



**International covenant  
on civil and  
political rights**

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HUMAN RIGHTS COMMITTEE

**CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES  
UNDER ARTICLE 40 OF THE COVENANT**

**Fourth periodic report**

**SRI LANKA\***

[18 September 2002]

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## Introduction

1. Sri Lanka's Third Report on the implementation of the International Covenant on Civil and Political Rights was submitted to the Human Rights Committee in 1994. The present report (the Fourth and Fifth Reports) highlights developments relevant to the period 1991 to April 2002. It also focuses on initiatives taken by the Government in relation to recommendations and concerns expressed by the Committee as well as other events, which have contributed to the improvement of the human rights situation in the country.

### Article 1. The Right of Self-Determination

2. Sri Lanka continues to recognise the right of self-determination as enshrined in Article 1 (2) and Article 55 of the United Nations Charter and reiterated and elaborated in the 1960 United Nations Declaration on the Granting of Independence to Colonial Countries and Peoples, the 1970 Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States, the 1992 United Nations Declaration on the Rights of the Minorities and the Vienna Declaration and Programme of Action of June 1993. However, this does not imply that Sri Lanka countenance it as a universal norm that provides a basis for unilateral secession leading to the fragmentation of existing nation states. Indeed Sri Lanka has consistently followed this principle in its state practice of according recognition to states. This position is commensurate with the right of self-determination as provided for in the United Nations Charter.

3. Even though Articles 1 (2) and 55 of the United Nations Charter recognise the right to self-determination, Article 2 (4) states that, "All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations". Hence, it envisages that this right should be exercised only within the framework of the principle of territorial integrity.

4. Similarly, the principal instruments of international law that have sought to elaborate this right, have not departed from adhering to the overarching tenet of territorial integrity. The 1970 Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States, an instrument drafted with the intention of buttressing and interpreting the right of self-determination as enunciated in the United Nations Charter and other major international human rights instruments, clearly recognises that the right of self-determination does not "authorise or encourage any action, that would dismember or impair totally or in part, the territorial integrity or political unity of sovereign states conducting themselves with the principle of equal rights and self-determination of people." This position was reiterated in Article 2 of the Vienna Declaration of 1993, which reads "In accordance with the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, this shall not be construed as authorising or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States ..."

## Article 2. Human Rights Mechanisms

5. Chapter III of the Constitution of the Democratic Socialist Republic of Sri Lanka enumerates the fundamental rights guaranteed by the Constitution. This was to ensure that principles pertaining to protection of fundamental rights would not be compromised for sake of mere expediency. The framers of the Constitution wanted these principles enshrined as fundamental laws, to put them beyond the reach of legislative majorities or government officials.

6. Some of the fundamental rights enshrined in the Constitution can only be claimed by a citizen of Sri Lanka, whilst others apply equally to non-citizens as well. Article 10 (Right to freedom of religion, Right to the freedom of conscience and the Right to change one's religion), Article 11 (Freedom from being subject to cruel, inhuman or degrading treatment or punishment), Article 12 (1) (Right to the equality and equal protection of the law), Article 12 (3) (right not to be discriminated on the grounds of race, religion, language, caste, sex or any such grounds with regard to access to shops, public restaurants, hotels, places of public entertainment and place of worship of his religion or be subject to liability, restrictions on such a basis) and Article 13 (Freedom from arbitrary arrest, detention and punishment and prohibition of retroactive penal legislation) do not make any distinction between citizens and non-citizens in application. However, Article 12 (2) (barring discrimination on grounds of sex, caste, religion, language, race, political opinion and place of birth) and Article 14 (the freedom of speech, the freedom of peaceful assembly, freedom of association, the freedom, either by himself or in association with others, and either in public or in private to manifest his religious belief in worship, observance, practice and teaching and the freedom by himself or in association with others to enjoy and promote his own culture and to use his own language, the freedom to engage by himself or in association with others in any lawful occupation, profession, trade, business or enterprise, the freedom of movement and of choosing his residence within Sri Lanka and the freedom to return to Sri Lanka) restricts its ambit of application to Sri Lankan citizens and to individuals for a period of ten years from the date of promulgation of the constitution, who were permanently and legally resident in Sri Lanka immediately prior to the promulgation of the constitution and who were not citizens of any other country at that time.

7. The rationale for such a distinction between citizens and non-citizens in affording protection to an individual's human rights is to safeguard the economic and political sovereignty of the citizens of Sri Lanka. Moreover, the rights enumerated in articles 10, 11 and 12 (1) and 13 can be considered as universal human rights norms that are well entrenched principles of international law, and therefore of universal applicability while the rights contained articles 12 (2) and 14 are not considered universally accepted precepts of international law and are relative to the context in which they are applied.

8. The Constitution of Sri Lanka by providing an enforceability mechanism under Article 17 of the Constitution has ensured that the status of fundamental rights enshrined in the Constitution are not merely recognised as moral and ethical rights but also as legal rights. Article 17 of the Constitution declares the right to apply to the Supreme Court in respect of infringement or imminent infringement of fundamental rights by executive or administrative action. This Article reads as follows:

“Every person shall be entitled to apply to the Supreme Court, as provided by Article 126, in respect of the infringement or imminent infringement by executive or administrative action, of a fundamental right to which a person is entitled under the provisions of this Chapter.”

9. Given that this article itself is situated in the 3rd Chapter of the Constitution, which is the Chapter of the Constitution that enumerates the provisions relating to the protection of fundamental rights in the Constitution, the right as provided in article 17 to move the Supreme Court in an instance where there has been or is going to be an infringement of a fundamental right, could be considered to be an enforceable fundamental right per se.

10. The manner in which the jurisdiction given by article 17 to the Supreme Court could be exercised and invoked is set out in Article 126 of the Constitution in the following manner:

- The Supreme Court shall have sole and exclusive jurisdiction to hear and determine any question relating to the infringement by executive or administrative action of any fundamental right or language right declared and recognised by Chapter III or IV;
- Where any person alleges that any such fundamental right or language right relating to such person has been infringed or is about to be infringed by executive or administrative action, he may himself or by an attorney on his behalf, within one month thereof, in accordance with such rules of court as may be in force, apply to the Supreme Court by way of petition in writing addressed to such Court praying for relief or redress in respect of such infringement. Such application may proceed only after leave to proceed has first been granted by the Supreme Court, which as the case may be granted or refused, by not less than two judges;
- Where in the course of hearing in the Court of Appeal into an application for orders in nature of a writ of habeas corpus, certiorari, prohibition, procedendo, mandamus or quo warranto, it appears to such Court that there is prima facie evidence of an infringement or imminent infringement of the provisions of Chapter III or Chapter IV (of the Constitution) by a party to such application, such Court shall forthwith refer such matter for determination by the Supreme Court;
- The Supreme Court shall have the power to grant such relief or make such directions as it may deem just and equitable in the circumstances in respect of any petition or reference referred to in paragraphs (2) and (3) of this Article or refer the matter back to the Court of Appeal if in its opinion there is no infringement of a fundamental right or language right;
- The Supreme Court shall hear and finally dispose of any petition or reference under this Article within two months of filing of such petition or making of such reference.

***Standing***

11. In *Paliyawadana v. A.G. and others* and *Somawathie v. Weerasinghe*, the Supreme Court ruled that only the individual whose fundamental rights have been violated or are imminent to be violated can seek relief from the Supreme Court. Therefore no relief could be sought from the Supreme Court on the basis that a third party's fundamental rights have been or to be imminently violated. The only amelioration of this rule is done through the medium of the rules governing the procedure adhered to in the Supreme Court in respect of the conduct of fundamental rights cases. Rule 44 (2) of the Supreme Court Rules 1990, currently applicable to fundamental rights applications provides that where for any reason the person whose fundamental rights or language rights has been or is about to be infringed is unable to sign a proxy appointing an Attorney-at-law to act on his behalf, any other person authorised by him (whether orally or in any other manner, whether directly or indirectly) to retain an Attorney-at-law to act on his behalf, may sign proxy on his behalf. Similarly, under Rule 44 (3) an application may be made by an attorney-at-law on behalf of any person aggrieved without a proxy in his favour provided that:

(a) The petition contains an averment to the effect that such an application is made on behalf of such person who is named therein, and

(b) Either such person or such Attorney-at-law named in the petition, is signed by such Attorney-at-law or by an instructing Attorney-at-law appointed by him.

12. In addition to the aforesaid rules, Rule 44 (7) permits the Supreme Court to take cognisance of an alleged infringement or imminent infringement without a formal petition being filed. When such an infringement is brought to the notice of the Supreme Court or any judge thereof in writing, the Chief Justice may refer such matter to a single Judge sitting in chambers. If the complaint discloses a prima facie case, the judge is empowered to direct that the complaint be treated as a petition notwithstanding non-compliance with the rules of the Supreme Court. However, he should be satisfied that the person whose fundamental right is involved does not or may not have the means to pursue such complaint in accordance with the Rules and such person has suffered or may suffer substantial prejudice by the infringement. If this criterion is fulfilled, the complaint will be referred to the Legal Aid Commission or to any Attorney-at-law who is a member of a panel or organisation established for the purpose of filling a formal application in the Supreme Court. If the complainant is not himself the person aggrieved the Registrar of the Supreme Court may be directed to ascertain from the person to whom the complaint relates whether he desires that action be taken in respect of such complaint. If such person notifies the Court that he does not desire any action, proceedings stand terminated.

***Executive or Administrative Action***

13. Article 17 of the Constitution of Sri Lanka speaks in terms of infringement of fundamental rights by "executive or administrative" action. Although the Constitution specifically rules out judicial and legislative action from the scope of Article 17, it does not provide a precise definition as what constitutes an "executive or administrative" action. Therefore, it has been left to the courts to provide such a definition.

14. Even though judicial action has been left out of the scope of Article 17, courts have held that this immunity does not extend to instances where a judicial officer has no discretion. In *Joseph Perera v. Attorney General*, the petitioners were detained under Emergency Regulation 24 (1) (b) which stipulated “where any person is suspected or accused of having committed the offence of causing or attempting to cause death, such person shall not be released on bail until the conclusion of his trial.” Hence the emergency regulations prevented a magistrate from granting bail to a suspect charged under them. The petitioners were arrested on 26 June 1986 and detained in Police custody till 15th July 1986, on which date they were produced before the Magistrate who remanded them. They were released on bail only on the 7th of August 1986 even though the police had completed their investigations by 15th July 1986 and had not come up with any material evidence to incriminate the petitioners. The Supreme Court held that the detention from July 15 to August 07 was illegal even though it was on the order of the magistrate. L.H. de Alwis J stated “Even though the last order of remand was made by the Magistrate, it was not in exercise of his judicial discretion, since he had none under the Emergency Regulations”.

15. In *Jayanetti v. Land Reform Commission*, it was contended that the expression “executive” in Article 126 must be read in accordance with and given the same meaning as in Article 4. Article 4 (b) states “the executive power of the people, including the defence of Sri Lanka shall be exercised by the President of the Republic of Sri Lanka elected by the People”. A five-member bench of the Supreme Court decisively rejected this attempt at narrow interpretation. It was pointed out, *per* Wanasundra J., that Article 126 used the expression “executive or administrative action” while Article 4 used the words “executive power”.

16. Referring to the expression “administrative” in Article 126, Mark Fernando J in *Parameswary Jayatheevan v. Attorney General and others* stated that it could not be interpreted on the basis of its face value. He said that there were powers, which cannot be appropriately classified as legislative, judicial or executive but is nevertheless “administrative” in a public law sense. Moreover, Fernando J also stated that not all acts of “legislative” or “judicial” institutions, functionaries or officials would be excluded from the scope of Article 126. The test, he stated must always be whether the impugned act was “executive or administrative” and not whether the institution or person can be characterised as “executive”. Thus the ultimate decision must depend on whether the act is “executive or administrative” in character and not upon the status of the institution or the official.

17. In *Mohomed Fiaz v. Attorney General and Others*, Fernando J, explained that the word “administrative” in Article 126 is intended to enlarge the category of acts within the scope of that Article 126. Hence, it may be that an act of a court or legislative body in denying a language right is “administrative” for the purpose of Article 126 even though it is done in the course of judicial or legislative proceedings.

18. The question whether every act of a State officer would constitute “executive or administrative” was raised in *Thadchanamoothi v. Attorney General and others*. The facts of the case were as follows. Three police officers were alleged to have tortured the petitioner. However, their superior officer had stated specifically that such alleged unlawful actions were never authorised by him or by his superior officers. It was contended on behalf of the State that

an act done by a State functionary would not constitute State action unless it is done within the scope of the powers given to him. Thus if it is an unlawful act or an act considered *ultra vires*, it would not be considered State action.

19. On this question, Wanasundera J, along with Thamotheram and Ismail JJ agreeing, was inclined to adopt with suitable modifications, the principles laid down by the European Court of Human Rights in *Ireland v. United Kingdom* and the Greek case. Both these cases predicated the appropriation of state liability upon the existence of “administrative practice” countenancing human rights violations. In other words, the existence of a practice, which although unlawful under the law has been adopted or tolerated by its officials or agents and did not just constitute an isolated act or acts in breach of the Convention, is required. Hence, there should be a repetition of the act in numerous occasions so as to express a general situation.

20. Nevertheless it is not essential to establish such a pattern of acts that they should have occurred in the same place or attributable to the agents of the same police or military authority or that the victims belonged to the same political category. The incidents could have either occurred in several places or at the hands of distinct authorities or in the alternative, the victims could have been persons of varying political affiliations.

21. The principal that manifests the existence of an administrative practice is the tolerance by superior authorities of illegal acts carried out by subordinate officers. In other words, the superiors of those immediately responsible for such acts though cognisant of such activities take no action to punish or prevent their repetition. Alternatively, that higher authority, in the face of numerous allegations, manifests indifference by refusing any adequate investigation into the truth or falsity, or that in judicial proceedings a fair hearing of such complaints is denied.

22. In this instance, Wanasundera J. held that there was no such “administrative practice” adopted or tolerated by the executive or the administration in Sri Lanka. The existence of an on-going police investigation into the alleged incident at the time the petition was filed seemed to have influenced the judiciary in negating the prevalence of such an “administrative practice”.

23. Although once again the Supreme Court declined to affirm the existence of an “administrative practice” in *Velmurugu v. Attorney General and others*, Wanasundera J who gave majority judgement appeared to have reconsidered the view he took in *Thadchanamoorthy* (supra). He was now inclined to the view that whilst the State should be held strictly liable for any acts of its high officials, in the case of subordinate officers, the State should be liable not only for all acts done under the colour of the office, i.e. within the scope of their authority, expressed or implied, but also for such acts that may be *ultra vires* and even in disregard of a prohibition or special directions, provided that they are done in the furtherance or supposed furtherance of their authority or done at least with the intention of benefiting the State.

24. A clear decision on the question under discussion was reached in *Maridas v. Attorney General and another*. The petitioner complained that the second respondent illegally arrested him. However, the second respondent filed an affidavit from one Sub-inspector Godagama in which that particular individual stated that it was he who arrested the petitioner. It was held that the State was liable for the petitioner’s arrest by Godagama even though he was not cited as a respondent. The State was directed to pay compensation accordingly.



25. Sharvananda J with whom Ranasinghe and Rodrigo JJ agreed delivered the judgement. On the question whether the petition should fail on the fact that the individual who arrested the petitioner was not cited as a respondent in the case, Sharvananda J stated the following: “What the petitioner is complaining of is an infringement of his fundamental rights by “executive or administrative action”, i.e. that the State has through the instrumentality of an over-zealous or despotic official, committed the transgression of his constitutional right. The protection afforded by Article 126 is against infringement of fundamental rights by the State, by some public authority endowed by it with the necessary coercive powers. The relief granted is principally against the State, although the delinquent official may also be directed to make amends and/or suffer punishment”.

26. On the question whether, in any event, the action of the officer concerned amounted to “executive or administrative action”, Sharvananda J stated that the officer was a repository of State power charged with law enforcement duties. In performance of his Police duties he represented the executive arm of the State. Given that the commissioning of the wrong was rendered possible by the exercise of the State power reposed in the particular police officer the state cannot absolve itself from the responsibility for the alleged infringing act.

27. The learned judge quoted with approval from the judgement of Justice Brandeis in *Iowa-Des Moines National Bank v. Bennet*, where the Supreme Court of the United States of America held that the State is liable not only when an official exceeds his authority but also when he disregards the special command of the law.

28. Similarly, in *Vivienne Goonewardena v. Perera and Others* the State was held liable for the arrest of the petitioner by a Police officer who was not named as a respondent but who had later filed an affidavit stating that he was responsible for arresting the petitioner. More importantly, Soza J who delivered the judgement on behalf of the Bench removed the distinction between the liability of the State in reference to actions of high officials and subordinate officials made by Wanasunsera J in *Velmurugu*.

29. Justice M.D.H. Fernando in *Saman v. Leeladasa* further elaborated the concept of State liability arising from administrative and executive action. In this case, the petitioner was a remand prisoner at the time of the alleged incident. He complained that the first respondent, a Prison Guard, assaulted him resulting in a fracture of an arm and other injuries. Even though the respondent had not been assigned any specific duties in relation to the petitioner, it was held that his actions came within the general ambit of his employment or duties. It was reasoned so, on the basis that the respondent’s act although not an authorised one was not so remote as to be totally unconnected with his legitimate duties. Moreover, it was also stated the alleged act was done in the performance of his master’s business and not merely during such performance. The court also held that, even assuming that there had been a prohibition on the use of excessive force by Prison guards, that would not have been prohibition, which limited the sphere of the employment. Hence, Fernando J held the State is liable on the basis of its vicarious liability for the acts of its servants. Elaborating further, he observed that an ultra vires act or even a criminal act done by a servant “in the course of employment” would render the master liable under common law. This principle was said to be applicable to liability arising from article 126 of the Constitution.

30. In *Mohamed Fiaz v. Attorney General and others* the concept of state liability for fundamental rights violations was expanded to encapsulate, violations arising through “State inaction”. The court also held that the responsibility for violation of fundamental rights would extend to a respondent who has no Executive status but is proved to be guilty of impropriety, connivance or any such conduct with the Executive in wrongful acts in violation of fundamental rights. It was also stated in this case that the act of a private individual would be executive if such act is done with the authority of the Executive. In other words, proof of State acquiescence in an act of a third party violating fundamental rights would come within the definition of executive or administrative action. Hence if the law enforcement authorities permit a climate of impunity to prevail due to the dereliction of their duty in protecting an individual’s fundamental rights, the fundamental rights jurisdiction of the Supreme Court could be invoked to seek redress.

31. The Supreme Court’s decision in *Sumith Jayantha Dias v. Reggie Ranathunga, Deputy Minister of Transport and others*, is an illustration of the efficacy of this remedy.

32. The facts of this case are as follows. The petitioner led an electronic news gathering team of the Independent Television Network (ITN) to film a programme named “Vimasuma”. The Team travelled in a van belonging to the ITN. They carried with them the necessary equipment including a valuable camera. The ITN logo was fixed prominently on the van used by them and on the camera. During their return to Colombo after conducting the programme, the petitioner observed at Miriswatte junction a burning lorry on the road with a crowd gathered around it. The petitioner and his team commenced filming that event with the camera and other equipment when they were interrupted by the first respondent, a deputy minister who arrived in an Intercooler Pajero accompanied by some other vehicles and several other persons including the second respondent (a Peoples’ Alliance *Pradeshiya Sabha* member), the fourth respondent (a Peoples’ Alliance supporter) and the fifth respondent (a police sergeant). The first respondent demanded that the petitioner give him the tape alleging that the petitioner had filmed the 1st respondent and the Intercooler Pajero. As it later transpired, the 1st respondent has thought that the television team was from TNL, a private television channel perceived by the government as being biased towards the opposition. The first respondent had also thought that the petitioner was attempting to make a film involving him with the burning of the lorry.

33. The respondent attempted to seize the camera, but the petitioner resisted whereupon on the instigation of the first respondent, the 5th respondent and others put him on the ground and assaulted him; next the 2nd, 3rd and the 5th respondents lifted the petitioner and put him into a police jeep. He was again assaulted by the 5th respondent inside the jeep and made to hand over his shirt, ITN identity card and the wallet containing Rs. 3,700 to a police officer. At the Gampha police station the petitioner’s shirt and the identity card were returned but when he asked for his money the 6th respondent, a police sergeant, abused him in obscene language. The 1st respondent was seated in the OIC’s (Officer-in-Charge) chair and questioned the petitioner regarding the tape whilst a uniformed police officer stood by. The petitioner explained that he was working for the ITN, whereupon the 1st respondent suggested an amicable settlement. The petitioner was released next day after six and half-hours of detention. Further, the petitioner received hospital treatment for his injuries, which he alleged, were sustained during the alleged assault. The injuries were consistent with assault.

34. Justice A. de Z. Gunawardana who delivered the judgement on behalf of the rest of the bench, in holding that the petitioner's fundamental rights were violated, had the following to say: "Although the 1st respondent was not acting in his official capacity as a Deputy Minister, and although the actions of the 2nd and 3rd respondents did not per se amount to "executive action", the 5th respondent participated in the attempt to seize the petitioner's camera and tape, in the assault on him, and his arrest. Other Police officers were present, and did nothing to check the assailants, to arrest them, or even to record their statements; instead they assisted in the arrest and even permitted the 1st respondent to question the petitioner while sitting in the chair of the officer-in-charge. What would otherwise have been the purely private act of the 1st to 3rd respondent was transformed into executive action by reason of the approval, connivance, acquiescence, participation and inaction of the 5th respondent and other police officers.

35. Similarly, in *Bandara v. Wickremasinghe*, an assault by some teachers on a 17 year old school boy under the colour of their office and in excess of disciplinary powers was held to constitute executive or administrative action.

### ***Acts of Public institutions***

36. Another question that has confronted the Supreme Courts is whether, acts of public institutions such as corporations and government owned business undertakings fall within the definition of "administrative and executive action" as stated in Article 126 of the Constitution.

37. In *Perera v. University Grants Commission* the Supreme Court over ruled a preliminary objection that acts of the said Commission did not constitute an administrative or executive action. The court stated that given that the Commission was a creature of a legislative act and it is entrusted with the function of controlling and planning of university education in the country and was also empowered to appropriate and control funds voted in by the Parliament for the universities, "... It was idle to contend that the Commission was not an organ or delegate of the Government."

38. However, the court was inclined to take a much narrower a view in the case of *Wijetunge v. Insurance Corporation*. Sharavanda J delivering the judgement on behalf of the bench stated "the Corporation cannot be regarded as a servant or agent of the Government. Even though the members of the Corporation were appointed by the Minister and the Corporation is subject to general or special directions from the Minister, the fact that the Act conferred on the Corporation powers which are given to it to be exercised at its own discretion and its name were not out weighed".

39. The Supreme Court in *Rajaratne v. Air Lanka Ltd.* finally overturned this restrictive approach and adopted a much more liberal interpretation of the phrase "administrative or executive action". The Court brought actions of government controlled limited liability companies within the definition of executive or administrative action by adopting a test of "governmental agency or instrumentality". Athukorale J giving the majority judgement stated:

"The government may act through the agency of its officers. It may also act through the agency of juridical persons set up by the State by, under or in accordance with a statute. The demands and obligations of the modern Welfare State have resulted in an alarming

increase in the magnitude and range of government activity. For the purpose of ensuring and achieving the rapid development of the whole country by means of public economic activity, the government is called upon to embark on a multitude of commercial and industrial undertakings. In fact, a stage has now been reached when it has become difficult to distinguish between governmental and non-governmental functions. The distinction is now virtually non-existent. The rigid and tardy procedures commonly associated with governmental departments and the red tapism inherent in such slow motion procedures have compelled the government to resort to the device of public corporations to carry on commercial and industrial undertakings, which require professional skills of a highly specialised and technical nature. But by resorting to this device of corporate entity the government cannot be permitted to liberate itself from its constitutional obligations in respect of fundamental rights, which it and its organs are enjoined to respect, secure and advance.”

40. Given the above reality, Authkorale J was of the opinion that the expression “executive or administrative action” should be given a broad construction. He was therefore, inclined to adopt the test of government agency or instrumentality as a rational one rather than one based on sovereign power (whether the legal entity has been endowed by law with some part of the coercive power of or special privileges enjoyed by the state).

41. Using the instrumentality or agency test he went on to state:

“In reality Air Lanka is a company formed by the government, owned by the government and controlled by the government. The juristic veil of corporate personality donned by the company for certain purposes, cannot, for the purpose of application and enforcement of fundamental rights enshrined in Part III of the Constitution be permitted to conceal the reality behind the operations of the company is quite manifest. The effect of all the above factors and features would, in view, render Air Lanka an agent or organ of the government. Its action can therefore properly be designed as executive or administrative action within the meaning of Articles 17 and 126 of the Constitution”.

42. Similarly, reasoning was adopted in *Hemasiri Fernando v. Hon. Mangala Samaraweera, Minister of Posts, Telecommunications and Media and others*, in holding that government controlled Telecommunications company could be held accountable for violation of fundamental rights enumerated in the third chapter of the Constitution. What was of significance was the fact that 35 per cent of the share holdings in the company was held by a private party. Dheeraratne J. delivering the judgement on behalf of the rest of the bench said: “Behind the veneer of the commercial company is the State. The power of the State is conferred on the third respondent (Secretary to the Treasury) to be held for the benefit of the public”.

### **The One Month Rule**

43. Article 126 (3) stipulates when an individual alleges that his or her fundamental rights or language right has been infringed or is about to be infringed by the executive or administrative action, he or she must apply to the Supreme Court within one month upon the alleged infringement.

44. The Supreme Court, in the case of *Jayawardena v. Attorney-General*, ruled that in the case of where the allegation is that of an imminent infringement of fundamental rights, the time bar begins from the instance where the complainant had cognisance of the fact of the imminent infringement.

45. However, courts in interpreting the above provision have taken a liberal view. In *Edirisuriya v. Navarathnam* and *Navasivayam v. Gunawardena*, the Supreme Court held that the time bar on petitioning was not a mandatory one but rather a discretionary one, therefore if the petitioner provides an adequate excuse for the delay in filing the petition it would not become operative.

46. The number of Fundamental Rights applications submitted to the Supreme Court from 1994 to 2000 is as follows:

**Table 1**  
**Fundamental rights applications**

Year	Number of applications	Number of applications disposed
1994	302	324
1995	669	369
1996	1 060	839
1997	1 078	965
1998	814	862
1999	1 055	949
2000	719	1 080

### **The Court of Appeal**

47. The Court of Appeal has appellate jurisdiction for the correction of all errors in fact or in law committed by any court of first instance, tribunal or other institution. The Court of Appeal may in the exercise of its appellate or revisionary jurisdiction affirm, reverse or modify the order, judgement, decree or sentence under review. Section 141 of the Constitution of Sri Lanka grants jurisdiction to the Court of Appeal to issue writs of Habeas Corpus. This enables an individual to challenge the legality of his or her detention. When this jurisdiction of the Court of Appeal is invoked, the court is empowered to either order that the individual concerned be produced in person in court or alternatively, could order a court of first instance to enquire and submit a report on the alleged detention.

**Table 2****Statistical information on Habeas Corpus Applications from 1996**

Year	No. of applications
1996	151
1997	121
1998	13
1999	31
2000	43
2001 (up to June)	15

48. In addition, as per Article 140 of the Constitution, the Court of Appeal exercises the authority to grant and issue orders in the nature of writs of certiorari, prohibition, procedendo, mandamus and quo warranto against the judge of any Court of First Instance or tribunal or other institution or any other person.

### **3. Parliamentary Commissioner for Administration (Ombudsman)**

49. The rapid expansion of the sphere of government as well as increased potency of the administrative organs of the State gave rise to many allegations of abuse of power on the part of public authorities. These included allegations of dereliction of duty by public servants, inefficiency, bias, unfair discrimination and delay or failure to reply to communications addressed to administrative authorities. However, the existing constitutional, legal and administrative remedies showed a manifest inability in providing redress to these grievances due to their procedural inadequacies. Hence, the Office of the Parliamentary Commissioner of Administration, an independent, informal and accessible authority was established for the securing of redress to aggrieved persons in cases of misadministration, at a minimum cost.

#### **Legal framework**

50. Article 156 of the Constitution stipulates that the Parliament create by legislation the legal framework for the establishment of the Office of Ombudsman. Accordingly, the Parliament enacted, "The Parliamentary Commissioner for Administration Act, No. 17 of 1981", in order to define the powers, duties and functions of the holder of the Office. This Act was subsequently amended in 1994, to expand the scope of powers of the Ombudsman.

#### **Duty to maintain secrecy**

51. Section 6 of the enabling act, which created the Office of the Parliamentary Commissioner for Administration, casts a duty upon the holder of the office to maintain secrecy in respect of matters that come to his knowledge in the exercise, performance and discharge of his functions. This is further buttressed by the stipulation that the Ombudsman takes an Oath of Office before the President undertaking not to divulge any information received by him in the exercise of his duties.

### **Independence of the Ombudsman**

52. The enabling legislation in order to ensure independence of the Office of the Ombudsman has given effect to the following provisions:

(a) The Ombudsman is, “appointed by the President upon the ratification of that appointment by the Constitutional Council and shall hold office during good behaviour”. Prior to the enactment of the 17th amendment to the Constitution, the Ombudsman was appointed exclusively by the President;

(b) The salary of the Ombudsman is to be determined by Parliament and cannot be diminished during his term of office;

(c) The salary of the Ombudsman is charged on the Consolidated Fund;

(d) The Ombudsman cannot be removed unless on the grounds specified in Article 156 (3) of the Constitution.

53. The grounds on which the Office of the Ombudsman would become vacant: upon his death; on his resignation in writing addressed to the President; on attaining the age of 70 years; on his removal by the President on account of ill health or physical or mental infirmity; or, on his removal by the President on an address to Parliament.

### **Powers and Functions of the Ombudsman**

54. Article 156 (1) of the Constitution entrusts a duty upon the Ombudsman to:

“ ... investigate and report upon complaints or allegations of infringement of fundamental rights and other injustices by public officers and officers of public corporations, local authorities and other like institutions ...”

