistic minority in that area. However, this is wholly within the discretion of the executive and this power has only been exercised on three occasions and by the same incumbent, as discussed below. No objective criterion, for example a specified proportion of the local population, exists to automatically trigger such a directive.

Where Sinhala alone is the language of administration, any person (except "an official acting in his official capacity") is entitled to receive communication from and to communicate with any official

³² Art. 19, *Constitution of the Democratic Socialist Republic of Sri Lanka*, 1978.

³³ Art. 20, *Constitution of the Democratic Socialist Republic of Sri Lanka*, 1978 as amended by Section 2, Sixteenth Amendment to the Constitution, 1988.

³⁴ Art. 22(1), *Constitution of the Democratic Socialist Republic of Sri Lanka*, 1978 as amended by Section 3, Sixteenth Amendment to the Constitution, 1988.

in his official capacity, in either Tamil or English; obtain a copy or an extract from any official register, record or other publication in either Tamil or English; and obtain an official document issued to her/him or a translation thereof in either English or Tamil.³⁵

Provincial councils or local authorities are entitled to receive and send communications with any official acting in an official capacity in the language of administration that they use, that is either Tamil or Sinhala. Additionally where the provincial council, local authority, public institution or official transacts business with similar institutions where a different language of administration is used, English may be used as the common language.³⁶ This proviso recognises the difficulty of, say, Sinhala language authorities finding Tamil translators and vice-versa, and the reality that English is often the common language across the linguistic divide.

The medium of examination for selection to the public service, judicial service, provincial public service, local government service or any public institution may be Tamil or Sinhala or a "language of [the person's] choice" (presumably English). However admission may be conditional on that person acquiring "a sufficient knowledge of Tamil or Sinhala, as the case may be, within a reasonable time ... where such knowledge is reasonably necessary for the discharge of his duties". It is also lawful for "sufficient knowledge of Sinhala or Tamil" to be a prerequisite for employment in any public service or institution where "no function of the office or employment for which he is recruited can be discharged otherwise than with a sufficient knowledge of such language".³⁷

³⁵ Art. 22(2)(a-c), *Constitution of the Democratic Socialist Republic of Sri Lanka*, 1978 as amended by Section 3, Sixteenth Amendment to the Constitution, 1988.

³⁶ Art. 22(4), *Constitution of the Democratic Socialist Republic of Sri Lanka*, 1978 as amended by Section 3, Sixteenth Amendment to the Constitution, 1988.

³⁷ Art. 22(5), *Constitution of the Democratic Socialist Republic of Sri Lanka*, 1978 as amended by Section 3, Sixteenth Amendment to the Constitution, 1988.

All laws and subordinate legislation are to be enacted and published in Tamil in addition to Sinhala together with an English translation.³⁸ Parliament is to determine which text is authentic in the event of inconsistency. In fact, the language so deemed to be authoritative within the text of legislative enactments is always Sinhala, such that the final section in all statutes reads, "[i]n the event of any inconsistency between the Sinhala and Tamil texts of this Act, the Sinhala text shall prevail", thereby discrediting the official status of Tamil.

Provincial councils and local authorities are permitted to issue orders, proclamations, rules, by-laws, regulations and notifications and issue circulars and forms in the language of administration with a translation in English.³⁹ Thus Tamil speakers with no knowledge of English are disadvantaged in dealings with these institutions in Sinhala majority areas.

Tamil is also raised to the language of the courts throughout Sri Lanka in addition to Sinhala;⁴⁰ although once again there is immediate back-tracking because Sinhala is asserted to be the language of the court in areas where Sinhala is the language of administration. The record and proceedings shall be in the language of the court.

Any party or applicant or legal representative may initiate proceedings, submit pleadings and other documents, and participate in court proceedings in either Tamil or Sinhala.⁴¹ Any judge, juror, party or applicant or legal representative is entitled to interpretation

³⁸ Art. 23(1), *Constitution of the Democratic Socialist Republic of Sri Lanka*, 1978 as amended by Section 3, Sixteenth Amendment to the Constitution, 1988. In practice, legislation is generally drafted in English and subsequently translated to Sinhala and Tamil.

³⁹ Art. 23(3), *Constitution of the Democratic Socialist Republic of Sri Lanka*, 1978 as amended by Section 3, Sixteenth Amendment to the Constitution, 1988.

⁴⁰ Art. 24(1), *Constitution of the Democratic Socialist Republic of Sri Lanka*, 1978 as amended by Section 4(1), Sixteenth Amendment to the Constitution, 1988.

⁴¹ Art. 24(3), *Constitution of the Democratic Socialist Republic of Sri Lanka*, 1978 as amended by Section 4(2), Sixteenth Amendment to the Constitution, 1988.

and translation at state expense, and to obtain any part of the record or translation thereof, in Sinhala or Tamil.⁴²

A discrete sub-section allows the Minister of Justice to direct that English, which is expressly named on a rare occasion, be used in records and proceedings of any court,⁴³ confirming its longstanding use in the Court of Appeal and Supreme Court.

3 International Standards

This section briefly presents international standards on the rights of internal linguistic minorities by way of evaluating Sri Lanka's conformity with international norms.⁴⁴ It is sobering at the outset to reflect on Mälksoo's observation as below:

Language rights have become a part of international human rights law but the content of these rights is currently at a relatively primitive stage of development. Although there have recently been some progressive developments in Europe, the notion of 'language rights' has not found its place in international instruments of law. As of today, one has to conclude that from the international legal perspective, language is still to large extent a political battlefield and not the object of universally applicable legal standards.⁴⁵

⁴² Art. 24(3), *Constitution of the Democratic Socialist Republic of Sri Lanka*, 1978 as amended by Section 4(3), Sixteenth Amendment to the Constitution, 1988.

⁴³ Art. 24(4), *Constitution of the Democratic Socialist Republic of Sri Lanka*, 1978 as amended by Section 4(4), Sixteenth Amendment to the Constitution, 1988.

⁴⁴ For an extensive discussion see Catherine Wood, "Language Rights: Rhetoric and Reality – Sri Lanka and International Law", *LST Review*, Vol. 10, Issue 145 (November 1999), pp.24-43.

⁴⁵ Lauri Mälksoo, "Language Rights in International Law: Why the Phoenix is Still in the Ashes", *Florida Journal of International Law*, Vol. 12, No. 3 (1998-2000), pp.431-465 at p.465

Thus discussions on language rights are framed by the broader concerns of minority rights as the linguistic rights of regional minorities and non-territorial minorities.

3.1 International Covenant on Civil and Political Rights 1966

The Government of Sri Lanka's binding obligation under international human rights law in respect of the rights of linguistic minorities is contained in Article 27 of the International Covenant on Civil and Political Rights 1966, which Sri Lanka ratified in 1980.

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

As is evident from the wording of the article, the nature of the right that is owed to Tamil speakers is *inter alia*, the right of non-discrimination. The corresponding obligation on the State is at minimal level, which is "to respect", therefore not to interfere in, the right of Tamil speakers to use, propagate and develop their language through their own means for example, community or privately owned Tamil medium educational and cultural institutions.

Although the wording of the article is admitted to be negative, the expert United Nations Human Rights Committee in its authoritative interpretation of the provisions finds that "[p]ositive measures of protection are ... required not only against the acts of the State party itself, whether through its legislative, judicial or administrative authorities, but also against the acts of other persons within the State party".⁴⁶

⁴⁶ P.6.1, United Nations Human Rights Committee, *General Comment No. 23: The rights of minorities (Art. 27)*: CCPR/C/Rev.1/Add.5, 08.04.94.

In fact, no measures have been taken by the Government of Sri Lanka to ensure respect for non-discrimination of Tamil speakers by "other persons" such as the private sector in for example, the provision of educational and health services or access to employment opportunities through appropriate equal opportunity legislation or scrutiny of non-state actors.

However, even prior to the conferment of official language status on Tamil, the Government of Sri Lanka has publicly funded Tamil medium education from pre-school through to university, Tamil language television and radio programmes, Tamil language daily and weekly newspapers, and cultural activities of Tamil speakers. These measures exceed its obligations under the Covenant.

In its most recent periodic state report to the Human Rights Committee, the Government of Sri Lanka seeks to satisfy its obligations under the Covenant by rehearsing the *de jure* equality of status between Sinhala and Tamil following the Thirteenth and Sixteenth Amendments to the Constitution; drawing attention to the existence and mandate of the Official Languages Commission; the public awareness programme of the Official Languages Department and language training of public servants.⁴⁷

Nonetheless, *de facto* equality between Sinhala and Tamil is denied.⁴⁸ The lived experience of Tamil speakers is one of discrimination, marginalisation and exclusion. For example, Tamil speaking residents in the estate sector continue to experience poor access to Tamil medium schools, neglected infrastructure for schools including recruitment of teachers; lack of Tamil speaking midwives and nurses in hospitals and health centres; lack of Tamil speaking *grama niladharis* (village officers) to transact official business; and

⁴⁷ P.523-536, *Consideration of Reports submitted under Article 40 of the Covenant: Sri Lankan Fourth Periodic Report*, CCPR/C/LKA/2002/4, 18 September 2002.

⁴⁸ This was unaddressed by the Human Rights Committee in its comments on the state report, *Concluding observations of the Human Rights Committee: Sri Lanka*, CCPR/CO/79/LKA, 1 December 2003.

inability to obtain official documentation such as birth, marriage and death certificates in Tamil.

Secondly, the fundamental rights protection afforded to Tamil speakers by both the 1972 and later the 1978 Constitutions of Sri Lanka is extended only to citizens of the country. Through discriminatory legislation and government policy hundreds of thousands of Up-Country Tamils born and ordinarily resident in Sri Lanka were deemed for decades to be Indian nationals or stateless⁴⁹ and therefore excluded from the protection of the fundamental rights chapter.

This is contrary to the Covenant that confers rights under article 27 to "all individuals within the territory of the State party and subject to its jurisdiction".⁵⁰ The reversal of de-citizenship through progressive passage of legislation⁵¹, eliminating statelessness and granting Sri Lankan citizenship to so-called Indian nationals, does not negate this obnoxiousness.

Sri Lanka acceded to the First Optional Protocol in 1997, thereby recognising the procedural right of individual petition to the Human Rights Committee where an individual claims to have suffered the violation of any right under the Covenant and when all domestic remedies have been exhausted. However, no written communication relating specifically to Article 27 has been submitted from Sri Lanka. In the Supreme Court's recent judgement in the *Singarasa* case, it was held that Sri Lanka's accession to the Protocol through declaration by the President is *ultra vires* the Constitutional provision that vests such authority in Parliament and not the Executive. Therefore Sarath Silva, CJ in his judgement concluded that accession to the Protocol is not binding on Sri

⁴⁹ Amita Shastri, "Estate Tamils, the Ceylon Citizenship Act of 1948 and Sri Lankan Politics", *Contemporary South Asia*, Vol. 8, No. 1 (1999), pp.65-86.

⁵⁰ Para 5.1, *General Comment No. 23: The rights of minorities (Art. 27)* ...

⁵¹ Most recently, the *Citizenship (Amendment) Act*, No. 16 of 2003.

Lanka and has no legal effect domestically.⁵² The situation at time of writing therefore is that while the Government of Sri Lanka has not denounced the Optional Protocol and therefore claims to uphold the right of individual petition, the Supreme Court of Sri Lanka has determined that the views of the Human Rights Committee in Geneva have no force within the domestic legal system, rendering recourse to it of limited value.⁵³

3.2 United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities 1992

The duty to take positive measures for promotion of linguistic minority rights is imposed on states in the non-binding 1992 United Nations (UN) Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities.⁵⁴

States shall adopt "appropriate legislative and other measures" to "protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories" and to "encourage conditions for the promotion of that identity."⁵⁵

This article has been interpreted by the UN Working Group on Minorities to impose a duty on states to integrate minorities in the process by which "appropriate measures" are determined; the

⁵² *Nallaratnam Singarasa v. Attorney-General*, SCM 15.09.2006, *LST Review*, Vol. 17, Issue Nos. 227 & 228 (Sep & Oct 2006), pp.9-18 at p.17

⁵³ The Government of Sri Lanka has made no effort since to remedy this defect, including in the recent International Covenant on Civil and Political Rights Act, No. 56 of 2007, suggesting that it is comfortable with the *status quo*.

⁵⁴ The Declaration was adopted without vote at the 92nd plenary meeting of the General Assembly on 18 December 1992. Sri Lanka, after some hesitation, was among the sponsors of the resolution, see Catherine Wood, "Language Rights: Rhetoric and Reality – Sri Lanka and International Law" ... p.32

⁵⁵ A. 1 (1) & (2) combined, *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities* 1992.

appropriate measures are deemed to include but not be limited to legislative, judicial, administrative, promotional and educational measures.⁵⁶

States are further obliged to "take measures to create favourable conditions to enable persons belonging to minorities to express their characteristics and to develop their [*inter alia*] ... language".⁵⁷ This article imposes the duty of active measures by the state to create such "favourable conditions". The measures "may require economic resources from the State. In the same way as the State provides funding for the development of the culture and language of the majority, it shall provide resources for similar activities of the minority."⁵⁸

While the 1992 UN Declaration does not create enforceable obligations on the Government of Sri Lanka, its adoption by consensus is indicative of its influence and acceptability among UN member states and therefore ought at the very least to be of persuasive importance in state policy and domestic jurisprudence.

In any case, it ought to be emphasised that Tamil is more than the language of a single linguistic minority group. It is the mother tongue of three ethnic minority communities comprising over 25 percent of the total population. Since 1978 it has been a national language in Sri Lanka and since 1987 one of the two official languages. At least one of the three Tamil speaking groups, North-Eastern Tamils, must also now be regarded as a national minority with a corresponding level of rights to the preservation and development of its national identity including language rights. This has ratcheted up the level of obligation on the Government of Sri Lanka.