55. Section 10 (3) of the enabling legislation defines the phrase ‘injustices’ in the following manner:

“... injustices includes any injustice alleged to have been or likely to be caused by any decision or recommendation ( include a recommendation to a Minister) or by any act or omission, and the infringement of any right recognised by the Constitution”

56. Although section 11 (b) of the enabling act imposes restrictions on the powers of the Ombudsman, these restrictions do not apply when alleged infringement constitutes that of a violation of a fundamental right.

### **Public access to the Ombudsman**

57. The Office of the Ombudsman is intended to be an informal, easily accessible avenue of redress against administrative excesses. It is characteristic of easy accessibility that sets the Office of the Ombudsman apart from other formal human rights redress mechanisms. In keeping

with this concept, the enabling act was amended in 1994 to enable the general public to convey to the Ombudsman their grievances by merely addressing a communication in writing to him. Further, in order to make the Office of the Ombudsman more accessible to the general public, the Ombudsman on his own initiative has been conducting inquiries and surgeries around the country without merely being confined to his office in Colombo, as was the practice previously.

### **Annual Report<sup>1</sup>**

58. The Ombudsman is required by law to prepare and present to Parliament, an annual report, giving a detailed account of the work undertaken during the preceding year in the exercise of his powers, duties and functions under the Act.

### **The powers of redress of the Ombudsman**

59. The Ombudsman upon making his determination is empowered to report his findings with the reasons, either to the head of the institution or to the Minister under whose purview the infringing institution falls under or to the Public Service Commission. Thereupon, he could also require the head of the institution concerned to notify, within a specified time, the steps he proposes to take to give effect to the Ombudsman's recommendation. However, if, inappropriate or inadequate action is taken on the recommendations made by the Ombudsman, he is entitled to report this transgression either to the President or the Parliament with appropriate recommendations for remedial actions.

### **Immunity of the Ombudsman**

60. The Ombudsman or any officer of his staff cannot be prosecuted for any act, which is done in good faith under this Act. Further, the Ombudsman or any officer of his staff cannot be called to give evidence in any Court or in any proceedings of a judicial nature, in respect of any report made by the Ombudsman under the Act or in respect of the publication of a substantially true account of such report.

61. No action, prosecution or other proceedings, whether it be civil or criminal, be brought against the Ombudsman in any court in respect of any report made by the Ombudsman under the Act or in respect of the publication of a substantially true account of such report.

## **4. Permanent Inter-Ministerial Standing Committee on Human Rights Issues**

62. A Permanent Inter-Ministerial Standing Committee on Human Rights Issues was established on 20 November 2000, with the Minister of Foreign Affairs as its Chairperson. In addition to the Chairperson, the membership of the Committee comprises of the Deputy Minister of Foreign Affairs (presently known as Minister Assisting Foreign Affairs), the Attorney General, the Solicitor General, Secretaries to the Ministries of Defence, Foreign Affairs, Justice and the three Service Commanders of the Armed Forces and the Inspector General of Police. It has been entrusted with the mandate to consider issues and incidents relating to human rights violations and to take policy decisions in this regard. In addition, the Standing Committee is also



mandated to oversee the gathering of information and evidence relating to incidents and cases that have a human rights sensitivity and ensuring the fulfilment of obligations, including reporting obligations cast upon Sri Lanka, by virtue of being a party to several International Human Rights Instruments.

63. The Standing Committee meets once a month to monitor, supervise and take policy decisions. In order ensure efficacy in fulfilling its mandate, the Standing Committee established the Inter-Ministerial Working Group on Human Rights. The Inter-Ministerial Working Group (IMWG), co-chaired by the Secretary to the Ministry of Defence and the Secretary to the Ministry of Foreign Affairs, was establishment to implement the decisions taken by the Standing Committee. It meets once a fortnight. One of the important tasks undertaken by this Committee is the supervision of the conduct of criminal investigations into allegations of human rights violations emanating through various United Nations human rights monitoring mechanisms.

### **The Anti-Harassment Committee**

64. The Government of Sri Lanka, aware of the possibility of harassment and violation of human rights that could take place at check points and barricades, which have been necessitated because of the vulnerability of human life and property to terrorist attacks, reinforced the already existing constitutional and legal provisions that prevent arbitrary arrest and detention and protect the privacy and human dignity of individuals, by creating administrative mechanisms with proactive mandates of preventing harassment and protecting human rights.

65. Unlike legal remedies which are exclusively complaint based, and the deterrent is contingent upon reactive action, administrative mechanisms not only provide redress to complaints but also act as watch dogs via review mechanisms in ensuring both legal as well as institutional safeguards aimed at the protection and promotion of human rights are not transgressed by the relevant officials and institutions in the performance of their duties.

66. Prior to the election of the present United National Front Government, the Presidential Anti-Harassment Committee and the National Human Rights Commission were the principal administrative mechanisms established by the government that promote and protect human rights. In order to ensure its continued efficacy both in terms of results and public perception, the new United National Front Government caused a change in the nomenclature and membership of The Presidential Committee on Unlawful Arrests and Harassment. A new Committee under the chairmanship of the Minister of Interior, with a specific mandate to examine allegations of harassment of Tamil people, both in the past and the present was established. Other members of the Committee are as follows: Hon. P. Chandrasekaran, M.P., Minister of Estate Infrastructure; Mr. Mano Ganesh, M.P./Colombo; Mr. R. Radhakrishnan, M.P./National List; Mr. Austin Fernando, Secretary, Ministry of Defense; Mr. M.N. Junaid, Secretary, Ministry of Interior; Mr. Bernard Goonethilleke, Director General, Secretariat for Co-ordination of the Peace Process and Special Assistant to the Prime Minister; Mr. Jeyaratnam, Secretary, Ministry of Rehabilitation, Resettlement and Refugees; Mr. K. Parameswaran, Secretary, Ministry of Hindu Affairs; Gen. Rohan Dalluwatte, Chief of Defense Staff; Lt. Gen. L. P. Balagalle, Commander, Sri Lanka Army; Air Marshal. J Weerakkody, Commander, Sri Lanka Air force; and Mr. K. Paramalingham, Senior Assistant Secretary, Ministry of Hindu Affairs.

67. The Committee held its inaugural meeting on 11 January 2002, at the Ministry of Defense. At this meeting the following decisions were taken:

- The check points in the up-country areas be limited to two points one along the main Nuwara Eliya/ Kandy road and the other in Pitawala, Ginigathhena;
- Decision was taken to relax the rules concerning the registration at police stations of Tamils who come to Colombo from the Northern and Eastern provinces. The requirement to register at a police station was done away with;
- The police were directed to take the necessary steps to minimize the waiting time for a pass to travel to Colombo from Vavuniya;
- An undertaking was given by Gen. Daluwatte that school buildings and other public places of worship in the North and East currently housing security force personnel would be evacuated by February 2002;
- The Secretary to the Ministry of Interior undertook to direct the Commissioner-General of Prisons to afford facilities to relatives and parents of detainees under the Prevention of Terrorism (Temporary Provisions) Act No.48 of 1979 (PTA), currently housed in prisons, to make regular visits to the detainees; and
- It was decided that all detainees currently held in the Magazine prison and Boosa camp be transferred to the Kaluthara prison.

68. The new government has taken a policy decision to remove all checkpoints and barricades in the city of Colombo and minimize the number of checkpoints and roadblocks that exist in other parts of the country. In addition, it has been decided to phase out the system of issuing passes that existed in Vavuniya, in order to facilitate the free movement of people and goods from un-cleared to the cleared areas. The government has also taken steps to ease the restrictions on fishing in the sea off the coast of the Northern and Eastern Provinces and it is also examining the feasibility of re-opening the main land route to Jaffna (Jaffna- Kandy Road).

#### **The Presidential Committee on Unlawful Arrests and Harassment (July 1998-November 2001)**

69. This committee was initially set up under the auspices of the Ministry of Justice, Constitutional Affairs and National Integration in July 1998 on a directive of the President. It was reconstituted under aegis of the Ministry of Justice in February 2001.

#### **Membership**

70. The Committee, which met under the chairmanship of Minister of Justice, comprised of ten members. Emphasis was made in making appointments to this committee to ensure that all nationalities in the Sri Lankan polity are represented. The membership of the Committee was as follows: Hon. Prof. G. L. Peiris, Minister of Constitutional Affairs and Industrial Development; Hon. Batty Weerakoone, Minister of Justice (chairman); Hon. S. B. Dissanayake, Minister of

Samurdhi, Rural Development, Parliamentary Affairs and Up-Country Development; Hon. Lakshman Kadirgamar, Minister of Foreign Affairs; Hon. Douglas Devananda, Minister of Development, Rehabilitation and Reconstruction of the North and Tamil Affairs of the North and East; Mr. Lakshman Jayakody, Deputy Chairman of the National Development Council; Mr. M. M. Zuhair, Legal Consultant of the Ministry of Aviation and AirPort Development; Mr. R. Sambanthan, Tamil United Liberation Front; Mr. R. Yogarajan, Ceylon Workers Congress; and Mr. R. Sidarathan, People's Liberation Organisation for Tamil Ealam. In order to strengthen the functioning of the Committee, Mr. Lakshman Jayakody was appointed as the "coordinator".

### **Areas of Representation**

71. The Committee looked into representations made by persons harassed or not dealt with according to law and took steps to grant them relief. The Committee entertained complaints and allegations of harassment such as:

- The Arrest of persons under the Prevention of Terrorism Act (PTA) or Emergency Regulations (ER), illegally without adopting due procedure;
- The abuse of PTA and ER to detain individuals;
- Prolonged periods of detention and the delay in bringing them to trial; and
- Harassment by Police and Armed Service personnel at the time of arrest and/ or at checking at checkpoints and in special operations. Since the Committee had a wide mandate, it entertained any type of complaint it deemed fit to be further looked into.

### **Infrastructure**

72. There were two administrative units functioning under the purview of the Committee. One unit functioned in the Ministry of Justice and employed a Lawyer on a full time basis. This was intended to provide individuals an opportunity to call over at this unit and hand over their complaints to this lawyer personally. The lawyer was authorized to grant immediate relief if there was a possibility of doing so.

73. The other Unit was the Police unit, comprising of police officers under the supervision of a senior Deputy Inspector General of Police. It functioned in a separate office and was headed by a Senior Superintendent of Police. He was assisted by eight other police officers. Its role was to function as the investigative arm of the Committee.

### **Meetings**

74. In order to facilitate the expeditious granting of relief to the complaints received, the Committee met, once a week on Monday. The meetings were attended by officials of the Ministry of Justice, Police Department (Terrorism Investigation Division, Criminal Investigation Department) and the three armed forces. In addition, the Committee was empowered to summon before its presence any official it deemed necessary to carry out its mandate.

### **The Role of the Attorney General's Department**

75. If any problems were encountered during the course of the investigations, the assistance of the Attorney General's Department was solicited by the Committee. In such an instance an official from the Attorney General's department was assigned to review the action taken and to give his opinion on any additional steps that need to be taken to ensure the successful prosecution of offenders. Further, the Committee closely monitored the cases where police had forwarded notes of investigation (IBE) to the Attorney General's Department, in order to bring about an expeditious conclusion to the cases.

### **Measures Taken by the Committee to Mitigate Hardships**

76. The Committee did not restrict its functions only to providing relief to aggrieved individuals who complained to the Committee. It also adopted several measures to ameliorate the problems encountered by the general public, due to various actions taken by the armed forces. Some of them were:

- Meeting with police and the armed forces whenever necessary to review the systems operated by them;
- The supply of Fax machines to Police divisions island wide, in order to enable the Police divisions to instantaneously provide comprehensive information on the individuals detained under the Emergency Regulations or under the PTA;
- Taking immediate action in instances of violent mass harassment;
- Issuing of instruction to the Police Department to adopt a uniform and simplified system of registration of persons from at all police stations; and
- Visits by the Chairman to prisons to inquire after the welfare of the detainees.

77. Although the Terms of Reference to the committee referred only to matters concerning arrest and harassment, the Committee enhanced the scope of the terms to encompass other hardships faced by civilians in the present security situation.

### **Statistics**

78. The statistical summary of the Committee's performance during its existence can be given as follows:

- Total number of Complaints received: 579;
- Total disposed of: 438;
- Total number of Complaints on which action is still pending: 141.

## Human Rights Commission of Sri Lanka

79. The Human Rights Commission (HRC) of Sri Lanka, which was established by the Government in March 1997,<sup>2</sup> is vested with monitoring, investigative and advisory powers in relation to human rights. It has been set up as a permanent national statutory institution to investigate any infringement or imminent infringement of a fundamental right declared and recognised by the Constitution, to grant appropriate relief. The powers of the Commission are wider than those of the Supreme Court, and complement the existing national framework for the protection of human rights. Unlike under the Constitution there are no time limits for filing a complaint before the HRC. Further, the Commission does not insist on procedural formalities in the presentation of complaints or petitions. This obviates the necessity of obtaining professional legal services in forwarding of a grievance to the Commission.

80. The membership of the Commission consists of five members, reflective of the ethnic configuration of the Sri Lankan polity. The enabling legislation requires that the membership of the Commission should consist of three Sinhalese, one Tamil and one Muslim and when appointments are made to the Commission by the President, it should be done on the recommendation of the Prime Minister, in consultation with the Speaker and the Leader of the Opposition.

81. The mandate of the Human Rights Commission is twofold: Broadly, it has:

(a) *A monitoring and an investigatory role* - The investigation of grievances arising from actions of the State which are of executive or administrative in nature; this consists of direct complaints and, in a broad sense, fundamental rights cases referred to the Commission by the Supreme Court;

(b) *An advisory role* - This covers a broad spectrum, which include:

- (i) The review of procedures to ensure compliance with the constitutional guarantees of fundamental rights;
- (ii) Advising the government in formulating legislation and administrative procedures for the furtherance of fundamental rights and ensuring that legislation existing and proposed, conforms to international human rights norms and Sri Lanka's obligations under treaties and other international instruments; and
- (iii) Promoting awareness of, and providing education in relation to human rights. According to Section 15 (3) of the Act, where an investigation conducted by the Commission discloses an infringement of a fundamental right, the Commission may recommend to the relevant authorities, that prosecution or other suitable action be taken against the person or persons found to be infringing fundamental rights. Alternatively, it may refer the matter to any court having jurisdiction to hear and determine such matter. It also can order the reimbursement of the expenditure incurred by the

complainant in bringing the petition before the Commission. Further, the Commission is empowered to take preventive measures in order to ensure there is no repetition of violations of fundamental rights.

82. The HRC has also been specifically vested with the power to monitor the welfare of detained persons. It is therefore authorised to visit places of detention frequently. In order to facilitate this function, all arrests and detention under the Emergency Regulations (ER) and the Prevention of Terrorism Act (PTA) must be reported to the Commission within 48 hours of arrest. Wilful failure to report an arrest or detention will attract penal sanctions under the HRC Act. This provision has been reinforced by the Presidential directive issued to the armed forces on the 7th of September 1997, which are identical to those issued under the regulations establishing the Human Rights Task Force (HRTF).

83. The Commission has ten regional offices headed by co-ordinators and two sub units staffed by investigating officers. In addition, the Human Rights Commission has set up a 24-hour hotline to enable the public to bring to the notice of the Commission any violations of fundamental rights. The Commission conducts monthly meetings with representatives of the three Service Commanders and the Inspector General of Police, and officers who have been nominated to liaise with the Commission in order to facilitate the functioning of the hotline.

84. A statistical summary covering the period January 1998 to June 2001, of the visits undertaken by the regional coordinators of the National Human Rights Commission to detention centres and police stations in areas under their purview is given below:

**Table 3**

**Visits to police stations and detention camps undertaken by each regional office**

Region	Police station	Detention camps
Jaffna	80	158
Batticaloa	182	154
Kandy	793	24
Anuradhapura	513	81
Trincomalee	278	43
Vavuniya	108	177
Badulla	301	21
Ampara	377	21
Kalmunai	831	1 093
Matara	763	7
Colombo	907	30
Total	5 133	1 809

**Optional Protocol to the Covenant**

85. The Government has ratified the Optional Protocol to the ICCPR. This measure which is consistent with Sri Lanka's policy of openness and accountability in human rights matters, has enabled Sri Lankan citizens to avail themselves of international remedies as a final resort in the

case of human rights violations. The instrument of accession was deposited on October 3, 1997 with the United Nations Secretary-General. Sri Lanka is the second country in the South and South East Asian region to ratify the Optional Protocol.

### **Article 3. Right to Equality**

#### **1. Institutional Mechanisms for the Advancement of Women**

##### **Constitutional Guarantees**

86. In order to give a justiciable safeguard against gender discrimination, Article 12 (2) of the Constitution provides that “ no citizen shall be discriminated against on grounds of race, religion, language, caste, sex, political opinion, place of birth or any such grounds”. Further, Article 12 (3) by stating “no person shall, on the grounds of race, religion, language, caste, sex or any one of such grounds, be subject to any disability, liability, restriction or condition with regard to access to shops, public restaurants, hotels, places of public entertainment and places of public worship of his own religion”, seeks to extend the protection against gender discrimination to the realm of acts done by private individuals. These provisions are reinforced by the Directive Principles of State Policy and Fundamental Duties, which enunciates the duty of the state to ensure the equality of opportunity to citizens regardless of race, religion, language, caste, sex and political opinion.

##### **Women’s Charter**

87. In March 1993, the Government of Sri Lanka adopted the Women’s Charter. It was envisaged that this declaratory document would provide a normative framework for the internalisation of the values enumerated in the United Nations Convention on the Elimination of All forms of Discrimination against Women (CEDAW). The Women’s Charter was an outcome of a lengthy consultative process in which the governmental as well as non-governmental agencies participated. Emphasis was made in ensuring that the heterogeneous nature of Sri Lankan society was reflected in the participants of the process that drafted the Charter.

88. Part I of the Charter vests specific obligations on the State vis-à-vis obligations undertaken upon the ratification of the CEDAW convention. These could be categorised into the following broad areas: political and civil rights; rights within the family; the right to education and training; the right to health care and nutrition; the right to protection from social discrimination; and the right to protection from gender based violence.

89. Since the provisions of the Women’s Charter are not instruments, steps have been taken to enact legislation incorporating its provisions. The draft legislation prepared for this purpose has already received assent of the Cabinet of Ministers.

##### **National Committee on Women**

90. The National Committee on Women (NCW) was established in August 1993 in order to give effect to provisions contained in the second part of the Women’s Charter. The Committee consists of four members and are appointed for a four-year term. The members of the committee

functioned until August 1997 and after which a new Committee was appointed with effect from November 20, 1997. One of the principal objectives of the aforesaid draft legislation is to give the NCW parity of status with other national institutions such as the Human Rights Commission, the Commission for the Elimination of Bribery or Corruption and the Parliamentary Commissioner for Administration.

91. The NCW is mandated to perform a consultative function to the Ministry in charge of women's affairs in the formulation of government policy in respect of women. It also plays a pivotal role in reviewing of legislation that affects women. Regular meetings and discussions on relevant issues are held with the relevant Minister in charge of the subject of Women's Affairs. The NCW also conducts gender sensitisation programmes through out the country in an effort to create awareness about the Women's Charter.

### **Ministry responsible for Women's Affairs**

92. In 1997 a separate Ministry solely responsible for Women's Affairs was established for the first time. Its principal role was to function as a national focal point and as an apex of the national machinery for the advancement of women's rights. Along with creation of a separate Ministry, a deputy Minister was also appointed. Holders of both the offices are women.

93. The Ministry of Women's Affairs has established a networking group of key public officers selected from each Ministry to oversee and ensure the implementation of its programme of work. These officers, called "focal points" are vested with the responsibility of familiarising themselves with women's issues, sensitising officers in the ministries and departments under them on gender issues and identifying issues, which need to be addressed. In addition, they are also responsible for gender mainstreaming and ensuring compliance with decided policy.

### **The Women's Bureau**

94. The Women's Bureau (WB) was established in 1978. Its activities include:

- capacity-building of women through social mobilisation and community leadership programmes;
- poverty alleviation through economic empowerment programmes; and
- combating violence against women through sensitisation, training and advocacy.

### **National Plan of Action for Women**

95. In 1996, the Ministry of Women's Affairs in collaboration with the National Committee on Women formulated the "National Plan of Action for Women in Sri Lanka". This plan identified the vital issues that need to be worked upon for the purpose of countering existing constraints obstructing the advancement of women. The plan was formulated in congruence with the outcome of the Beijing Conference and the action plan prepared there upon. In the



formulation of the plan, emphasis was on ensuring that the final outcome was a result of a wide consensus. In keeping with this concept, consultations were held by the authors of the plan with the private sector, non-governmental sector as well as with the State sector.

96. The plan identified specific issues of concern and action that required to be taken. The remedial action was identified in such manner so as to ascertain what action could be taken in short, medium or in the long term. Following governmental approval, public authorities identified as lacking in gender sensitivity in their activities have been requested to take remedial action. In addition, state officials known as “focal points” have been entrusted with the task of implementing the Action Plan in their respective Ministries. Thus, discussions have been initiated with the Gender Focal Points to implement the plan taking up activities specified in the Plan.

97. Further, the Ministry of Women’s Affairs has organised training programmes to sensitise policy makers and planners on the methodologies in incorporating the plan into the work plan of the respective Ministries.

98. In keeping with the current societal changes, the National Plan of Action is being updated in 12 critical areas of concern, in order to ensure it does not lose its relevance.

### **Implementation of the Beijing Platform of Action**

99. In addition to the National Plan of Action, the Ministry of Women’s Affairs and the National Committee on Women have jointly undertaken several measures to ensure the implementation of the Beijing Platform of Action. They are as follows:

#### **1. Access to technical and education**

100. The recent thrust of the activities of the Ministry of Women’s Affairs has focused on Women’s entrepreneurial development and social mobilisation. In furtherance of this goal, the Women’s Bureau of the Ministry works at grass root level through 22 Women’s Development Centres and through Provincial Councils and other local governmental institutions in granting low interest credit through a revolving fund for self employment. In addition the bureau participates in the imparting of technical knowledge in accounting and marketing to women entrepreneurs. It also helps in promotion of the goods and services manufactured by these entrepreneurs by organising exhibitions and trade fairs. Further, self-employment for women is facilitated through the promotion of home gardening programmes.

#### **2. Empowerment**

101. The Bureau conducts awareness raising programmes especially through the audio and the visual media on women’s issues. The subjects of legal literacy, reproductive health, nutrition and domestic violence are brought into focus through these programmes. Likewise, the National Committee on Women also holds panel discussions in English as well as in the Vernacular languages on the rights of women and gender equality on the occasion of the International

Women's Day. In keeping with the principle of creating gender awareness, the National Committee on Women annually publishes a journal focusing on Women's Affairs in both English as well as in the vernacular languages.

102. Leadership training programmes are also conducted by the Bureau, in addition to administering of seven counselling centres, including three in the Free Trade Zones. Further, in order to promote greater participation of women in politics the National Committee on Women has made specific recommendations to political parties on the need to ensuring of gender mainstreaming of its members as well as the importance of having women candidates for the elections at all levels and also of the need to appoint women to positions of authority within the party power structures.

### **3. Removal of Discrimination against Women**

103. The National Committee on Women was instrumental in the formulation of a gender sensitive set of guidelines in the issue of visas to foreign spouses, in place of the previously discriminatory guidelines. It also played a catalytic role in the engendering of legislation that abrogated legislation that discriminate against women.

### **4. Violence against Women**

104. The National Committee on Women has established a Centre for Gender Complaints (CGC). It receives, on an average, 100 complaints a month. Remedial action in respect of these complaints are instituted either via referral to the parties concerned or by legal counselling or alternatively through the procurement of legal aid. The National Committee on Women as part of its awareness campaign has produced advertisements to deter the perpetration of sexual harassment, to be telecast on television. It is envisaged that these adverts will continue to be telecast on a long-term basis.

### **5. Women and Armed Conflict**

105. The National Committee on Women conducted two forum discussions on women displaced by the armed conflict in the North and East. Consequently, recommendations were made to the Presidential Secretariat for engendering of relief and rehabilitation measures. These recommendations also highlighted the unnecessary and costly duplication of such activities by the government as well as Foreign Agencies.

## **2. Women and the Economy**

106. Out of the Total of a Labour force of approximately, 6, 853,889, women number only about 2, 307,902. However, the entry of women into the labour market has shown a 36 per cent increase in the year 2000. The highest participation rate for females in the labour force is reported from the age groups of 22-25 years and followed by the age group of 28-29 years.

107. Women's labour force participation is more evident in the informal sector. This constitutes 26.5 per cent of the total female labour force. In this sector women are found working as casual labourers, agricultural workers and workers in the home based industries. This segment of the female labour force continues to be a target of the state sponsored self-employment programmes.

108. The economic liberalisation policies and export orientation and private sector participation have further, enhanced women's employment opportunities. Although there has been a decline from 58.4 per cent in 1994 to 50.4 per cent in 1998 in the female work force participation in the agricultural segment of the economy, women engaged in the industrial sector have increased considerably. In fact in the manufacturing and service sector, which are the dominant sectors in the economy in terms of revenue, are areas that have the largest female work force participation. The percentage of women in the manufacturing sector has increased from 44.4 per cent in 1994 to 50.4 per cent in 1999. Moreover, 90 per cent of garment factory workers are women. Most of these girls are between the ages of 18-30.

109. Although an increase in the number of women employed in private sector has been recorded, when compared with the number employed in public sector, most of these jobs remain low-skilled, labour intensive jobs. Nevertheless, earnings of these women make an important contribution to the country's foreign exchange revenue and to their family incomes.

110. The unemployment rate among women has seen a decline when compared with the unemployment rate of their male counterparts. It recorded a decline from 23.4 percent in 1990 to 13 per cent in 1999 and 11 percent during the first three quarters of 2000, whereas the male unemployment rate fell from 11.8 per cent in 1990 to 6.7 per cent in 1999 and 5.9 percent during the first three quarters of 2000. Yet it still remains double that of the male unemployment rate of 7.4 per cent. A high percentage of these unemployed females are in the age groups of 15-19 and 20-24 years. An interesting phenomenon pertaining to this category is the fact the women, who are unemployed, are better educated than the male unemployed.

111. In order to redress the problem of female unemployment, the State has commenced assistance programmes for self-employment. The Ministry of Samurdhi Development, the Vocational Training Authority, the Women's Bureau and the IRDP has been playing a catalytic role in this field. They jointly provide a self-employment package, which consists of training, credit facilities and market information. If the need arises, additional credit facilities are obtained by these institutions for the recipients through co-operative societies as well as commercial banks, both in the state and private sector.

### **Migrant Workers**

112. Positive developments have been seen in policies pertaining to migrant workers during the period under review. Following the amendment of the Foreign Employment Act in 1994, many beneficial programmes have been initiated. The programmes given below could be cited as examples.

- The compulsory registration of migrant workers with the Sri Lanka Bureau of Foreign Employment (SLBFE);

- Introduction of compulsory training before departure in 47 training centres run and managed by both the State and private sector in different parts of the country;
- Labour contracts in 10 countries;
- Free medical insurance schemes;
- Loans at low interests for migrants;
- The appointment of Labour Welfare Officers in Sri Lankan missions abroad;
- Provision of an ambulance for the use of any injured returnees at the airport; and
- Giving of scholarships for the children of migrant workers to prevent “dropping out” of schools.

113. It has been reported that the compulsory licensing of recruitment agencies and better surveillance on the part of the authorities has resulted in the reduction of illegal immigration.

114. Despite introduction of these welfare provisions, around 10 per cent of the migrant women workers continue to be subject to economic exploitation and sexual abuse. The resulting social costs are indeed a cause for concern to the Government of Sri Lanka. It is hoped that the United Nations Convention on the Protection of Migrant Workers, to which Sri Lanka recently became a party, would strengthen the protection of the rights of the migrant workers.

115. The contribution of female migrant workers in reducing the balance of payment deficit, unemployment problem and in increasing family incomes though appreciated at official levels, are yet to gain its due recognition from the society at large. Although they have been empowered by their experiences in an alien land, these women have little prospect of upward mobility on their return.

116. In all cases the benefit for the other members of the family as a result of income remitted by the migrant workers does not seem to be a commensurate with the cost of opportunity they incur by working in another country. Access to childcare services is minuscule. This compels them to entrust the welfare of young children to their extended family, chiefly to their husband, grandmother or even to a neighbour in some instances. The employers often exploit them, by compelling them to work long hours without adequate sleep and by confining them to houses. Further, given that there is no adequate legal protection, they are also vulnerable to sexual and physical abuse.

117. The material benefit to the family that would improve their quality of life does not always seem to happen. Lack of knowledge in banking and investment often results in savings and remittances sent by migrant workers being either misappropriated or misused by their relatives.

118. In this context, state policies have been giving priority to promoting male employment overseas. Meanwhile, even though there remains a niche market for housemaids in Asia and Cyprus, the number of female migrant workers has seen a decline from 73.2 per cent in 1995

to 66.3 per cent in 1998. Further, the percentage of housemaids among women migrant workers has also decreased from 90.3 per cent to 80.5 per cent. Women no longer migrate only to be employed as housemaids. There has been a substantial increase in the number of women seeking other forms of unskilled employment, such as helpers in factories and as cleaners.

### **3. Women and Education and Training**

119. It is evident that equal educational opportunities have enhanced the status of women in the Sri Lankan society. The female literacy rate is 89 per cent. While female enrolment to primary education, secondary and higher education was respectively 48.4 per cent, 49.9 per cent and 57.9 per cent of the total student population, they constitute 50.9 per cent of the total university student population. Moreover, they outnumber males in undergraduate enrolments in the fields of medicine, law and Arts.

120. Compulsory education legislation was passed for the 5-14 age group. In addition the government via the National Education Commission is initiating education reforms. Some goals of these envisaged programmes are given below:

- (a) Provision of at least one or two well equipped senior secondary schools in each administrative district;
- (b) Improving the quality of education and promoting more creativity in education in schools, teacher education institutions and universities;
- (c) Increasing the access to English education, technology and to educational counselling; and
- (d) Providing adequate vocational educational facilities for leavers and establish links between universities and training institutions and employers.

121. These educational reforms are intended to benefit women by improving their literacy levels, quality of education and enhancing their technical skills.

### **4. Women in power and decision-making**

#### **1. Public Life**

122. Approximately around half the labour-force in professional, semi-professional and middle level employment is constituted of women. The health and the educational sectors have traditionally been their preserve. While the number of women employed in professional and technical fields accounted for 43.9 per cent of the total work force of that sector, number of females employed in administrative and managerial levels was 23.6 per cent. The figure employed as clerks and related clerical fields was 48.3 per cent of the total work force of that sector.

123. The women employed in the highest decision making levels remained low. Women form only 13.3 per cent of the entire cadre of permanent secretaries, the highest position in governmental bureaucratic hierarchy. Only 8 per cent of the Vice Chancellors and 13 per cent of the University Deans were women.

124. The same statistics are reflected in the legal field. In the appellate Courts there is only a single Supreme Court Judge and another female Judge of the Court of Appeal and only 21.9 per cent of the judges in the original courts are women. However, given that the promotions in the Judiciary is based on seniority and the dominance of women in terms of numbers in the legal profession, it should only be a matter of time before women are appointed to the highest echelons of the Judiciary. Further, in the main government departments, employing lawyers i.e. the Attorney General's department and the Legal Draftsmen's department, females are mainly represented at the middle levels. This is indicative of a fairer representation of women in the legal field in the immediate future.

## **2. Political life**

125. Although political consciousness is high among women and most of them exercise their franchise, this fact is not reflected in the number of women participating in power structures either within the political parties or the State. Women only constitute of 3.8 per cent of the parliamentarians and 13 per cent of the Cabinet of Ministers. While the figure is 4 per cent in Provincial Councils, the figure in Municipal and Urban Councils is 2 per cent of the elected representatives. Similarly, only 2 per cent of the members of Pradeshiya Sabas are women. This is a downward trend compared to the figure of 3 per cent for the previous term.

126. Women entering politics are constrained in advancing their careers by culture, tradition, financial constraints and problems associated with reconciling the role of homemaker with the demands of a political career.

127. Prior to the October 2000 elections, the government as well as NGOs have advocated the allocation of 30 per cent of the seats in parliament and local governmental bodies to women, in order to increase their participation in electoral politics. Similar requests were made for the same percentage of seats in the national list (a mechanism that allows political parties to nominate candidates to parliament.) to be reserved for women. Furthermore, political parties have been requested to reorganise their women's wings to allow for an increase in number of women candidates to contest elections. Similarly, training of women with leadership qualities, especially at grass root levels to contest at the Pradeshiya Saba level elections is being carried out in an effort to redress the gender imbalance in political representation. Moreover, the new United National Front Government has launched an initiative to ensure 20 per cent female participation at the nomination stage as candidates at local government elections.

## **Articles 4 and 5. Human Rights During Emergency**

128. For the purpose of maintaining a balance between individual rights and freedoms and interests of the society at large, Article 15 of the Constitution of Sri Lanka permits the imposition of restrictions on the fundamental rights enumerated in Articles 12 (freedom from discrimination), 13(1)(freedom from arbitrary arrest), 13(2)(freedom deprived of liberty except

upon and in terms of an order made by a judge in accordance with procedure established by law) and 14 (freedom of speech and expression, freedom of peaceful assembly and the freedom to join or form a trade union and the freedom of worship, the freedom to use his or her own language or the freedom to promote his or her culture, the freedom to engage in lawful profession or trade and the freedom of movement) of the constitution. According to Article 15(7), these provisions are “ subject to such restrictions as may be prescribed by law in the interest of national security, public order and the protection of public health or morality or for the purpose of securing due recognition and respect and freedoms of others, or of meeting the just requirements of the general welfare of a democratic society”. Similarly, while rights declared by Articles 13(5)(right to be presumed innocent until proven otherwise) and 13(6)(freedom from retrospective punishment) can be restricted by law in the interest of national security, Articles 15(2) to (6) permit the restriction of various freedoms declared by Article 14 as may be prescribed by law for the purpose set out therein.

129. Furthermore, Article 15(8) declares that the exercise and operation of the rights declared by Articles 12(1) (right to equality before the law and the equal protection of the law), 13 and 14 are subject to restrictions prescribed by law, in their application to the members of the Armed Forces, the Police and other forces charged with the maintenance of public order. This has been done in the interests of ensuring the proper discharge of their duties and the maintenance of discipline among such individuals.

130. Moreover, Article 155 of the Constitution gives the Executive the power to make emergency regulations utilising the powers vested in him or her by virtue of the Public Security Ordinance<sup>3</sup> (PSO), having the legal effect of over-riding, amending or suspending the operation of any law, except the provisions of the Constitution. Similarly, section 5(1) of the PSO also empowers the Executive with the authority to issue emergency regulations which:

- (a) Authorise and provide for the detention of persons;
- (b) Authorise the taking of possession or control of any property or undertaking, the acquisition of any property other than land;
- (c) Authorise the entering and searching of any premises;
- (d) Provide for amending any law, for suspending the operation of any law and for the applying of any law with or without modification;
- (e) Provide for charging, in respect of the granting or issue of any licence, permit, certificate or other document for the purpose of the regulations, any prescribed fee;
- (f) Provide for payment of compensation and remuneration to persons affected by regulations;
- (g) Make provision for the apprehension and punishment of offenders and for their trial by such courts, not being courts-martial, and in accordance with such procedure as may be provided for by the regulations, and for appeals from the orders or decisions of such Courts and hearing and disposal of such appeals.

131. The phrase “law” utilised in Article 15 is defined by the Constitution to “include regulations made under law for the time being relating to public security”. Thus this phrase when read together with Article 155 of the Constitution and the provisions of the Public Security Act empowers the President to enact by decree, regulations restricting enjoyment of aforesaid rights. However, this should not be construed as giving the executive a “carte blanche” to restrict the rights and freedoms enjoyed by the people.

132. The Constitution itself enunciates the freedom of thought, conscience and religion (Article 10), freedom from torture (Article 11), the right to a fair trial (Article 13(3)) and the freedom from punishment with death or imprisonment except in accordance with the law (Article 13(4)) as absolute rights. Therefore, these rights cannot be restricted under any circumstances.

133. Similarly, even though Article 155 empowers the President to suspend, amend or over-ride the operation of any law, it does not purport to deprive the legislature’s control over the Executive’s emergency powers. In fact it seeks to do the opposite. It purports to provide a safeguard against the abuse of emergency powers and arbitrary action by the Executive, by stipulating that any law or emergency regulation proclaimed by the Executive must be approved by the majority of members of the legislature within 10 days of its proclamation. Further, it states that such a proclamation only has a life span of 30 days, unless it is renewed by the legislature through a resolution passed to that effect by the majority of the members of the parliament.

134. Moreover, the judiciary through the creative interpretation of the provisions of the Constitution has sought to be a bulwark against the abuse of emergency powers by the Executive. In *Yasapala v. Wickramasinghe*, a case in which Emergency Regulations which restricted the freedom of association in the interest of national security was challenged, Sharavanda J., held that the relationship between the impugned regulation and its purpose must be one of rationality or proximity. Similarly, in the landmark case of *Joseph Perera v. Attorney General*, a five member Bench of the Supreme Court unanimously held that the Article 15(7) permitted only such restrictions that have an “intimate, real and rational” connection with the object of the restrictions. The case concerned the restriction of the freedom of speech by an Emergency Regulation. Sharvananda C.J. stated:

“If the restrictions imposed are wide enough to cover permissible as well as impermissible restrictions, the regulations will be struck down as a whole, since the restriction put upon the freedom of speech will not be justifiable by Article 15(2) or 15(7)... The regulation must satisfy this objective ... [I]t is competent for the court to question the necessity of the Emergency Regulation and whether there is a proximate or rational nexus between the restriction imposed on a citizen’s fundamental right by emergency regulation and the object sought to be achieved by the regulation”.

135. Hence the specific regulation must stand to examination in court that its objective of national security, reasonably prevails over the unrestricted freedom of expression. In this way only can such a regulation be valid. The President’s mere subjective assertion that he/she thought it necessary to make a particular regulation does not lend any validity to such regulation.



136. An amendment to the Emergency regulations was enacted by the Government gazette dated 6<sup>th</sup> April 2001, which required suspects arrested under the Emergency Regulations to be produced before a Magistrate not later than 14 days from the date of arrest. Subsequently, with effect from July 2001, the Government of Sri Lanka permitted the Emergency Regulations to lapse. Therefore, the Emergency regulations are at present not in force.

#### **Prevention of Terrorism (Temporary Provisions) Act No. 4 of 1979**

137. This Act commonly referred to as the “PTA”, was intended to make temporary provisions for the prevention of acts of terrorism in Sri Lanka, the prevention of unlawful activities of any individual, group of individuals, association, organisation or body of persons within or outside Sri Lanka. The Preamble of the Act states (*inter alia*):

“Public order in Sri Lanka continues to be endangered by elements or groups of persons or associations that advocate the use of force or the commission of crime as a means of, or as an aid in, accomplishing governmental change within Sri Lanka, and have resorted to acts of murder and threats of murder of members of Parliament and of local authorities, police officers and witnesses to such acts, and other law abiding and innocent citizens, as well as the commission of other acts of terrorism such as armed robbery, damage to state property and other acts involving actual or threatened coercion, intimidation and violence”.

138. Part I of the Act details the offences and penalties under it. Part II, which makes provision for the investigation of offences, provides in section 6 for the powers of the police to:

- (a) Arrest any person;
- (b) Enter and search any premises;
- (c) Stop and search any individual or any vehicle, vessel train or aircraft; and
- (d) Seize any document or thing, connected with or reasonably suspected of being connected with or concerned in any unlawful activity.

139. Any person arrested under section 6 can only be kept in custody for a period not exceeding seventy two hours, unless a detention order under this section has been made in respect of such person, be produced before a Magistrate before the expiry of such period. The Magistrate must, on application made in writing for this purpose by a police officer not below the rank of Superintendent, make an order that such a person be remanded until the conclusion of his or her trial (s. 7(1)).

140. Part III of the Act provides for detention and restriction orders. Section 9 of this part provides that where the Minister has reason to believe or suspect that any person is connected with or concerned in any unlawful activity, the Minister may order that such a person be detained for a period not exceeding three months in the first instance, in such a place and conditions as may be determined by the Minister. Any such detention order may be extended from time to time for a period not exceeding three months at a time. The aggregate period of such detentions

cannot, however, exceed a period of eighteen months (s 9(1)). These detention and restriction orders are final and cannot be called in question in any court or tribunal by way of writ or otherwise.<sup>4</sup>

141. Part IV of the Act pertains to the conduct of trials of suspects detained under PTA. Section 15 of the Act, as amended by Act No. 22 of 1988, provides that every offender who commits an offence under the Act is triable without a preliminary inquiry, on an indictment before a Judge of the High Court sitting alone without a jury or before the High Court at Bar by three Judges without a jury, as may be decided by the Chief Justice.

## **Article 6. The Right to Life**

### **1. The imposition of the death penalty**

142. According to the Penal Code that is presently in operation in Sri Lanka only the perpetration of three offences can attract the sanction of death. While the offences of murder and treason attract a mandatory sanction of the death penalty, in the instance of the offence of “drug trafficking”, the sentencing judge is given the discretion of either imposing the death penalty or a sentence of a life imprisonment. However, the imposition of such a punishment is not an outcome of an arbitrary single act but rather as shown below a result of a process immanently predicated upon ensuring the acquittal of the accused.

143. Where there is a suspicion that the offence of murder has been perpetrated, the Police commence a criminal investigation. Simultaneously, a magisterial inquest into the death is also initiated to ascertain the cause of it. If both the police investigations and the magisterial inquest conclude that the cause of death was not of natural reasons but rather one of homicide and if the investigators discover adequate material to identify and prosecute an offender, a non-summary inquiry is then conducted before a magistrate. The reason for this is to ascertain whether there is adequate material to prosecute the accused on indictment in the High Court. If the outcome of this process is a decision in the affirmative to commit the accused for a trial in the High Court, a copy of the case record is then forwarded to the Attorney General.

144. The Attorney General reviews the evidence contained in the case record along with the material contained in the notes of investigation and considers whether there is adequate material which is reliable and admissible to try the accused on indictment. If the Attorney General decides in the affirmative, an indictment is then presented to the High Court. On receipt of the indictment, it is presented to the accused. Whereupon the accused is invited to elect whether he wishes to be tried either by a judge sitting with a jury or by a judge alone.

145. Further, if the accused is unable to retain a private counsel, the State legal aid mechanism assigns a lawyer to appear on his behalf. Moreover, it is mandatory in respect of the offence of murder to be tried even in the circumstances where there has been an admission of guilt by the accused. Hence there remains no exception to the rule that it is incumbent upon the prosecution to prove the guilt of the accused beyond a reasonable doubt for an individual to be convicted of murder.

146. Moreover, under the provisions of the Evidence Law of Sri Lanka, a confession made to a Police Officer cannot be led in evidence against the accused. During the entirety of the trial proceedings the accused could either elect to remain silent or offer evidence on his behalf. Alternatively, he could give a statement from the dock, which cannot be subject to cross-examination. Thereupon if the High Court concludes that the accused is guilty of committing the crime of murder, the court is then empowered to pass the sentence of death by hanging on the accused.

147. However, this does not signify the end of the process, for the accused. He is entitled to right of appeal to the Court of Appeal against his conviction. It could be done either by obtaining the services of a lawyer or of a Prison Officer. This individual is entrusted with the task of presenting the appeal to the Court of Appeal. If the accused is not satisfied with the verdict of the Court of Appeal, he has a further right of appeal to the Supreme Court against his conviction.

148. The law pertaining to the implementing of the death sentence has not changed since 1959. However, the death sentence has not been implemented since 1974. This is due to the fact that the Head of State, at every instance of a death sentence being imposed, has refrained from specifying the date and time of implementation, a mandatory formality required for its execution. This has led to such sentences being commuted to life imprisonment. Thus there has been a de-facto moratorium on the implementation of the death-sentence.

149. The increase in the incidence of organised crime during the past few years has led to an outcry from certain quarters for a change in this policy. Similarly, some sociologists and criminologists have attributed the increase in the incidence of organised crime to the inability of penal sanctions to act as a deterrent. Hence, the Government was compelled to review its policy with regard to the implementation of the death sentence.

150. In 1991 a Committee of Senior Government Officials recommended to the Government to refrain from commuting death sentences to life imprisonment in the following cases:

- (a) premeditated murder involving cruel conduct;
- (b) murder with aid of sophisticated weaponry and inflicted in the course of organised gang warfare; and
- (c) drug trafficking involving large quantities of narcotics.

151. Following these recommendations, the government announced that if the Attorney General, the Trial Judge and the Minister of Justice were in conformity on the execution of the death sentence, then it would be implemented in instances where individuals have been found guilty of committing the aforementioned heinous crimes. As of December 2000, there were 23 individuals belonging to this category. The policy of observing a moratorium on the implementation of the death penalty continues to be observed by the government. On the occasion of the festival of Vesak, the President commuted the sentences of all prisoners on death row to life imprisonment.

### **Measures taken to prevent the involuntary or enforced removals of persons**

152. Several initiatives have been taken to investigate allegations of involuntary removals and disappearances. Prior to this a Presidential Commission of Inquiry into Involuntary Removal of Persons (PCIIRP) had been appointed in 1991. However, its mandate was limited to the investigation of complaints of disappearances that was alleged to have taken place after the 11<sup>th</sup> of January 1991. Given that most allegations of enforced removals made by Local and International NGOs related to the period before 1991, particularly to the period 1988 to 1990, it was perceived only as a specious exercise.

153. Hence, in 1995 the government appointed 3 Regional Commissions of Inquiry (commonly referred to as the three zonal Commissions), to inquire into and report on alleged disappearances that occurred during the period 1<sup>st</sup> January 1988 to 31<sup>st</sup> December 1990. The Three Commissions were established to cover the three principal geographical regions in the southern parts of the country. It was entrusted with a mandate to inquire in to allegations of disappearances, so as to ascertain:

- (a) The veracity of the allegations;
- (b) To provide compensation and relief to families of the victims in proven cases of disappearances; and
- (c) To identify and punish the perpetrators of the crime of causing disappearances.

154. At the expiry of the timeframe (13.11.94-03.10.97) stipulated in their terms of reference, the Commissions concluded that approximately, 16,800 persons had disappeared during the period under reference.

155. Unfortunately, in the course of their inquiries the Commissions were unable to enquire in to all the complaints of enforced removals they had received. Hence a single Commission of Inquiry known as the “All Island Presidential Commission on Disappearances” was appointed by the government on the 30th of 1998 with a mandate to inquire into and report on these remaining complaints.

156. Nevertheless, of a total of 16,800 alleged disappearances, in respect of the 1,681 cases, the zonal commissions were of the opinion that, there was evidence indicative of the identities of those responsible for the relevant involuntary removal of persons and their subsequent disappearances. Therefore, acting on the recommendation made by the Commissions, the government decided to institute criminal proceedings against the perpetrators.

157. In order to facilitate this process in November 1997, a separate unit in the Police Department was established, named the “Disappearances Investigations Unit” (DIU). This unit was mandated to conduct criminal investigations into these 1,681 cases. Congruent to the DIU, a separate unit was established in the Attorney General’s Department in July 1998, named the “Missing Persons Commissions” (MPC Unit). The task of this Unit was to consider the institution of criminal proceedings against perpetrators.

158. The Disappearances Investigation Unit (DIU) as of 31<sup>st</sup> of December 2000, completed conducting criminal investigations into 1,175 cases out of the 1681 cases referred to above.

159. Similarly, the Missing Persons Commissions Unit of the Attorney General's Department, which has received Notes of Investigations relating to these 1,175 cases, has taken the under mentioned action.

**Table 4**

	Nature of the Action Taken (as at 31st December 2001)	
1	Indicted in the High Courts (number of cases)	262
2	Non Summary action instituted in the Magisterial Court (number of cases)	86
3	Total number of Security Force's personnel against whom Criminal Action has been instituted	597
4	Discharged due to want or absence of evidence	423
5	DIU advised to cause further investigations	323

160. So far criminal proceedings have been instituted against 597 personnel attached to the Police and the Armed Forces. The cases have been filed in the High Courts and the Magisterial Courts, and they are now proceeding.

161. The "All Island Commission of Inquiry", also concluded inquiries in August 2000. It reported that a further 10,400 persons had disappeared during the relevant period. Hence action was taken to amend the official statistical records pertaining to enforced or involuntarily removed persons to reflect these new findings. With this new addition the total number of persons who had disappeared during the period 1988-90 currently remains approximately at, 27,200. The entire process pertaining to the conduct of criminal investigations and the filing of criminal cases is still continuing.

162. Meanwhile, consequent to a decision taken at the Inter-Ministerial Working Group on Human Rights Issues, the Disappearance Investigation Unit (DIU) of the Police Department was recently mandated with the task of conducting criminal investigations into more recent alleged disappearances. As a priority task, the DIU recorded the statement of 190 complaints, out of total of a 378 reported disappearances. It is expected that upon the completion of the relevant investigations, the Notes of Investigation will be forwarded to the Missing Persons Unit of the Attorney General's Department, for the consideration of the institution of criminal proceedings.

#### **Compensation paid to the families of the "disappeared"**

163. In order to fulfil one of the recommendations of the "zonal" Commissions, the Rehabilitation of Persons, Properties and Industries Authority (REPIIA) has been paying compensation to those families of disappeared and issuing death certificates since August 1995. As of 30.05.2001 a total of Rs.555, 517,200 had been paid as compensation to the families of 16,324 victims.

**Cases of disappeared reported by the United Nations Working Group**

164. Around 12,000 cases of enforced or involuntary disappearances had been reported to the Government of Sri Lanka by the United Nations Working Group on Enforced or Involuntary Disappearances in Geneva for clarification. On a Cabinet decision dated 24. 002. 1999, a Special Unit was established within the REPPIA, on a temporary basis, for a period of one year, for this purpose. Since this unit could not fulfil its given mandate within one year, its mandate was subsequently extended for a further two years. By October 2001, it had fulfilled its mandate by the payment of compensation and the issuing of death certificates to the families of individuals considered as enforced or involuntarily disappeared. From a total of 11,881 cases referred by the United Nations working group 267 were found to be repetitions. In respect of the remaining clarified cases it is envisaged that criminal proceedings would be instituted against the perpetrators in the near future where they are clearly identifiable.

165. The success of this unit in working towards the fulfilment of its given mandate is reflected by the commendation it received for its work from Mr. Diego Garcia-Sayan, the Chairman of the United Nations Working Group on Enforced or Involuntary Disappearances.

**Disappearances in Jaffna, 1996**

166. A Board of Investigation (BOI) of the Ministry of Defence was established in November 1996, consequent to the receipt of complaints alleging that individuals were missing after being arrested by the security forces personnel in the North. The BOI conducted its investigations independent of inquiries normally conducted within the services.

167. The Board processed lists of names of persons alleged to have disappeared. These lists were received from a number of sources such as, the Presidential Secretariat, Amnesty International, United Nations Working Group on Disappearances, ICRC, Members of Parliament, the Chairman of RAN, Association of Guardian of Persons Arrested and later Disappeared, the Government Agent of Jaffna and also directly from family members of Missing Persons. The BOI concluded that 378 persons had disappeared in the Jaffna Peninsula, in 1996. The Disappearances Investigations Unit (DIU) is currently conducting criminal investigations into the relevant disappearances. It is envisaged at the conclusion of these investigations that the Missing Persons Unit of the Attorney General's Department would be able to make a decision on the institution of criminal proceedings.

168. In addition to the above measures, the President issued the following instructions to the security forces in order to prevent the occurrence of enforced or involuntary disappearances:

- No person shall be arrested or detained under any ERs or the PTA except in accordance with the law and proper procedure and by a person who is authorised by law to make such arrest or order such detention;

- At or about the time of arrest or if it is not possible in the circumstances, immediately thereafter:
  - (i) The person making the arrest must identify himself to the person arrested or any relative or friend of such person upon inquiry being made, by name and rank;
  - (ii) Every person arrested or detained must be informed of the reason for arrest;
  - (iii) The person making the arrest or detention shall issue to the spouse, father or mother or any other close relative, a document in a form specified by the Secretary, Ministry of Defence, acknowledging the fact of the arrest. The name and rank of the arresting officer, the time and date of arrest and the place at which the person will be detained also be specified. It shall be the duty of the holder of such document to return the same to or produce the same before, the appropriate authority when the person so arrested is released from custody.

169. In an instance where any person is taken into custody and is not possible to issue a document set out above, it shall be the duty of the arresting officer, if such officer is a police officer, to make an entry in the Information book giving reasons as to why it is not possible to so issue a document. If the arresting officer is a member of the armed forces it is the duty of such an individual to report the reasons why it is not possible to issue to the officer in charge of the Police of the Police Station, whose duty it shall be to make entry such fact with reason in the Information Book.

170. The person arrested should be afforded a means of communicating with a relative or friend to ensure that his/her whereabouts are known to the family:

- When a child under 12 years or a woman is sought to be arrested or detained, a person of their choice should be allowed to accompany them to the place of questioning. As far as possible a child or woman should be placed in the custody of a woman's unit of the armed forces or the Police or in the custody of another woman military or Police Officer;
- A statement of a person arrested or detained should be recorded in the language of that person's choice and should, thereafter, be asked to sign the statement. A person who desires to make a statement in his or her own handwriting should be permitted to do so;
- The members of the HRC should be permitted access to the persons arrested or detained and should be permitted to enter at any time at any place of detention, Police station or any other place of detention, in which such person is detained in custody or confined;

- Every officer, who makes an arrest or detention as the case may be, shall forthwith and in any case not later than 48 hours from the time of such arrest or detention, inform the HRC or any person specially authorised by the HRC, of such arrest or detention and the place at which the person so arrested or detained is being held in custody.

### **Article 7. Prevention of Torture**

#### **Supreme Court of Sri Lanka**

171. Article 11 of the Constitution of Sri Lanka provides that no person shall be subject to cruel, inhuman or degrading treatment or punishment. Embodying the precept of non-derogation of the freedom from torture as enunciated in Article 7 of the ICCPR, the Sri Lankan Constitution has enshrined the freedom from torture as an absolute right. It does not permit any restrictions to be imposed on it by law, except after approval by the people at a referendum.

172. The Supreme Court defining the scope of Article 11 of the Constitution has stated that torture, cruel, inhuman or degrading treatment or punishment may take many forms, both psychological and physical. Further, there must be an assessment of the acts or conduct complained of, which satisfies the Court that they fall within the ambit of the article. Accordingly, having regard to the nature and gravity of the issue, a high degree of certainty is required before the balance of probability might be said to tilt in favour of a petition endeavouring to discharge his burden of proving that he was subject to torture or cruel, inhuman or degrading treatment or punishment. The court in a recent decision recognised custodial rape as amounting to torture.

#### **Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment Act of No. 22 of 1994**

173. The Government of Sri Lanka in order to re-affirm its unequivocal commitment towards the protection of the freedom from torture, deposited the instruments of ratification in 1994 for the International Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).<sup>5</sup> Subsequently, the Parliament of Sri Lanka passed legislation embodying the provisions of the CAT. This legislation colloquially referred to as the “CAT Act” deems the perpetration of torture as a criminal offence attracting a mandatory minimum prison term of seven years but not exceeding ten years, plus a fine not less than Rs.10, 000 but not exceeding Rs.50, 000. Section 12 of the CAT act defines torture in the following manner:

“Any act which causes severe pain whether, physical or mental to any other person, for the purpose of:

- (i) obtaining from such person or a third person any information or confession;



- (ii) punishing such person for any act which he or a third person has committed or is suspected of having committed;
- (iii) intimidating or coercing such person or third person.

174. This legislation also amended the extradition law to provide for an “extradite or prosecute” regime as envisaged in the Convention. So far ten individuals have been convicted for transgressing the provisions of the CAT Act.

#### **The establishment of an effective mechanism for the criminal prosecution of public officials committing acts of torture**

175. The Government, cognisant of the fact that permeation of a deterrent effect against the committing acts of torture is contingent upon the existence of efficacious investigatory mechanism dedicated to the prosecution of perpetrators, assigned the conduct of criminal investigations into allegations of torture to the Criminal Investigation Department of the Police (CID). Concomitantly a special unit named the “ Prosecution of Torture Perpetrators Unit (PTP Unit)” was established in the Attorney General’s Department to function symbiotically with the CID in the prosecution of torturers. While the relevant branch of the CID is headed by an Assistant Superintendent of Police and comes under the direct purview of the Deputy Inspector General in charge of the CID, the PTP unit is headed by a Deputy Solicitor General and a Senior State Counsel and comes under the direct supervision of the Attorney General and the Solicitor General. The PTP consists of Seven State Counsels.

176. The principal task of the PTP unit is to ensure the successful conviction of perpetrators of torture. The process utilised by the PTP Unit in implementing this task can be described as follows:

177. On the completion of the criminal investigation, the CID submits to the PTP unit the corresponding notes of investigations. The initial duty of the Unit is to consider the institution of criminal proceedings against the alleged perpetrators of torture. In doing so, consideration is given to the availability of material disclosing the commission of offences, adequacy of such material, their reliability and admissibility in court. Consequent to a decision being taken to indict the alleged perpetrators of torture, the CID is advised to cause the arrest of the suspect(s) and produce the suspect(s) before a Magistrate. Thereafter, the indictment is prepared and forwarded to the relevant High Court. It is customary that a State Counsel representing the Attorney General leads the prosecution of such a case.

178. In addition to the above, the PTP Unit monitors the progress and advises on the conduct of investigations of the CID pertaining to allegations of torture. The CID is duty bound to report the progress of investigations on the perpetration of torture to the PTP Unit, in order that this information may be periodically recorded in a computerised database maintained by this Unit.

**Issuing of precise instructions to the members of the security forces in order to deter the perpetration of torture**

179. Since it was perceived as a necessity that fresh instructions should be issued as a matter of priority delineating the government's policy pertaining to freedom from torture, on the 14th of January 2001, the Inspector General of Police under his name addressed an official circular to all Officers-in-Charge of police divisions (holding the rank of Senior Superintendent of Police) in the entire country and to Officers-in-Charge of specialised divisions (such as the Terrorism Investigation Division, Criminal Investigation Department, Police Narcotic Bureau, etc.), on the need to ensure that, under no circumstance should torture be perpetrated or there could be acquiescence in its perpetration. The circular cast a duty upon Officers-in-Charge of Divisions and Specialised Units, to sensitise all police officers under their command on the necessity of preventing torture. In order to manifest the government's immitigable commitment in implementing its zero-tolerance policy on the perpetration of torture, the circular not only detailed penal sanctions the perpetration of torture would attract but also alluded to the fact that the Attorney General had already instituted criminal proceedings against persons found responsible for committing acts of torture. The circular also stated that it was the personal responsibility of all Officers-in-Charge of divisions to ensure that subordinate Police Officers desist from engaging any cruel, inhuman, degrading or torturous act.

180. Further, on a direction by the Secretary to the Minister of Defence (MOD), the Inspector General of Police appointed a Senior Deputy Inspector General of Police (DIG) to supervise and co-ordinate all investigations into allegations of human rights abuses and to oversee the implementation of preventive measures adopted in respect of human rights violations. This DIG has undertaken a series of unannounced visits to detention centres giving priority to ones situated in the North and East.

181. Subsequent to the issuing of the circular by the IGP, a comprehensive audit was carried out to ascertain whether all the Officers-in-Charge of Police Divisions and Specialised Units had adhered to the requirement of circular germane to the instructions issued to subordinate officers on the prevention of acts of torture. Official reports as well as unofficial information received from divisions and specialised units, reveal that, by the end of February 2001, all Police Officers attached to the Sri Lanka Police Department had received specific instructions on the need to totally desist from indulging in any form of torture. The compliance to these regulations are subject to continuous monitoring by the Senior Deputy Inspector General of Police by the way of unannounced visits to Police stations. Investigations and inquiries into any allegations of violation of these regulations are also conducted under the supervision of this Senior Deputy Inspector General of Police.