⁵⁶ Para 30 & 31, *Commentary of the Working Group on Minorities to the United Nations Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities*, E/CN.4/Sub.2/AC.5/2005/2, 4 April 2005, p.8

⁵⁷ A. 4 (2), *Declaration on the Rights of Persons ...*

⁵⁸ Para 56, *Commentary of the Working Group on Minorities ...* p.13

4 Official Languages Commission

An Official Languages Commission (hereafter "Commission") was established in 1991 by virtue of the Official Languages Commission Act No. 18 of 1991. The Commission is composed of six members appointed by the President, who is also empowered to nominate one among their number as Chairman.⁵⁹ The large number of Commissioners is apparently to allow for multi-ethnic representation – presently there is one Tamil and one Muslim Commissioner – although there is no express statutory stipulation as to ethnic diversity. It may also be to compensate for the fact that only the Chair of the Commission presently serves in a full-time capacity. The term of office is three years with eligibility for indefinite reappointment.⁶⁰ An institutional link with the Official Languages Department is maintained through ex-officio appointment of the Commissioner of the Department as Secretary to the Commission. The Commission is obliged to meet at least once each month and as often as necessary, the quorum for a meeting being four members.⁶¹

4.1 Objectives and powers

The objectives⁶² of the Commission are: to recommend principles of policy, relating to the use of the Official Languages; and to monitor and supervise compliance with the provisions contained in Chapter IV (on language) of the Constitution; take all such action and measures as are necessary to ensure the use of Sinhala, Tamil and English; promote the appreciation of the Official Languages and the acceptance, maintenance, and continuance of their status, equality and right of use; conduct investigations, both on its own

⁵⁹ S. 5 (1) & (2), *Official Languages Commission Act*, No. 18 of 1991. Regrettably the Official Languages Commission was not among those statutory institutions whose independence from executive control was sought to be achieved through the Seventeenth Amendment to the Constitution in 2001.

⁶⁰ S. 9 (1), *Official Languages Commission Act*, No. 18 of 1991.

⁶¹ S. 12 (2) and (1) respectively, *ibid*

⁶² S. 6 (a)-(d) respectively, *ibid*

initiative, and in response to any complaints received; and to take remedial action in accordance with the provisions of the Act.

The powers⁶³ vested in the Commission are to initiate reviews of any regulations, directives, or administrative practices which affect, or may affect, the status or use of the relevant languages as it may deem necessary or desirable; issue or commission such studies or policy papers on the status or use of the relevant languages as it may deem necessary or desirable; undertake such public educational activities, including, sponsoring or initiating publications or other media presentations on the status and use of the relevant languages as it may consider desirable; do all such other things as are necessary for, or incidental to, the attainment of the objects of the Commission or necessary for or incidental to, the exercise of any powers of the Commission; and appoint Committees as may be necessary to assist the Commission in its duties.

In summary, the functions of the Official Languages Commission are to advise government on matters of language policy; to monitor the compliance especially of public authorities in compliance with the constitutional provisions on language; to educate state officials, private sector and the general public on the status and use of Sinhala, Tamil and English and finally, to investigate complaints arising from alleged violation of the official languages law.

4.2 Investigation of complaints

The scope and procedure for investigation of complaints is as follows: the Commission is obliged to ("shall") act upon every complaint arising from acts or omissions of public institutions⁶⁴ relating to the status and use of relevant languages (that is Sinhala, Tamil and English) where such status or use is or was not recognised;

⁶³ S. 7 (a)-(c), (e) and s. 8 (1) respectively, *ibid*.

⁶⁴ Defined in s. 39 as any ministry, department, public corporation, statutory body, provincial council, local authority (municipal council, urban council, *pradeshiya sabha*) or wholly government owned business undertaking.

where the right to or duty of use is or was not being recognised or complied with; where any law (statute, regulation, rule, order, notification, by-law) relating to status and use as contained in Constitutional provisions on language policy (Chapter IV) is not complied with; and where the objectives and intent of Chapter IV is or was not being respected or complied with.⁶⁵

It should be repeated that persons whose language rights are alleged to be infringed or about to be infringed by executive or administrative action, are not obliged to utilise the Commission or exhaust its statutory investigative and complaints procedure, but may directly petition the Supreme Court for relief or redress.⁶⁶ However, the Commission may with the Court's permission, intervene in such proceedings in the public interest.⁶⁷

Complaints may be made by an affected person or persons (group) or parties acting *bona fide* (therefore in the public interest) in bringing such acts or omissions to the notice of the Commission. Complaints must be treated as confidential communications. While the head of the public institution against whom the complaint is made shall be informed of the Commission's intention to investigate, the identity of the complainant shall not be divulged without the complainant's prior consent.⁶⁸

Complaints may be refused or investigation may be discontinued where the subject matter is trivial; complaints are frivolous, vexatious or *mala fide*; the subject matter is outside the mandate of the Commission; or where initiation or continuation is "unnecessary".⁶⁹ This sweeping discretionary authority to decline complaints or terminate investigations, particularly in the catch-all final sub-section, is quite remarkable. The Commission is obliged to inform the complainant of the decision and its reasons, in writing

⁶⁵ S. 18 (a)-(d), *Official Languages Commission, Act No. 18 of 1991*.

⁶⁶ A. 126, *Constitution of the Democratic Socialist Republic of Sri Lanka*, 1978.

⁶⁷ S. 29 (1) & (2), *Official Languages Commission Act, No. 18 of 1991*.

⁶⁸ S. 20 (3) & (4), *ibid*.

⁶⁹ S. 19 (1) (a)-(d) respectively, *ibid*

within fourteen days of making the decision.⁷⁰ The complainant has the right to petition the Supreme Court against this decision within thirty days of its receipt, where leave to proceed is granted by the Court,⁷¹ and apply for relief or redress as the Court considers "just and equitable or appropriate".⁷²

In its conduct of an investigation or review, the Commission is empowered to summon witnesses and compel production of documents; administer oaths and compel witnesses to give oral or written evidence under oath; receive, accept and consider any other form of information or evidence as it sees fit; and conduct such investigation in the premises of any public institution as it may deem fit.⁷³

Any person who fails without cause to appear before the Commission; or refuses to be sworn or refuses to answer questions; or refuses to produce documentation requested by the Commission in its investigation of a complaint; or who publishes defamatory statements of the Commission or member relating to an investigation; or interferes with the process of the Commission; or restricts or obstructs the Commission in its exercise of powers, shall upon conviction before a magistrate be guilty of an offence with the penalty of a fine not exceeding Rs 10,000 or imprisonment for a term not exceeding three years or both.⁷⁴

The Commission is not required to hold public hearings during an investigation or review, nor is any individual or public institution entitled to be heard as a matter of right.⁷⁵ This is wholly unsatisfactory. However, any individual or institution likely to be the subject of criticism in a report or recommendation shall be afforded the opportunity of response before the investigation ends.⁷⁶

⁷⁰ S. 19 (2), *ibid*

⁷¹ S. 24 (2), *ibid*

⁷² S. 24 (1) (b), *ibid*

⁷³ S. 21 (a)-(d) respectively, *ibid*

⁷⁴ S. 37 (d), (i-iii) and (a)-(c) respectively, *ibid*

⁷⁵ S. 22 (1), *ibid*

⁷⁶ S. 22 (2), *ibid*

Where the Commission, following its investigation, is not satisfied of the merits of the complaint, it is still obliged to report that decision to the complainant and set out its reasons.⁷⁷ The complainant is afforded the avenue of petitioning the Supreme Court, where leave to proceed is granted by the Court,⁷⁸ within thirty days of receipt of the report for relief or redress as the Court considers "just and equitable or appropriate".⁷⁹

The Commission is obliged to make a report, and therefore to conclude any investigation or review, within sixty days of receipt of complaint; where it is unable to do so it is still required to issue an interim report within that period explaining the reasons for delay.⁸⁰ The final report must be issued within 120 days of the making of the complaint.⁸¹ If the Commission fails to do so then the complainant is entitled to petition the Supreme Court, where leave to proceed is granted by the Court,⁸² within thirty days from the expiry of the 120 day period for relief or redress as the Court considers "just and equitable or appropriate".⁸³

Subsequent to investigation and preceding the report, the Commission may communicate with the head of the relevant public institution regarding acts or omissions for consideration and action; or for reconsideration, alteration or discontinuation of any directive or practice contravening the official languages policy.⁸⁴ In such a report the Commission may make directions to the head of the public institution concerned requiring notification, within a specified time, of action taken to give effect to its recommendations.⁸⁵

⁷⁷ S. 23 (2), *ibid*

⁷⁸ S. 24 (2), *ibid*

⁷⁹ S. 24 (1) (c), *ibid*

⁸⁰ S. 23 (3), *ibid*

⁸¹ S. 23 (4), *ibid*

⁸² S. 24 (2), *ibid*

⁸³ S. 24 (1) (a), *ibid*

⁸⁴ S. 23 (1), *ibid*

⁸⁵ S. 23 (5), *ibid*

Where the head of the public institution concerned fails to implement the recommendations within ninety days of receipt of the report, the Commissioner of the Official Languages Department (not Commission) may, following written notification to the Attorney-General and within a further ninety days, apply to the Provincial High Court nearest to the residence of the complainant for an order directing the respondent to give effect to the recommendations in the report.⁸⁶

The Attorney-General or the Official Languages Commission may, "where the public interest so requires", apply to the Supreme Court to transfer any application before the High Court to the Supreme Court for its determination.⁸⁷ Where the Supreme Court determines that a public institution has failed to comply with the language provisions in Chapter IV of the Constitution or any law implementing those provisions, the Court may grant "such relief or make such directions as it considers just and equitable or appropriate in all the circumstances of the case".⁸⁸

A public servant who "wilfully fails or neglects" to transact business, receive or make communication, issue any copy or extract from any register, record, publication or other document in any relevant language shall be guilty of an offence upon conviction in a magistrate's court and liable to a fine not exceeding Rs1 000⁸⁹ or to imprisonment not exceeding three months or to both fine and imprisonment. However, the permission of the Attorney-General must be obtained prior to any prosecution.⁹⁰

⁸⁶ S. 25 (1) read with s. 27 (b), *ibid*

⁸⁷ S. 26, *ibid*

⁸⁸ S. 27 (a), *ibid*

⁸⁹ The quantum has not been increased since 1991, when it was already a modest amount, and is therefore not in itself of deterrence.

⁹⁰ S. 28 (1) & (2) respectively, *Official Languages Commission Act*, No. 18 of 1991.

4.3 Critique

The Commission is statutorily obliged to furnish an annual report⁹¹ containing its recommendations to public institutions but failed to do so from its inception in 1991 until 2002.

The Commission lacks visibility and authority. Its existence and mandate is little known to the general public. In a recent poll 66.5 percent of respondents were unaware of the official languages policy and 71.6 percent were unaware of the Official Languages Commission.⁹²

The Commission receives only a handful of complaints each year. In 2005 a mere six written complaints were made, while an unspecified number were received by telephone as well as on the basis of media reports.⁹³ No details are presented in the annual report as to the substance of these complaints nor are there statistics as to their disposal or recommendations for redress. The small number of complaints is attributed by the Commission itself to "insufficient awareness among the public of its existence and powers".⁹⁴

The number of written complaints received in 2006 is reported to have risen to 14. Some issues include the absence of Tamil translators at the Mount Lavinia Magistrate's Court; unavailability of the electoral register in Tamil; difficulty of making complaints to the police in Tamil; absence of Tamil speaking *grama niladharis* in Badulla district; provision of birth certificates in Sinhala only; and lack of hospital signage in all three languages.⁹⁵ No information is

⁹¹ S. 32, *ibid*

⁹² Foundation for Co-Existence, *Language Discrimination to Language Equality*, Colombo: Foundation for Co-Existence 2006, p.30.

⁹³ Official Languages Commission, *Annual Report 2005*, Rajagiriya: Official Languages Commission 2006, p.21.

⁹⁴ Official Languages Commission, *Annual Report 2005* ... p.21.

⁹⁵ The annual report for 2006 was unpublished at time of writing and therefore this information was obtained through interview with the OLC's Language Officer by Dilhara Pathirana on July 5 2007.

available on the action, if any, taken by relevant public authorities following the Commission's intervention.

In 2005, the Commission visited nine designated bilingual divisional secretariats in Badulla, Kandy and Nuwara Eliya to monitor compliance with the official languages policy.⁹⁶ Directions were given to ensure that public notices, regulations and documents including official forms as well as name-boards, signs and directions be provided in all three languages indicating poor adherence to the policy. Two follow-up workshops were organised for divisional secretaries to assist them in the formulation and design of standardised trilingual forms which were lacking.

Six awareness raising workshops were also organised in 2005 for public officers with responsibility for implementation of the official languages policy.⁹⁷ These officers in the public service, provincial public service, local government, and district-level state corporations and boards were from Colombo, Gampaha, Kalutara and Nuwara Eliya districts as well as Central and Uva provinces.

The Commission appointed two sub-committees for revision of Sinhala and Tamil language school curricula and textbooks to be used in teaching the second official language.⁹⁸ This project is reliant on external funding. Trilingual phrase books were devised respectively for three groups of public officials, the police, health workers and frontline officers in government departments, to aid them in their interaction with the public, particularly linguistic minorities in their areas.⁹⁹ Island-wide Tamil language training programmes were conducted for police officers excepting in Northern districts.¹⁰⁰ One hundred and twenty police officers received instruction in basic Tamil and 365 in advanced Tamil. Final examinations were conducted for

⁹⁶ Official Languages Commission, *Annual Report 2005* ... p.12.

⁹⁷ Official Languages Commission, *Annual Report 2005* ... pp.12-13.

⁹⁸ Official Languages Commission, *Annual Report 2005* ... pp.13-14.