182. In addition the Sri Lanka Army has established special units named "Human Rights Cells" with a mandate in ensuring the adherence of military personnel particularly those serving in operational areas to international human rights norms in the discharge of their duty. Further a separate directorate under the purview of a Brigadier was established at the Army headquarters with a remit to ensure the compliance of the Army to international human rights norms in the performance of its duties. In addition, standing orders have been issued by the Commander of the Army, stipulating procedure to be adhered in the arresting, questioning and the detention of

suspects. Emphasis was made in ensuring that these orders complied with human rights norms and domestic legal requirements. Hence they strictly prohibit the perpetration of torture or the infliction of other cruel, inhuman or degrading treatment.

### **The establishment of a process that ensures the judicial supervision of places of detention**

183. Consequent to a recommendation made by the Inter-Ministerial Working Group on Human Rights, on 6th of April 2001, the President promulgated amendments to the Emergency Regulations, that inter alia empowered Magistrates to visit places of detention situated within their respective jurisdiction. Such visits may be conducted without prior intimation. The new regulations cast a duty on Magistrates to conduct such visits at least once a month. In order to make the process relating to detention transparent, the new regulations require Officers-in-Charge of detention facilities, to submit to Magistrates a list once in 14 days, containing the names of suspects detained in their respective detention centres. The list so tendered has to be exhibited in a Notice Board located in the respective Magistrates' Courts. These new regulations further require suspects arrested under the Emergency Regulations to be produced before a magistrate as soon as possible but not longer than 14 days after the arrest.

### **The development of a central register for detainees in all parts of the country**

184. A twenty-four hour telephone hotline has been established in the premises to assist relatives of the detainees, in obtaining accurate information pertaining to the detention such as their whereabouts, the nature and circumstances of the detention etc, expeditiously. Police personnel fluent in all three languages - Sinhala, Tamil and English, staff this facility. The telephone number of this hotline is 01-386061. This facility now enables family members of persons believed to have been arrested to ascertain (a) whether in fact such a person has been arrested and if so (b) identity of the arresting authority and (c) place of detention.

185. In order to enhance the efficacy of this telephone hotline, a computerised Central Police Registry (CPR) under the purview of the Senior Inspector General of Police (Human Rights) has been established. This registry contains current and accurate information pertaining to all arrests and detentions of suspects under the Emergency Regulations and the PTA. It is located at the Police Headquarters.

186. Police internal departmental regulations now require all arresting officers to notify the personnel operating the CPR of arrest of suspects within six hours of such arrest.

### **Human rights education for the armed forces**

187. Human rights education forms part of the training of all law enforcement officers, members of the armed forces and prison officers. This training includes lectures on the fundamental rights guaranteed by the Constitution, international norms on human rights, law of criminal procedure, the rights of a citizen and the duties and obligations of law enforcement officers. Demonstrations and visual aids reinforce these lectures. Seminars and discussions are also held during various stages of the officers' career.

188. Human rights education was introduced into police training in the early 1980s. It is now a subject of instruction in the Sri Lanka Police training school where basic training is provided for new recruits, and at the Police Higher Training Institute where promotional and refresher courses are provided and at Divisional Training Centers where in-service training is provided. Officers are questioned on aspects of human rights at all examinations. In 1997, all OICs, ASPs, DIGs and SPs underwent a special two-day training programme on international norms on human rights.

189. As a matter of policy the Government is committed to ensuring that all service personnel are properly instructed and trained to respect and observe standards of human rights and humanitarian law, so that their powers are not used arbitrarily or excessively and that weapons are not used indiscriminately. While the Law of War and Humanitarian Law have been part of the education and training of the armed forces, the scope and content of these programmes are being revised with emphasis on understanding and practice. These programmes have been initiated to inculcate in the security forces the necessity of treating human rights laws and norms as apotheosises in the discharge of their duties.

190. A separate Directorate at Army Headquarters to deal exclusively with International Humanitarian Law was established in 1997. The role and tasks of the Directorate include overseeing implementation of IHL and the Law of War by the armed forces, planning and implementing a dissemination programme on a regular basis for all ranks in operational areas and in training institutions. It also includes, working out syllabuses for IHL and the Laws of War to be taught to Army personnel ranging from recruit to Captain level. This is for the purpose of introducing these as compulsory subjects at promotion examinations. In order to ensure that every soldier has an intimate knowledge of human rights laws, it now forms part of the syllabus of every training programme of the Sri Lanka Army. In 2001, the mandate of this directorate was broadened to include the subject of Human Rights.

191. Further, human rights and humanitarian law forms a large component of the syllabuses in the training programmes conducted both at the recruitment level and advance levels in the Air force and Navy. Moreover, personnel in these services are required to demonstrate an intimate knowledge of domestic and international human rights laws and norms, as a pre-requisite to obtain promotions. It is also mandatory for all personnel belong to these services, serving in operational areas to undergo training programmes conducted by the Human Rights Commission, on the practical application of Human Rights laws in the discharge of their duties.

192. The Government has also benefited from the assistance received from non-governmental organisations in conducting human rights awareness programmes for the armed forces, the police and other public servants.

193. The ICRC began conducting disseminating seminars aimed at promoting the awareness and understanding of International Humanitarian Law among the armed forces in Sri Lanka in 1986. Since the establishment of an ICRC delegation in Sri Lanka in 1990 these programmes have continued and expanded to include law enforcement officers, members of special task forces, paramilitary units, public servants and Sri Lanka Red Cross workers. Regular courses and lectures are held for all levels of armed forces personnel in training centres and in operational areas.

Approximately 35,000 persons have participated in these disseminating seminars since June 1993 and 25,000 armed forces personnel have been among this number. In March 1997, the ICRC conducted a week-long seminar on Humanitarian law for 10 army majors and 15 captains. It is expected that these officers will be sent in teams to training centres and operational areas to disseminate this knowledge.

194. The ICRC has also printed booklets in English, Sinhala and Tamil on the Law of War and manuals of instructions, which have been distributed to the forces. It also sponsors members of the armed forces to participate in international or regional seminars on humanitarian law.

195. The Centre for the Study of Human Rights of the University of Colombo, in June 1993 launched a programme to provide human rights education for the armed forces and the police with a view to sensitising those groups to the value of human rights and to point out the limits of their powers. Subsequent to preliminary discussions with Directors of Training of the armed forces and police, two introductory seminars/workshops were conducted for a group of 31 new ASP's and 7 naval officers respectively.

196. In 1995 steps were taken to supplement the training of three specific target groups, i.e. the policy makers, the trainers and recruit levels of the Armed Forces and the Police. A training manual has been compiled covering human rights standards and court cases for the trainers and a handbook for the recruits. The training manual was formally presented to trainers in the Armed forces and the Police in March 1995, at a one- day workshop held in Colombo.

#### **Article 8. Prohibition of Slavery**

197. Slavery was abolished in Sri Lanka by the Abolition of Slavery Ordinance No. 20 of 1844. Further, the Penal Code (Amendment) Act No. 22 of 1995 recognises a new offence of Trafficking in Persons, which, *inter alia*, prohibits acts of buying or selling or bartering of any person for money or any other consideration.

#### **Article 9. Right to Liberty and Freedom from Arbitrary Arrest**

198. The Sri Lankan Constitution, recognising that procedural safeguards are a *sine qua non* for avoiding rule by whim or caprice and that they stand to prevent the abuse of the judicial process for individual gain or political expediency declares these rights to be fundamental rights. Article 13(1) of the Constitution reads: "No person shall be arrested except according to procedure laid down by law. Any person arrested shall be informed of the reason for his arrest". Similarly, Article 13(2) of the Constitution provides for "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".

199. Synonymous to the above provisions of the Constitution, the Criminal Procedure Code of Sri Lanka (CPC) provides for the following procedure that needs to be adhered in the arrest and detention of individuals:

*The manner of arrest:*

S.23 (1)- In making an arrest, the person making the arrest shall not actually touch or confine the body of person to be arrested unless there be submission to custody by word of action and shall inform the person to be arrested of the nature of the charge or allegation upon which he is arrested.

200. *Arrest with Warrant and Detention:* Under SS. 53 and 54 of the Criminal Procedure Code the person executing a warrant of arrest issued by a court under the Code must notify the substance of it to the person arrested and if so required to show the warrant or copy of the of it signed by the person issuing it. The person arrested must be brought without unnecessary delay before the Court before which such person is required by law to be produced. Further when warrant is issued for the arrest for a bailable offence, an endorsement for bail has to be made.

201. *Arrest without Warrant and Detention:* Any peace officer may under section 32 of the Criminal Procedure Code, without an order from a Magistrate and without a warrant, arrest any person:

- (a) Who in presence of the arresting officer commits any breach of peace;
- (b) Who has been concerned in any cognisable offence or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists of his having been so concerned;
- (c) Having in his possession without excuse (the burden of proving which excuse shall lie on such person) any implement of housebreaking;
- (d) Who has been proclaimed as an offender;
- (e) In whose possession anything is found which may reasonably be suspected to be property stolen or fraudulently obtained and who may reasonably be suspected of having committed an offence with reference to such thing;
- (f) Who obstructs a peace officer while in the execution of his duty or who has escaped or attempts to escape from lawful custody;
- (g) Reasonably suspected of being a deserter from the Navy, Army or Air Force;
- (h) Found taking precautions to conceal his presence under circumstances which afford reason to believe that he is taking such precautions with a view to committing a cognisable offence; and

(i) Who has been concerned in or against whom reasonable suspicion exists of having been concerned with an act which is punishable as an offence and for which he is under any law relating to extradition or to fugitive persons or otherwise liable to be apprehended or detained in custody.

202. Implicit in this power given to a peace officer is that the person arrested must be the person concerned in a cognisable offence or against whom a complaint has been made or credible information has been received. A person cannot be arrested on a vague and general suspicion, without knowledge of the precise crime suspected of having been committed, but with the hope of obtaining evidence of the commission of a crime by searching the suspect after arresting him. Whenever a police officer arrests a person on suspicion without a warrant, “common justice and common sense” require that he should inform the suspect of the nature of the charge or of the true grounds on which he is arrested.

203. Although the CPC vests on a private citizen the power of arresting any person who in his presence commits a cognisable offence<sup>6</sup> or who has been proclaimed as an offender, or who is running away and whom he reasonably suspects of having committed a cognisable offence it also casts upon the individual making such an arrest a corresponding duty, to hand over the suspects without unnecessary delay to the nearest peace officer or in his absence to the nearest police station. The CPC delineates analogous provisions for circumstances where an arrest is made by a peace officer without an arrest warrant. It requires the arresting officer without unnecessary delay and subject to the provisions as to bail, take or send the person arrested before a magistrate having jurisdiction in the case.<sup>7</sup> Similarly, it provides that the period that an individual could be detained without been produced before a magistrate cannot exceed 24 hours exclusive of the time required for the journey from the place of detention to the Magistrate’s Court.<sup>8</sup> Concomitantly, SS 35-38 of the CPC stipulates that Officers in Charge of Police stations must report to the Magistrate’s Court of their respective districts the cases of all persons arrested without warrant by any police officer attached to their stations or brought before them and whether such persons have been admitted to bail or otherwise.

204. Similar provisions are contained in S. 65 of the Police Ordinance. It states that “a person taken into custody by any police officer without warrant (except persons detained for the mere purposes of ascertaining their name and residence) must forthwith be delivered into the custody of the officer in charge of a station in order that such person may be secured until he can be brought before a Magistrate to be dealt with according to law”.

*Restriction imposed on the freedom from arbitrary arrest*

205. Cognisant of the fact that limitations are a necessary condition for the enjoyment of freedom, the Constitution permits the curtailment of the freedom from arbitrary arrest by Article 15(7) of the constitution on the following ground, subject to a proviso that these restrictions should be prescribed by law:

- (a) In the interest of national security;
- (b) Public order;

- (c) The protection of public health or morality;
- (d) For the purpose of securing due recognition and respect for the rights and freedoms of others; or
- (e) The meeting of the just requirements of the general welfare of a democratic society.

206. This article defines the term “law” to include regulations made under the law for the time being relating to public security.

207. Faced with an extraordinary security situation, which proved a threat to the very fabric of the Sri Lankan society and the state, the Government was compelled to proclaim regulations curtailing the freedom from arbitrary arrest by resorting to powers vested in it by virtue of the Public Security Ordinance of 1947. However, none of these regulations could undermine the Supreme Court’s constitutional duty of protecting, guaranteeing and advancing fundamental rights. In fact as the cases given below would show the progressive activism shown by the court in defending and uphold the freedom from arbitrary arrest, created an increase in rights awareness among the general public.

#### **Navasivayam v. Gunawadena<sup>9</sup>**

208. This case marked a watershed in the field of personal liberty because it sought to expand the definition of arrest to include the use of coercion to contain one’s freedom of movement. The facts of this case are as follows:

209. The petitioner alleged that the third respondent at Ginigathena arrested him while he was travelling in a bus and that he was not informed of the reason for his arrest. The third respondent denied the arrest. He stated that he was investigating into a case of robbery of a gun from the Rozella Farm and had reason to believe the petitioner was acquainted with the facts and circumstances relating to the robbery. He therefore “required” the petitioner to accompany him to the Ginigathena police station for questioning and “released” him after recording his statement at the police station.

210. Sharvananda C.J., with Authkorale and H.A.G de Silva JJ agreeing stated:

“In my view, when the 3<sup>rd</sup> respondent required the petitioner to accompany him to the Police Station and took him to the Police Station, the Petitioner was in law arrested by the 3<sup>rd</sup> respondent. The petitioner was prevented by the action of the 3<sup>rd</sup> respondent from proceeding with his journey in the bus. The petitioner was deprived of his liberty to go where he pleased. It was not necessary that there should have been any actual use of force; the threat of force used to procure the petitioner’s submission was sufficient. The Petitioner did not go to the Police Station voluntarily. The 3<sup>rd</sup> respondent took him to the Police [Station].



211. Sharvananda C.J., further stated:

“[t]he liberty of the individual [which] is a matter of great constitutional importance .... should not be interfered with, whatever the status of that individual be, arbitrarily and without justification”

**Piyasiri v. Fernando A.S.P<sup>10</sup>**

212. This case concerned applications filed by fourteen Customs Officers alleging illegal arrest. The petitioners were returning after work at the Katunayake Airport when they were stopped at Seeduwa by A.S.P Fernando of the Bribery Commissioner’s Department and questioned about money, whiskey, foreign currency and imported items they carried. They were then asked to go to the Seeduwa Police station in their own cars. The petitioners were searched at the police station and ordered to proceed to the Bribery Commissioner’s Department in Colombo. Fernando also travelled to Colombo. In Colombo their statements were recorded and they were released on giving a written undertaking to appear in the Magistrate’s Court the following morning. Fernando denied arrest formal or otherwise. He stated that the petitioners were no time confined or incarcerated and that their movements were restricted only for the limited purpose of searching them and recording the statements.

213. The Supreme Court in this case sought to refine its definition of arrest given in *Navasivayam v. Gunawadena*. It also took the opportunity for the first time to define the powers of arrest of a Police Officer in the context of the fundamental rights jurisdiction of the court. H.A.G. de Silva J (with Atukorale and L.H. de Alwis JJ agreeing) delivered the judgement of the court. He stated:

“Custody does not today, necessarily import the meaning of confinement but has been extended to mean lack of freedom of movement brought about not only by detention but also by threatened coercion, the existence of which can be inferred from surrounding circumstances”

214. Defining the powers of arrest of the police, Justice de Silva had this to say:

“No Police Officer has the right to arrest a person on vague general suspicion, not knowing the precise crime suspected but hoping to obtain evidence of the commission of some crime for which they have the power to arrest. Even if such evidence comes to light, the arrest will be illegal because there will have been no proper communications of the reasons for arrest to the accused at the time of arrest”.

**Vivienne Goonewardena v. Perera<sup>11</sup>**

215. The Supreme Court enunciated in this case that an arrest is only legal if it is clearly permitted by law. The petitioner in this case, a veteran Marxist politician, complained that the first respondent arrested her at the Kollupitiya Police Station, after she and her women comrades had gone there to request the release of a cameraman who had taken photographs of Police officers snatching their banners when returning after a demonstration on International Women’s day. The version of the respondent was that one Sub-Inspector Ganeshanathan, who was not

named as a respondent saw a procession of about fifty persons and inquired from the processionists whether they had a permit to go on a procession; that no permit was produced; that as it was an offence under section 77 of the Police Ordinance to go in procession “without authority of a lawful permit” he directed the members of the procession to disperse; that the petitioner pushed him aside and proceeded with the procession thereby obstructing him in the performance of his lawful duty and that he arrested the petitioner and four others having informed them of the reason for their arrest. The obstruction of a Police Officer in the course of his duties is a cognisable offence.

216. Soza J., with Colin-Thome and Ratwatte JJ agreeing, noted that section 77(1) of the Police Ordinance does not make it an offence to take out or hold a procession without a valid permit. No permit is required. The only requirement is that notice be given. It may even be oral notice, as the Ordinance does not prescribe written notice. Sub-inspector Ganeshanathan, in his affidavit, said nothing of any notice having been given. Soza J., held that here was no legal basis for Ganeshanathan’s order to the processionist to disperse. The absence of a permit did not make the continuance of the procession an offence or any of the processionist liable to arrest. The petitioner was well within her rights to ignore the order to disperse. As such, Ganeshanathan was in no position to complain that the petitioner obstructed him while in the execution of his duty. In the result, the arrest of the petitioner was declared illegal.

### **Wijewardena v. Zain<sup>12</sup>**

217. Justice Kulatunge delivering the judgement on behalf of the rest of the bench stated in this case that the wider discretion given to Police officers during an Emergency is qualified by its objective, namely the safety of the State, the protection of the general public and the due performance of the duties of the Police in that regard in the context of an Emergency. “As such, Police officers should be mindful of the need to ensure that they do not resort to Emergency Regulations in investigating offences covered by [the] normal law except in those cases in which it would be appropriate in the interest of public security to invoke such regulations”, the learned judge stated.

### **Chandradasa v. Lal Fernando**

218. Atukorale J., in this case emphasised that the rule that an arrest based purely on the subjective satisfaction of the Police officer would be arbitrary and violative of Article 13(1), applied in the case of an arrest for an offence under Emergency Regulations and constitutes a “legal restraint” on the powers of arrest under Emergency Regulations.

### **Sirisena and Others v. Ernest Perera and Others**

219. The case involved an incident where the petitioners had been deprived of liberty because the respondents wished to interrogate them and not because they were suspected of having committed any offence. The principal issue which the Supreme Court had to resolve was the question whether a deprivation of liberty would amount to an arrest within the meaning of Article 13(1) only if such deprivation is for the purpose of being dealt with under the law.

220. Resolving this question Mark Fernando J stated that Article 13(1) clearly and unambiguously prohibited any arbitrary deprivation of liberty. Elaborating of how in case of an ambiguity in interpreting this article should it be done, he stated: “Any ambiguity must be resolved in favour of the liberty of the citizen, by preferring that interpretation which enhances the right rather than another which diminishes it”.

**Malinda Channa Peris & v. A.G. and others**

221. This case involved an incident where there was a telephone call to the police at Wadduwa in which an unidentified person had said that there was to be held that day a meeting of the JVP, an organisation had been responsible for two unsuccessful insurgencies but at the time of the incident was a legitimate political party. There was a meeting of the Ratawesi Peramuna, an organisation which was opposed to the JVP, at the Kawdudwa Temple- a place at which its previous incumbent priest had been murdered by the JVP. The police, despite explanations to the contrary at the time of the arrest by the persons, arrested the members of the Ratawesi Perumuna who had gathered at the temple on suspicion of being members of the Janatha Vimukthi Peramuna (JVP). The police alleged the individuals arrested were indulging in conspiracy to overthrow the government of the day. Rejecting the contentions of the police who were the respondents, the court held the police action to be violative of the petitioners fundamental rights protected by Article 13(1) of the constitution. It held that there should be reasonable probability of an offence being committed and not a suspicion or hopes of an arresting officer for an arrest to be executed.

222. A.R.B. Amerasinghe delivering the judgement on behalf of the court said:

“... the officer making the arrest cannot act on suspicion founded on mere conjecture or vague surmise. His information must give rise to a reasonable suspicion that the suspect was concerned in the commission of an offence for which he could have arrested a person without a warrant. The suspicion must not be of an uncertain and vague nature, but of a positive and definite character, there must be reasonable grounds for suspecting that the person arrested was concerned in the commission of an offence”

223. He further stated justifying an arrest on the basis of “vague, general suspicions and hope or even confident assumption that something might eventually turn up to provide a reasonable ground for an arrest will not do”.

224. Commenting on the second leg of Article 13(1) of the Constitution that of an individual’s right to know the reason for arrest, his Lordship stated: “The right to be informed of the reasons for arrest is not found in Regulation 17<sup>13</sup> or 18.<sup>14</sup> That provision is to be found in Article 13(1) of the Constitution. That provision cannot be repealed by Emergency Regulations, much less by judicial interpretation. Although in terms of Article 15(7) the exercise and operation of the right to be given reasons may be subject to restrictions imposed by law, including Emergency Regulations, no such law exists. If the recommended practice of issuing of Detention Orders with written reasons for the arrest cannot be observed, then the person concerned should at least be orally given reasons. For this is his untrammelled right today under 13(1) of the Constitution”.

**Sunil Rodrigo (On behalf of B. Sirisena Cooray) v. Chandananda de Silva and Others**

225. The principal actors in this case were Mr. Sirisena Cooray, prominent Minister in the former UNP government and Mr. Chandrananda de Silva the Secretary to the Ministry of Defence. Mr. Cooray himself did not petition the Supreme Court. As the rules of the Supreme Court permitted, his lawyer Mr. Sunil Rodrigo, Attorney-at-law did so on his behalf, alleging infringement of Articles 13(1) and 13(2) of the Constitution. The chronology of the events that precipitated the filing of this petition could be described in the following manner:

226. Mr. Sirisena Cooray was arrested by Police Officers on 16th of 1997, acting on an order of the first respondent the Defence Secretary, issued on the same day. The Secretary was acting on the power of preventive detention vested in him by para. 17(1) of the Emergency Regulations of 1994. The Secretary made the order on the basis of three reports, as well as some additional material called by him, which claimed that Mr. Cooray had discussions with several notorious underworld figures about assassinating or causing physical harm to the President. The three reports were all from very senior Police Officers: The Inspector General of Police; the Director, National Intelligence Bureau; and the Deputy Inspector General of Police, Criminal Investigation Department. Mr. Cooray in his affidavit, denied involvement in any conspiracy or having had discussions about murdering the President with any person.

227. Petitioner alleged that the manner in which the arrest was carried out violated Mr. Cooray's fundamental rights guaranteed by Articles 13(1) and 13(2) of the Constitution.

228. Regulation 17(1) of 1994 gave the Secretary, a discretionary power to order the arrest and detention of a person for a period not exceeding three months, if he is satisfied that the said person was, inter-alia, acting or liable to act in a manner prejudicial to national security or the preservation of public order.

229. Justice A.R.B Amerasinghe delivering the judgement on behalf of the court said that the term "satisfied" used in Regulation 17(1) serves as a restraint on the exercise of the discretionary power. On previous occasion in *Malinda Channa Peris & v. A.G. and others*, his Lordship delineating the power of the Secretary, under regulation 17(1) said the term "satisfied" meant that the Secretary should be able to state that he himself came to form such an opinion. Further, he stated that the Secretary should not merely mechanically rubber stamp detention orders placed before him by law enforcement personnel and should not abdicate or allow others to usurp the powers vested in him by regulations 17(1). In the instant case reinforcing these stipulations, using the judicial principles laid down in the seminal British case of *Associated Provincial Picture House Ltd v. Wenesbury Corporation*, his lordship inferred an objective test to determine whether the Secretary adopted a reasonable course of action on the basis of the facts before him. This meant the court examining whether the Secretary directed himself properly in law when coming to the decision and whether he called to his attention all matters he is bound to consider excluding all irrelevant matters, before coming to a conclusion. Applying the facts to the law, Justice Amerasinghe stated that the Defence Secretary had not been "reasonably satisfied", on the information available to him and that the arrest and detention of Mr. Cooray was no way necessary to avoid a threat to national security or public order. Moreover, he said the Secretary

had acted “mechanically” upon the reports of the Police Officers and in doing so, took into account irrelevant factors and ignored matters he ought to have considered, thereby misdirecting himself in law.

230. On the second limb of Article 13(1), the rule that “any person arrested shall be informed of the reason for his arrest”, his Lordship rejecting the implied defence of the respondent that informing the “purpose”(the preservation of national security and public order), of arrest was sufficient in law said: “ It is insufficient for the person arrested to be given the purpose or object of the arrest, such as those set out in Regulation 17(1) [e.g. national security] and reproduced in the detention order in this case.... He must be given the reasons i.e., the grounds-all the material and pertinent facts and particulars that went to make up the mind of the Secretary not merely the inferences arrived at by the Secretary ... For it is then that the person will have information that will enable him to take meaningful steps towards regaining his liberty, e.g. by showing that there was a mistake or rebutting a suspicion or explaining a misunderstanding, with the result that, he may be saved from the consequence of false accusations”.

231. On the question of infringement of right enumerated in Article 13(2) of the 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”) his Lordship was inclined to follow the law laid down by Justice Wanasundera in *Edirisuriya v. Navaratnam*. Justice Wanasundera stated in that case “If it is intended to restrict the requirement of [Article] 13(2) - which undoubtedly can be done by a suitable wording of the regulation so as to have a direct impact on Article 13(2) itself, when national security and public order demands it. This must be specifically done. Article 13(2) cannot be restricted without a specific reference to it”.

232. Applying this principle, Justice Amerasinghe examined the Emergency Regulation 17 (1) and concluded that they contained no restriction on the operation of Article 13(2) (or any other corresponding provisions in the ordinary law, i.e. sections 36 and 37 of the Code of Criminal Procedure). As such Mr. Cooray was entitled to have been produced before a Magistrate within 24 hours of his arrest. However, since this had not occurred the respondents had violated Mr. Cooray’s rights guaranteed by Article 13(2) of the Constitution.

#### **Article 10. Persons deprived of their liberty shall be treated with humanity**

233. Although the present Constitution of Sri Lanka does not contain a specific Article in the Fundamental Rights Chapter relating to humane treatment of persons deprived of their liberty, Article 11 safeguards a person from inhuman and degrading treatment and punishment. Thus Article 11 is broad enough to encompass persons deprived of their liberty. (Constitutional and legal provisions governing the treatment of those deprived of their liberty have been discussed at length in Sri Lanka’s third periodic report.)

234. The Prisons Ordinance (as amended) and the Prison Rules of the Department of Prisons largely govern persons deprived of their liberty, which are guided by the United Nations Standard Minimum Rules on the Treatment of Prisoners. The numbers of institutions, which are involved in the rehabilitation of persons deprived of their liberty to normal life, are as follows:

**Table 5**

**Rehabilitation institutions**

Category	Number
Closed prisons for Convicted persons	03
Remand prisons	14
Work camps	05
Open prison camps	02
Training school for youthful offenders	01
Correctional centres for youthful offenders	02
Drug rehabilitation centre	01
Work release centre	01
Lock-ups	28

235. All the above institutions come within the administrative purview of the Prisons Department. A new open prison camp was recently located at Kuruwita in the Ratnapura District. Due to the terrorist violence in the Northern and Eastern Provinces, a number of open prison camps and remand prisons have been destroyed. Further, the work camp at Veeravila has been converted into a detention centre for terrorist suspects. After government control was reestablished in May 1996 over the Jaffna peninsula, the Prisons Department has established a prison in the area and is in the process of enhancing its facilities.

236. Overcrowding of prisons is a pressing problem faced by the prison authorities. A number of factors have contributed to this problem: the loss of a number of prisons in conflict areas, increase in the crime rate, increased number of individuals arrested under the Emergency Regulations (ER) and Prevention Terrorist Act (PTA) for security reasons, judicial delays etc. As housing is inadequate and as the buildings are old, a building project is presently being implemented by the Commissioner of Prisons to meet the pressing problem of overcrowding. As a remedial measure to this problem in addition to the launching of a project aimed at increasing the number of prison buildings and relocation of prisons in rural areas where there is room for expansion, other measures such as license board releases<sup>15</sup> and home leave schemes have been initiated (Statistics relating to the prisoner population is attached as annex 3).

237. Despite the over crowding and the resulting constraint on resources, measures have been instituted to ensure that the prisoners are provided with well balanced meals according to a regimen drawn up by a dietician and approved by the Medical Research Institute of Sri Lanka (MRI).

238. The normal work routine of a prison inmate which begins at 6.45 a.m. is preceded by breakfast and religious observances. This shift lasts until 11.00 a.m. The prisoners resume work after lunch at 12 noon and are expected to work until 4.00 p.m. During the course of the day

they are engaged in industrial activities such as soap making, printing, tailoring, laundry-work, black smith's work, agriculture etc. During the course of the week a prisoner is expected to perform a minimum of forty-seven hours of labour.

239. The time period of one hour per day i.e. 4.00 to 5.00 P.M is allocated for leisure activities. In their leisure time they have access to daily newspapers and other reading material at the prison library. Prisoners also have facilities to listen to radio programmes of their choice during leisure time. They are further encouraged to develop any special skills or talents they may possess by participating in recreational activities such as painting, carpentry, wood carving, sculpture, Kandyan dancing etc. They also publish a journal called "Sannivedana.". The prisoners also have access to television, and popular movies are screened for their entertainment on a weekly basis. Each prison has in-built places of religious worship. Thus each prisoner is able to practise his/her religion without interference. While some Buddhists engage in meditation and observe of religious practices on each Poya day, Christians attend mass on Sundays and Hindu prisoners are allowed to perform poojah's on Fridays. The Young Muslim Men's Association (YMMA) of Central Tennekumbura has been looking after the needs of Muslim prisoners at the Bogambara prison, remand prison and open prison camp at Pallekele, during the holy month of Ramazan. The Sinhala and Tamil New Year, with all its rituals and games, are celebrated by prisoners throughout the island every year.