⁹⁹ Official Languages Commission, *Annual Report 2005* ... pp.14-15

¹⁰⁰ Official Languages Commission, *Annual Report 2005* ... pp.15-20

514 candidates following completion of their basic and advanced training programmes. Five hundred and twenty nine nurses from districts with large linguistic minorities received training in Tamil, while 151 nurses were trained in Sinhala. Final examinations for 215 nurses and 15 doctors who followed the Tamil language course and for 205 nurses who followed the Sinhala language course were conducted in 2005. One hundred and seventy four naval personnel received Tamil language training for basic communication with civilians in conflict areas and 84 among them were examined upon completion of their course.

The Commission is subject to severe budgetary constraints such that funding in 2007 (Rs10.4 million) was lower than the allocation in the previous year (Rs10.8 million) and significantly lower than its request for a modest Rs13 million.¹⁰¹ Until 2000 budgetary allocations only provided for the institutional costs of the Commission and wages of its staff. There was no financial provision until 2001 onwards for policy implementation. The Treasury's attitude highlights the low priority given to the Commission and its important work, despite the statutory duty on the government to make available "adequate funds for the purpose of enabling the Commission to exercise its powers and discharge its functions ..."¹⁰²

Chronic under-funding has been the Commission's justification in the past for not taking a pro-active role in soliciting complaints, while freely admitting its unwillingness to increase its caseload in the absence of increased financial, human and infrastructure resources. In 2005, for example, actual staff cadre at the Commission was 14 whereas approved cadre was 27.¹⁰³ Only one among the fourteen was employed as Language Officer, the remainder being administrative and support staff.

¹⁰¹ "Collure hits out at Treasury officials for slashing funds", *Daily Mirror*, January 30 2007.

¹⁰² S. 16, *Official Languages Commission Act*, No. 18 of 1991.

¹⁰³ Official Languages Commission, *Annual Report 2005* ... p.7

The Commission has been unwilling to exercise its powers to litigate. It has never referred a complaint to the High Court or the Supreme Court. It has never sought to prosecute a public official citing the high standard of proof required. More recently, it has argued that it is unfair to prosecute public officials when the necessary infrastructure for implementation of the official languages policy is denied to them.¹⁰⁴ The overlap with the Official Languages Department is illustrated by the role of its Commissioner in initiating prosecutions whereas this power is more rationally vested in the Official Languages Commission.

Although the Commission may only receive complaints relating to public institutions, it is empowered to make recommendations on adherence to the official languages policy on the part of private institutions.¹⁰⁵ Regrettably it has never exercised this power although Tamil speakers are routinely discriminated against by private sector establishments through lack of Tamil speaking staff to transact business while signage and employment application forms are in Sinhala and/or English alone and the like.

The Commission's remonstrations on the official languages policy are barely heeded by government and the enforcement of its directives is contingent upon the support of individual ministers and sympathetic senior officials.

Although conceived as an independent statutory institution, it was initially an appendage of the Ministry of Public Administration and since November 2005, of the Ministry of Constitutional Affairs and National Integration. From the perspective of disaffected groups and individuals, it is "another agent of the State rendered impotent by legal provisions ... enacted by the State",¹⁰⁶ questioning its *bona fides* and discouraging recourse to it.

¹⁰⁴ Official Languages Commission, *Annual Report 2005* ... p.21.

¹⁰⁵ S. 31, *Official Languages Commission Act*, No. 18 of 1991.

¹⁰⁶ M.C.M. Iqbal, "The Beginning of the Ethnic Problem in Sri Lanka—Violation of Language Rights", *LST Review*, Vol. 11, Issue No. 154 (August 2000), p. 26.

5 : Memorandum of Recommendations for the Proper Implementation of the Policy on Official Languages 2005

The official launch of the 'Memorandum of Recommendations for the Proper Implementation of the Policy on Official Languages' (hereafter 'Memorandum') by the Official Languages Commission on 21 November 2005 was a significant step for the Commission itself being the first public presentation of its views and recommendations since inception in 1991. (It was subsequently re-submitted on 24 April 2007 to President Mahinda Rajapakse.)

The Memorandum was prepared in accordance with the statutory authority conferred on the Commission to issue policy papers "on any matter relating to the status and use of either [Sinhala or Tamil] and making recommendations on any matter relating to Chapter IV of the Constitution".¹⁰⁷

The Chairman of the Commission, Mr. Raja Collure, slammed the State's failure to implement its own official languages policy as a violation of the fundamental rights of affected citizens; and observed that "faithful implementation of the Official Languages policy is an important aspect touching on the solution of the National Question ..."¹⁰⁸

The Memorandum comprises six parts accompanied by five appendices. Its four planks are a statement of current law and policy; an evaluation of its implementation; a discussion of constraints encountered; and finally the recommendations of the Commission.

The review of the law is a bald restatement of the constitutional provisions on language as modified by the Thirteenth and Sixteenth

¹⁰⁷ S. 31, *Official Languages Commission Act*, No. 18 of 1991.

¹⁰⁸ Official Languages Commission, *Memorandum of Recommendations for the Proper Implementation of the Policy on the Official Languages*, Rajagiriya: Official Languages Commission 2005, p.i.

Amendments. There is neither critical comment on the legal framework or recognition of lacuna nor proposals for reform. As the law on official languages has been rehearsed above, this section is confined to the last three themes of the Memorandum.

The Commission's view is that there are no defects in the constitutional and statutory provisions on official languages and therefore the problem is ascribed entirely to the implementation of the law. Incidentally, this perspective is also shared by many civil society critics of state discrimination against Tamil speakers, who believe the law to be satisfactory and its ineffectiveness to be a matter of provision of "necessary resources and political support".¹⁰⁹ The Commission is forthright in blaming successive governments for non-implementation. However, no reasons for this neglect or unwillingness are indicated, although resource constraints on the government budget are recognised at several points. (It is irresistible to note that such constraints evaporate in matters of military expenditure and the maintenance of government ministers.)

The solution, according to the Commission, is for the public administrative service throughout the country to be bilingual (Sinhala and Tamil). Therefore the thrust of the recommendations contained in the Memorandum is to achieve Tamil language proficiency among a sufficient number of Sinhala public servants (38 percent) while also accelerating the recruitment of Tamil speaking persons to the public service to a level representative of their proportion of the population as a whole.

The Official Languages Department is rightly regarded as incapable of executing the scale of language training envisaged in the Memorandum and therefore the Commission proposes its conversion into a National Languages Institution with district-level branches across the island.

¹⁰⁹ M. C. M. Iqbal, "Securing Language Rights – Key Elements in the Peace Process", *LST Review*, Vol. 12, Issue 176 (June 2002), p.7.

5.1 Compliance

The section on implementation in the Memorandum begins by admitting the "enormous gap between constitutional provisions and their application".¹¹⁰ It notes that Tamil speaking citizens have minimal means of communicating in their own language with central government. Even provincial administrations as the tier of government nearer to people than central government have failed miserably in serving residents not proficient in the language of administration, particularly for Tamil speakers outside the North and East, despite Tamil's official language status.

To improve this dismal situation, then President Chandrika Kumaratunga became the first (and to date only) incumbent to exercise Constitutional powers¹¹¹ declaring Tamil as an additional language of administration in certain areas outside of the North and East. Through three gazette notifications,¹¹² 29 divisional secretariats in six districts were designated as bilingual administrative divisions. These include areas where the Tamil speaking population is as high as over 70 percent (Nuwara Eliya and Ambagamuwa in Nuwara Eliya district and Kalpitiya and Puttalam in Puttalam district).

There is no objective criterion by which the decision is reached nor is a minimum threshold of Tamil speakers discernible from the selection that has been made. For example, two divisions in Badulla district with fewer than 15 percent Tamil speakers are designated as bilingual administrations, whereas several divisions where the Tamil speaking population average 30 percent (including Matale, Rattota and Ukuwela in Matale district; Kuliyaipitiya in Kurunegala district; and Lankapura and Welikanda in Polonnaruwa district) are omitted.¹¹³

¹¹⁰ Para 2.1, *Memorandum of Recommendations* ..., p.4.

¹¹¹ A. 22 (1), *Constitution of the Democratic Socialist Republic of Sri Lanka, 1978 as amended by s. 3, Sixteenth Amendment to the Constitution, 1988.*

¹¹² *Government Gazette* Nos. 1105/25 of 12.11.1999; 1171/18 of 14.02.2001 and 1283/3 of 07.04.2003 respectively, cf. *Appendix II, Memorandum of Recommendations* ..., p.41.

¹¹³ Para 2.3, *Memorandum of Recommendations* ..., p.4.

It may be that political lobbying by Up-Country Tamil and Muslim parties, crucial to parliamentary support for the government, was influential in the selection of divisions. The Official Languages Commission therefore recommends that bilingual designation be based upon a minimum 20 percent minority linguistic proportion of the local population.¹¹⁴

However, even where divisions are officially bilingual, Tamil speakers are no better off than before. As the Commission remarks, "mere direction [on bilingual administration] ... is useless unless facilities for its implementation are provided."¹¹⁵ The predicament of Tamil speakers in bilingual divisions is identical to that of Tamil speakers in mono-lingual Sinhala divisions: inability to communicate and transact official business in Tamil; inability to obtain copies or extracts from official records in Tamil; and inability to obtain official translations in Tamil of documents issued to them.¹¹⁶ The Commission also points to Sinhala speakers in the North and East where Tamil is the language of administration experiencing similar difficulties.

Simultaneous interpretation, particularly into and from Tamil, at ministerial meetings is not available.¹¹⁷ Tamil speaking members of provincial councils and local authorities outside of the North and East are unable to conduct official business in their own language, nor offered simultaneous interpretation, with the exception of the Western Provincial Council and Colombo Municipal Council. Minutes of meetings and proceedings are generally unavailable in both national and official languages.¹¹⁸ Whereas provincial councils and

¹¹⁴ Para 2.3, *Memorandum of Recommendations* ..., p.5. The 1998 language audit conducted by Marga Institute for the Official Languages Commission (but ignored in the OLC's *Memorandum*) recommended a lower proportion of 12½ percent, see Annex V, Foundation for Co-Existence, *Language Discrimination to Language Equality* ..., p.53.

¹¹⁵ Para 2.5, *Memorandum of Recommendations* ..., p.5.

¹¹⁶ Para 2.6, *Memorandum of Recommendations* ..., p.5.

¹¹⁷ Para 2.7, *Memorandum of Recommendations* ..., p.5.

¹¹⁸ Para 2.8, *Memorandum of Recommendations* ..., pp.5-6.

local authorities are entitled to receive communications and transact business in their language of administration, communications are in Sinhala and to a lesser extent in English.¹¹⁹

Provincial councils and local authorities continue to publish orders, proclamations, rules, by-laws and regulations as well as circulars and forms solely in the language of administration and without translation into English as required. While recognising that there is no legal compulsion for publication in both official languages, the Commission recommends such measures as "preferable". The Commission points particularly to non-compliance in this regard by bilingual divisional secretariats. Provincial councils in general and some central government departments have failed to display signage in both official languages and English. Local authorities have persistently failed to display street signs in all three languages despite reminder by the Commission in 2003.¹²⁰

Poor compliance with the provision on use of official languages in the courts is blamed on the scarcity of competent Sinhala to Tamil and Tamil to Sinhala interpreters and translators as well as Sinhala or Tamil to English and English to Sinhala or Tamil. The translation of documents including court records where the language of the court differs is subject to enormous delay and difficulty. The Commission recommends that "a fair number" of judges at all levels of the judiciary be conversant in all three languages to reduce their reliance on interpreters and translators.¹²¹

The Commission highlights, in the Memorandum, a letter by then President Chandrika Bandaranaike Kumaratunga on 30 June 1997 to her cabinet of ministers and senior public officials regarding non-compliance with the official languages policy with prescriptions on implementation within two months.

¹¹⁹ Para 2.9, *Memorandum of Recommendations* ..., p.6.

¹²⁰ Para 2.10, *Memorandum of Recommendations* ..., p.6.

¹²¹ Para 2.11, *Memorandum of Recommendations* ..., p.6-7.

Six specific directions were issued and the relevant cabinet minister charged with their personal supervision and requested to report on action taken within one month.¹²²

- All regulations, legal provisions and information to be available in all three languages;
- All forms to be printed in all three languages;
- All letters from the public to be replied in the language in which it is received or at least with an English translation.
- All name-boards of public institutions and other signage to be displayed in all three languages;
- All vacancies for Sinhala to Tamil translators and Tamil typists to be filled and temporary staff recruited for this purpose where permanent cadre do not exist;
- A senior official in each institution to be charged with responsibility for implementation of the official languages policy.

Ten years on, at time of writing, these directives remain ignored. Even these instructions are as the Commission itself notes, "... of a minimal nature as far as the implementation of the language policy is concerned".¹²³

5.2 Constraints

According to the Memorandum, the root of difficulties in non-implementation of the official languages policy is asserted to be in the public sector and its incapacity to discharge its duties. The Commission estimates that Tamil speakers constitute 8.31 percent of all public servants whereas they comprise 26 percent of the population.¹²⁴

¹²² Para 2.13, *Memorandum of Recommendations* ..., p.7, and in full as Appendix III.

¹²³ Para 2.14, *Memorandum of Recommendations* ..., p.8.

¹²⁴ Para 3.4, *Memorandum of Recommendations* ... p.10.

The table below is illustrative of the distribution of Tamil speakers across the state sector such that the largest single proportion appears to be employed in provincial councils. It also highlights ethnic disparities within the Tamil linguistic minority as all three minority communities are under-represented in relation to their representation in the general population. Muslims are poorly represented, while Up-Country Tamils are worst represented and one suspects concentrated in bottom-end jobs. Unfortunately these statistics are not disaggregated by province or district and gender to arrive at a fuller picture.

TABLE 4: TAMIL SPEAKING PUBLIC SERVANTS BY SECTOR AND ETHNICITY¹²⁵

SECTOR	TOTAL NUMBER OF EMPLOYEES	MUSLIMS (%)	SRI LANKA TAMILS (%)	TAMILS OF RECENT INDIAN ORIGIN (%)	TAMIL SPEAKING EMPLOYEES (TOTAL) (%)
State	259,734	3.09	5.06	0.25	8.40
Provincial Council	292,072	5.75	12.3	1.76	19.81
Semi-government	247,845	3.20	5.48	0.37	9

Of the total number of public servants, of which there are varying estimates across official statistical indices, the Commission believes that around 40 percent would require proficiency in a second official language to perform their duties consistently with the official languages law.¹²⁶ The methodology and reasoning behind the computation of this figure is not unveiled. In the long term the Commission envisions a bilingual (Sinhala and Tamil) if not trilingual (official languages and English) public service.

¹²⁵ Department of Census and Statistics (2002 provisional estimate) as cited in the *Memorandum of Recommendations* ... p.10.

¹²⁶ Para 3.2, *Memorandum of Recommendations* ... p.9.

Considering the scale of the undertaking to achieve bilingual proficiency (over 90 percent of public employees are mono-lingual Sinhala speakers) the Commission suggests a calibrated approach such that the degree of proficiency required varies according to tasks and roles, and that public servants with greater contact with minority language users be the initial focus for language training. Thus three categories of bilingual proficiency are identified: basic conversational skills with minimal reading and writing ability particularly for government officers directly dealing with public enquiries as well as the police and health services; higher level of conversation and ability to correspond (reading and writing skills); and finally, sufficient ability to read, analyse and draft reports in that second official language.¹²⁷

The Commission observes that language training programmes are conducted by a number of public institutions, principally the Department of Official Languages, Sri Lanka Institute of Development Administration and Sri Lanka Foundation Institute.

The Official Languages Department began language training in 1992 and up to 2003 had trained 7290 public servants in elementary Tamil and 527 in higher Tamil as well as 1183 in elementary Sinhala and 95 in higher Sinhala.¹²⁸ This is under one percent of the total number of government officers and many of those trained are likely to no longer be in public service. Therefore the Memorandum proposes an accelerated programme, aiming to train at least one-third of all public servants in each of the above three categories within a period of five years.

As of June 2005 there were only 166 translators in all-island government service. Of this number, 108 could translate from

¹²⁷ Para 3.5, *Memorandum of Recommendations* ... pp.10-11.

¹²⁸ Para 3.9, *Memorandum of Recommendations* ... p.12. This figure is more credible than the government's claim in 2000 that "[a]nnually about 10,000 public servants undergo language training provided by the [Official Languages] Department", Para 32, *Ninth Periodic Report of Sri Lanka to the Committee on the Elimination of Racial Discrimination*, CERD/C/357/Add.3, 20 November 2000, p.10.

Sinhala to English; 44 from Sinhala to Tamil and 14 from Tamil to English. Whereas 400 posts of 'apprentice translator' were created in 2000, only 240 persons accepted appointments and of this number only 150 remain.¹²⁹ Thus at both junior and senior levels there is a serious dearth of skilled personnel. Here too, the Memorandum proposes an accelerated training programme.

The scarcity of competent interpreters is even greater than that of translators and exacerbated by the lack of technical equipment even at ministry level. The Memorandum proposes recruitment of university graduates, qualified in one of the three languages, to be trained as interpreters for a further two years.¹³⁰ It emphasises the government's responsibility to provide the necessary equipment for transcription and simultaneous interpretation. However, the Memorandum does not propose any specific targets or timelines for training and recruitment of interpreters and translators.

English, as the Memorandum notes, has declined in use among public servants who are now overwhelmingly educated in Sinhala or Tamil medium and are not comfortable with the use of English in conversation or written communication. Proficiency in English is recommended, particularly for higher and executive grades, as a means of improving their quality and enabling them to access "the outside world ... to break with the insular character embedded in them."¹³¹ Between 1992 and 2003 the Department of Official Languages has trained 9,114 persons in elementary English and 909 persons in higher English.¹³²

It is noted that the Department of Official Languages had discontinued its early role in the production of glossaries of technical terms for use by public servants and that the existing dictionaries and phrase books were hopelessly out of date through

¹²⁹ Para 3.13, *Memorandum of Recommendations* ... p.13.

¹³⁰ Para 3.18, *Memorandum of Recommendations* ... p.14.

¹³¹ Para 3.20, *Memorandum of Recommendations* ... p.14.

¹³² Para 3.25, *Memorandum of Recommendations* ... p.15.

new developments in science, technology and communication in the intervening decades. The Memorandum determines, without explanation, that the Department of Official Languages is not the appropriate institution for compilation of glossaries in all fields of knowledge but ought instead to be confined to those for public administration and the law alone.¹³³

The Commission recognises that public duty and national interest are inadequate motivators of public servants when it comes to bilingual language training. Therefore it proposes a scheme of material incentives and benefits including additional allowances and improved promotion prospects. The present range of cash incentives¹³⁴ ranging from Rs 150 to Rs 500 a month plus a single lump sum payment (dependent on level of qualification) is of visible value. The Commission has urged its enhancement as an "investment towards promoting national unity and building national integration which are pre-requisites for economic development".¹³⁵

5.3 Recommendations

The Commission envisages the implementation of the official languages policy over 15 years and in three stages of five years each. One-third of public servants would be bilingual at the end of the first phase; two-thirds by the end of the second; and by the end of the third stage, the entire public administrative service would be bilingual.

It is observed that every five years some 20 percent of all public servants vacate their posts through retirement, resignation, illness and the like and therefore at the end of the envisaged fifteen years only 40 percent of the original cadre will remain. Under these circumstances, the Commission believes it to be imperative that the

¹³³ Para 3.28 and 3.29, *Memorandum of Recommendations* ... p.16.

¹³⁴ Cf. *Public Administration Circular* 28/98 (30 December 1998), reproduced as Appendix V in the *Memorandum of Recommendations* ... pp.18-25.

¹³⁵ Para 3.37, *Memorandum of Recommendations* ... p.17.

recruitment of future public servants be on the basis of existing proficiency in the second official language or expectation that such proficiency will be acquired once in employment and within a specified period of time.¹³⁶

Within the first stage of implementation, the Commission proposes an increase in the intake of Tamil speaking public officers so as to satisfactorily reflect their number in the population.¹³⁷ Further, it recommends that both Sinhala and Tamil be compulsory subjects in the school curriculum¹³⁸ to inculcate bilingualism among young people; at present students do study Tamil or Sinhala as a second language but the standard is low and a pass is not required for academic promotion.

The Commission recommends restructuring the Department of Official Languages so as to perform the role of primary institution for accelerated language training of public officers. It recommends that the Department henceforth have four main tasks: mainly, language training in Sinhala, Tamil and English; training in languages of smaller linguistic minorities such as Malay and Malayalam, and languages useful for employment inside and outside of Sri Lanka; official translations; and compilation of glossaries directly related to law and public administration.¹³⁹

It is proposed that the Department become a statutory institution enjoying a degree of autonomy from government and be recast as a national languages institution.¹⁴⁰ This institution is suggested to be appropriate for the production of glossaries, dictionaries and standardisation of terminology in different branches of knowledge. The Memorandum observes that the national languages require constant updating of their vocabularies to keep pace with new developments.

¹³⁶ Para 4.4, *Memorandum of Recommendations* ... p.18.

¹³⁷ Para (f), First Schedule, *Memorandum of Recommendations* ... p.26

¹³⁸ Para (k), First Schedule, *Memorandum of Recommendations* ... p.27.

¹³⁹ Para 4.15, *Memorandum of Recommendations* ... p.21.

¹⁴⁰ Para 4.17, *Memorandum of Recommendations* ... p.22.

The Memorandum notes that government has hitherto concentrated on the translation of documents from English into the official languages and vice-versa but not between the official languages. The Commission proposes that universities assume the training of translators and interpreters for the public sector, with the aim of graduating at least 200 translators and 200 interpreters each year, prioritising translation and interpretation between official languages. In addition to diploma and postgraduate courses, it is recommended that degree level courses be initiated emphasising vocational rather than academic skills.¹⁴¹

Training in English (the "link language") should be prioritised among public officers who require functional competence in English in departments of Foreign Affairs, Trade and Commerce, Industry and Technology, Health Services, Customs, Emigration and Immigration among others; followed by those in the higher managerial, administrative and executive echelons in all government departments; professionals on a needs basis as determined by their respective Ministry; and finally all other government employees with an interest in attaining fluency in English.¹⁴²

The Commission proposes the abolition of the present Translators Service and its replacement by two separate institutions: the Government Translators Service and Government Interpreters Service.¹⁴³ It is recognised their staff should receive remuneration appropriate to their qualifications, training and nature of work, presumably an admission of low pay and status contributing to under-recruitment of cadre and high turnover.

Financial incentives for public servants who acquire proficiency in the second official language and/or link language are recommended for increase on a scale of Rs500 to Rs1,000 to Rs2,000 per month depending on level of qualification. It is also suggested that language

¹⁴¹ Para 4.19, *Memorandum of Recommendations* ... p.22.

¹⁴² Para 3.21 & 3.24 and 4.20, *Memorandum of Recommendations*...p.15 and pp.22-23 respectively.

¹⁴³ Para 4.25, *Memorandum of Recommendations* ... p.25.

proficiency in more than one official language become a criterion for promotion including through creation of special grades for public employees with higher and advanced levels of proficiency in both the second official language and the link language.¹⁴⁴

Following from the Commission's recommendation that any divisional secretariat with a minimum linguistic proportion of 20 percent be deemed to be bilingual such that both Sinhala and Tamil are recognised as languages of administration, some 43 divisional secretariats in Ampara, Anuradhapura, Colombo, Gampaha, Kandy, Kegalle, Kurunegala, Matale, Matara, Polonnaruwa, Ratnapura, Trincomalee and Vavuniya districts are identified for action by the Executive in this regard.¹⁴⁵

Although overall responsibility for ensuring compliance with the official languages law in Chapter IV of the Constitution rests with the Official Languages Commission as stipulated in the 1991 Official Languages Commission Act, the Commission recommends that supervision and monitoring of the implementation of the languages policy and the recommendations contained in the Memorandum be devolved to relevant subject ministries such as Public Administration, Home Affairs, Provincial Councils and Local Government, Police, Health Service, and Justice among others. It further recommends that these Ministries receive bi-annual and annual reports on implementation of the languages policy from departments, services and institutions within their portfolio.¹⁴⁶

5.4 Implementation

The government, undoubtedly through the exertions of Minister of Constitutional Affairs and National Integration and Communist Party leader, D. E. W. Gunasekera, has acted on some of the recommendations in the Official Languages Commission 2005 Memorandum.

¹⁴⁴ Para 4.26 & 4.27, *Memorandum of Recommendations* ... p.25.

¹⁴⁵ Para 4.24, *Memorandum of Recommendations* ... pp.23-24.

¹⁴⁶ Para 4.28 - 4.30, *Memorandum of Recommendations* ... p.25.

As of 1 July 2007 all officers recruited to the public and provincial public service after that date must acquire proficiency in the second official language within five years of entering into service.¹⁴⁷ Three levels of proficiency are identified as required by the functions of the post. Increments of officers who do not attain the level of proficiency stipulated will be deferred until satisfaction of this requirement.

Financial incentives for public officers who acquire or demonstrate language proficiency in a second official language were also raised with effect from 1 February 2007.¹⁴⁸ Henceforth, one lump sum payment of either Rs15,000 or Rs20,000 or Rs25,000 will be paid dependent on level of proficiency gained in addition to a monthly allowance equivalent to an increment. The training may be conducted by the Department of Official Languages or other state or private or non-governmental institution but based upon syllabi prepared by the Department while the examination will also be conducted by the same Department. The incentives for learning of English are not raised to the level of the new circular but remain as provided in the previous 1998 circular (discussed above).

In November 2006, cabinet approval was received for establishment of the National Institute of Language Education and Training (NILET). The NILET has the functions of *inter alia*: conducting language training in Sinhala, Tamil and English to produce competent instructors in those languages; conducting research and studies on language training; awarding certificates and diplomas to successful candidates of training and education courses provided by the Institute; creating a documentation centre on languages; conducting specifically designed language courses for interpreters, translators and stenographers; undertaking, assisting and promoting linguistic research in Sinhala, Tamil and English and other languages and, when necessary, recommending changes to the vocabularies of the official and link languages.¹⁴⁹

¹⁴⁷ *Public Administration Circular* 07/2007, E/2/3/2/70, 28 May 2007.

¹⁴⁸ *Public Administration Circular* 03/2007, E/9/6/91, 09 February 2007.

¹⁴⁹ S. 5,(a)-(c) and (e)-(g) respectively, *National Institute of Language Education and Training Act*, No. 26 of 2007.

The administration of the Institute is vested in a Board of Management consisting of nine members appointed by the Minister in charge of the subject of National Integration.¹⁵⁰ Four of the members serve on an ex-officio basis: Secretary to the Ministry of Education; Secretary to the Ministry of Public Administration; Secretary to the Ministry of Finance and Secretary to the Ministry of Constitutional Affairs and National Integration and five members are to be selected among persons with experience and capacity in languages, literature, education and management. The Chairman of the Board is nominated by the Minister from among their number. The term of office is three years and may be renewed indefinitely barring death, resignation or removal.¹⁵¹ The quorum for any meeting of the Board is three.¹⁵²

The Minister is authorised to offer general or special directions in writing to the Board as to the exercise and discharge of its functions which the latter is duty bound to implement.¹⁵³ The Board is obliged to publish an annual report on its activities at the end of each financial year.¹⁵⁴ This report is to be submitted to Parliament following approval from the Minister.

The chief executive officer of the Institute is the Director-General, to be selected among eminent management professionals, and appointed by the Minister in consultation with the Board of Management.¹⁵⁵ The Director-General is entitled to seat with voice but no vote in meetings of the Board of Management.