240. Prison inmates conclude their days work routine at 6.00 p.m. after partaking of their dinner at 5.00 p.m.

241. All long-term prisoners are given vocational training under the supervision of departmental vocational training instructors in fields of carpentry, masonry, tailoring, bakery training and animal husbandry. In addition, the National Apprentice and Industrial Training Authority (NAITA) has organised vocational training programmes for prisoners. Plans are under way to train over 100 prisoners at a given time in carpentry, welding, blacksmith's work, sheet metal work, painting and industrial sewing. The objective of this programme is to develop the vocational skills of inmates in order to enable them to find gainful employment in society. At the end of the training programme, the participants will be awarded a certificate of merit.

242. General amnesties are granted by the President to selected categories of convicted offenders from time to time, in terms of the powers vested in the President under article 34 (1) of the Constitution; the practice has been to grant such amnesties to mark special occasions of national, religious and cultural significance.

243. The ERs and PTA included safeguards to ensure rights of detainees. Under Regulation 19 (4), all places of detention authorised by the Secretary of Defence must be gazetted along with the addresses. The number of places of detention has considerably declined over the years. The places of detention gazetted included mostly police stations, prisons and a few detention camps in the conflict areas under the supervision of the army. Upon arrest and detention of a suspect (for interrogation) under the ERs or PTA by the security forces, the suspect is handed over to the police of the area within 2-3 days of arrest. Consequently, persons arrested are kept in detention (Army) camps only for a minimum period of time. Thus, law regulates both prisons and detention centres.

244. All prison rules apply to detainees on the same basis as other prisoners. The only exception is that visitors are limited to the next-of-kin and lawyers. Thus, prison rules are suspended only in relation to visitors for security reasons. However, with regard to visitors, the Commissioner of Prisons has the discretion to permit visitors who do not pose a security threat.

245. In terms of the Prison Ordinance, any judicial officer beginning from Magistrate to a Supreme Court judge are entitled to visit any prison at any time without notice in order to verify whether prison authorities adhering to the accepted international norms governing the administration of prisons and centers of detention. The Release of Remand Prisoners Act No. 15 of 1990 provides for monthly visits to prisons by a magistrate who is vested with the power to order release in appropriate cases. Further, when the Emergency Regulations were in force, it was the duty of the Magistrate within whose jurisdiction any place of detention was situated, to visit such centers at least once a month.

246. Under the Prisons Ordinance, a Board of Prison Visitors is constituted for the entire country with the mandate of the overall supervision of all prisons. The Board comprises seven members who are non-governmental personnel and who advise the Commissioner of Prisons. They meet with the Commissioner at least once in two months. The Board has already submitted its Report for 1996 to the Commissioner. The report is presently under review. The recommendations made by the Board will be taken into account when preparing the prisons building projects. The Local Prison Visitors Committee, which comprises non-governmental personnel from the area, visits the relevant prison and makes periodic recommendations to the Commissioner in regard to the relevant prison. Furthermore, the Prison Welfare Associations (PWA) in each prison go into all the different aspects of prison welfare. Recently, the PWA of the Welikada prison purchased seven television sets for the benefit of the prisoners. Prisoners are brought before the Welfare Association to voice their grievances. The PWA provides assistance to the dependants when the breadwinner is in prison.

247. NGOs such as Lions, JayCees and Rotary visit prisons and conduct social welfare programmes. For instance, the Lions Club built a crèche at the Welikada women's prison. Since the prisons also house non-nationals convicted of offences, diplomats from the relevant foreign diplomatic missions regularly visit the prisons.

248. The Protective Accommodation and Rehabilitation Centres, where certain persons arrested under the ER's and surrendeers are rehabilitated, come under the administration of the Department of the Commissioner General of Rehabilitation. There are two such rehabilitation centres: one at Weeravila, and the other at Gangodawila. There are 35 surrendeers in all these centres. The programmes at these centres include masonry, carpentry, hairdressing, tailoring, agriculture, driving-heavy vehicles, learning languages, religious activities, recreation etc. Counselling facilities will be provided for these protected persons from 1997. Adequate meals, clothing and other provisions are provided for the inmates by the centre. Five named relatives of each inmate are allowed to visit weekly. In order to provide after-care for these inmates, monitoring is done through officers of the Department of the Commissioner General of Rehabilitation. However, in conflict zones, monitoring is conducted by Government Authorities such as Provincial Councils, Army, Police etc.



**Article 11. No one shall be imprisoned merely on the inability to fulfil a contractual obligation**

249. Under the Civil law of Sri Lanka, which governs contractual obligations, no person can be imprisoned for failure to carry out his obligations under a contract.

**Article 12. Right to liberty of movement**

250. The Fundamental Rights Chapter of the Constitution provides for the freedom of movement and of choosing one's residence within Sri Lanka [Article 14(1) (h)], and the freedom to return to Sri Lanka [Article 14 (1) (I)]. The above rights are also available to non- citizens. Article 14(2) states " A person who, not being a citizen of any other country, has been permanently and legally resident in Sri Lanka immediately prior to the commencement of the Constitution and continues to be so resident shall be entitled, for a period of ten years from the commencement of the Constitution, to the rights declared and recognised by paragraph (1) of this Article". These rights, however, are subject to such restrictions as may be prescribed by law in the interests of national security, national economy, 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 for meeting the just requirements of the general welfare of a democratic society.

251. There are over 1.5 million Sri Lankans overseas, either employed or resident. The inconvenience caused to prospective travellers by the requirement to sign a bond by two guarantors to obtain a Sri Lankan passport valid for "All Countries" was removed in 1989, by the introduction of a standard application fee. This new procedure facilitated the expeditious processing of passport applications.

252. The Government has introduced a scheme to make passport application forms freely available to the people. Under this scheme, passport application forms can be obtained free of charge from any Divisional Secretariat in the Island. An applicant could also obtain an application form for a passport by post, by forwarding a self addressed stamped envelope to the Department of Immigration and Emigration or applications posted on the internet site of the Department of Immigration & Emigration. Except in the case of urgent passports, duly perfected application forms can be submitted to the Divisional Secretariat itself, without undergoing the inconvenience of travelling to Colombo. The Department of Immigration and Emigration will make arrangements to issue the passport and make arrangements to send it by registered post to the applicant. However, for a passport needed within 24 hours, the applicant has to apply to the Department of Immigration and Emigration.

253. The statistics relating to the number of applications received in from 1996 to 2000 along with the number of applications turndown is as follows.

**Table 6**  
**Passport applications**

Year	Total applications received	No. of applications turned down <sup>16</sup>	No. of Passports issued
1996	290 652	310	290 342
1997	315 473	511	314 962
1998	333 653	4 087	329 548
1999	337 607	1 878	335 607
2000	327 071	6 044	321 027
Total	1 603 838	12 830 <sup>17</sup>	1 591 686

254. Even though an individual's application for travel documents may be denied, it does not extinguish the right to submit a fresh application. He or She is entitled to submit a fresh application along with the requested documents. The lack of success on the previous attempt would not prejudice the new application. Further, in the event of a temporary suspension of an application for a travel document an individual is to entitled furnish additional documentary proof to satisfy the competent authority. (Attached to this report as annex 4 is a document containing information pertaining to Sri Lanka's Visa policy)

255. Sri Lankan migrants have been granted the facility of retaining the Sri Lankan citizenship, while, being a citizen of another country in terms of the 1987 amendment to the Citizenship Act. There were over two thousand Sri Lankans holding dual citizenship in 1995.

256. Before the signing of the ceasefire agreement between LTTE and the Government of Sri Lanka in February 2002, terrorist violence, had severely restricted the freedom of movement and right to choose one's residence in the affected areas. Civilian access to Jaffna from the South by land was prevented by the LTTE by mining the main access (A-9) route and destroying the railway link to the North. The modes of civilian travel to the Jaffna peninsula were restricted to sea and air routes. The Government chartered vessels to provide a passenger service every other day between Trincomalee and Point Pedro, and Trincomalee and Karainagar via Kankasanthurai. The domestic airline service transported civilians from Colombo to Palaly and back twice a day. Whilst for the ship journey RS. 1400.00 was charged per passenger the fare for the air ticket was RS.3550 for an adult and RS. 1750 for a child under 12 years respectively. Given persistent attempts on the part of the LTTE to disrupt this service the government was reluctantly been compelled to resort to a passenger screening system in order to ensure the security of the passengers using this service. However, steps was taken to ensure that this process be conducted without causing any inconvenience or it being abused to indulge in acts such as racial profiling.

**Article 13. Non-nationals can be expelled only after reaching a decision  
in accordance with the law**

257. Under the Immigrants and Emigrants Act of Sri Lanka, a non-national who enters Sri Lanka illicitly without a visa, or overstays the period of his visa, can be deported from Sri Lanka on a removal order. Before a removal order is made, the Controller of Immigration and Emigration is required to give the person an opportunity of stating reasons to plead against such an order being made. According to the Immigrants and Emigrants Act, an order of removal

or/and order of deportation is to be made by the Minister of Defence. Such an order can be contested before the Court of Appeal by invoking its writ jurisdiction. Conversely, the powers of the Court of Appeal could also be invoked to stay the execution of the order until the final determination of the application. The provisions of extradition treaties are also subject to the legal procedures set out in the Extradition Law of 1977. A person committed to await extradition is entitled to make an application to the Court of Appeal for a mandate in the form of a writ of habeas corpus. [For further details please refer Sri Lanka's third periodic report under the ICCPR].

#### **Article 14. All persons are equal before a Court or Tribunal**

##### **The Administration of Justice and the Court System**

###### **1. Establishment of Courts**

258. Article 105(1) of the Constitution provides that subject to the provisions of the Constitution, the institutions for the administration of justice, which protected, vindicated and enforced the rights of the people, are:

- (a) The Supreme Court of Sri Lanka;
- (b) The Court of Appeal of the Republic of Sri Lanka;
- (c) The High Court of the Republic of Sri Lanka;<sup>18</sup> and
- (d) Such other Courts of First Instance, tribunals or such institutions as parliament may from time to time ordain and establish.

259. Similarly, Article 105(2) provides the "parliament may replace or abolish or amend the powers, duties, jurisdiction and procedure of all courts, tribunals and institutions except the Supreme Court.

###### **(a) The Supreme Court of Sri Lanka**

260. According to Article 118 of the Constitution, the Supreme Court remains the highest and final superior court of record in Sri Lanka. In addition the Constitution grants the Supreme Court the jurisdiction in respect of Constitutional matters, jurisdiction for the protection of fundamental rights, consultative jurisdiction, jurisdiction in presidential election petitions, jurisdiction in respect of any breach of any privileges of parliament and jurisdiction in respect of any other matter which parliament may by law vest or ordain.

261. The Supreme Court has the sole and exclusive jurisdiction to determine whether any Bill or provision of a Bill is inconsistent with the Constitution.<sup>19</sup> When doing so it is duty bound to give reasons. This jurisdiction of the Supreme Court can be invoked by the President by a written reference to the Chief Justice or by any citizen by a petition in writing addressed to the Supreme Court. Such reference must be made, or such petition must be filed, within one week of the Bill being placed on the Order Paper of the Parliament. A copy of it must at the same time

be delivered to the Speaker. When this jurisdiction of the Supreme Court is invoked no proceedings can take place in Parliament in relation to such Bill until either the determination of the Supreme Court has been made, or a period of three weeks from the date of such reference or petition has expired. Further, the Supreme Court is required to make and communicate its decision in relation to such a petition within three weeks of the reference or the filing of the petition. As per Article 123 of the Constitution it is incumbent upon the Supreme Court to give reasons when delivering judgement in such instances. In the event of the Cabinet of Ministers endorsing a bill as important in the national interest the Court is compelled to deliver its judgement on the constitutional validity of such a bill within 24 hours.

262. According to Article 125 of the Constitution the Supreme Court also has sole and exclusive jurisdiction to hear and determine any question relating to the interpretation of the Constitution. Therefore, whenever, any question arises in the course of any proceedings in any other Court or tribunal or other institution empowered by law to administer justice or to exercise judicial or quasi-judicial functions must forthwith be referred to the Supreme Court for determination. The Supreme Court must determine such question within two months of the date of reference and make any such consequential order as the circumstances of the case may require.

263. Article 126(1) confers on the Supreme Court, sole and exclusive jurisdiction to adjudicate on any question pertaining to the infringement or imminent infringement by executive or administrative action of any fundamental right or language right granted by chapters III and IV of the constitution.

264. The Supreme Court is also the final court of civil and criminal appellate jurisdiction for the correction of all errors in fact or in law, which are committed by the Court of Appeal or any court of First Instance, tribunal or such institution. In exercising this jurisdiction, the Supreme Court has sole and exclusive cognisance by way of appeal from any decision of the Court of Appeal where any appeal lies to the Supreme Court. It may also issue such directions to any Court of First Instance or order a new trial or further hearing in any proceedings of case currently before a court, in the interest of justice. The Supreme Court in exercise of its appellate jurisdiction could also ask for and admit fresh or additional evidence if necessary in the interest of justice and may direct that such evidence be recorded by the Court of Appeal or any Court of First Instance. All these provisions regarding the manner in which the Supreme Court could exercise its appellate jurisdiction are contained in Article 127(2).

265. Article 128(1) contains a right of appeal to the Supreme Court from any decision of the Court of Appeal if the Court of Appeal grants permission or at the instance of any aggrieved party. However, Article 128(2) provides for such a right of appeal, notwithstanding a refusal by the Court of Appeal permission to do so, if the Supreme Court grants special leave to appeal in such an instance. Moreover, a proviso to this article adds that the Supreme Court could grant leave to appeal in any matter of public or general importance.

266. The Supreme Court also exercises a consultative jurisdiction. Where it appears to the President of the Republic that a question of fact or law has arisen from sufficient public importance to obtain the opinion of the Supreme Court, he/she may refer the question to the court and the court shall after such hearing as it thinks fit, within the period specified report its opinion to the President.

267. The jurisdiction of the Supreme Court to adjudicate in election petitions is limited to any legal proceedings pertaining to the election of the President and any appeal from a decision of the Court of Appeal in an election petition case.

268. The Supreme Court consists of the Chief Justice and not less than six and not more than ten other judges appointed by the President, upon the recommendations made by the Constitutional Council. It can function notwithstanding any vacancy in its membership, and no act or proceedings of the Court can be deemed to be, invalid by reason of any such vacancy or any defect in the appointment of a judge.

**(b) The Court of Appeal**

269. The Court of Appeal is the other superior court of record created by the Constitution. According to Article 138(1) the new Court of Appeal has an appellate jurisdiction for the correction of any error in fact or in law committed by any Court of First Instance, tribunal or other institution. This Article further confers on the Court of Appeal, sole and exclusive cognisance by way of appeal, revision and restitution in integrum, of all causes, suits, actions, prosecutions and other institution, provided that no decision of a court or tribunal shall be reversed or varied if there is no prejudice to the substantial rights of the parties or occasioned a failure of justice.

270. In exercising its powers of appeal according to law, this court could affirm, reverse, correct or modify any order, judgement, decree or sentence. It could also give directions to a lower court, tribunal or institution and order a new trial or admit additional or supplementary evidence, which it considers essential to the matters at issue. According to Article 140 of the Constitution, the Court of Appeal also has full power and authority to inspect and examine the records of any Court of First Instance, tribunal or other institution and also to grant writs of certiorari, prohibition, procedendo, madamus and quo warranto against any other person.

271. However, Article 140 states that these powers are subject to the provisions of the Constitution. A proviso to this Article added by the First Amendment to the constitution gives Parliament the discretion to transfer the writ jurisdiction mentioned above in certain circumstances to the Supreme Court.

272. This court also has the power to issue writs of habeas corpus, power to bring up and remove prisoners from custody and the power to grant injunctions. The jurisdiction to try election petitions in respect of election to the membership of parliament is exercised by the Court of Appeal by virtue of Article 144 of the Constitution.

**(c) Courts of First Instance**

273. The Judicature Act established the Courts of First Instance, defined their jurisdiction and regulated the procedure in before such courts. Section 2 of the Judicature Act specifies the Court of First to be:

**(I) The High Court**

274. Article 111(1) of the Constitution stipulates that the High Court is the Highest Court of First Instance exercising criminal jurisdiction. There is also constitutional provision for the appointment, removal and disciplinary control of judges of the High Court by the Judicial Service Commission. According to the constitution the high court consists of ten judges at the minimum and not more than twenty judges at the maximum. The Judicature Act provides that the age of retirement of a Judge of the High Court shall be sixty-one years. The main function of the High Court is the exercise of the original criminal jurisdiction. According to section 9(1) of the Judicature Act, any offence committed within the air space of Sri Lanka falls within the jurisdiction of the High Court. The other jurisdiction of the High Court is the exercise of admiralty jurisdiction. Similarly, the judges of the High Court are empowered to impose any sentence or other penalty prescribed by law.

275. Trial in the High Court is by jury before a Judge of the High Court if the accused elects to be tried by a jury where at least one charge is for an offence referred to in the Second Schedule of the Judicature Act, No 2 of 1978. All other trials are held before a Judge of the High Court sitting alone without a jury. Trials at bar are held by the High Court in accordance with the law for the time being in force for offences punishable under the Penal Code and other laws.

276. Under Article 154 P (3) of the Constitution, Provincial High Courts have jurisdiction to exercise according to law, the original criminal jurisdiction of the High Court of the Republic of Sri Lanka in respect of offences committed within the province:

(a) To exercise, notwithstanding anything under Article 138(relating to the jurisdiction of the Court of Appeal) of the Constitution, and subject to any law, appellate and revisionary jurisdiction in respect of convictions, sentences and orders of the Magistrate and Primary Courts within the Province;

(b) To exercise such other jurisdictions and powers as provided by Parliament by law;

(c) To issue orders in the nature of writs of Habeas Corpus, in respect of persons illegally detained within the Province; and

(d) To issue orders in the nature of writs of Certiorari, Prohibition, Procendo, Mandamus and Quo Warranto against any person.

**(II) The Magistrates' Courts**

277. The Judicature Act, No 2 of 1978, provides that a Magistrates' Court shall have and exercise all powers and authorities which, are conferred by the provisions of the Penal Code or of the Code of Criminal Procedure Act (CPC) or of any other enactment. Section of the CPC confers every Magistrate's Court power to hear, try, determine and dispose of in a summary way

all suits and prosecutions for offences committed wholly or in part within its local jurisdiction and by law made cognisable by a Magistrate's Court. The First schedule of the Code of Criminal Procedure Act specifies the offence under the Penal Code, which are triable by a Magistrate's Court.

278. A Magistrate's Court may impose any of the following sentences:

- (a) Imprisonment of either description for a term not exceeding two years;
- (b) Fine not exceeding one thousand five hundred rupees; and
- (c) Any special powers of punishment granted by the provisions of any enactment.

279. Magistrate's Courts have jurisdiction to issue warrants to search or cause to be searched all places wherein any stolen goods or any goods, which or in respect of which any offence has been committed, alleged to be kept or concealed, and to require persons to furnish security for the peace or for their good behaviour according to law. A Magistrate has also jurisdiction, to inquire into all cases in which any person dies in any prison or mental or leprosy hospital or comes to his death by violence or accident, or when death occurs suddenly or when any person is found dead without its being known the cause of death.

280. A Magistrate, at any stage of any inquiry or trial, as the case may be, may in his discretion release on bail any person accused of any non-bailable offence. However, a person alleged to have committed or have been concerned in committing or suspected to have committed an offence under section 114, 191 or 296 of the Penal Code cannot be released, at any stage of any inquiry or trial except by a judge of the High Court.

## **The Armed Forces and the Law**

### **(1) Discipline**

281. Officers and men of the Army and Navy are subject respectively to military law and naval law respectively as contained in the Army and Navy Acts and other legislation. Similarly, officers and men of the Air Force are subject to the Air Force Act. In addition they remain subject to the ordinary law of the land. A member of the Army, Navy or Airforce who commits a military, naval or air force offence, or a civil offence may be taken into military, naval or air-force custody as the case may be, by an officer of the category describes in the particular Act.

282. The offences created by the Army and Air Force Acts in respect of military service include:

- (a) Mutiny and insubordination, desertion, and fraudulent enlistment and absence without leave;
- (b) Disgraceful conduct;
- (c) Drunkenness;

- (d) Offences in relation to persons in custody; and
- (e) Offences in relation to property.

283. The offences under the Navy Act include:

- (a) Misconduct in the presence of and communication with the enemy;
- (b) Neglect of Duty;
- (c) Mutiny;
- (d) Insubordination;
- (e) Desertion;
- (f) Offences in relating to persons in custody.

284. Apart from the offences defined in the Navy Act, a Court- Martial may try an offence defined any other legislative enactment in Sri Lanka.

## **(2) Courts-Martial**

285. The courts-martial or the military service judicial system was established by the Army, Air force and Navy Acts to try persons subject to military law i.e.-military personnel. Courts-martial under the Army and Air Force Acts may be either established by the President or an officer of rank authorised to do so under the relevant Acts. They must consist of not less than three but not more than nine members. Where it is convened to try a person for the offence of treason, murder or rape, the court-martial must consist of not less than five members. In an instance where it has been convened to a person for a civil offence it must consist of not less than three members. In order to ensure the impartiality of the membership of the tribunal the Air Force and Army Acts preclude the following individuals for being members of a court martial:

- (a) The prosecutor;
- (b) Any witness for the prosecution;
- (c) The Commanding officer of the accused; and
- (d) The officer who investigated the charge on which the accused is arraigned.

286. Further, an accused person is entitled to object on a reasonable ground, to any member of a court-martial. In respect of leading and cross-examining of evidence in a court martial both the Army and Air force Acts stipulate the applicability of the Evidence Ordinance. Likewise, a court martial is required to take cognisance of the procedure accepted in the Criminal Procedure Code and the Penal Code in addition to any other laws considered necessary to arrive at an equitable decision.



287. The accused before a court martial has a right to obtain a copy of the summary of evidence and the charge sheet under which he was charged, at least 24 hours prior to the trial enabling him to prepare for his defence. Further, he is entitled to retain his own defence counsel at the trial. In the event the accused is unable to do so due to financial constraints, it is incumbent upon the Army or Air force depending on the accused choice to either appoint an officer to defend him or to appoint a friend of the accused to act on his behalf. In addition to this, the respective forces are required to afford the accused all the necessary facilities to prepare his defence including permission to communicate with his counsel and witnesses.

288. Courts-martial under the Army and Air force Acts are empowered to impose the following penal sanctions if found guilty of transgressing its provisions:

- (a) Death;<sup>20</sup>
- (b) Rigorous imprisonment;
- (c) Simple imprisonment;
- (d) Cashiering;
- (e) Dismissal from the Air force;

(f) Forfeiture, in the prescribed manner of seniority of rank, either in the Air Force or in the corps to which the offender belongs, or in both; or, in the case of an officer whose promotion depends upon length of service, forfeiture of all or any part of his service for the purpose of promotion;

- (g) Severe reprimand; and
- (h) Such penal deductions from pay as authorized by the respective Acts.

289. The accused has a right to appeal the decision of the Court to the convening authority under regulation 140 of the court martial regulations.

290. Similar, sentencing powers are vested on a Naval Court-martial by section 120 of the Navy Act. If the offence that's been committed is not one defined in Naval Act but rather in another legislation then the court-martial's sentencing powers would be governed according to that legislation.

291. For the trial and punishment of a person subject to naval law who has committed any naval or civil offences, the President or an officer of a rank not below that of Lieutenant Commander authorised by him may order a court martial. A court consists of not less than three but not more than nine members. Where it is convened to try a person subject to naval law for the offence of treason, murder or rape, the court martial must consist of a minimum of five members. On other occasions it should have a minimum membership of three members. As in the case of courts martial set up under the Army and Air Force Acts, an accused may object, for any reasonable cause, to any member of the court-martial. In order to ascertain whether there is a

prima-facie case against a suspect, prior to constituting a court martial, it is mandatory that summary of evidence recorded. In keeping with the principles of natural justice, a copy of this summary is handed over to the accused once the evidence is recorded. In addition the following documents are provided to an accused in advance for him to prepare for the trial:

- (a) Charge Sheet;
- (b) List of members of the panel of officers of the court martial;
- (c) List of witnesses;
- (d) List of documents;
- (e) Warrant ordering the court martial; and
- (f) Circumstantial Letter.

292. An accused is also entitled retain a lawyer to present his defence at a court martial. In an instance where the accused is unable to do so, at his request an officer could be appointed to represent and defend him at the trial.

### **(3) Judge-Advocate**

293. The authority ordering a court martial under the Army and Air Force Acts or a court martial under the Navy Act must appoint a person who has sufficient knowledge of the practice and procedure of courts-martial and to the general principles and procedure of courts-martial and of principles of law and of the rules of evidence, to act as Judge-Advocate of the court martial.<sup>21</sup> It is the duty of the Judge Advocate, whether before or during the proceedings, to give advice on questions of law or procedure relating to the charge or trial, to the prosecutor and to the accused. The Act declares them entitled to obtain such advice at any time after the appointment of the Judge Advocate. During the proceedings he can give advice only with the prior permission of the court martial. It is also his duty to invite the attention of the court to any irregularities in the proceedings. Whether or not he is consulted, he must inform the court-martial and the authority convening it of any defect in the charge or in the constitution of the court-martial, and must give his advice on any matter before it.

294. The Judge Advocate must take all such action as may be necessary to ensure that the accused does not suffer any disadvantage such as any incapacity to examine or cross examine witnesses or to give evidence clearly. He may, for that purpose, with the permission of the court-martial question any witness on any relevant matter. At the conclusion of the case he must, unless both he and the court martial consider it unnecessary, sum up the evidence and advise the court martial upon the law relating to the case before the court martial proceeds to deliberate upon its finding. The failure of the Judge Advocate to sum up on the evidence before the court deliberations on its finding is a fatal irregularity.

#### **(4) Civil Courts and the Armed Forces**

295. The Army, Navy and Air Force Acts do not affect the jurisdiction of a civil Court to try or punish for any civil offence any person subject to military law. It is the duty of every commanding officer on an order of a civil Court to surrender to the Court any officer or soldier under his command that is charged with, or convicted of, any civil offence before that Court. Similarly, it is also his duty to assist any police officer or any other officer concerned or connected with the administration of justice to arrest any officer or soldier so charged or convicted.

296. Article 140 of the Constitution, which relates to the grant and issue of writs of mandamus, certiorari and prohibition are deemed to apply in respect of any court-martial or any military authority exercising judicial functions. The provisions of Article 141 of the Constitution relating to the issue of writs of habeas corpus are deemed to apply in respect of any person illegally detained in custody by order of a court-martial or other military authority.

297. A member of the Armed Forces, like any other citizen is bound by ordinary law. Therefore he will be liable in civil Courts for all illegal acts even if they are committed in obedience to the orders of a superior officer.

#### **Laws governing the publicity of proceedings**

298. Recognising that publicity is an essential element of a fair judicial proceeding, article 106 of the Constitution provides that the sittings of every Court tribunal or other institution established under the Constitution or ordained and established by Parliament shall subject to the provisions of the Constitution be held in public, and all persons shall be entitled to freely to attend such sittings. A judge or presiding officer of any such Court, tribunal or other institution may in his discretion, whenever he considers it desirable exclude therefrom such persons as are not directly interested in the proceedings therein:

- (a) In proceedings relating to family relations;
- (b) In proceedings relating to sexual matters;
- (c) In the interest of national security or public safety; and
- (d) In the interest of order and security within the precincts of such Court, tribunal or other institution.

#### **The Independence of the Judiciary**

299. Article 107 of the Constitution provides that the Chief Justice, the President of the Court of Appeal and every other Judge of the Supreme and of the Court of Appeal shall be appointed by the President of the Republic by warrant under his hand and hold office during good behaviour. They cannot be removed except by an order of the President made after an address of Parliament, supported by a majority of the total number of Members of Parliament (including those not present), subsequent to a petition presented to the President on the basis of a proved

misbehaviour or incapacity. However, no such resolution for the presentation of such an address can be entertained by the Speaker or placed on the Order Paper of Parliament, unless notice of such resolution is signed by not less than one-third of the total number of Members of Parliament and sets out all the details of the alleged misbehaviour or incapacity. Parliament is required by law or by Standing Orders to provide for all matters relating to the presentation of such an address, including the procedure for the passing of such resolution, the investigation and proof of the alleged misbehaviour or incapacity and the right of such Judge to appear and to be heard in person or by representative.

300. Standing Order 78A provides that where notice of a resolution for the presentation of an address to the President for the removal of a Judge from office is given to the Speaker in accordance with Article 107, the Speaker must entertain such resolution and place it on the Order Paper of Parliament. But such resolution cannot be proceeded with until after the expiration of a period of one month from the date on which the Select Committee was appointed. Paragraph 2 of the Standing Order that deals with appointment of such a Select Committee requires the Speaker, to appoint a Select Committee with a minimum membership of seven Members of Parliament for this purpose. The Select Committee is required to transmit to the Judge concerned a copy of the resolution setting out the allegations of misbehaviour or incapacity made against him. The Judge is compelled by the Standing Order governing the functioning of the Select Committee to make a written statement of defence within a stipulated time period. Moreover, the Judge has the right to appear before the Select Committee to be heard either in person or via representative and adduce evidence, oral or documentary, in disproof of the allegations against him.

301. At the conclusion of the investigation made by it, the Select Committee must within one month of the commencement of its sittings report its findings together with minutes of evidence taken before it to Parliament. It may also make a special report of any matters, which it may think, fit to bring to the notice of Parliament. If however, the Select Committee is unable to report its findings to Parliament within the stipulated time limit, the Committee must seek the permission of Parliament for an extension of a further specified period of time, giving reasons for it. Where the resolution for the presentation of an address to the President is passed by Parliament, the Speaker must present such address to the President on behalf of Parliament.