An Academic Board is created, responsible to the Board of Management, and with the powers of: provision of advice relating

¹⁵⁰ S. 3, *National Institute of Language Education and Training Act*, No. 26 of 2007.

¹⁵¹ S. 2, Schedule, *National Institute of Language Education and Training Act*, No. 26 of 2007.

¹⁵² S. 8 (2), Schedule, *National Institute of Language Education and Training Act*, No. 26 of 2007.

¹⁵³ S. 17, *National Institute of Language Education and Training Act*, No. 26 of 2007.

¹⁵⁴ S. 23, *National Institute of Language Education and Training Act*, No. 26 of 2007.

¹⁵⁵ S. 9, *National Institute of Language Education and Training Act*, No. 26 of 2007.

to academic activities of the NILET; conducting examinations and award of diplomas and certificates; submission of recommendations and reports to the Institute on academic matters; recommendations on admissions requirement for students; rule-making on academic programmes of the Institutes; recommendations for appointment of examiners; recommendations relating to appointment, dismissal, disciplining and terms of employment of academic staff; recommendations on award of scholarships, bursaries, prizes and so on as well as of persons eligible for the same; appointment of committees comprising representatives of the Academic Board; and rule-making on meetings and procedures of the Academic Board.¹⁵⁶

An Advisory Council is also created to provide advice to the Institute on its effectiveness and as a forum for discussion of issues relating to the Institute and its development. The Council shall be appointed by the Minister in charge of the subject of National Integration and consist of five eminent persons in the field of languages, literature and education.¹⁵⁷

NILET will be based at Agalawatte and had not begun functioning at time of writing. Although the Official Languages Commission had recommended the disbandment of the Department of Official Languages, it now appears that the Department will continue to exist independently of the new Institute and with overlapping functions.

6 Conclusion

The Memorandum of Recommendations is inspired by good intentions: to achieve through progressive measures, the implementation of the official languages policy within public administration. Nevertheless some questions persist.

¹⁵⁶ S. 8, *National Institute of Language Education and Training Act*, No. 26 of 2007.

¹⁵⁷ S. 15, *National Institute of Language Education and Training Act*, No. 26 of 2007.

Will material (monetary, confirmation of employment, promotion) incentives to encourage bilingualism among public officers be sufficient to encourage uptake of language training courses in the absence of political leadership by government or moral sanction by society? Will mid-career officers make the effort? Will there be a backlash from public officers causing government to back-pedal? Does the unwillingness of the Official Languages Commission to countenance prosecution of public officers confirm them in their impunity for either passive or wilful non-implementation of the official languages law? Will government reverse decades of discrimination against Tamil-speakers in the public service by actively recruiting them, when it is politically more advantageous to reward their own (Sinhala) supporters?

The larger critique is that the Memorandum is flawed by its bureaucratic-administrative perspective on language policy. The avowed purpose of the Memorandum is the reform of the administrative service for the purpose of better serving linguistic minorities through implementation of the official languages law. However, the Official Languages Commission has eschewed altogether a rights-based approach to the issue of ... language rights!

Using a rights-based-approach, the Commission would have begun from the subject position of Tamil speakers themselves. Instead of presenting Tamil speakers merely as beneficiaries or users of public services with needs to be serviced, minorities are empowered where they are viewed and view themselves as rights-holders with claims on state and society.

These claims are founded upon universal human rights, some of which are in the fundamental rights chapter of the Constitution and others contained in international human rights instruments to which Sri Lanka has acceded or is obliged under customary international law and which are the inalienable right of all humans.

This vocabulary of rights and duties is accompanied by concepts of accountability, culpability and responsibility. These allow us to identify the duties that are imposed on different actors and institutions; the contribution of their actions and omissions to rights violations; and the assignation of responsibility therefore creating remedies and drawing attention to the need for and nature of processes and institutions to secure them.

Instead of only demanding more resources and being indifferent to their distribution, the rights based approach would alert us to those who are most vulnerable, whose needs are ignored or suppressed by dominant groups within their own communities, and direct the substance and allocation of resources accordingly.

A human rights approach to the issue of language policy would have centred on informing linguistic minorities of their rights and educating public officers, companies, non-governmental organisations and social associations of their duties. It would have identified existing institutions and mechanisms for accountability and redress as well as areas for reform and innovation. It would have balanced the obligations imposed on the state with resource constraints, without allowing the latter to defer the satisfaction of the former indefinitely.

Still, it is difficult to see how decades of Sinhala majoritarianism may be reversed through policy papers and government circulars and even legal reform and constitutional change. The application of the official languages policy offering linguistic equality to Tamil speakers is a chimera in the absence of radical reform (de-communalisation) of the state, and one constant amidst instability in Sri Lanka is the "reform-resistant"¹⁵⁸ character of the state.

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¹⁵⁸ I am borrowing here from Jayadeva Uyangoda's, 'A State of Desire? Some Reflections on the Unreformability of Sri Lanka's Post-Colonial Polity' in S. T. Hettige and M. Mayer (eds.), *Sri Lanka at Crossroads: Dilemmas and Prospects after 50 Years of Independence*, New Delhi: Macmillan India 2000.

XI

POST-TSUNAMI HOUSING RIGHTS

*Shyamala Gomez**

1 Introduction

The tsunami of 26 December 2004 brought about new challenges to the people of Sri Lanka. Approximately 100,000 houses were destroyed or damaged and over 150,000 people were left without their livelihoods.¹ In addition to the reconstruction of housing for those displaced by the tsunami, the State sought to grapple with the restoration of livelihoods and the psycho social impact of the tsunami on those affected by it. Evidence indicates that more women than men were affected by the tsunami.² The elderly and disabled were also affected. Over 1,000 children were left orphans and questions relating to custodianship and inheritance rights have also emerged.

The reconstruction of houses partially damaged or destroyed by the tsunami was a slow process. A rights based approach to reconstruction would have been the ideal, where the basic human rights of those affected are addressed in a systematic and co-ordinated manner. This did not take place. The following sections deal with a few aspects relating to housing during the recovery process including the impact of the tsunami on women and their right to adequate housing and shelter.

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¹ Ministry of Finance and Planning & Reconstruction and Development Agency (RADA), *Post-Tsunami Recovery and Reconstruction: December 2006*, p.viii

² *Ibid.*

2 Overview of Institutions Set Up Post-Tsunami

Several institutions were established by the State to deal with the disaster. The Centre for National Operations (CNO) was the first to be set up in the immediate aftermath of the tsunami to deal with the crisis at hand. Three task forces were established by the government subsequently, including the Task Force for Rebuilding the Nation (TAFREN). The Task Force for Relief (TAFOR) and the Transitional Accommodation Project (TAP) were merged and the Reconstruction and Development Agency (RADA) was established under the Presidential Secretariat.³

The donor community also formed an *ad-hoc* group to share information and expertise by forming the Donor Group on Permanent Housing. The Group, chaired by RADA and hosted by the World Bank, is a forum to exchange information on the current status of tsunami housing. The Donor Group consists of the World Bank, Asian Development Bank, bilaterals, large INGOs such as World Vision, CARE and Centre on Housing Rights and Evictions (COHRE) and civil sector organizations. Similarly, UN Habitat chairs the Housing and Habitat Forum (H&H) which consists of UN agencies, INGOs and NGOs working on housing issues. It discusses issues related to shelter, care and maintenance and also is a forum in which to share technical expertise and practical problems encountered in the housing programme. However, grassroots groups are not represented at this forum and this is a notable gap. It is possible that some of these groups feed information to NGOs working in the field and that this information is shared at the H&H Forum meetings.

Institutional instability was a setback to the reconstruction process. The different institutions set up, post-tsunami, had several shortcomings. They were plagued by financial instability and politics

³ See Sri Lanka: *State of Human Rights 2006*, Law & Society Trust, Colombo 2007 "Human Rights Implications of the Tsunami," for a detailed discussion of state structures set up to address the aftermath of the tsunami.

also came into play in the different appointments at higher levels. The frequent change of leadership in these institutions resulted in instability and *ad-hoc* measures being taken.

Poor co-ordination between institutional structures dealing with post-tsunami housing was another setback which resulted in duplication of efforts and wastage of financial and other resources. A lack of co-ordination among the different commissions and departments established was also evident. Insufficient and inefficient networking among these organizations has led to unclear, *ad-hoc* implementation of policy decisions. RADA has failed to provide co-ordination in overseeing the reconstruction effort.

The assistance of existing institutions dealing with housing such as the National Housing Development Authority (NHDA) should have been called for by institutions such as RADA. This would have provided stability and certainty to the process. Institutions such as the NHDA could have provided valuable expertise to the reconstruction process with their long years of experience in the housing field. Similarly, a lack of scientific input into the post-tsunami reconstruction process was a gap which should have been filled.

Currently reconstruction work is being handled by RADA. Though it is not a statutory body, steps were taken to give it this status through a draft bill, however this process was not completed. RADA's housing unit was, in mid 2007, absorbed into the Ministry of Nation Building, which will take over the housing reconstruction program. The other divisions of RADA will be wound up by 30 June 2007. The consequences of this shift in power are yet to be seen.

3 Current Status of Housing

According to the RADA two year report, approximately 51 percent of the required houses have been completed.⁴ The total need is estimated at 118,327 houses.⁵ Reconstruction in the Southern province has attempted to meet the housing needs of those affected, while reconstruction in the East has been slow. The prevailing security situation, high costs of raw materials and lack of skilled workers in the North and East contributed to the slow progress of reconstruction. The housing needs of those in East far outnumbered the need for housing in the South. The Western province too lagged behind in terms of meeting housing needs. This was mainly due to the lack of suitable land. Despite these housing gaps, RADA states that the construction of housing is due to be completed by the end of 2007.

Another issue that surfaced was that relocated families were reluctant to move and instead preferred to stay on in transitional shelters. UN Habitat reported that as of 1 June 2007, a total of 12,608 transitional shelters were still in occupation.⁶ The reasons included the lack of infrastructure in permanent housing, and the unsuitability and unavailability of relocation sites. Perhaps most compellingly, these families received more aid if they stayed on in the transitional shelters. Two and a half years after the tsunami, these transitional shelters lack basic living conditions and, according to the Disaster Relief Monitoring Unit (DRMU) of the Human Rights Commission, the conditions of the transitional shelters in the east are deteriorating and they are unfit for habitation. A report from Batticaloa indicates that the temporary shelters had no kitchens and the tin sheeting made the houses unbearably hot. The houses were later re-roofed with thatch, providing more ventilation.⁷ The DRMU also stated

⁴ *Ibid.*, p.7.

⁵ *Ibid.*

⁶ GA District Housing Co-ordinator CADREP.

⁷ *Tsunami Aftermath: Violations of Women's Human Rights Sri Lanka*, INFORM, CATAW, SWDC, APWLD, 2006, p.19.

that over 100,000 IDPs were still languishing in transitional shelters. The problem was exacerbated by the fact that it has been difficult to separate the legitimate tsunami survivors from others such as extended families who have moved into these temporary shelters. Questions also surfaced as to the care and maintenance of these transitional shelters, as some of the organizations that built them are no longer represented in the country. Even where an institutional presence remains, a lack of funds prevents them from maintaining these houses.

The quality of the permanent housing is also questionable. Reports have cited building defects which have affected the walls and roofing of the housing, making them uninhabitable. The poor quality of building materials used for reconstruction also contributed to the lack of habitability of these houses. The design of houses in some instances was unsuitable in the Sri Lankan context. Some reports from the South indicated that houses lacked kitchens, while in others toilets adjoined the kitchen area.⁸ These factors point to a lack of monitoring by the authorities of permanent housing construction. It also points to the fact that affected communities were not consulted as to their preferences in the rebuilding of houses. Women in the east complained that they were not consulted in the planning of housing.⁹ Other issues that arose included a lack of basic infrastructure to housing sites such as solid waste disposal, roads, electricity and water. Environmental problems were also imminent where incomplete environmental impact assessments had been conducted.

There have also been problems with the suitability of the relocation sites for permanent housing. The State acquired property for this purpose, however, very little consultation took place with those affected, with the result that many were reluctant to move to the new sites and instead preferred to remain in the transitional shelters.

⁸ Information gathered from interview with Southern Trust, a voluntary organization working with the tsunami affected in the south.

⁹ *Tsunami Aftermath*, p.19

Another reason for their reluctance was that in some instances the sites were not appropriate for a community's livelihoods; for example, the fisher community preferred to remain in close proximity to the sea in order to carry on with fishing activities.

4 The Tsunami Housing Policy (THP)

A new THP was formulated by RADA with the assistance of key stakeholders in April 2006. The implications of the policy and the modalities of how land and housing were to be allocated to those affected by the tsunami will be examined in this section.

The housing policy superseded all previous government circulars and provided for a more systematic approach to the reconstruction of housing. District Secretaries were entrusted with overall responsibility for the implementation of tsunami housing reconstruction in their respective districts. Guidelines on the implementation of the housing policy were distributed to District Secretaries, who were given the discretion to take decisions regarding its implementation. The THP in its introduction states that all tsunami housing projects will be owned and implemented by district/divisional secretaries in consultation with and with the assistance of CBOs and monitored by RADA.

4.1 Objectives of the policy

Although the objective of the THP was to expedite the reconstruction process so that all tsunami affected persons would have a house to move back into by the end of 2006, this did not materialize. In this section, we look at some of the shortcomings of the policy. The serious gaps in the policy as regards the housing needs of women will be highlighted.