302. On the previous occasion the Human Rights Committee examined Sri Lanka's periodic report, it expressed concern on the compatibility of the impeachment process with the scope and spirit of Article 14, since it would compromise the independence of the judiciary. As stated above Article 107 a judge can be removed only on "proved grounds of misbehaviour or incapacity" and the standing orders allows for the judge in question defend himself either on his own or retaining a legal counsel, none adherence to the rules of natural justice by the inquiring committee would be attract judicial review. Indeed nowhere either in the relevant constitutional provisions or the standing orders seeks to exclude judicial scrutiny of the decisions of the inquiring committee. Thus, it is envisaged that if the inquiring committee were to misdirect itself in law or breaches the rules of natural justice its decisions could be subject to judicial review.

303. Further, it is the position of Sri Lanka that an impeachment process where the legislature plays the principal role does not by itself contravene the provisions of Article 14 of the ICCPR. In fact the United Nations Basic Principles on the Independence of the Judiciary seem to approve this type of mechanism, since provisions that deal with disciplinary proceedings against judges state “Decisions in disciplinary, suspension or removal proceedings should be subject to an independent review. This principle may not apply to the decisions of the highest court and those of the legislature in impeachment or similar proceedings”.

304. The salaries of the Judges of the Supreme Court and of the Court of Appeal must be determined by Parliament and charged on the Consolidated Fund. The salary payable to, and the pension entitlement of a Judge of the Supreme Court and a Judge of the Court of Appeal cannot be reduced after his appointment.<sup>22</sup>

305. No Judge of the Supreme Court or the Court of Appeal is permitted to perform any other office (whether paid or not) or accept any place of profit or emolument, except as authorised by the Constitution or written Law or with the written consent of the President. A Judge of the Supreme Court or Court of Appeal may, however, be required by the President to perform or discharge any other appropriate duties or functions under any written law. No person who has held office as a permanent Judge of the Supreme Court or of the Court of Appeal may appear, plead act or practice in any court, tribunal or institution as an attorney-at-law.

306. The Registries of the Supreme Court and the Court of Appeal have, under the Constitution, been placed in charge of the Registrars of the respective Courts. They are subject to the supervision, direction and control of the Chief Justice and the President of the Court of Appeal respectively.

307. So far as the independence and security of tenure of the Judges of the High Court are concerned, they are appointed by the President of the Republic on the mandatory recommendations of the Judicial Services Commissions and are subject to disciplinary control by the Judicial Service Commission. The independence of other judicial officers of the original courts is secured by vesting their appointment, transfer, dismissal and disciplinary control in the Judicial Service Commission. In addition this commission is vested with the power of formulating rules regarding training of judges of the High Court and schemes of recruiting, training, appointment, promotion and transfer of judicial officers<sup>23</sup> and scheduled public officers.<sup>24</sup> This Commission consists of the Chief Justice who is the Chairman, and two Judges of the Supreme Court appointed by the President on the recommendation of the Constitutional Council. Any salary or allowance payable to a member of the Commission must be charged on the Consolidated Fund and cannot be diminished during his term of office. The salary so payable is in addition to the emoluments attached to his substantive appointment.

308. In order to ensure that this commission is able to function without fear or favour, the Constitution provides that “every person who, otherwise than in the course of his duty, directly or indirectly, by himself or by any other person, in any manner whatsoever, influences or attempts to influence any decision of the Commission or any of its members, is guilty of an offence and, on conviction by the High Court after trial, without a jury becomes liable to a fine not exceeding one thousand rupees or imprisonment for a term not exceeding one year or to both such fine and such imprisonment”.

309. The independence of persons administrating justice is also provided for in Article 116 of the Constitution. This Article states:

(a) Every judge, presiding officer, public officer or other person entrusted by law with judicial powers or functions is required to exercise and perform such without and functions without being subject to any direction or other interference proceeding from any other person except a superior court, tribunal, institution or other person entitled to under law to direct or supervise such judge, presiding officer, public officer or such other person in the exercise or performance of such powers or functions;

(b) Every person who, without legal authority, interferes or attempts to interfere with the exercise or performance of the judicial powers or functions of any judge, presiding officer, public officer or such other person is guilty of an offence punishable by the High Court on conviction after a trial without a jury with imprisonment of either description for a term which may extend to a period of one year. Such person may, in addition, be disqualified for a period not exceeding seven years from the date of such conviction from being an elector and from voting at a Referendum or at any election of the President of the Republic or at any election of a Member of Parliament or any local authority or from holding any public office and from being employed as a public officer.

310. Another provision, which exists to secure the independence of the Judiciary, is the rule embodied in the Standing Orders of Parliament that the conduct of the Judges and other persons engaged in the administration of justice cannot be raised except on a substantive motion. Further, questions referring to any matter, which is under adjudication by a court of law, or to any matter on which a judicial decision is pending cannot be raised in Parliament.

### **Presidential (Special) Commission of Inquiry**

311. The Human Rights Committee was of the view that the provisions of the Special Presidential Commissions Act was not commensurate with articles 14 and 25 of the ICCPR, since the act contained an ouster clause which did not allow for the commission's findings to be subjected to scrutiny by an appellate court and also because findings of a commission could attract penal sanctions in the form of deprivation of civic rights. Indeed, the Human Rights Committee's concerns probably would have arisen due to the Supreme Court's decision in the case of *Weeraratne v. Percy Colin Thome*, which had limited the grounds for challenging the findings of the commissions to those contained in the Interpretation (Amendment) Act of 1972.<sup>25</sup> However, during the period covered in this report, the Supreme Court in the case of *Cooray v. Banadaranaike*, expanded the grounds of judicial review of the findings of the Special Presidential Commissions, holding that the Interpretation (Amendment) Act of 1972 stands implicitly repealed by the provisions of the Constitution of 1978. A detailed analysis of this case and other judicial decisions in relation to the powers of the Special Presidential Commissions, during the period under review, are given below:

(a) *Sirisena Cooray v. Tissa Bandaranayake*

312. A Special Presidential Commission was appointed to inquire into the Petitioners conduct, particularly in relation to the allegations that he was responsible for the assassination of the

former Minister of Defence Mr. Athulathmudali. The Commission of Inquiry recommended that the petitioner should be disqualified from the membership of Parliament for committing the offence of contempt of court. Such a recommendation was justified by the Commission on the basis that the petitioner had failed to comply with the notices issued by the Commission ordering him to appear before it. It also held the petitioner responsible for the assassination.

313. However, the petitioner sought to challenge this finding in the Supreme Court on the basis that it was made on ex-parte evidence and any purported notices, which the Commission alleged to have sent to the petitioner, had not in fact been received by him. Therefore, the petitioner stated that the Commission has not adhered to the rules of natural justice in the conduct of its proceedings. On this basis the petitioner sought a writ of certiorari to quash the findings of the Commission.

314. The respondents objected to this on the basis that the petitioner delayed in invoking the revisionary jurisdiction of the court. However, the Supreme Court rejected this objection on the basis that within a short interval of the sessional paper carrying the commissions' report being published the petitioner had challenged the findings of the Commissioners. The respondents sought to restrict the Court's ability to review on the basis of the ouster clause contained in Article 81 of the Constitution and S 9(1) of the Special Presidential Commission Act No. 7 of 1978. However, the court responded by stating on the account of Article 140 of the Constitution,<sup>26</sup> that ouster clauses cannot constrain the court's jurisdiction to review decisions of the Presidential Commissions. In coming to this conclusion the Supreme Court relied on Justice M.D.H. Fernando's obiter dicta pronouncement in *Attapattu v. Peoples Bank*. In *Attapattu v. Peoples Bank*, Justice Fernando sought to reintroduce to a certain extent the law emanating from the House of Lords decision in the seminal case of *Anisminic v. Foreign Compensation Commission Ltd*. In that case the House of Lords departed from its previously restrictive approach of reviewing only errors of law that "went in to their jurisdiction" made by tribunals protected by ouster clauses. It made errors of law made within their jurisdiction by such tribunals also amenable to judicial review. This decision was subsequently incorporated into Sri Lankan law.<sup>27</sup> However, subsequently the Interpretation (Amendment) Act of 1972 sought to restrict the powers of the courts<sup>28</sup> to review decisions of tribunals protected by ouster clauses by regressing to the pre-Anisminic position. In *Attapattu v. Peoples Bank*, Fernando J said that courts are no longer constrained by this Act since Article 140 expressly<sup>29</sup> provides the courts with power to grant the writ of certiorari against decisions of tribunals.

315. The respondents also contended that the Commission's decision only amounted to a recommendation and therefore was not amenable to judicial review. However, the Supreme Court rejected this argument on the grounds that the recommendation had the potential to effect the petitioner's civic rights.

(b) *Paskaralingam v. Perera*

316. In this case a Special Presidential Commission was appointed to inquire into certain abuses, alleged to have been committed by the petitioner who was a very senior civil servant under the previous government. The Supreme Court on the basis of non-participation of one of the members at the subsequent stage of proceedings quashed the findings of the Commission. He had also not signed the report of the Commission.

(c) *Wijepala Mendis v. Perera*

317. In this case a Special Presidential Commission called upon the petitioner along with some others to show cause on the petitioner's action of having induced individuals with a dishonest intention to surrender a particular land with a lesser market value and obtain in exchange from the state by use of his official position a land with higher market value. Thereby causing a loss to the state and gain for him-self. The Supreme Court quashed the Commissions findings on the following grounds:

(a) There was no finding by the Commission in respect of the petitioner's dishonest intention;

(b) Out of the three Commissioners appointed to inquire into the matter one had ceased to function by the time the Commission published its findings;

(c) The Commission had come to findings not regarding an exchange of land but in respect of sale and leases of land; and

(d) The Commission in responding to an attempted settlement had embarked on an area, which they had no jurisdiction to embark on.

318. The Supreme Court also availed of itself the opportunity to reaffirm its decision in *Cooray v. Bandaranayake* (see supra).

### **LABOUR TRIBUNALS**

319. Labour Tribunals were established in 1957 by an amendment to section 31 of the Industrial Disputes Act, according to which a workman or a trade union on behalf of a workman could apply to a Labour Tribunal for relief or redress in respect of the termination of services by an employer or on a question of gratuity or other benefits or such other matters relating to terms of employment or conditions of labour of a workman as may be prescribed by the Minister. The intention of this amendment was to grant relief to a workman who does not have equal bargaining power with his employer. Its conformity to the requirements of Article 14 is shown below in the form of analysis of the jurisprudence developed by this tribunal and the rights of litigants who seek redress before this tribunal.

320. The "just and equitable" principle plays a vital role in dealing with industrial disputes in Sri Lanka. The just and equitable principle and the non-applicability of the rules of evidence rigidly recognise the concept of natural law as against positive law. Natural law envisages the provisions of natural justice, viz., the right to a fair hearing and the rule against bias. Such a procedure is expected to ensure impartiality.



321. The just and equitable principle functioning within the overall concept of natural justice is illustrated in several cases, among them the following:

- *In United Engineering Workers Union v. Devanayagam* (69 NLR 289), it was held that arbitrators industrial courts and labour tribunals can act unfettered by the contract of service and that awards that are just and equitable can be made;
- *In Peiris v. Podisingho* (78L W at 46), it was held that the test of a just and equitable order is those qualities that would be apparent to any fair minded person;
- *In Richard Peiris v. Wijesiriwardena* (62 NLR at 233 ) it was held that in keeping with positive guidelines a just and equitable order should fall within the frame-work of the law; and
- *In Hayleys v. Crossette Thambiyah* (63 NLR at 248 ) it was observed that it is a strange proposition to state that when section 24 of the Industrial Disputes Act conferred jurisdiction on an Industrial Court to make a just and equitable award, such a tribunal can completely disregard the law of the country and act in an arbitrary manner. This principle was followed in *Superintendent, High Forest Estate v. Malapene Sri Lanka Watu Kamkaru Sangamaya* (66 NLR 14) where it was held that it is not open to a labour tribunal to grant equitable relief to a spouse of a labourer when the contract of service had been terminated by the employer under section 23(1) of the Estate Labour Indian Ordinance. It was held that in granting a just and equitable order a tribunal should act judicially. In *B. v. Gunasinghe* (1970) 72 NLR 76 the judge expressed the view that the decision in the Devanayagam case must not be thought to mean that Labour Tribunals do not and are not required to act judicially. It was emphasised that the question whether a particular functionary is under a duty to act judicially is distinct from the question whether he holds judicial office. It was further held that Labour Tribunals are required to follow the principles of natural justice and accordingly all material evidence will have to be taken into account in arriving at a just and equitable order. In *Nakiyakanda Group v. Lanka Estate Workers Union* (1969- 77LW 52), it was held that in making a just and equitable order one must consider not only the interest of the employee but also the interest of the employer and the wider interest of the country, for the object of social legislation is to have contended employees and employers.

322. In brief the Appellate Courts in Sri Lanka have given the following guidelines in relation to the principles of just and equitable orders:

- (a) The law of the land should be followed;
- (b) Labour Tribunals and Arbitrators should act judicially by following the principles of natural justice;
- (c) All material evidence should be taken into account;

- (d) Every material question involved must be considered;
- (e) Orders or awards should contain reasons for that order;
- (f) Labour Tribunals and arbitrators must not act arbitrarily; and
- (g) Public interest should be considered.

(a) *Applicability of the Evidence Ordinance*

323. Section 36(4) of the Industrial Disputes Act reads thus: In the conduct of proceedings under this Act, any Industrial Court, Labour Tribunal, Arbitrator or authorised officer or the Commissioner shall not be bound by any of the provisions of the Evidence Ordinance. Though these provisions state that the institutions, which are dealing with industrial disputes, are not bound by the provisions of the Evidence Ordinance, the appellate courts have given some guidelines as regard to their applicability in proceedings before these institutions. In the case of *Ceylon University Clerical and Technical Association v. The University of Ceylon* (170 NLR 84) the Supreme Court stated that although Labour Tribunals are not bound by the Evidence Ordinance it would be well for them to be conversant with the wisdom contained in it and treat it as a safe-guard. In *Somawathie v. Baksons Textiles Industries Limited* (1979 NLR) at 204 Rajaratnam J., stated that section 36(4) by not conferring labour courts to the rules of evidence highlights the distinction between the function of courts of law which are bound by the rules of the Evidence Ordinance and the equitable jurisdiction of the Industrial Courts, Arbitrators and Labour Tribunals which are empowered to make orders that are just and equitable. Thus “it is for this reason that the Labour Tribunals are not confined by rules of evidence. They can adopt their own procedure. They can act on confessions and the testimony of accomplices so that they can have a free hand to make a fair order”.

324. Although a Labour Tribunal dealing with an industrial dispute is not a court in the sense that it is strictly bound by the rules of evidence, it does not mean that it can act on mere conjecture and its peculiar idea of social justice. It is obligatory on its part to act within its jurisdiction and according to the law applicable to the matter in dispute.

325. A recent development in the case of *Colombage v. Ceylon Petroleum Corporation* (1999) (38 Sri LR 150) can be summarised is as follows:

- (a) The provisions of the Evidence Ordinance do not bind a Labour Tribunal;
- (b) However, section 36(4) of the Industrial Disputes Act does not permit a Labour Tribunal to act in total disregard of one of the fundamental principles underlying the provisions of the Evidence Ordinance; and
- (c) Inadmissible hearsay is excluded on the plainest considerations of fairness and justice for its material upon which no reliance could be placed. A Labour Tribunal is clearly under a duty to judicially evaluate the evidentiary material placed before it.

326. In the case of *All Ceylon Commercial and Industrial Workers Union v. Nestle Lanka Ltd* (1999) 1 *Sri LR*, 343, it was held that a deciding authority which has made a finding of primary fact wholly unsupported by evidence or which has drawn an inference wholly unsupported by any of the primary facts found by it will be held to have erred on a point of law. The no evidence rule does not contemplate a total lack of evidence. It is equally applicable where the evidence taken as a whole is not reasonably capable of supporting the findings or decisions.

327. In the case of *David Anderson v. Ahamed Husny* (SC 14/1000 *SC minutes* 11.01.1001) Fernando J., stated that “where it is true that the tribunal is not bound by the Evidence Ordinance, that enactment contains certain basic principles of justice and fairness relevant to adjudication by any Tribunal. One common sense principle is found in section 102 that the burden of proof lies on that person who would fail if no evidence at all were given on either side. There was no good reason for departing from that principal”. Therefore, though section 36(4) of the Act states that Labour Tribunals are not bound by the provisions of the Evidence Ordinance, the decisions of the superior courts indicate the danger of total rejection of the provisions of the Evidence Ordinance in proceedings before Labour Tribunals. In short, it would be the best guideline to be followed in dispensing of social justice.

*(b) Rights of a litigant in a labour tribunal*

328. The rights of litigants before Labour Tribunals derive from the jurisdiction of Labour Tribunals. Section 318 deals with the jurisdiction of Labour Tribunal as follows:

- (a) Termination of services of an employee by his employer;
- (b) The question whether gratuity or other benefits are due to him from the employer on termination of serve, and the amount of such gratuity except in the case where the Gratuity Act of 1983 applies;
- (c) The question where the forfeiture of gratuity in terms of the gratuity Act of 1983 has been correctly made in terms of that Act; and
- (d) Such other matters relating to the terms of employment or the condition of labour of a workman as may be prescribed.

329. Therefore it is only a workman who may seek relief from a Labour Tribunal. This is the special feature that distinguishes Labour Tribunals from other courts of law where either party to a dispute may seek relief from that court.

330. It is well-settled law that an applicant or a respondent can file an application or answer or replication in any of the languages i.e., in Sinhala or Tamil or English.

331. Another special feature of this institution is that Trade Union Officials or a representative or an Attorney-at-Law could represent the parties. In other words this institution enables litigants to contest their claims by even laymen who are acquainted with the labour laws.

332. Another special feature is that appeals lie against the order of a Labour Tribunal only on a question of law.

333. Save as provides subsection (2), an order of the Labour Tribunal shall be final and shall not be called in question in any court.

334. Where the workman or the Trade Union which makes an application to a Labour Tribunal or the employer to whom that application relates is dissatisfied with the order of the Tribunal on that application such workman, Trade Union or employer may appeal from that order to the High Court. (A list containing the names of organizations that provide free legal aid is attached as annex 5.)

### **Article 15. Retrospective Penal Laws**

335. The Constitution of Sri Lanka specifically provides against retroactive legislation under Article 13 (6), except where such legislation is to give effect to an act that was criminal according to the general principles of law recognised by the comity of nations. This is a well-established exception recognised in the Convention and is intended to give effect to international obligations undertaken by the State. Further, according to Article 15 (1), this Article shall be subject to restrictions as may be prescribed by law in the interest of national security.

### **Article 16. Right to recognition as a person before the law**

336. From the Colonial period, the right to recognition as a person before the law, has formed the very foundation on which our legal system was established. Our courts jealously safeguard this right which forms the cornerstone of our judicial system. Article 12 (1) of the Constitution of Sri Lanka reiterates this principle by stating that all persons are equal before the law and are entitled to equal protection of the law.

337. Nevertheless, in a modern society, however, it is impossible, due to the claims of society itself and of public interest, to have absolute equality among all sections of people in society. Further, there have been exceptions in keeping with international law.

338. Thus, foreign sovereigns and diplomats are entitled to certain immunities and are also exempt from the jurisdiction of the courts. In Sri Lanka, the President is immune from suit.<sup>30</sup> The Heads of State of most countries enjoy such immunity. Judges have immunity for acts done in the discharge of their duties. Members of Parliament cannot be arrested during sessions of Parliament. In Sri Lanka no Member of Parliament can be arrested without the prior permission of the Speaker. They are also immune from actions for defamation for anything said in Parliament. In most countries, including Sri Lanka, public authorities and officials enjoy special privileges and powers.

### **Article 17. Right to private and family life**

339. The laws relating to the right to privacy and family life are governed by the Common Law of the country, which is the Roman Dutch Law. Both the Civil Procedure Code and the Criminal Procedure Code of Sri Lanka stipulate that no one can be arrested or have his/her home searched otherwise than in accordance with the due process of the law.

340. The Police Training curriculum emphasises respect for the crime scene, proper collection of evidence, the inadmissibility of illegally obtained evidence etc. and thus protects the right to private and family life.

### **Article 18. Freedom of thought, conscience and religion**

341. Article 10 of the Constitution of Sri Lanka provides for the freedom of thought, conscience and religion including the freedom to have or to adopt a religion or belief of his/her choice. This right cannot be restricted under any circumstances. Article 10 is entrenched under Article 83 (a) of the present Constitution, which states that an amendment to this Article would need not only a 2/3rds majority in Parliament but also a referendum. Article 14-(1) (e) of the Constitution guarantees the freedom to manifest one's religion or belief in worship, observance, practice and teaching. While the rights conferred under Article 10 are not subject to any restrictions, certain restrictions are permitted with respect to the rights under Article 14-(1) (e). Accordingly, Article 15 (7) of the Constitution provides for restrictions prescribed by law in the interest of national security, public order and the protection of public health or morality, or for the purpose of securing due recognition and respect for the rights and freedoms of others.

342. The Supreme Court in the case of *Athukorale and others v. The Attorney General* (Sri Lanka Broadcasting Authority Case), which is, analysed below emphasized the nexus between the right to the Freedom of Information and the freedom of Freedom of thought and conscience. Information was described by the court as the "staple food" of thought that individuals require without any unnecessary restrictions. Thereby according the right to freedom of information the status of a constitutionally entrenched right.

#### **Athukorale and others v. The Attorney General (Sri Lanka Broadcasting Authority Case)**

343. In *Athukorale and others v. The Attorney General*, the fifteen petitioners brought an application for determination by the Supreme Court as to the constitutional validity of the Sri Lanka Broadcasting Authority (SLBA) Bill, which was published in the Government Gazette of 21st of March 1997, and placed on the Order Paper of Parliament on 10th April 1997.

344. The fifteen petitioners were a motley collection that included representatives of political parties, and private individuals, natural persons and body corporates, and non- governmental organisations. Primarily, their complaint was that if the SLBA Bill were enacted, the operation of the SLBA Act would entail that their right to equality under Article 12 of the Constitution would be violated. There were other arguments presented by the various petitioners, not only under other fundamental rights found in the Constitution, but also under general administrative law principles.

345. The purpose of the Bill was the establishment of a statutory authority to regulate broadcasting in this country. This authority would not only regulate the establishment and maintenance of broadcasting stations (both radio and television)} but was also empowered for the issuance of annually renewable licenses for such stations. It was able to impose conditions and terms of license, issue directions as to broadcast content, and what is more, impose sanctions for non-compliance. The Bill also envisaged the creation of a criminal offence for offenders of licensing terms. To recapitulate, the SLBA would be regulator not only of the technical dimensions of broadcasting (such as the allocation of frequencies through licensing), but would also have the power to control and regulate the programme content of the broadcasters.

346. At the time this Bill was brought before Parliament by the government, Sri Lanka's electronic media industry had developed beyond the stage where the airwaves were the exclusive domain of the State. Thus, the majority of petitioners in this case were individuals or corporate bodies who were private broadcasting station operators. Their primary complaint was that SLBA Bill would, if enacted, operate to treat them unequally before the law and that the State owned Sri Lanka Broadcasting Corporation (SLBC) and Sri Lanka Rupavahini Corporation (SLRC) would not operate under the same SLBA regime that they were potentially subjected. That is, the SLBC which was established, and governed, by the Ceylon Broadcasting Act No.37 of 1966, and the SLRC, established and governed by the Sri Lanka Rupavahini Act No.6 of 1982, exercises self-regulation over their programme content, sponsorship, financing, scheduling etc. The SLBA Bill did not expressly repeal the provisions in those Acts to bring the SLBC and the SLRC into the new regime of regulation. It is on this basis that the petitioners alleged potential inequality before the law (therefore unequal protection of the law), under Article 12 of the Constitution. What is important to note here is that while the SLBA Bill envisaged some amendments, both to the SLBC Act and the SLRC Act, as far as the specific issue of supervision and control of broadcast content was concerned, the SLBA Bill contained no express words of abrogation. Thus, the manner in which the court construed both statutes in relation to the Bill is of first importance.

347. The judgement in *Athukorale* can be anatomised from two perspectives. Firstly, the question whether the provisions of the SLBA Bill (as interpreted above) if enacted would serve to violate various fundamental rights of the petitioners. These included those rights enshrined in Article 12 (Right to equality), Articles 14 (I) (a) and 14 (I) (g) (Freedom of speech and expression including publication, and the Right to engage in any lawful occupation, profession, trade, business or enterprise), and Article 10 (Freedom of thought).

348. The question whether the freedom of expression extended to a right to see and hear, news and views, of independence and accumulated balance of the sort discussed by the court above, had come up for determination before the Supreme Court a year before *Athukorale*, almost to the date, in the case of *Wimal Fernando v. SLBC*. In that case, Justice Fernando made an extensive pronouncement on the right to hear and the freedom of information, where his lordship held that a freedom of information, in the absence of an express constitutional provision, could not be found to exist within the freedom of expression. Rather, Justice Fernando opined, an ancillary right to information could be more appropriately imputed from the Article 10 freedom of thought. One must have access to information without unjustifiable fetters in order to meaningfully exercise one's freedom of thought under Article 10 of the Constitution. The learned judge described information as "the staple food of thought".

349. It must be noted that Justice Fernando's dicta on this matter was not binding on a subsequent court, as the decision in *Fernando v. SLBC* did not turn on Article 10. Notwithstanding that, in *Athukorale*, the Supreme Court affirmed Justice Fernando's comments on freedom of information and Article 10, as being the correct statement of the law.

350. The court held in this case that the provisions of the SLBA Bill would give rise to an Authority that falls foul of administrative law principles governing accountability and independence to such an extent, that the regulatory regime had the potential to operate in effect, to stifle alternative views and render the desirable clash of antagonistic ideas illusory. In this way, the court found that the petitioners' right to receive independent information would be curtailed with the effect that their freedom of thought would be adversely affected. The Constitution permits absolutely no restrictions or abridgements to Article 10 dealing with the freedom of thought. If the effect of the prospective SLBA Act would be to impinge on the free exercise of the fundamental right under Article 10, the court correctly determined that that would be tantamount to an amendment to the Constitution. In such a case, the court held, the correct procedure to be adopted was to obtain a 2/3rd majority of the total number of Members of Parliament (including those not present) and also the assent of the People at a Referendum, in accordance with Article 83 of the Constitution, if the SLBA Act was to be legally enacted.

### **Article 19. Freedom of Expression**

#### **Constitutional Guarantees**

351. The Constitution of Sri Lanka provides for the freedom of speech and expression including publication under Article 14 (1) (a).<sup>31</sup> The Constitution allows for restrictions to be provided by law in the interests of racial and religious harmony, national security,<sup>32</sup> public order, for the purpose of securing due recognition and respect for the rights and freedoms of others<sup>33</sup> etc.[Article 15 (2) & Article 15 (7)]. Likewise, the 6th amendment to the Constitution also prohibits the support, promotion, encouragement or advocacy of a separate State within the territory of Sri Lanka by any individual or group of persons.

352. The Supreme Court of Sri Lanka in a recent judgment upheld the right to freedom of expression in *Wimal Fernando v. Sri Lanka Broadcasting Corporation*<sup>34</sup> [(1995) SC Appn. 81]. It was held that the decision to take the Non-Formal Educational Service, of the State Broadcasting Corporation off the air in February 1995, was in fact an infringement of the petitioner's fundamental right to freedom of speech and expression under Article 14 (1) (a) of the 1978 Constitution of Sri Lanka.

353. In the case of *Asoka Gunawardena and Ponnampereuma Aarachchige v. S.C.W. Pathirana and others* (SC Appn. 519/95), in February 1997 the Supreme Court strongly upheld the fundamental right of every Sri Lankan to be different, to think differently (Article 10) and to express different opinions in public [Article 14 (1) (a)]. The Supreme Court gave judgment in favour of two supporters of the United National Party (UNP), who were arrested and detained for

possessing and circulating a pamphlet critical of the Government, and further ordered the State to pay an unprecedented sum of Rs. 70,000 including costs to each of the petitioners. In the case of *Ekanayake v. Herath Banda* (SC Appn. 25/91, SCM 18.12.91)] the Supreme Court held:

“ The expression of views which may be unpopular, obnoxious, distasteful or wrong is nevertheless within the ambit of free speech and expression, provided of course there is no advocacy of or incitement to violence or other illegal conduct... for dissent is inextricably woven into the fabric of democracy.”

[*Ekanayake v. Herath Banda* (SC Appn. 25/91, SCM 18.12.91)]

### **Empirical evidence on media freedom**

354. A Committee was established by the government to look into the feasibility of establishing a Centre of Excellence dedicated to the profession of journalism. The Committee's report on the establishment of a National Media Institute (NMI) was accepted by the Cabinet and it was suggested that the conducting of skill development programmes for the media industry should not be delayed until the establishment of the proposed National Media Institute. The Media Training Institute was inaugurated in December 1996 for the design and implementation of skills development programmes. In response to the recommendations made by the Committee on Improving Economic Conditions and Status of Journalists, the Sri Lanka Insurance Corporation launched a new insurance scheme for journalists in November 1996.

355. The preponderant role in the Sri Lankan media industry is played by the private sector. Today, a number of private companies are playing a very prominent role in the media industry, whether it is print or electronic media. Totally de-regulated high-tech media such as the Internet are fast spreading. Although the public sector TV, radio and press still do exist, Government involvement is limited to appointing the relevant Boards of Directors. The Directors of each of these institutions function at their own discretion and plan their news and programmes without Government interference. The number of private television and radio stations in Sri Lanka has increased considerably over the past years. There are six private sector TV channels and a host of FM radio stations. All of them run their own news and current affairs programmes often in an interactive fashion.

356. The viewers and listeners are provided with a variety of programmes with a number of different perspectives to choose from. The print media being the most popular and most widely utilised, reach all corners of the island in the form of newspaper, magazine, bulletins, leaflets etc. Since both the electronic and print media are available in Sinhala, Tamil and English, they provide information and entertainment for the entire community. The Government is openly criticised in both the print and electronic media. The Government, which earlier had a monopoly over the transmission of news, has permitted the private radio and television stations to air their own news bulletins and current affairs programmes often in an interactive fashion. Private channels also broadcast discussions and comments on topics of current interest. Further, international news programmes beamed by BBC, CNN, VOA, SKY etc. and other programmes, talk shows, documentaries are also aired over local TV and radio stations.