The objectives of the policy stress that regardless of ownership, a house for a house will be granted and that all affected shelters will

be considered, regardless of location. However, this objective was not always achieved. The issue of whether renters would be entitled to housing has yet to be dealt with. RADA has taken the position that in the event of excess housing being available after eligible persons had been housed, renters may be considered eligible. The question of extended families affected by the tsunami and their housing entitlements was also raised. The housing policy makes special reference to the fact that extended families could pool entitlements to construct a larger house. This provision has given rise to confusion as to what would constitute an extended family and who is entitled to make this claim. It is important to recognize the extended family system and ensure that all members of an extended family are compensated for their losses.

Equity between beneficiaries was another objective of the policy. However, here too, confusion as to who the actual beneficiaries were and should be, stultified and delayed the process of reconstruction. The last given number of beneficiaries was approximately 120,000.¹⁰ However, the Department of Census and Statistics released the number of beneficiaries at 86,000. No authoritative beneficiary list has been compiled and as a result the numbers are uncertain. This confusion over beneficiary lists has also resulted in duplication of assistance being given to some beneficiaries while other beneficiaries have not received their due. There was no systematic effort to track the movement of legitimate beneficiaries, with the result that many did not receive the assistance due to them. Donors and the government need to have an accurate list of beneficiaries if they are to conduct consultations and encourage community participation in voicing their housing needs.

4.2 Allocation of housing under the policy

In March 2006, the Tsunami Housing Reconstruction Unit (THRU) was absorbed into RADA. Since then, RADA has been responsible

¹⁰ Meeting of the Donor Group on Permanent Housing at the Ministry of Nation Building, November 2007.

for the coordination of the donor built housing programme at central level and by the District Secretaries at district level. The housing programme was supported by over 200 donors, private companies and individuals. A mammoth co-ordination effort was required, though not always provided, by RADA and government officials working at district level. In 2005, the State imposed a coastal buffer zone prohibiting construction within 200m of the sea in the North and East and 100m in the South and West. The suitability of such a zone was questioned due to the relocation of those dependent on the fishing industry. This led to the relaxation of the buffer zone, resulting in turn in an increased demand for housing from 98,525 to 114,069.¹¹

Transitional housing was provided in the first instance and permanent housing was to be provided upon reconstruction. Two types of housing under the permanent housing component were the donor driven programme and the home owner driven programme. The former programme was to be funded by donors whereby relocated housing was constructed for those families who had lived within the buffer zone and the latter programme consisted of the reconstruction of damaged houses by the home owners with the assistance of cash grants provided by the state.

The THP lays down these housing assistance options:

1. Government land + donor built house under the donor driven housing programme for those who lived within the buffer zone.
2. Government land + government cash grant of Rs. 250,000 to construct a new house together with regulated donor assistance provided to complete the house through co financing agreement.
3. Government cash grant of Rs. 150,000 for Ampara and Rs. 250,000 for Colombo to purchase land + government cash

¹¹ Post-Tsunami Recovery and Reconstruction, p.15.

grant of Rs.250,000 to construct a house + regulated donor assistance through co-financing agreement.

4. Housing reconstruction grant of Rs. 250,000 for fully damaged houses and Rs.100,000 for partially damaged houses + regulated donor assistance provided to complete only fully damaged houses through co-financing.

The financing of partially and fully damaged housing was to be Rs.100,000, given in two installments, Payments of Rs.250,000 were to be given in four installments. A few reports have indicated that many families have not received all the installments due to lack of progress on reconstruction. The families' failures to progress in reconstruction have been attributed to circumstances beyond their control, such as rising costs and building houses which they are unable to finance. NGOs and INGOs also co-funded partly damaged units. It is estimated that in the case of nearly 91 percent of fully damaged houses, "top up" funds are needed for completing these houses in the North and East.¹²

The owner driven housing programme has been more successful than the donor driven programme due to the participation of affected families in the reconstruction process. The THP stresses community participation, though this factor has not been present in housing reconstruction in most instances.

The RADA report highlights that the South has been oversupplied with approximately 6,000 houses. This problem has occurred as result of poor coordination efforts and needs to be addressed. There are no clear guidelines on how these houses are going to be distributed. The equity issue among beneficiaries has also cropped up with different agencies and different donors building houses of different standards and costs. Some affected families received government grants and top up funds from other agencies, while others did not. This caused tension and ill will among the

¹² Post-Tsunami Recovery and Reconstruction, p.15.

beneficiaries and there was a tendency to switch donors in the hope of getting a better offer.¹³

Although the policy stresses community participation, indications are that those affected by the tsunami were ill informed of the assistance and other benefits available. The right to information is integral to any informed decision making process. Beneficiaries were in the majority of instances unaware of their entitlements and relied heavily on hearsay to make their choices.

The Government policy of a "house for a house" meant that even encroachers were eligible for a house. However, renters were excluded and were unable to claim any compensation for their losses due to the tsunami, although the house owner could claim compensation. This issue has been raised time and time again at different fora with no solution.

5 A Case for Joint Ownership of State Land

At the outset, immediately after the tsunami, it was unclear under which legal provisions the allocation of state land was to be carried out. Subsequently, RADA clarified that land was to be allocated under the State Lands Ordinance (SLO) to those affected by the tsunami.¹⁴ Under the SLO, the practice has always been to grant ownership of state land in one person's name. In most cases, this was the head of the household, understood to be the male spouse in a household, unless it was a single headed household, in which case it could be a woman.

An INGO, the Centre on Housing Rights and Eviction (COHRE) has, in collaboration with several other NGOs, donor organisations and experts, formulated gender sensitive guidelines to the Tsunami Housing Policy (THP). The guidelines set out clear measures to be

¹³ Post-Tsunami Recovery and Reconstruction, p.23.

¹⁴ Post-Tsunami Recovery and Reconstruction, p.21.

taken to ensure that women are considered in the reconstruction process and also to ensure that women are not discriminated against in allocation of land and cash grants.

The administrative practice of granting sole ownership of state land is ingrained in the legal system and had not been questioned till the tsunami struck. COHRE initiated a process whereby an opinion was sought from the Attorney General's Department in October 2006 as to whether it would be possible to grant co-ownership of land in specific situations when the state allocates land. It is only in specific cases that co-ownership is suitable. COHRE's Gender Sensitive Guidelines to the THP specify that the following three principles should guide the allocation of property to those affected by the tsunami:

- a. Where the title to land previously owned is not at issue, new land title should be given, to the previous land owner/s;
- b. Where the land was encroached upon, new land title should be given in co-ownership to both spouses, unless there are compelling reasons to do otherwise;
- c. Where previous ownership is disputed or unclear or where both spouses have contributed to the previous property, the authorities must have the discretion to give new land title in co-ownership to both spouses.¹⁵

The Attorney General's Department gave its opinion in February 2007, however this opinion was based on the Registration of Title Act¹⁶ which does not have any bearing on property affected by the tsunami. COHRE therefore decided to approach the Attorney General's Department for another opinion in August 2007. The second opinion is pending. COHRE has conducted several programmes on women and housing rights and has created

¹⁵ Gender Sensitive Guidelines to the Tsunami Housing Policy, Centre on Housing Rights and Evictions (COHRE), July 2006

¹⁶ Registration of Title Act No.21 of 1998

awareness on the issue of joint ownership and the need to lobby for change in this discriminatory practice.

COHRE conducted a study among 100 women in Hambantota, Ampara and Matara who had been dispossessed of their land due to the tsunami. When the state allocated land after the tsunami, it was found that these women had not been granted property, and instead their spouses, who had signed as "head of the household", were given the property instead. These case studies have been collected by COHRE to advocate for joint ownership in specific situations and also to ensure that women are granted land in their own name when the state allocates property.

According to the 2006 RADA report,

the process for obtaining clear land titles has been complex and considerable time and effort has been spent in (sic) it. Gender considerations in relation to land titles i.e. properties/land being registered in both husband and wife's names rather than just in the 'head of the household' name continues to be an unresolved issue.¹⁷

This statement in the RADA report is not followed by any solutions. The failure to identify possible solutions to resolve the problem clearly highlights the lack of interest of the State in issues of women's right to own property. To resolve this issue, the State needs to make a commitment that it will do away with archaic discriminatory administrative practices that do not give women an equal right to own and deal with state property.

Under a new policy direction issued by the Commissioner General of Land,¹⁸ title to state land given in the post-tsunami context will be given in the name of the family unit considered as a whole, in

¹⁷ Post-Tsunami Recovery and Reconstruction, p.23.

¹⁸ Information obtained from Dixon Nilaweera, Consultant, UN Habitat.

consultation with the family as to whose name should be used. Many women have benefited from this procedure.¹⁹ Another salutary development is that divisional secretaries have been given instructions to ensure that land title is given in the name of women where there is evidence of domestic violence in the household or where there is a danger of ill treatment of the children or if there is a possibility of the dependents becoming destitute.²⁰

In donor driven housing, the trend has been to give the house in the name of the husband. This is in spite of the fact that prior to the tsunami, many women living in the North and East owned title to property. However, less than 10 percent of households have received legal ownership of houses given by donors. The lack of uniformity in the allocation of property also affects private grants of land where private entities such as social service organizations and the private sector donated land and housing to displaced persons. There is uncertainty as to whose name these private grants were given in. A streamlining of the process is required to ensure equity between beneficiaries and uniformity of approach.

The Sri Lankan Constitution enshrines the principle of equality before the law and the equal protection of the law and also lays down the principle of non-discrimination on the basis of sex.²¹ The administrative practice of giving land grants in one name, in most cases the male head of the household, violates the principle of equality enshrined in the Constitution and must be done away with. Similarly, the Constitution does not contain any impediment to women holding and dealing with property.

¹⁹ Interview with Dixon Nilaweera, Consultant, UN Habitat

²⁰ Circular No. 2006/3(i) of 31 October 2006, Land Commissioner General's Department.

²¹ Article 12. of the Constitution of Sri Lanka

6 Gender Implications of the Tsunami Housing Policy

The principle of restitution demands that the owner of land prior to the tsunami disaster should necessarily be given title to new land where allocated by the State. Women must have the ability to deal with property they have title to. When women own property, it elevates them to a position where they have bargaining power. They can use the property as collateral in obtaining loans etc. Any state housing policy should take this into consideration when formulating policy.

The THP has not taken women's rights concerns as regards housing into account. It is a weak document from a gender perspective and several gaps have arisen in the implementation of the policy. The policy contains hardly any reference to women and has a reference to legal ownership. It states "in the case of married couples, title for new property will be awarded to that spouse with an equitable interest in the property. However, either spouse is entitled to transfer ownership by a letter of mutual consent." The explanation also states that a person who has legal title to the land containing the damaged property is deemed the legal owner. The wording is confusing and lacks clarity, leaving room for misinterpretation and abuse of discretionary powers vested in state officials working at different levels such as RADA and the district secretaries. The state did not release any guideline on how to implement these provisions and some women who had owned property prior to the tsunami were disentitled to land grants when the state allocated land to the tsunami affected. A stark example of this is seen in the east where the customary practice among those in the Muslim community was to bestow land given to a mother as dowry or inheritance to her daughter. Where land allocations were done haphazardly, not taking into account these important considerations, women and girls lost their rights to land and property which they had previously owned and enjoyed.²²

²² *Tsunami Aftermath*, p.24, see n.8

The THP also directs district secretaries to ensure "proper prioritization of beneficiaries, so that vulnerable groups such as single women, elderly, multi child households etc. receive assistance first." There is no guideline on how to implement these instructions. It has been left to the discretion of the district secretaries to comply, which is unsatisfactory.

The COHRE guidelines recommend various measures to ensure that women participate in the process of reconstruction, including consultations with affected families and other interest groups. It is imperative that consultations are held to gather information on the needs of affected communities and this includes consulting with women. Women have been left out of the reconstruction process. They have not been consulted on issues such as housing design, size and location. The guidelines stress that community participation is necessary in keeping with the THP. It lays down that District Secretaries should consult with CBOs, local clergy, social workers and other interest groups in implementing the THP. Divisional Secretaries and District Secretaries are an important target group and civil society groups should focus on providing these state officials with training and awareness to ensure that they perform their tasks efficiently. The RADA two year report states that consultation with beneficiaries has been inconsistent.²³

Another issue flagged in the COHRE guidelines is the danger of relying on gender discriminatory concepts such as the "head of the household." The guidelines stress that households should be seen as being run jointly or administered jointly. There is no single head of the household. Each family has its own method of distributing family responsibilities and these factors should be taken into account in the distribution of land and housing. However, when state forms are distributed for collection of information, they specify that the head of the household signs the document. In many cases, husbands signed the form, so that women who had owned land prior to the

²³ Post-Tsunami Recovery and Reconstruction, p.23.

tsunami were not able to receive state land, as their spouses had already signed the form as "head of household." As a result, the gift certificate would be issued in the husband's name, although he had not owned property prior to the tsunami. The COHRE guidelines stress that where women owned property previously, new allocations should be given in their name and where property was owned jointly, then new allocations of land and housing should be given in both spouses' names. On the other hand, if dowry property was in another family member's name and they are now deceased, then new land title should be given in the woman's name as it is her dowry property. Currently, a gift certificate is issued as a precursor to land allocation at a later date. Over 2000 land grants are expected to have been allocated by the end of 2007.

Cash grants given after the tsunami were supposed to be deposited in joint bank accounts. Often, this did not happen and the grants were deposited in bank accounts that were in the name of the head of the household. The guidelines lay down that it is important that such joint bank accounts are created by banks so that women too can benefit from these cash grants.

Another issue touched upon in the guidelines is that informal cohabitation arrangements should be taken into account in land allocation. Sri Lankan law recognizes marriage by habit and repute and it is quite common for men and women to live together in village communities as husband and wife without having a formal marriage registration. District Secretaries should use their discretionary powers to inquire into such matters prior to allocating land. The THP only refers to "married couples". However, the reality must be considered when land is given by the State.

Grievance handling is also dealt with in the guidelines. They state that in any grievance redressing mechanism, half the numbers must consist of women. It also provides that an appeal process must be available.