357. The government on the 15th of July 2001 removed restrictions imposed under the Public Security Ordinance on the media on the coverage of war. At present both foreign and local media enjoy unbridled freedom of the press.

### **Parliamentary privileges**

358. The last occasion the Human Rights Committee examined Sri Lanka's periodic report submitted under the ICCPR, it expressed concern about the provisions in the Parliamentary (Powers and Privileges) Act which empowered Parliament to, inter alia, punish as breaches of Parliamentary privileges "wilful publication of a false or perverted report of a Parliamentary or a Committee thereof, misrepresentation of a speech made by a member in Parliament or a Committee and publication of a defamatory statement reflecting on the proceedings and the character of Parliament or concerning any member in respect of his conduct as a member".

359. The reasons for the existence of such a statutory provision is to ensure that interested unscrupulous element do not distort for their benefit words said or spoken in Parliament by its members during its proceedings. Given the cut-throat nature of electoral politics probability of such an incident occurring is very high. Since the general public elects individuals to parliament and parliamentarians are ultimately accountable to the people it is only fair that a state enacts legislation protecting the right of voters to see and hear authentic versions of the deeds and statements of their representatives in the legislature. If not the elector would be denied a proper standard from which he or she may gauge the performance of the representative he or she elected to parliament. Such a right is of importance especially in the context of a re-election bid. Therefore there is a direct co-relation between the Parliamentary Privileges and the right to franchise of an individual. Further, in Attorney General v. Nadesan the Supreme Court held that the Parliamentary (Powers and Privileges) Act, cannot in any way be utilised to stifle objective criticism on the conduct of parliamentarians and parliamentary proceedings.

### **Repealing the Penal Code provisions relating to the offence of criminal defamation**

360. The government in keeping with its manifesto pledge has announced that it would be tabling in parliament an amendment to the Penal Code repealing Chapter 9 of the Penal Code, which are the provisions relating to the offence of Criminal Defamation. However, the government has given a commitment to the representative bodies of the press that it would do so only after ascertaining their views on the draft legislation. In repealing these provisions, which are essentially a hangover of colonialism Sri Lanka would be joining growing international consensus, which seems such provisions as unnecessary and repressive.

### **Legislation of a freedom of information bill**

361. The government manifesting its commitment towards fostering a culture of transparency and accountability in public bodies agreed to the proposal put forward by the Editors for the legislation of a Freedom of Information Bill. Towards this end the Prime Minister appointed a committee comprising of Mr. K.N. Chosky, Mr. Imtiaz Bakeer-Markar and Mr. Bradman Weerakoon to study the draft legislation presented by the Editor's Guild.

362. This bill is intended to compliment the right to information as inferred by the Supreme Court as an ancillary right to the Freedom of Expression as provided by the constitution. This law by minimizing administrative restrictions and bureaucratic procedures relating to public access to government held information would enhance the ability of the public to be effective participants in the process of decision whilst ensuring accountability on the part of public officials. It would also enhance the protection provided by law to journalistic sources. The scope of the limitations imposed on the right to the freedom of information in this legislation would be strictly restricted to, even in times of emergency to those warranted by the exigencies of the situation and ones reasonably and justifiable in the establishment of an open and democratic society based on the values of human dignity, equality and freedom.

### **Establishment of a Training Institute for Journalists**

363. A training school for journalist with an emphasis of imparting of professional skills as opposed to academic knowledge has been a long felt need. The government recognizing this has undertaken to provide the necessary infrastructure for the establishment of this institution. The proposed institution would have an autonomous governing structure solely representative of the journalistic profession sans any government control.

### **Establishment of a Press Complaints Commission**

364. The Government has consented to the proposal brought by the Editor's Guild and the News Paper Society of Sri Lanka, the organization representing the interest of the private Newspaper publishers for the abolishing of the Press Council and replacing it with a Voluntary Press Complaints Commission, modelled on the British institution bearing the same name. This institution would be a self- regulatory mechanism run and financed by the various organizations and professional bodies of the News Paper industry. The principal objective of this institution would be to ensure that the media in Sri Lanka is free and responsible i.e. that it is sensitive to the needs and expectations of its readers whilst maintaining the highest journalistic standards. Arbitration and mediation would be the methods of dispute resolution of this institution. The membership of the Commission would be constituted of the nominees of organizations representing the interests of the publishers of newspapers, editors and journalists. In contrast to the Press Council whose membership was appointed exclusively by the President, the advantage of this type of mechanism is that since it is self- regulatory it is highly unlikely that it can be opened to allegations of an inherent government bias in its discharge of its duties. A voluntary code of conduct signed by editors and publishers of newspapers would be the benchmark used by this institution in resolving disputes. The government's role in this institution would be restricted to providing the necessary infrastructure and start up capital towards its establishment.

### **Article 20. Prohibition of propaganda of war**

365. The Directive Principles of State Policy and Fundamental Duties under the Constitution of Sri Lanka state that it is the duty of every person to defend the constitution and the law, and to further the national interest and to foster national unity (Article 28).

366. Under the Penal Code of Sri Lanka, the Prevention of Terrorism (Temporary Provisions) Act and the Emergency (Miscellaneous Provisions and Powers) Regulations, the advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence are offences. Similarly, Regulation 26 of the Emergency Regulations makes it an offence to promote or foster feelings of hatred or hostility between different sections, classes or groups of inhabitants.

#### **Article 21. Freedom of Assembly**

367. The right to freedom of assembly is ensured under Article 14 (1) (b) of the Constitution of Sri Lanka, which states that every citizen is entitled to the freedom of peaceful assembly. It further stipulates that the restrictions under this right must be prescribed by law in the interest of racial and religious harmony [Article 15 (3)], national security, public order etc [Article 15 (7)].

368. The right of peaceful assembly is freely and frequently utilised not only by workers but also by the general public in the case of strikes, rallies, demonstration or protests, public gatherings, political or religious meetings etc.

#### **Article 22. Freedom of Association and the Right to join a Trade Union**

369. Labour legislation was first promulgated in the country in 1865, in order to provide statutory protection to persons entering into service contracts. Subsequently, many labour laws were enacted to extend protection to workers including women and children. The existing labour legislation of Sri Lanka applies with equal force throughout the country with no exception being made to Free Trade Zones (FTZ) or Economic Processing Zones (EPZ).

370. The beginning of a working class movement in Sri Lanka could be traced to the 1890s; the first collective action was reported in 1893. In the course of time, a strong tradition of trade unionism evolved in the country - a tradition which is inextricably linked with the significant role played by trade unions in the independence movement of Sri Lanka.

371. During the early 20th Century, the Ceylon Workers' Welfare League and the Ceylon National Congress adopted resolutions which demanded, inter-alia, the grant of the right of association to workers; the fixing and regulation of minimum wages and hours of work; the abolition of child labour; and the ensuring of good working and living conditions to workers. Some of the earliest trade unions were formed between 1923 and 1928. The All Ceylon Trade Union Congress was established in 1928. From around 1923 onwards, the left-wing socialist parties entered the political arena and espoused the cause of workers' rights.

372. The above developments culminated in the enactment of several important labour laws which included the Trade Union Ordinance of 1935 that gave recognition to the rights of the workers to join and form a trade union of their choice. This was followed by a series of labour legislation: the Workmen's Compensation Ordinance of 1935 which provided for the payment of compensation to workmen who sustained physical injuries in the course of employment; the Employment of Females in Mines Ordinance of 1937; the Employment of Women and Young Persons Act of 1956; the Maternity Benefits Ordinance of 1939 which made it compulsory for employers to make payments by way of cash benefits and leave benefits to women workers

during confinement and to ensure the safety and health of the mother and child before and after confinement; the Wages Board Ordinance of 1941 which provided for the regulation of terms and conditions of employees and stipulation of minimum wages; the Shop and Office Employees (Regulation of Employment and Remuneration) Act of 1954; the Factories Ordinance of 1942 which provided for ensuring the safety and health of workers employed in the factories.

373. The Industrial Disputes Act of 1950 was a landmark legislation with regard to the promotion of labour relations and industrial peace in the country. This Act provided for the prevention, investigation, settlement of industrial disputes, and promotion of collective bargaining with a view to maintaining a better employee- employer relationship. The efficacy of this legislation was enhanced by an amendment brought about in 1999.<sup>35</sup> This amendment sought to protect employees from being victimised by employers for their trade union activities. Sri Lanka is also a party to two fundamental conventions of the ILO, namely the Convention on Right to Organise and Collective Bargaining No. 98 of 1949 and the Convention on Freedom of Association and Protection of Right to Organise No. 87 of 1948. Sri Lanka ratified these instruments on 13.12.1972 and 15.11.1995 respectively.

374. The First Republican Constitution of Sri Lanka (1972) incorporated a chapter on fundamental rights and freedoms, which enabled trade unions to function effectively. Under Article 18 {(1) (f) and (g)} of the 1972 Constitution, all citizens have the right to freedom of peaceful assembly and of association, and every citizen has the right to freedom of speech and expression, including publication.

375. The Freedom of Association and the freedom to form and join a union are basic rights enshrined in the Second Republican Constitution of 1978. Article 14{(1) (c) and 14 (1) (d)} guarantees freedom of association and the right to form and join a trade union (TU) to every citizen of Sri Lanka. However, under Article 15 freedom of association can be restricted by law in the interest of racial and religious harmony, and in the interest of national security.

376. The Courts of Sri Lanka have not been hesitant to uphold the constitutional right to freedom of association. In the case of *K. A. D. A. Goonaratne v. Peoples' Bank*, a case instituted under the 1972 Constitution, the Supreme Court held that a restriction by the employer that an employee should resign from the membership of a particular trade union before being eligible for promotion and that he should not hold membership of such trade unions while holding a post in a particular grade was obnoxious to the fundamental right to the freedom of association guaranteed by the Constitution. The Supreme Court made the following observations in regard to the right of membership of a trade union:

“The right of all employees (except a few prescribed categories) to voluntarily form unions is part of the law of this land. It exists both in the Constitution and in statute form. No employer can take away this statutory right by imposing a term to the contrary in a contract of employment. But of course where the State considers a restriction of this right is necessary for good cause, it is enabled to do so by Section 18 (2) of the 1972 Constitution. Such a restriction can be imposed only by law and only for grounds set out in Section 18 (2) and no other.”

377. The Supreme Court interpreting the provisions which guarantees the freedom of association under the present constitution has defined it as an “indispensable means of preserving liberties concerned with a wide variety of political, social, economic, educational, religious and cultural ends”. Further, M.D.H. Fernando J in *Bandara v. Premachandra*, stated “... Article 14(1)(c) is of general application to all forms of associations, including trade unions; and not only to the initial act of forming or joining an association, but to continuing membership and participation in the lawful activities of the association”.

378. The Trade Union Ordinance No. 14 of 1935 (as amended) defines a Trade Union as any association or combination of workmen or employers, whether temporary or permanent, having among its objects one or more of the following objects:

- The regulation of relations between workmen and employers or between workmen and workmen or between employers;
- The imposing of restrictive conditions on the conduct of any trade or business;
- The representation of either workmen or employers in trade disputes; or
- The promotion or organisation or financing of strikes or lockouts in any trade or industry or the provision of pay or other benefits for its members during a strike or lockout, and includes any federation of two or more trade unions.

379. A workman is defined very widely in the Ordinance as a person who has entered into or works under a contract with an employer in any capacity whether the contract is expressed or implied, oral or in writing and whether it is a contract of service or apprenticeship or a contract personally to execute any work or labour and includes any person ordinarily employed under such contract, whether such person is or is not in employment at any particular time. The Ordinance also contains provisions intended to create a legal environment for Trade Unions to function freely in the attainment of their objectives.

380. The Ordinance however precludes judicial officers, members of the armed forces, police officers, prison officers and members of the Agricultural Corps established under the Agricultural Corps Ordinance from forming into trade unions.

381. As indicated earlier, the Labour Laws of Sri Lanka do apply in their entirety to the whole of the Island. Thus, the Export Processing Zones (EPZ) are not excluded, and there is no legislation preventing the workers in the zones from being members of a TU. However, the unionisation rate is very low. This is not an outcome attributed to the prevention of workers from joining trade unions, but to other factors such as the predominance of female employees (around 80 per cent) working in the Zones and their reluctance to join trade unions and the inability of the trade unions to penetrate into these areas. However, there are instances where some of the EPZ workers have joined trade unions and other worker organisations operating outside the Zones.

382. In the EPZ the option the workers have for trade unions are Employees' Councils (EC). Currently around 125 Employees' Councils are functioning in EPZs. Each EC comprises 5-15 elected workers. The Board of Investments (BOI) and the Department of Labour conducts elections for the ECs. The BOI officials constantly monitor the activities of the ECs. The main tasks of the ECs are grievance handling and worker welfare. When disputes occur and the management fails to resolve it, attempts are made by the BOI officials to bring about an amicable settlement. The prevailing consultative process between the workers, the management and the BOI has proved to be very effective. In the event an amicable settlement cannot be reached, the dispute is referred to the Labour Department for determination. A dispute could also be referred to the Department of Labour in the first instance. In such an instance the Department of Labour makes all attempts to settle the dispute by conciliation. The workers also could seek redress at the Labour Tribunal for termination of services.

### **Article 23. Equality within the family**

383. Article 27(12) of the Constitution states that the State shall recognise and protect the family as the basic unit of society.

384. There is no discrimination between men and women in regard to family benefits such as the right to loans and the right to participate in all cultural and sports activities. Both spouses have equal rights to married allowances and pension benefits. Provident fund benefits are available under specified conditions, which are equally applicable to both males and females, except in one instance. The exception is that a female who ceases to be employed in consequence of marriage can claim the fund benefits. {Vide Article 3(1) b of the Employees' Provident Fund Act, No. 15 of 1958}. Food stamps are also available to eligible persons irrespective of the sex. Men and women have the same rights to conclude bank loans and other forms of financial assistance.

385. However, as Sri Lanka is a multi-racial and multi-religious society, some women continue to be governed not by the general laws of the country, but by their own customary or religious laws which determine their rights and obligations in the areas of family relations and property.

### **Civil matters**

386. Under the Roman-Dutch Law women suffered disabilities in the area of civil matters. However, the statutory reforms introduced by the British in the 20th century removed the above disabilities on women in relation to civil matters.

387. Under the Common Law, an unmarried woman is considered a *femme sole* and has no restriction whatsoever in relation to legal rights pertaining to contracts, business transactions and administration of property. Unmarried women under all systems of law have similar rights. All systems of law also recognise an unmarried adult woman's right to full enjoyment of her earnings.

388. In the case of married women under the General Law, contained in the Married Women's Property Ordinance of 1923, the Kandyan Law and the Muslim Law, complete freedom is vested in married women with regard to contracts, business transactions, property and earnings. Since recently, a wife's income is separately assessed for purposes of tax. With regard to married women governed by the Thesawalamai, although the Jaffna Matrimonial Rights and Inheritance Ordinance of 1911 gives a married woman full powers to transact with regard to her movable property and earnings, no disposal of immovable property can be made without the husband's consent. However, where a husband withholds consent unreasonably or in exceptional circumstances, the court has the power to authorise the disposal of immovable property.

389. The Civil Law also contains protective provisions that no female judgement debtor can be sent to jail for default.

390. Under the General Law of matrimonial rights and inheritance, the surviving spouse has equal rights to succeed to the property of the deceased spouse where the property has not been disposed of by will. However, there are significant differences in regard to intestate succession between the General law on the one hand and Thesawalamai and Kandyan law on the other. The Muslim Law however, indicates a preference for males in intestate succession.

391. Unlike earlier when the age of testamentary capacity was 18 years for women and 21 years for men, the freedom of testation is now available to both males and females at the age of 18 years in terms of the Wills (Amendment) Act No. 5 of 1993. (The age of majority was reduced to 18 years from 21 years in terms of the Age of Majority (Amendment) Act No. 17 of 1989.) As discussed earlier a woman subject to the Thesawalamai can however dispose of her immovable property only with the consent of the husband.

## **Marriage**

392. The minimum age of marriage under the General Law was 12 for girls and 16 for boys. This difference has been rectified and the marriageable age has been raised to 18 year for both sexes by the Marriage Registration (Amendment) Ordinance of 1995. The customary marriageable age under the Kandyan Law was also raised to 18 years under the Kandyan Marriage and Divorce (Amendment) Act of 1995. The General law of the land is applicable to Tamil inhabitants in respect of marriage. However, in matters relevant to property Thesawalamai Law governs them. There is no minimum age of marriage under the Muslim Law, which merely confers on a Quazi the right to exercise some control over marriages to be solemnized where the bride is under the age of 12 years. Any amendment to the age of marriage under Muslim Law has to be initiated by the Muslim community itself.

393. The decision to raise the minimum age of marriage to 18 years to all males and females, irrespective of the laws to which they may be subject (except Muslim Law), is in recognition of the welfare of the nation, on the grounds of health, eugenics, as a deterrent against maternal mortality and as a salutary measure on the birth rate and the current population policy of the State. Sri Lanka is also a signatory to the UN Convention on Consent to Marriage and the Minimum Age of Marriage.

394. Due to the raising of the age of marriage and other socio-economic factors there has been a significant rise in the age of marriage of women. Child marriages even among the Muslim community are quite rare.

395. A woman's express consent to a contract of marriage is a pre-requisite of a valid marriage under all the laws, although under the Muslim law the bride's father or guardian communicates such consent. In a Muslim marriage there is no provision for recording the consent of the bride in the registration form. Various committees, including the Muslim Law Research Committee have recommended that provision be made to record a bride's consent to a marriage. With the spread of education among Muslim females, the social conditions that led to the exclusion of the bride's signature are no longer prevalent in the Muslim community.

396. Free choice of marriage is available to all persons who are legally permitted to enter into a contract of marriage. Within the more conservative sections of society, arranged marriages are also common but they are subject to the required consent of the bride. Matrimonial columns in the local newspapers reveal that marriages are arranged by parents and elders not only for women but also for men. About 30 per cent of the columns concern matrimonial partners for men.

### **Family relations**

397. During the existence of a marriage, the concept of the male as the head of a family unit is still prevalent. Legislation governing children and young persons as well as general marriages and Kandyan marriages, emphasize that during the subsistence of a marriage, the father has preferential rights as natural guardian. The Muslim Law also confers significant rights over minor children upon the father.

398. Though the preferential right of the father was recognised earlier on custody issues upon divorce of the parents, the trends in recent judicial developments have been to emphasize the "best interests of the child." This principle applies even in custody disputes under Muslim law.

399. The property rights of married women and their legal capacity have been referred to earlier.

400. As regards dissolution of marriage, the same grounds for divorce exist under the General Law for both men and women. They are adultery subsequent to marriage, malicious desertion, and incurable impotency at the time of marriage. A judicial separation can be converted to a divorce after 2 years.

401. Under the Personal Laws grounds of divorce are more liberal than under the Common Law. In the Kandyan Law the grounds for divorce are adultery by the wife after marriage, adultery by the husband coupled with incest or gross cruelty, desertion by either spouse for 2 years, inability to live happily together and mutual consent.

402. Under the Muslim Law, divorce is available on the mutual consent of both parties. In the absence of mutual consent a wife can apply for a divorce on the fault grounds of husband's ill treatment or cruelty or any act or omission amounting to a fault. No grounds are laid down in



respect of a husband who wishes to obtain a divorce. Where a husband intends to divorce his wife he is required to give notice of his intention to the Quazi of the area in which the wife is residing. If the Quazi is unable to bring about reconciliation within 30 days the husband can obtain a divorce by following the procedure prescribed in the second schedule of the Marriage and Divorce Muslim Act No. 13 of 1951 (as amended).

403. The Administration of Justice (Amendment) Law also provided for maintenance in matrimonial actions to be claimed by either spouse and the position remains the same under the Civil Procedure Code now governing the subject. The concept of duty of support, which was earlier upon the man, is now extended also to the woman. The present laws governing maintenance are presently being updated with the view of having a separate act on maintenance.

404. Although polygamy and polyandry had been recognised by the traditional Sinhala Laws, in the 19th century, the British Colonial rule made polygamy and polyandry illegal. Today bigamy is a penal offence except in the case of Muslims, who in fact practice polygamy only very rarely in Sri Lanka. Further, the Muslim Marriage and Divorce Act of 1954 contains provision to give notice to the first wife by a man who intends to contract a second marriage. Statistics reveal that only one half per cent of registered Muslim marriages are polygamous. A few instances of non-Muslims converting to Islam, solely for the purpose of a polygamous marriage, has led to proposals being made to invalidate any subsequent marriage entered into without the legal dissolution of an earlier marriage.

405. A father's obligation to maintain a child upon the dissolution of a marriage is expressly recognized by the Maintenance Ordinance.

406. Under General Law a father is statutorily obliged to maintain his illegitimate children; although under traditional Islamic Law no such obligation is imposed on a father, in Sri Lanka such a duty has been imposed on a Muslim father by statute. The recognition of such an obligation has been made due to the impact of the Maintenance Ordinance.

### **Representation of minors**

407. In terms of the Civil Procedure Code now in force, men and women have the same rights to institute actions on behalf of minors, as next of kin. However, married women were precluded from being appointed as guardians for minor defendants. This prohibition was removed in 1975 with the enactment of the Administration of Justice (Amendment) Law, which repealed the Civil Procedure Code then in force. However, with the automatic reintroduction of the former Civil Procedure Code in its entirety in 1977, the preclusive provision too was automatically reintroduced though not intentionally. Amendment to the civil procedure to rectify this anomaly has received cabinet and presently is in the process of being presented to the legislature.

408. With regard to the institution or defence of an action by a person adjudged to be of unsound mind, the same provisions apply as in the case of a minor.

### **Adoption of children**

409. Under the Adoption of Children Ordinance of 1941, any person may apply to court for the Adoption of a child. No adoption order can however be made where a sole applicant is a male and the child in respect of whom the application is made is a female, unless the court is satisfied that there are special circumstances which justify the making of such an adoption order.

### **Citizenship**

410. Sri Lankan law does not recognise the *ius soli* concept and confers citizenship on the basis of descent. In the case of marital children, citizenship is granted through descent from males born in Sri Lanka. Consequently, a Sri Lankan woman who marries a foreigner cannot obtain Sri Lankan citizenship by descent, as a right, for her child.<sup>36</sup> However, in the case of non-marital children, such a child is granted citizenship by descent exclusively through the nationality of the mother.

### **Violence against Women**

411. The Women's Charter emphasizes the State's commitment towards ensuring the "right to protection from gender based violence." The Charter affirms that the State shall take all measures to prevent the phenomenon of violence against women, children and young persons in society, in the work place, in the family as well as in custody in particular such manifestation of it as rape, incest, sexual harassment and physical and mental abuse, torture and cruel, inhuman or degrading treatment.

412. The law in its present application affords protection for women victims of gender related violence. The Government has given due attention to the issue of violence against women by introducing amendments to the law on sexual offences in 1995. Accordingly, amendments made to the Penal Code reviews and redefines sexual violence, while it recognises sexual harassment and trafficking in persons as punishable offences. The definition of rape has been enhanced to include recognition of marital rape where the spouses are judicially separated, custodial rape, rape of a pregnant woman, rape of a woman under 18 years, rape of a woman who is mentally or physically disabled, and gang rape. The penalties for rape, incest, procurement, grave sexual abuse and grievous hurt, have been made more stringent and minimum mandatory sentences have been introduced while, the provision for whipping of the guilty party has been removed in keeping with international standards that have been accepted by the Government. Domestic violence per se is not identified as a punishable offence, nevertheless, the abuser can be prosecuted under the Penal Code for causing grievous bodily harm under the new amendments to the law. The government is currently engaged in a consultative process aimed drafting a legislation that would exclusively deal with the subject of domestic violence. One the principal objective of the bill would be to empower any victim of domestic violence to get a protection order, a more comprehensive remedy than the prevailing injunctions.

## **Article 24. Rights of the Child**

413. Article 27 (13) of the Constitution of Sri Lanka requires that the State shall promote with special care the interests of children and youth, so as to ensure their full development (physical, mental, moral, religious and social) and to protect them from exploitation and discrimination.

414. The Monitoring Committee on the Implementation of the Children's Charter (Children's Committee) has studied the concluding remarks made by the Committee on the Rights of the Child, and action is being taken in regard to the issues raised. The Children's Committee meets once a month to review progress. The priority attached to the protection of children and youth is reflected in budgetary provisions. The allocations provided for the Acton Plan for children under the Ministry of Health and Social Services have been maintained at an undiminished level though most Ministries and Departments are experiencing budgetary constraints.

### **Birth certificates**

415. Under the laws relating to the registration of births, the birth of every child is required to be registered. A child born in Sri Lanka has the status of a citizen if his father was a citizen at the time of birth. In the case of children born out of wedlock, citizenship devolves from the mother.

### **Health Care**

416. The Government lays great emphasis on health care and nutrition. The Government is committed to reducing malnutrition among children, and has taken action in this regard. A National Nutrition Steering Committee has been set up to monitor and co-ordinate nutrition improvement programmes. The State Health Service has also been carrying out the following programmes to uplift the health conditions among children: universal child immunization, control of diarrhoeal diseases, control of acute respiratory infection, growth monitoring and promotion, baby friendly hospital initiatives, psycho-social development, school health, family planning and monitoring the implementation of the marketing code for breast milk substitutes. The recent polio immunization programme was conducted island-wide, including the areas affected by the conflict. It is reported that there have been no confirmed cases of polio in Sri Lanka since 1994. Furthermore, there has been a steady decline in the infant mortality rate (16 per 1000 live births) as well as the maternal mortality rate (30 per 100,000 births). Moreover, food stamps are given by the State to poor families to supplement their nutritional needs, specially those of children. The total value of food stamps provided in 1996 amounted to Rs. 420 million.

### **Education**

417. Economic hardships are identified as the main cause for school drop-outs and non-attendance at school. Due to poverty, children are forced to take part in domestic/income generating activities, which prevent them from attending school. Children are generally used when the demand for labour peaks during such times as the cultivation season and the harvesting season. This is especially prevalent in the rural areas. To facilitate school attendance island-wide, the Government provides free textbooks, school uniforms, mid-day meals and

subsidised transport for school children. To help those who fail to continue formal education due to economic constraints, non-formal education programmes in basic literacy and vocational training are provided by the non-formal literacy centres of the Ministry of Education. Special education is provided for children with disabilities under a special scheme with teachers trained in the subject.

418. Though the Education Ordinance of 1939 provided for the introduction of regulations for making education compulsory for children between specified age limits this provision was not brought into operation. However, the Government has introduced regulations and legislation to enforce compulsory education for children aged between 5 and 14. It is hoped that these measures would will eliminate early dropouts and reduce the incidence of child labour.

419. The Ministry of Education & Higher Education together with the National Institute of Education is engaged in the revision of educational policy and curriculum; and is searching for alternative methods of making education more meaningful to the students. Many efforts are being made to improve the quality of education and teaching throughout the country. In this context, provision of teachers to remote areas has also received priority attention of the Government. Education on Conflict Resolution (ECR) and human rights have already been integrated into the school curriculum at the primary and secondary levels. Education programmes on AIDS and STD are also being conducted at the secondary level.

420. Furthermore, in order to involve teachers in fighting child abuse, the Teacher Education Management has now taken steps to include Child Rights in the curriculum of Colleges of Education and Teachers Colleges.

### **Adoption**

421. Under the law governing adoption as enacted in the Adoption of Children's Ordinance of 1941, an adoption will only be made for the welfare of the child. This general principle applies in addition to any provisions of any written or other law relating to the adoption of children by persons subject to the Thesawalamai Law or the Kandyan Law. This is in accordance with the fundamental principle embodied in Articles 3 and 21 of the Rights of the Child Convention and in Articles 3 and 22 of the Children's Charter. The Adoption of Children's Ordinance also enjoins that the wishes of the child will be given effect to, having regard to the age and understanding of the child. The Thesawalamai principles relating to the law of parent and child have for the large part been superseded by the Convention of the rights of the child. Muslim law requires consanguinity as a condition for qualifying oneself for intestate succession. The Adoption of Children's Ordinance being a general law does not abrogate the special law set out in the Muslim Intestate Succession Ordinance which prescribes that intestate succession to any deceased Muslim domiciled in Sri Lanka shall be governed by the Muslim law applicable to the sect to which the deceased Muslim belonged. The applicability of the above Muslim law requirement has been illustrated in a Supreme Court determination in *Ghousse v. Ghousse (1988 ISLR 25)*. In this case the Supreme Court held that Muslims who could adopt children under the Adoption Ordinance could nevertheless rely on Islamic principles of inheritance and deny an adopted child's right to succeed to his/ her adoptive parents' property if they died intestate. It is apparent that under the Muslim Law a distinction is maintained between a natural child and an adopted child.

422. Inter-country adoption is governed by the Adoption Ordinance as amended in 1992. The increasing demand for children for adoption by parents from developed countries resulted in grave abuse in the late 1980s. Intermediaries were making a commercial business of finding local infants and very young children for adoption by foreign parents. Timely action was taken by the Government to put an end to these abuses by amending the Adoption of Children Ordinance in 1992. Provisions of the amendment are summarised below:

- Suitable children for foreign applicants should be selected by the Commissioner of Probation and Child Care Services only from the State Receiving Homes and Voluntary Homes registered with the Department of Probation and Child Care Services for a period not less than five years;
- Priority shall be given to local applicants. A child can be considered for adoption by a foreign family only if there is no local applicant for him/her;
- The maximum number of adoption orders that can be made by all courts in any calendar year in favour of foreign applicants will be prescribed by regulation and that ceiling should not be exceeded;
- It is prohibited to keep expectant mothers or children with or without mothers in custody, for adoption purposes, in any place other than a State Receiving Home or Registered Voluntary Home;
- It would be an offence to give or receive a payment or a reward in consideration of adoption of children;
- Punishments for violation of the law are enhanced; and
- Adoptive parents will have to forward progress reports quarterly until the child's adoption is confirmed in the receiving country and half yearly after such confirmation for a period of two years and thereafter yearly until the child reaches the age of ten.