District Secretaries are vested with wide discretionary powers that must be exercised in a gender sensitive manner. It is therefore vital that they undergo training to identify situations in which women may be discriminated against. District Secretaries must inquire into situations on a case by case basis as no two situations are alike. Civil society organizations together with the State sector should hold awareness training programmes for District Secretaries on women and their rights as regards land and property and adequate housing. It is also important for District Secretaries to adopt a rights based approach in their work and this must be included in their training programmes.

7 Emerging Developments

7.1 A Restitution Policy

Every internally displaced person (IDP) has a right to return to his or her original home. They have the right to return of their own free will, voluntarily and as of choice. However, IDPs also have the option of choosing to stay back at their location of displacement or have the option of being relocated to another location. IDPs also do not lose their rights to property they owned prior to displacement.²⁴ In this section we examine measures that have been taken to address the right to restitution and resettlement of IDPs.

The COHRE has recently been working towards the introduction of a national housing and restitution policy for Sri Lanka. This is a necessity in a context where large scale displacements have occurred as a result of conflict and disaster. A policy framework becomes imperative to deal with continuing displacement or in the event of a natural disaster such as the tsunami. There has been no consistent state policy to deal with issues of restitution of displaced persons. Restitution rights embrace a wide spectrum such as adequate housing, restoration of livelihoods, compensation, secondary occupation

²⁴ See below on the Pinheiro Principles

and ownership issues. Restitution claims procedures may also be complex. Such procedures should be flexible and relatively fast with a possibility of appeal.

The mandate of the North East Housing Reconstruction Programme (NEHRP),²⁵ is to facilitate the reconstruction of 46,000 houses in the North and East over a four year period through the provision of housing cash grants. The objective of the programme, which is mainly funded by the World Bank, is to facilitate the return of displaced populations in the North and East to their homes and the regularization of land title to identified beneficiaries. The housing assistance consists of Rs.110,000 to each family with a monthly income below Rs.2,500 to rebuild or repair their damaged houses.²⁶

REPPIA was established under the Ministry of Resettlement and Disaster Relief Services. Its mandate is the rehabilitation and resettlement of persons and properties affected by the war. Under its Unified Assistance Scheme, REPPIA provides assistance of Rs. 100,000 to a non government servant and Rs. 150,000 to a government servant to rebuild their homes. These discrepancies in claims payments between the different schemes in operation under REPPIA and the NEHRP need to be addressed to ensure non discrimination among the beneficiaries in the different programmes. The schemes need to be revisited and revamped to make them consistent. The Ministry of Resettlement is spearheading this process with the assistance of civil society organizations in putting forward recommendations towards the formation of a resettlement policy.

²⁵ The North East Provincial Council (NEPC) in Trincomalee would be the implementing agency. A National Steering Committee under the chairmanship of the Secretary to the Ministry of Relief, Rehabilitation and Reconciliation would monitor the overall program. A Provincial Program Coordinating Committee would meet once every two months, and will be responsible for supervising NEHRP. The NEPC established the North East Housing Reconstruction Unit (NEHRU) to manage the program, which would be chaired by Chief Secretary of the NEPC.

²⁶ <http://tamilcanadian.com/tools>

Another recent development has been the establishment of a Resettlement Authority by statute to work towards the formation of a national policy on resettlement and to “plan, implement, monitor and co-ordinate the resettlement of internally displaced persons and refugees.”²⁷ Its objectives include ensuring the resettlement of persons in a safe and dignified manner, facilitating the rehabilitation of IDPs and refugees and their entry into the development process.

The mandate of the Authority is broad and includes the formulation of a resettlement policy; the co-ordination of government, NGOs, INGOs and donors involved in the resettlement process; the provision of assistance to IDPs to obtain lost documentation and infrastructure; health and education facilities; the mobilization of resources; solving of disputes regarding ownership; looking into the needs of the displaced and the provision of access to information to concerned agencies.²⁸ The Act also empowers the Authority to acquire land for the implementation of its projects. A shortcoming of the law is that it only deals with displacement as a result of armed conflict resulting from “generalized violence”. Its mandate does not extend to other forms of displacement such as displacement due to natural disaster and development-related displacement. However, the Authority would arguably be involved in the resettlement of those who have been doubly displaced as a result of the armed conflict and the tsunami. The Resettlement Authority is intended to pave the way for a more streamlined resettlement process. Only time will reveal its efficiency.

The Pinheiro Principles are a set of UN guidelines on housing and property restitution for refugees and IDPs which act as practical guidelines to states on how to address complex legal and other issues based on housing, land and property restitution. They provide standards based on internationally accepted human rights norms and humanitarian and refugee law, for the implementation of

²⁷ Resettlement Authority Act No. 9 of 2007.

²⁸ *Ibid.*, section 14.

restitution laws, policies and programmes. The application of these principles in the Sri Lankan context will ensure that IDPs are able to return to their homes freely or to alternative locations based on their choice as soon as possible. The post-tsunami reconstruction process in Sri Lanka is yet to implement the standards laid down in the Pinheiro Principles in any consistent manner. The lack of a co-ordinated, systematic reconstruction process is an obstacle to the application of these principles.

7.2 A National Housing Policy for Sri Lanka

Another initiative in the pipeline is the formulation of a comprehensive national housing policy for Sri Lanka. In the present context, the issue of housing is handled by various different state agencies such as the NHDA and the Urban Development Authority (UDA). The Ministry of Resettlement and Ministry of Lands also have within their mandates issues relating to housing. A national policy that would address the housing needs of different groups such as the plantation sector, the fishing sector, slum dwellers and privately owned housing is a dire need. UN Habitat has launched a project to look into the formulation of a housing policy. Organisations such as COHRE have expressed interest in assisting this process. The policy may take several years to be formulated. It is important to start a dialogue at grassroots level and at policy level as soon as possible so that a policy is achievable in the not too distant future. The ideal process would be one in which civil society, donor agencies and the state sector join hands towards this end.

7.3 Proposed Changes to the Land Development Ordinance

The Land Development Ordinance (LDO) of 1935 gives preference to male heirs and has been the subject of law reform for many years. Recently, the debate has restarted and there are now concrete moves to address this discriminatory provision by several civil society organisations including COHRE and Centre for Women's

Research (CENWOR). The Ministry of Women's Empowerment is also partnering this process. It is expected that draft amendments to the LDO will be submitted to the Legal Draftsman's Department in 2007. The LDO does not directly impact on the granting of land titles post-tsunami as this is being done under the State Lands Ordinance. However, the impetus for reform of the LDO has re-emerged after the tsunami along with lobbying for joint ownership of title under the State Lands Ordinance.

8 Conclusion

The aftermath of the tsunami required a massive multisectoral recovery effort. The lessons learned over the past two years in dealing with the issues and problems that surfaced should pave the way towards a more co-ordinated, systematic approach to the recovery process. With RADA being absorbed into the Ministry of Nation Building, a better co-ordinated reconstruction process is needed. Although the housing programme will formally end in December 2007, issues will still have to be dealt with in the future, such as the frequent monitoring of newly constructed housing; updating of beneficiary lists in the event that extended families or others will be given the housing which is in over supply; and the issue of land ownership and the Presidential grants that will be made.

The involvement of the private sector and established housing authorities in the reconstruction process is also important. Their services and expertise should be requested by the State as soon as possible to ensure that the housing programme benefits from their technical and other expertise. An accurate beneficiary list must be formulated to avoid the duplication of assistance and also to eradicate bribery and corruption at lower levels.

The joint ownership of land titles to be given in specific situations when the state allocates land is an issue that must be taken up by civil society and women's groups. The call for joint ownership must

be a constant and unified one to succeed. Increased community participation in decisions regarding the rebuilding of their lives must be ensured by the state and civil society organizations, and this must include the voices of women.

In the Sri Lankan context, the extended family system plays an important role. This factor must be taken into consideration in the allocation of land and property in order to ensure that their rights are protected. Renters are another group disadvantaged by the current housing policy – they should be given the right to claim compensation for losses resulting from the tsunami.

The ideal reconstruction programme would ensure that the design of housing takes into account the lifestyles, livelihoods and occupation of those residing in them. Similarly, it would consult with women on their housing needs such as design, size (depending of the size of the family), and type of house. Basic structural considerations, such as the fact that every house must have a toilet, bathroom and kitchen, are important. The security, privacy and dignity of women also need to be taken into consideration in the reconstruction of housing.

The State must network with civil society and other interest groups in a more effective and organised manner. Only then will the reconstruction effort be holistic and multi sectoral in approach. Reconstruction is due to end by December 2007 and the State and non-state sectors need to make a concerted effort to co-ordinate and streamline this process.

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SCHEDULE I

UN Conventions on Human Rights and International
Conventions on Terrorism Signed, Ratified or Acceded to by
Sri Lanka as at 31 December 2006 *

*(28 in total, in alphabetical order, with the two signed/ratified/acceded to in
2006 denoted by an asterisk)*

*Additional Protocol to the Convention on Prohibitions or Restrictions on the
use of Certain Conventional Weapons which may be deemed to be Excessively
Injurious or to have Indiscriminate Effects (Protocol IV, entitled Protocol on
Blinding Laser Weapons)*

Acceded on 24 September 2004

Convention Against Corruption

Acceded on 11 May 2004

*Convention Against Torture and Other Cruel, Inhuman or Degrading
Treatment or Punishment (CAT)*

Acceded on 3 January 1994

* 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 for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others

Acceded on 15 April 1958

Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)

Ratified on 5 October 1981

Convention on Prohibitions or Restrictions on the use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects (with Protocols I, II and III)

Acceded on 24 September 2004

Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents

Acceded on 27 February 1991

Convention on the Prevention and Punishment of the Crime of Genocide

Acceded on 12 October 1950

Convention on the Rights of the Child (CRC)

Ratified on 12 July 1991

Convention on the Suppression of Unlawful Acts Against the Safety of Maritime Navigation

Acceded on 6 September 2000

International Convention Against the Taking of Hostages

Acceded on 6 September 2000

International Convention for the Suppression of Acts of Nuclear Terrorism

Signed on 14 September 2005

International Convention for the Suppression of Financing of Terrorism

Ratified on 6 September 2000

International Convention for the Suppression of Terrorist Bombings
Ratified on 23 March 1999

*International Convention on the Elimination of All Forms of Racial
Discrimination (ICERD)*
Acceded on 18 February 1982

*International Convention on the Protection of the Rights of All Migrant
Workers and Members of Their Families*
Acceded on 11 March 1996

International Covenant on Civil and Political Rights (ICCPR)
Acceded on 11 June 1980

International Covenant on Economic, Social and Cultural Rights (ICESCR)
Acceded on 11 June 1980

*International Covenant on the Suppression and Punishment of the Crime of
Apartheid*
Acceded on 18 February 1982

*Optional Protocol 1 to the International Covenant on Civil and Political Rights
(ICCPR)*
Acceded on 3 October 1997

*Optional Protocol to the Convention on the Elimination of All Forms of
Discrimination Against Women (CEDAW)*
Ratified on 15 January 2003

*Optional Protocol to the Convention on the Rights of the Child on the
Involvement of Children in Armed Conflict*
Ratified on 6 September 2000

* *Optional Protocol to the Convention on the Rights of the Child on the Sale
of Children, Child Prostitution, and Child Pornography*
Ratified on 22 October 2006

*Protocol Against the Smuggling of Migrants by Land, Sea and Air
- Supplementing the United Nations Convention Against Transnational
Organised Crime*

Signed on 15 December 2000

*Protocol on Prohibitions and Restrictions on the use of Mines, Booby-
traps and Other Devices (Protocol II as amended on 03rd May 1996)
annexed to the Convention on Prohibitions or Restrictions on Use of certain
Conventional Weapons*

Acceded on 24 September 2004

*Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially
Women and Children - Supplementing the United Nations Convention
Against Transnational Organised Crime*

Signed on 15 December 2000

United Nations Convention Against Transnational Organised Crime

Signed on 15 December 2000

** Vienna Convention on Consular Relations*

Acceded on 4 May 2006

SCHEDULE II

ILO Conventions Ratified by Sri Lanka as at 31 Dec. 2006

No.	Convention Name	Ratified Date	Present Status
C4	<i>Night Work (Women) Convention, 1919</i>	08.10.1951	Denounced
C5	<i>Minimum Age (Industry) Convention, 1919</i>	27.09.1950	Denounced
C6	<i>Night Work of Young Persons (Industry) Convention, 1919</i>	26.10.1950	Denounced
C7	<i>Minimum Age (Sea) Convention, 1920</i>	02.09.1950	Denounced
C8	<i>Unemployment Indemnity (Shipwreck) Convention, 1920</i>	25.04.1951	
C10	<i>Minimum Age (Agriculture) Convention, 1921</i>	29.11.1991	Denounced
C11	<i>Right of Association (Agriculture) Convention, 1921</i>	25.08.1952	
C15	<i>Minimum Age (Trimmers and Stockers) Convention, 1921</i>	25.04.1951	Denounced
C16	<i>Medical Examination of Young Persons (Sea) Convention, 1921</i>	25.04.1950	
C18	<i>Workmen's Compensation (Occupational Diseases) Convention, 1925</i>	17.05.1952	
C26	<i>Minimum Wage Fixing Machinery Convention, 1928</i>	09.06.1961	
C29	<i>Forced Labour Convention, 1930</i>	05.04.1950	
C41	<i>Night Work (Women) Convention (Revised), 1934</i>	02.09.1950	Denounced

No.	Convention Name	Ratified Date	Present Status
C45	<i>Underground Work (Women) Convention, 1935</i>	20.12.1950	
C58	<i>Minimum Age (Sea) Convention (Revised), 1936</i>	18.05.1959	
C63	<i>Convention concerning Statistics of Wages and Hours of Work, 1938.</i>	25.08.1952	Denounced
C80	<i>Final Articles Revision Convention, 1946</i>	10.09.1950	
C81	<i>Labour Inspection Convention, 1947</i>	03.04.1950	
C87	<i>Freedom of Association and Protection of the Right to Organise Convention, 1948</i>	15.11.1995	
C89	<i>Night Work (Women) Convention (Revised), 1948</i>	31.03.1966	Denounced
C90	<i>Night Work of Young Persons (Industry) Convention (Revised), 1948</i>	18.05.1959	
C95	<i>Protection of Wage Convention, 1949</i>	27.10.1983	
C96	<i>Pre-charging Employment Agencies Convention (Revised), 1949</i>	30.04.1958	
C98	<i>Right to Organise and Collective Bargaining Convention, 1949</i>	13.12.1972	
C99	<i>Minimum Wage-Fixing Machinery (Agriculture) Convention, 1951</i>	05.04.1954	

No.	Convention Name	Ratified Date	Present Status
C100	<i>Equal Remuneration Convention, 1951</i>	01.04.1993	
C103	<i>Maternity Protection Convention (Revised), 1952</i>	01.04.1993	
C105	<i>Abolition of Forced Labour Convention, 1957</i>	07.01.2003	
C106	<i>Weekly Rest (Commerce and Offices) Convention, 1957</i>	27.10.1983	
C108	<i>Seafarers' Identity Documents Convention, 1958</i>	24.11.1995	
C110	<i>Conditions of Employment of Plantation workers Convention, 1958</i>	24.04.1995	
C111	<i>Discrimination (Employment and Occupation) Convention, 1958</i>	27.11.1998	
C115	<i>Radiation Protection Convention, 1960</i>	18.06.1986	
C116	<i>Final Articles Revision Convention, 1961</i>	26.04.1974	
C131	<i>Minimum Wage Fixing Convention, 1970</i>	17.03.1975	
C135	<i>Worker's Representatives Convention, 1971</i>	16.11.1976	
C138	<i>Minimum Age for Admission to Employment, 1973</i>	11.02.2000	
C144	<i>Tripartite Consultations to Promote the Implementation of ILO Convention, 1976</i>	17.03.1994	

No.	Convention Name	Ratified Date	Present Status
C160	<i>Labour Statistics Convention, 1985</i>	01.04.1993	
C182	<i>Worst Forms of Child Labour Convention, 1999</i>	01.03.2001	

SCHEDULE III

Humanitarian Law Conventions Ratified by Sri Lanka as at 31 December 2006

Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field, 1949

Ratified on 28 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 February 1959

Geneva Convention Relating to the Protection of Civilian Persons in Time of War, 1949

Ratified on 28 February 1959

Geneva Convention Relating to the Treatment of Prisoners of War, 1949

Ratified on 28 February 1959

SCHEDULE IV

Some Human Rights Instruments NOT Ratified by Sri Lanka as at 31 December 2006

(15 in total, in alphabetical order)

*Convention on the Non-Applicability of Statutory Limitations to War Crimes
and Crimes Against Humanity, 1968*

Convention on the Political Rights of Women

Convention relating to the Status of Refugees, 1954

ILO Convention No.102 concerning Minimum Standards of Social Security

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.143 concerning Migrants in Abusive Conditions and
the Promotion of Equality of Opportunity and Treatment of Migrant
Workers*

*ILO Convention No.151 concerning Protection of the Right to Organize and
Procedures for Determining Conditions of Employment in the Public Service*

ILO Convention No.154 concerning the Promotion of Collective Bargaining

*ILO Convention No.168 concerning Employment Promotion and Protection
against Unemployment*

*Optional Protocol II to the International Covenant on Civil and Political
Rights (ICCPR)*

*Protocol Additional to the Geneva Convention of 12 August 1949, and
Relating to the Protection of Victims of International Armed Conflicts
(Protocol I)*

*Protocol Additional to the Geneva Convention of 12 August 1949, and
Relating to the Protection of Victims of Non-International Armed Conflicts
(Protocol II)*

Protocol to the Convention relating to the Status of Refugees, 1967

Rome Statute of the International Criminal Court (ICC)

SCHEDULE V

Fundamental Rights (FR) Cases Decided during the year 2006

Article 11 – *Freedom from torture and inhuman or degrading treatment*

Koralaliyanage Palitha Thisa Kumara v. Silva and others, SC(FR)
Application No.121/2004, SCM 17.02.2006

Article 12 – *Equality before the law*

Dr. Asoka Somabandu Karunananda v. Open University of Sri Lanka and others, SC(FR) Application No.450/2003, SCM 03.08.2006

Mahinda Rajapakse v. Chandra Fernando, IGP and others, SC(FR)
Application No.387/2005, SCM 27.03.2006

N.W.M. Jayantha Wijesekera and others v. Attorney General and others, SC(FR) Application Nos.243-245/2006, SCM 16.10.2006

Wickremage D. Rohan Vishvanath v. Divisional Secretary, Madhurawala, SC(FR) Application No.174/2003, SCM 17.02.2006

Article 13 – *Freedom from arbitrary arrest, detention and punishment, and prohibition of retroactive penal legislation / Article 11*

M.K.P. Prasanna Chandralal, AAL on behalf of Dalkadura Arachchige Nimal Silva v. ASP Ranmal Kodituwakku and others, SC(FR)
Application No.565/2000, SCM 16.11.2006

SCHEDULE VI

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17th Amendment Bill, SC Special Determination No.6/2001,
21.09.2001, Parliamentary Debates (Hansard) of 24.09.2001

National Authority on Tobacco and Alcohol Bill, SC Special
Determination Nos.1-6/2006, Parliamentary Debates (Hansard)
of 04.07.2006

National Authority on Tobacco and Alcohol Bill, SC Special
Determination Nos.13-22/2005, Parliamentary Debates (Hansard)
of 01.02.2006

*Provincial Councils Bill and the Thirteenth Amendment to the Constitution
Bill*, [1987] 2 SLR 312

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AG v. Chanmugam, 71 NLR 78

AG v. Ratnagopal, 72 NLR 145 (Privy Council)

Amal Sudath Silva v. Kodituwakku [1987] 2 SLR 119

[Appointment of Members to the Human Rights Commission],
CA (Writ) No.890/2006

Atapattu v. People's Bank (SC) [1997] 1 SLR 221

Attorney-General v. Don Sirisena, 70 NLR 347

Attorney-General v. Kanagaratnam, 52 NLR 121 at 130, per Nagalingam, J.

Bandara v. Premachandra, [1994] 1 SLR 301, at p.312 per G.P.S. de Silva, C.J.

Brahmanage Arun Sheron Suranga Wijewardana v. Priyasan Ampawila and others, SC(FR) No.553/2002, SCM 27.05.2005

Bulankulame v. Secretary, Ministry of Industrial Development, [2000] 3 SLR 243, (SC) per Justice A.R.B. Amerasinghe

Campbell and Cosans v. UK (Case law of the EUCT, Vol.1, p.170)

Centre for Policy Alternatives v. Dissanayake, SC 26/2002, SCM 27.5.2003

Chas P. Hayley and Co. Ltd v. Commercial and Industrial Workers and others, [1995] 2 SLR 42

Chongwe v. Zambia, Case No.821/1998, Views adopted on 25 October 2000

Chulasubadra v. University of Colombo, [1985] 1 SLR 244

[Concerning Constitutional Council], CA (Writ) No.668/2006, CA (Writ) No.184/2006

[Concerning National Police Commission], CA (Writ) No.555/2006

Consumer Association of Lanka v. Telecommunications Regulatory Commission of Sri Lanka and three others, CA (Writ) Application No.1776/2003, CA Minutes 25.07.2005

De Mel v. de Silva, 51 NLR 105 (DB)

De Mel v. de Silva, 51 NLR 282

De Silva v. Atukorale, [1993] 1 SLR 283, (SC) per M.D.H. Fernando, J.

Delgado Paez v. Colombia, Case No.195/1985, Views adopted on 12 July 1990

Dias v. Abeywardene, 68 NLR 109

Dr. Kunanandan v. University of Jaffna, 2006 (1) ALR 1, per Justice Sri Skandarajah (CA)

Dr. Shiranthi Perera v. University of Colombo 2006 (2) ALR, per Justice K. Sripavan

Ediriweera v. Kapukotuwa, [2003] 1 SLR 228

Environmental Foundation Ltd. v. Urban Development Authority of Sri Lanka and Others, SC(FR) Application No.47/2004, SCM 28.11.2005, per Chief Justice Sarath N. Silva

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Faiz v. AG, [1995] 1 SLR 372

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Fernandopulle v. M/Lands & Agriculture, 79 (I) NLR

Gamaethige v. Siriwardene, [1988] 1 SLR 385

H.C.M.A. v. the Netherlands, Case No.213/1986, adopted
30 March 1989

H.W. Wanasinghe and others v. University of Colombo and others, CA
(Writ) Application No.1261/2004, CA Minutes 06.07.2006, per
Sriskandarajah, J.

Hamdard Dawakhana v. Union of India, AIR 1960 SC, p.544

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Appeal 58/2003, SC Minutes of 20.01.2004

Hewage v. UGC, SC No.627/2002, SCM 08.08.2003

Hewakuruppu v. GA de Silva, Tea Commissioner et al, SC(FR)
No.118/1984, SCM 10.11.1984

In re Ratnagopal, 70 NLR 409

In re Wijetunge, 72 NLR 514

Jayasena v. Punchi Appuhamy, [1980] 1 SLR

John W. Rast v. Van Deman and Lewis Co., (1915) 60 US Lawyers Ed.
679, at 690

Joseph Perera alias Brutten Perera v. the Attorney-General, [1992] 1 SLR
199

K.C. Adiathan v. Attorney-General, SC Application No.17 of 1979

Kanapathipillai Machchavallavan v. Officer in Charge, Plantain Point, Trincomalee, [2005] 1 SLR 341

Karunathilaka and another v. Dayananda Dissanayake, Commissioner of Elections and others, [1999] 1 SLR 157, at p.180

Karunatileke v. Dissanayake, [1999] 1 SLR 157

Kemasiri Kumara Caldera's Case, SC(FR) Application No.343/1999, SCM 06.11.2001

King v. Noordeen, 13 NLR 115

Koralakiyanage Palitha Thissa Kumara v. Silva and others, SC(FR) Application No.121/2004, SCM 17.02.2006

Leeda Violet and others v. Vidanapathirana, Officer in Charge, Police Station, Dickwella and others, [1994] LKCA 45; [1994] 3 SLR 377 (16 November 1994, per Sarath Nanda Silva, J.)

Lilanthi De Silva v. Attorney-General and others, [2000] 3 SLR 155

Lokugalappathi and others v. the State, HC Ratnapura No.121/1994, CA 93-99/1999

Mahenthiran v. AG, SC(FR) Application No.68/1980, SCM 05.08.1980

Maithripala Senanayake v. Mahindasoma and others, SCC. Appeal No.41/1996, SCM 14.12.1996

Manohara v. President, Peradeniya Campus, University of Sri Lanka, BALR [1983] Vol.1, Part 11, p.45

Mayor of Colombo v. CMC Bribery Commission, 41 CLW 30

Mediwake v Dissanayake [2001] 1 SLR 177 (SC)

Mendis, Fowzie and others v. Goonewardene, G.P.A. Silva, [1978-79] 2 SLR 322

Moosajee v. Arthur and others, 2004(2) ALR 1, per Weerasuriya, J. (SC)

N.V.K.K. Weragoda, General Secretary, UNP v. Dissanayake and others, CA No.330/2006, CA Minutes of 24.03.2006, per Sripavan, J.

N.W. Jayantha Wijesekera and others v. Attorney-General and others, SC(FR) Application Nos.243, 244, 245/2006, SCM 16.10.2006

Nakkuda Ali v. Jayaratne, 51 NLR 457

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Perera v. Edirisinghe, [1995] 1 SLR 148, at 156

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S.E. v. Argentina, Case No.275/1988, adopted 26 March 1990

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Sanjeewa v. Suraweera, [2003] 1 SLR 317

Sannasgala v. University of Kelaniya, [1991] 2 SLR 193

Seemanmemeru Pathirana Shantha Dharmapriya Pathirana v. DIG, Personnel Training and others, CA (Writ) Application No.1123/2002, CA Minutes 09.10.2006

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Shahul Hameed, Mohammed Nilam and others v. K. Udugampola and others, SC(FR) Application Nos.68/2002 and 73-76/2002, SCM 29.01.2004

Silva v. Bandaranayake, [1997] 1 SLR 92

Silva v. Iddamalgoda, [2003] 2 SLR 63

Silva and others v. Siddique, [1978-79] 1 SLR 166

Sirisena v. Perera, [1991] 2 SLR 97

Sonic Net Technologies (Pvt.) Ltd. v. Mahindadasa, Vaidyalankara and others, [2006] SC(FR) Application No.236/2006

Sriyani Silva v. Iddamalgoda and others, SC(FR) Application No.471/2000

Sujeewa Aruna Senasinghe v. Senior Superintendant of Police, Nugegoda and three others, [2003] 1 SLR 172, at 186

Sundakaran v. Bharathi, [1989] 1 SLR 46

Tbavaneethan v. Dayananda Dissanayake, Commissioner of Elections and others, [2003] 1 SLR 74

The Greek case, 127B (1969) Com. Rep. 70

The Mayor of Colombo v. CMC Bribery Commissioner, 41 CLW 28

The Mayor of Colombo v. CMC Bribery Commissioner, 41 CLW 33

Tyrer v. UK, (1978) 2 EHHR 1

Veerakesari Ltd. v. Fernando, 6 NLR 145

Velu v. Velu, 76 NLR 21

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* *Hiran Ekanayake v. Sri Lanka*, CCPR/C/88/D/1201/2003, decision on admissibility 31.10.2006

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* *Susila Malani Dahanayake and others v. Sri Lanka*, CCPR/C/87/D/1331/2004, decision on admissibility 25.07.2006

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