423. It should be noted that the safeguards specified in detail in the amendments with regard to inter-country adoptions are not stipulated in the same manner for local adoptions. What the law stipulates in the case of the local adoption is the general principle that it should be for the welfare of the child and that his or her wishes should be given due consideration.

424. Trafficking in persons was made an offence by the Penal Code (Amendment) Act No. 22 of 1995. The Amendment prohibits a series of acts which include, inter alia, the recruiting of women or couples to bear children, procuring children from hospitals, welfare centres etc. for adoption by intimidation; falsification of any birth record or register; impersonation of the mother or provision of assistance in such impersonation. Stringent penalties, including minimum mandatory sentences of imprisonment are prescribed for these offences.

### **Foster Parents and Sponsorship Programmes**

425. The Government has launched the Sevana Sarana Foster Parents Scheme under which benefactors, local and foreign, undertake to provide financial assistance to children selected from disadvantaged families. NGOs and religious bodies have also promoted such schemes by acting as intermediaries in bringing the foster parents and the beneficiary children together. The Department of Probation and Child Care implements a Child Sponsorship Programme under which needy children selected from poor families are paid a monthly allowance of Rs 200. Presently, this programme benefits covers only about 450 children. The Government plans to increase the coverage.

### **Child Labour**

426. The Employment of Women, Young Persons and Children's Act of 1956 contains detailed provisions with regard to such matters as the number of hours of employment, minimum age of employment for specified trades, conditions of employment etc. According to these provisions, children over the age of 14 may be employed under conditions, which ensure that the safeguards provided by the law are not violated. Children under the age of 14 can only be employed in the context of aiding parents or guardians in light agricultural or horticultural work. Even in such circumstances children under 14 cannot be employed during regular school hours.

427. Moreover, there is an absolute prohibition in regard to certain specified occupations. The regulations pertaining to employment of children under the Women, Young Persons and Children's Act and the Minimum wages (Indian Labour) ordinance<sup>37</sup> have been revised by the Department of Labour on the basis of recommendations made by the Children's Committee so as to ensure employment of children for whatever reasons is prohibited. The amended allows the courts to award compensation by the way of damages paid by the employee, to victims of child labour.

428. Despite the change in the law child labour remains a significant problem. A considerable proportion of those employed outside the family work as domestic servants. However, accurate estimates of young children thus employed are not available as employers are reluctant to provide information regarding young children in their employ. Therefore, in the prevailing circumstances, a strict enforcement of the law is difficult. In March 1996, the Ministry of Labour & Vocational Training granted authority to the Department of Probation and Child Care Services to conduct investigations in regard to child labour by inspecting households, under Section 34 (1) (c) (ii) of the Women, Young Persons and Children's Act. In order to take such children into protective custody, the Probation Officers have to be accompanied by police officers. The Department has launched a programme of public awareness to inform households of the existing legal provisions relating to child labour and to sensitise them to the human cost of child labour. As a result of these awareness programmes, 104 complaints were received in 1995. In Sri Lanka, families living under conditions of extreme poverty may want their children to work in households in order to obtain various benefits from the arrangement. Some parents send their children as domestic servants to rich households, which maintain a complex patron-client relationship. The complex social structures, which sustain child labour in these situations, both of the paid as well as the unpaid type, are not easily amenable to the law.

429. A National Workshop on child labour, funded by the ILO, was held in co-ordination with the Department of Labour, in September 1996. It was decided at this workshop to implement several action programmes to eliminate child labour in Sri Lanka in 1997. The Ministry of Labour and Vocational Training and the ILO jointly initiated these programmes. The ILO's programme on the Elimination of Child Labour (IPEC) set up a National Steering Committee on the Elimination of Child Labour in March 1997 which drafted a national action plan for the elimination of child labour.<sup>38</sup>

### **Child Prostitution**

430. The incidence of child prostitution, which has increased in the recent past, has been causing grave concern to both the Government and the public. The victims have been mainly male children. There have been increasing reports of paedophiles from western countries visiting Sri Lanka and engaging in sexual abuse of children.

431. The Department of Probation and Child Care Services in collaboration with the Ministry of Education and the Tourist Board has been disseminating information on child prostitution and has also been conducting public awareness programmes to combat child prostitution. The NGOs too have played a positive role in addressing the above problem.

432. The amendments introduced to the Penal Code in October 1995 contain provisions to strengthen the law relating to sexual offences against children. While new sexual offences against children, such as trafficking in children and grave sexual abuse have been specified, existing offences have been redefined and the penalties enhanced. The sexual offences recognised under the Penal Code are: use of children in obscene publications exhibitions etc.; cruelty to children; procurement; sexual exploitation of children; trafficking in persons; rape, incest, unnatural offences, gross indecency and grave sexual abuse.

433. The Police Department has opened desks as well as separate units to deal with crimes against women and children in 31 police divisions. These special units are deployed for investigating offences against children with regard to such matters as ill-treatment, sexual exploitation and child pornography. The Department of Probation and Child Care, through its awareness programmes, has been successful in obtaining a satisfactory public response. Presently, an increasing number of cases are being reported to the Police by the public. The Department of Police, the Department of Probation and Child Care and NGOs are making a collective effort to combat offences perpetrated against children.

434. The Government of Sri Lanka is presently co-ordinating with foreign governments to combat the menace of child prostitution and trafficking. In early 1997, the Government of Sri Lanka granted international judicial assistance to both the Swiss Government and the Government of Netherlands by allowing special investigative teams to visit the country to gather necessary evidence against the respective child abusers in respect of legal proceedings instituted in these countries. At present, both foreign nationals (Swiss and Dutch) have been arrested in the respective countries and are in preventive custody awaiting trial.

435. In December 1996, the President issued a directive to the Presidential Committee on Prevention of Child Abuse to draw an immediate action plan, which strictly deals with offences against children including sexual exploitation of children and child labour. Legal procedures, enactment of legislation, counselling and therapy for the victim and awareness creation are to be addressed in depth by this special Committee. The need for strengthening the childcare activities at the district level was also emphasised. The Action Plan for the prevention of child abuse focuses on:

- Establishment of a National Child Protection Authority (NCPA) under the purview of the President in terms of Article 44 (2) of the Constitution, empowered to formulate policy, monitor implementation and network all activities, in relation to this subject;
- Amendment to relevant existing laws and establish new legal procedures to ensure effective prosecution of the offender;
- Initiation of action to make child abuse a non-bailable offence;
- Establishment of a special desk at every police station to deal with offences against children with trained women officers;
- Creation of a facility (HELPLINE) for the public to report offences against children;
- Provision of comprehensive training programmes for probation and child care officers; and
- Introduction of children's rights, sexually transmitted diseases and relevant life skills into the education curriculum;

### **National Child Protection Authority (NCPA)**

436. One of the most important recommendations of the Presidential Task Force on Child Protection was the establishment of a National Child Protection Authority (NCPA). The NCPA bill was presented in parliament by the Minister of Justice in August 1998, and was passed unanimously in November 1998 (National Child Protection Authority (NCPA) Act, 1998).<sup>39</sup> It was gazetted in January 1999 and in June 1999 a board was appointed under the chairmanship of Prof. Harendra de Silva who was also the chairman of the Presidential Task Force on Child Protection.

### **The Composition of the NCPA**

437. The membership of the NCPA includes paediatricians, forensic pathologists, psychiatrists, psychologist, a senior police officer, a senior lawyer from the Attorney General's department and five other members associated with child protection efforts from NGOs. Ex-officio members consist of the Commissioner of Labour, the Commissioner of Probation and Child Care Services and the Chairman of the Monitoring Committee of the CRC (Convention on the Rights of the Child). Another panel of ex-officio members includes senior officers from the



Ministries of Justice, Education, Defence, Health, Social Services, Provincial Councils, Women's Affairs, Labour, Tourism and Media. The presence of high-ranking officials also facilitates the co-ordination of mechanisms of action suggested at NCPA meetings. Moreover, the NCPA also has the added advantage of being directly under the President. Raison d'être of the inclusion both governmental and non-governmental representatives in the membership of NCPA was to ensure effective co-ordination among the various actors involved securing the rights of children. Hence ensuring even in the implementation and formulation of government policy relating to child rights there is no departure from the principle of the "best interest of the child".

### **The mandate of the NCPA**

438. The NCPA has been given a broad range of powers, objectives and duties. These include;

- (a) Advising the government on national policy and measures in respect of the prevention of child abuse and the treatment of victims of child abuse and the protection of children.
- (b) Consulting and co-ordinating with the relevant ministries, local authorities, public and private sector organisations and recommend measures for the prevention of child abuse and protection of victims of child abuse.
- (c) Recommending legal, administrative and other reforms for the effective implementation of national policy.
- (d) Monitoring and implementation of other reforms for the effective implementation of national policy.
- (e) Monitoring and implementation of the law, the progress of all investigations and criminal proceedings in cases of child abuse.
- (f) Recommending measures in relation to protection, rehabilitation and re-integration into society of children affected armed conflict.
- (g) Taking appropriate steps for the safety and protection of children in conflict with law.
- (h) Advising and assisting local bodies and NGOs in co-ordinating campaigns against child abuse.
- (i) Co-ordinating promoting and conducting research on child abuse.
- (j) Organising and facilitating workshops, seminars etc.
- (k) Co-ordinating and assisting the tourist industry to prevent child abuse.

- (l) Preparing and maintaining a national database on child abuse.
- (m) Monitoring the organizations providing care for children.
- (n) Serving as liaison to and exchange information with foreign governments and international organizations.

#### **Awareness Programmes Conducted by the NCPA**

439. The NCPA is currently engaged in an awareness campaign through the mediums of advertisements placed in the print as well as electronic media and also by printing of posters, greeting cards and stickers. Efforts have been made to co-opt the corporate sector to support these endeavours. Further, one of the cardinal features of these programmes are the involvement of school based student clubs. This is aimed at encouraging the participation of students in promoting and protecting Child Rights. The NCPA has established “Child Protection Committees” in all schools (10,800) with tripartite participation by students, parents and teachers to address problems relating to Child Rights.<sup>40</sup> A book has been published and distributed by the NCPA among teachers stipulating the government’s guideline on the use of corporal punishment, a practice that is still widely prevalent in schools.

440. The tangible success of the awareness can be seen by the increase reportage of child abuse cases in the media. However, unfortunately the media while making a very positive contribution to the campaign in creating awareness about child abuse has also times found to be indulging in sensationalism in their reportage pertaining to allegations of child abuse. Further, with a “surfacing of the iceberg” phenomenon, child abuse is often interpreted as a new occurrence. Hence in order to enlighten the media on how to adhere to “child sensitive” reportage especially in the context of allegations of child abuse, the NCPA has initiated an on-going dialogue with all sections of the media.

#### **Skills development of Professionals**

441. Multidisciplinary training programmes as well as addressing the judiciary has been initiated with the sponsorship from the UNICEF, the British Government and the International Society for the Prevention of Child Abuse and Neglect (ISPCAN).<sup>41</sup>

442. AUSAID (Australian Government Aid) has funded the process of setting up District Child Protection Committees. The District committees would function similar to the NCPA at a district level later designed to spread to town/ village council level. Their main functions would be awareness creation to prevent child abuse, and monitoring. The NCPA has drafted the Terms of Reference (TOR) for the establishment of Provincial, District and Town/ Village committees, and is being implemented now.

443. SIDA (Swedish Government aid) has given funds, for the initial established of recording of video evidence (which was introduced as a law at the request of the NCPA). The training of the staff has been initiated.

444. The introduction of new legal policies has not had effects on the implementation of the law as yet. However, the NCPA has requested the Attorney General to open fresh trials, in cases where they felt the judgements were ‘inappropriate’. Since the NCPA has mandate to monitor investigation and law enforcement in cases of child abuse, several NGO’s are now sending complaints to the NCPA in relation to action taken by officials, what is considered inappropriate.

#### **Legal amendments made by the Task Force/NCPA**

445. The presidential task force recommended amendments, which are now legally in force. Previously in cases of rape, a preliminary inquiry (non-summary) by the magistrate, which was often protracted and led to psychological trauma to the child. The new amendment to the judicature act dispenses with the non-summary inquiry in the case of statutory rape (of children below 16 years), which has now reduced the duration of the court procedure.

446. The presidential task force also recommended other amendments, which are now in the process of implementation. One of the main amendments that envisaged is the amendment to the Evidence Ordinance, which would enable the video evidence of the preliminary interview of a child witness to be admissible in a trial.<sup>42</sup> The Department of Labour increased the minimum age for domestic labour from 12 to 14 years at the request of the NCPA.

447. Among the other recommendations that is in the pipeline of being legislated as amendments to existing legislation are: to dispense with the requirement of taking an oath in respect of child witness and to enable age indication in a doctor’s certificate to be considered prima facie proof of age where age is relevant in a case and there is no better evidence.

448. The proposed amendments to Juvenile Justice Laws by the NCPA have been approved the Cabinet of Ministers and are now with the legal draftsman. The NCPA has also made recommendations to laws pertaining to obscene publications.

449. It is also preparing a new medico-legal examination form (MLEF) for documenting child abuse, since at present only adult forms are used. The new MLEF would also have a feedback to the NCPA with “tear off slips” for both the judicial medical officer and the police, to ensure monitoring of action taken.

450. The NCPA has appointed a legal subcommittee to look at the feasibility of introducing an “Inquisitorial” judicial system for children as opposed to the adversarial system, which currently in use in cases which involving children. Steps have been taken on the initiative of the NCPA to amend the provisions of the bail act pertaining to paedophiles.

#### **Child Protection and Rehabilitation**

451. This is a “weak area” since the resources including manpower and expertise is lacking. At the moment many children remain in hospitals or orphanages if the child cannot be sent back home. In some instances, the children are sent to identified relatives. Foster care is not practical at present since the monetary resources are lacking, and it would mean the need for a large staff with social services/probation and child-care with appropriate training.

452. The NCPA is in the process of establishing guidelines for institutional care with more professional approach and training. A British Social Worker (VSO volunteer) is currently working with the NCPA in training instructors who in turn would train individuals working institutions providing care for children at a grass root level.

453. The NCPA has formulated a project proposal to improve the present institutional care for ex-domestic workers, street kids and child soldiers. The lack resources are inhibited its implementation.

454. Moreover, there are only 5-6 clinical psychologist in the country. However, none of them posses doctoral qualifications. Hence making the training of clinical psychologists at an undergraduate level impossible. Funding in the form of undergraduate as well as postgraduate scholarships would immensely contribute towards the improvement of institutionalised childcare.

### **Child Victims of Violence and Displaced Children**

455. The violent terrorism unleashed by the Liberation Tigers for Tamil Eelam (LTTE) has directly and indirectly affected the lives of a large number of children. They fall into several categories: children of displaced families; children who have witnessed and experienced violence; children of armed forces personnel killed in action; child combatants between the ages of 9-18 years who have been forcibly recruited by the LTTE. Children living in the Northern and Eastern provinces and children living in threatened villages of the districts of Puttalam, Anuradhapura and Polonnaruwa are among the worst affected. Even Children living in the other districts have also been affected by incidents of massive bomb explosions targeting civilians. An estimated population of two million is suffering as a result of the terrorist campaign. Many children have been killed, disabled and orphaned; many have been subjected to the trauma of witnessing extreme forms of brutality and violence, including the death of a parent or a loved one. Children of all communities - Sinhalese, Tamils and Muslims have been affected due to the terrorist activities of the LTTE.

456. While some of the displaced persons are housed in 373 welfare centres in various parts of the country, others are living with friends and relatives. The majority of the orphaned children are living with extended families or in the community with foster mothers. Displaced children are in various situations of deprivation and hardship.

457. The Government has taken several measures for the amelioration of conditions of these children and is working in close collaboration with international NGOs and agencies such as ICRC, Save the Children Fund, Oxfam and UNHCR. The prevailing situation has caused severe hardships to children in the areas affected by the conflict. The State has been providing all possible support to the refugees and displaced children in order to ensure their right to life, survival and development.

458. A special effort is being made to meet the needs of children in varying situations. A significant proportion of the affected families will not be in a position to return to the localities and homes from which they have been displaced. The task of rehabilitating them and providing them with the basic necessities of life has posed major problems. In the case of children, there

are several urgent needs that have to be met. They include health and nutritional needs of infants and pre-school children, education for children of school-going age, care and rehabilitation for children traumatised by violence and loss of parents, and restoration to homes and families in the case of children who have been separated from parents.

459. The Ministry of Rehabilitation and Reconstruction is entrusted with the responsibility of care and rehabilitation of refugees. These children have been provided with food, clothing, schooling and facilities for recreation. The Government has ensured the regular supply of essential goods including food and pharmaceuticals. Displaced children are eligible to attend schools in the areas where they seek shelter. Wherever there is a large influx of students, arrangements are made to conduct afternoon classes for displaced students from 2.00 p.m. to 5.00 p.m. as a temporary measure until adequate educational resources are provided. In January 1996, the Government launched a scholarship programme for displaced children to help overcome the difficulties and constraints faced by them. Under this programme a monthly allowance of Rs. 500/= is to be paid to eligible students on a merit basis. Counselling too is being provided to help the children deal with the mental trauma they have experienced. Several programmes have been initiated to deal with problems of traumatised children and those separated from their parents. Immunisation programmes and other health clinics have been conducted to provide health care for these children. The Government is working closely with NGOs to provide the basic needs of these children and their families. However, the magnitude and complexity of the problems are such that a sustained effort over a long period is required to deal with them effectively.

### **Child Combatants**

460. Article 38(2) of the Convention on the protection of the Rights of the Child states that State Parties should take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities. Sri Lanka has gone beyond this Article by insisting that all new recruits of the armed forces should be over eighteen years of age. Sri Lanka reiterated its unequivocal commitment towards the eradication of the problem of Child Soldiers by ratifying the Optional Protocol to the Convention on the Rights of the Child on the involvement of Children in Armed Conflict on 8th October 2000. Moreover, the Government of Sri Lanka has drawn up an action plan to tackle the problem of Child Soldiers.<sup>43</sup>

461. Sri Lanka's Directorate of Military Intelligence estimates that at least 60 per cent of LTTE fighters are below the age of 18 years. Even if this is considered an exaggeration, estimates of LTTE fighters killed in combat reveal that at least 40 per cent of the fighting force consist of girls and boys between the ages of 9 and 18 years. Children have been recruited as they are receptive to indoctrination fine tuned to their level of mental maturity, willing to engage in high risk operations, obedient and can easily use weapons such as M16, AK-47 and T-56 which are light in weight, easy to fire and maintain and require minimum training. Children are well known to be used for both gathering of intelligence and engagement in combat. They form the first wave of suicide attacks carried out by the LTTE against their targets. Children are used in all activities of the armed combat except in leadership positions.

462. Compared to the year 1994, more information is now available on child combatants. The nucleus of the LTTE baby brigade had been first formed in early 1984. A major recruitment drive to draw children was first launched in October 1987 as an added force to fight the 100,000 strong Indian Peace Keeping Force (IPKF).

463. It is also estimated that one-third of all LTTE recruits are females who serve in all units. Over the past several years, nearly all suicide bombers engaged by the LTTE have been females.

464. Originally, the majority of child combatants between the ages of 10 to 16 years were from Batticaloa, in the Eastern Province. However, now there are more children from Jaffna and the Wannai, in the Northern Province. The families of child combatants are termed "Great hero families" and receive special status wherever the LTTE is in control. They pay no taxes, receive preferential status in job interviews and are also allocated special seats in all public functions organised by the LTTE in areas controlled by them. The LTTE's unwritten rule is that every family should give a son or a daughter to its cause.

465. A typical unit of child combatants is trained for four months in jungles. They receive short haircuts to ensure that deserters can be easily identified. Parents have no access to their children during training.

466. The trained young fighters are prepared for battle, by attacking unprotected or weakly defended border villages. In these attacks, experienced fighters guide LTTE child combatants armed with automatic weapons. These civilian targets have no police and forward defence lines for protection. These groups are later deployed for attacks on army camps. To gain greater strength and surprise the LTTE mixes "Black Tigers", who are physically strong and psychologically mature and well trained, with the "Baby Brigade".

467. From late 1995 to mid 1996, the LTTE has recruited and trained at least 2,000 persons, largely from the displaced population in the North. It has been estimated that about 1,000 of these persons were between the ages of 12 and 18 years, and have since been dispersed among the fighting units. The LTTE has established a "Leopard Brigade", which is composed of children drawn from LTTE managed orphanages. The LTTE regards this group as its most fierce fighting source.

468. Although the LTTE sends their fighters into battle with cyanide capsules strung around their necks for committing suicide when taken as captives or injured, the majority of youngsters do not commit suicide when they are overpowered by the armed forces.

### **Graca Machel report**

469. Graca Machel, in her 1996 Report on the Impact of Armed Conflict on Children has raised the plight of the child combatants and has been a strong international advocate against this practice. Her report has received high priority of the Government in terms of implementing its recommendations. The Government of Sri Lanka has initiated action, both within the country as well as at international level, to advocate the elimination of the recruitment of children as combatants. This issue was raised by the Sri Lankan Foreign Minister at the 52nd United Nations General Assembly in September 1997.

470. The Government is planning a comprehensive programme not only to prevent recruitment but also to help in the rehabilitation and social integration of child combatants. There are also plans to provide professional psychological assistance to former child soldiers captured by or surrendered to the armed forces. External assistance is being sought for this programme. At present, former child combatants are housed in centres run by the National Youth Services Council.

### **United Nations intervention**

471. The Special Representative of the United Nations Secretary-General Mr. Olara Otunnu who paid a visit to Sri Lanka in May 1998 was able to perceive the plight of affected children in armed conflict during his tour of the Northern Province. The Government of Sri Lanka expressed willingness to implement a national programme for all children who are subject to trauma, disabilities and handicaps resulting from the war. Mr Otunnu met with the LTTE leadership in the Vanni and several issues concerning the protection, rights and welfare of children affected by the ongoing conflict were raised. The following commitments in relation to children in armed conflict were made by the LTTE in its discussions with him:

(a) Participation and recruitment of Children - The LTTE undertook not to engage children below the age of 18 years in combat and not to conscript children below the age of 17 years. The LTTE leadership accepted that a framework to monitor these commitments should be put in place;

(b) Freedom of Movement for displaced people - The LTTE made the commitment not to impede the movement of displaced people to Government controlled areas. Further, the LTTE made a commitment not to impede the displaced Muslim population from returning to their homes and accepted that a framework to monitor this process should be introduced;

(c) Distribution of Humanitarian supplies - The LTTE made a commitment not to interfere with the distribution of humanitarian supplies meant for the affected civilians and accepted that a framework to monitor this process should be enforced;

(d) Observing the Convention on the Rights of the Child - Mr Otunnu stressed the importance of all parties including the non-State sector, to observe the Convention on the Rights of the Child and urged the LTTE to make a public commitment to respect the principles and provisions of the Convention. The LTTE had indicated its readiness to let its cadres receive information and instructions on the provisions of the Convention; and

(e) Targeting civilians - The LTTE agreed to review its strategies and tactics and had indicated its readiness to let its cadres receive information and instructions on the provisions of the Convention.

472. The LTTE, despite the assurances given to the Special Representative, is continuing the recruitment of children below 18 years as combatants. This was clearly evident on several occasions when the combatants surrendered or were killed in the confrontations with security forces. The Government of Sri Lanka has brought this situation to the notice of Mr. Olara Otunnu several times since his last visit to the country.<sup>44</sup> Indeed the callousness and

the triviality with which the LTTE seems to be treating their commitments to Mr. Olara Otunnu led Mr. Kofi Annan, the Secretary-General of the United Nations to report the matter to the United Nations Security Council.<sup>45</sup>

### **Children in conflict with the law**

473. The laws relating to the administration of juvenile justice is contained primarily in the Children and Young Persons Ordinance enacted in 1939. This ordinance applies to persons under the age of 16 years. Provision for the detention of youthful offenders (those between 16 and 22) is found in the Youthful Offenders (Training Schools) Ordinance of 1939. Probation of offenders, including juvenile offenders, is governed by the Probation of Offenders' Ordinance of 1944. The Penal Code, Code of Criminal Procedure Act and the Prisons Ordinance also contain some special provisions applicable to juvenile offenders.

474. Children and young persons are required to be detained separately from adult offenders. Young suspects who are not granted bail are committed to remand homes. They cannot be committed to a prison. Parents of juvenile offenders are required, wherever possible, to attend all relevant courts proceedings. Prior to producing a juvenile offender in court, the police are required to notify a probation officer to make necessary investigations regarding the home surroundings, school record, health and character of the offender, and make such information available to court.

475. Action has been initiated by the Government to amend the laws relating to juvenile justice, based on the recommendations made by the Children's Committee. The Law Commission is presently reviewing all the relevant laws.

### **Article 25. Right to Take Part in Public Affairs**

#### **Karunathilaka and Deshapriya v. Dissanavaka and Others (Provincial Council Case)<sup>46</sup>**

476. The case of *Karunathilaka and Deshapriya* is an important decision since it confirmed the independent nature of the high constitutional office of the Commissioner of Elections. The Commissioner's independence was held to have been a power akin to a duty, the deliberate fettering of the exercise of which discretion would be deemed arbitrary in law.

477. Another equally important, reason is the Court's *dicta* on the constitutional position of the right to vote. This primary right of a democratic society, was projected to be not a fundamental right in the law of Sri Lanka by Counsel for respondents on the ground that such a right was not expressly provided for in Chapter III of the Constitution. The Court rightly rejected this argument and stated that "the silent and secret expression of a citizen's preference as between one candidate and another by casting his vote is no less an exercise of the freedom of speech and expression than the most eloquent speech from a political platform."

478. This petition was brought by two journalists, Varuna Karunathilaka and Sunanda Deshapriya. The latter was also one of the successful petitioners in the earlier *Nuwara Eliya Mayor's Case*.<sup>47</sup> This fundamental rights application was decided in January 1999 by a bench of



three judges: Chief Justice G. P. S. de Silva and Justices Fernando and Gunasekera. Justice Fernando delivered the unanimous judgement of the Court in a decision that is for many reasons, an important addition to administrative and constitutional case law.

479. The application was brought against Dayananda Dissanayake, the Commissioner of Elections, and the twelve District Returning Officers of the Central, North Central, Sabaragamuwa, Uva and Western Provinces and as required by law, the Attorney-General.

480. This case is important in that the application by only two petitioners as registered voters, affected the rights of all voters resident in the named provinces. As will become clear, the case took place against a dramatic background of a government attempting to employ methods that can only be described as contrary to the spirit of democracy in order to subvert the holding of elections to the named five Provincial Councils.

481. The five Provincial Councils stood dissolved by operation of law under Article 154E of the Constitution, as their lawful terms of office had expired. The Elections Commissioner had called for nominations for the elections, which had been submitted by the contesting parties and groups. These lists and the electoral symbols had also been duly Gazetted.

482. The Commissioner proceeded to issue Notices under s.22 (1) of the Provincial Councils Election Act (1988), fixing the date of the poll as 28th August 1998. Postal ballot papers were to be issued on 4th August 1998. Relating to these and other arrangements including the provision of security for the elections, a meeting also took place at this time between the Elections Commissioner, the Inspector General of Police, and representatives of political parties. At this meeting the IGP agreed to formulate an appropriate security plan, and no considerations of security impinging upon the holding of the elections were brought up at this point.

483. Then on 3rd August 1998, the issue of postal ballot papers by the Returning Officers (previously scheduled for 4th August 1998) was abruptly suspended by the Commissioner by telegram dated the same day. On the following day, 4 August 1998, the President under powers vested by s.2 (1) of the Public Security Ordinance, issued a Proclamation declaring an island-wide State of Emergency. Immediately thereafter, an Emergency Regulation was issued pursuant to the Proclamation, declaring inoperative the Commissioner's Notice under s.22 (1) Provincial Councils Election Act (1988), as far as the prefixed date of poll, 28th August 1998, was concerned.

484. The petitioners' primary line of argument was that the Proclamation was an unwarranted and unlawful exercise of the President's discretion under the Public Security Ordinance, because there was no evidence of a deterioration of the security situation in the country between the date of dissolution of the five Councils and the date of the Proclamation. Indeed as Counsel pointed out, it was precisely during this time that the South Asian Association for Regional Co-operation Summit was held in Colombo, which was also a high security event.

485. The petitioners also submitted that that no other Emergency Regulation other than the impugned one (referred to above) had been promulgated under the Proclamation was suggestive of both (i.e., the impugned Emergency regulation and the Proclamation), being part of one, homogenous scheme, with the sole objective of postponing the elections to the five Councils.

Counsel cited newspaper reports indicating that this was the Government's intention even before the Proclamation was made. If this was the case, then the Proclamation and the Emergency Regulation could not be held to be for a purpose envisaged or sanctioned by the Public Security Ordinance, and would therefore be invalid.

486. The Court responded to this argument by declining to pronounce on the validity of the Proclamation stating that it had not had the benefit of a full argument on the issue. But the Respondents' line of defence to the petitioners' challenge was to attempt to invoke the provisions relating to Presidential immunity from suit under Article 35 of the Constitution. This invocation of the issue of immunity, for long one of the most controversial features in our Constitution, enabled the Court to make extensive observations on the scope and limitations of Article 35. Justice Fernando held that "Article 35 only prohibits the institution (or continuation) of legal proceedings against the President while in office; it imposes no bar whatsoever on proceedings (a). against him when he is no longer in office, and (b). other persons [i.e., officials, etc.] at any time. That is the very nature of immunity: immunity is a shield for the doer, not for the act. ... Article 35, therefore, neither transforms an unlawful act into a lawful one, nor renders it one which shall not be questioned in any Court." Thus it can be seen that the Supreme Court's *dicta* in relation to Presidential immunity certainly extinguished some common misconceptions, chief among them the erroneous idea that such immunity, if not absolute, was near absolute.

487. In this way, the Court found that the respondents' conduct in cancelling the issue of postal ballot papers on 3rd August 1998, as well as the failure to make alternative arrangements for the holding of the poll after the original date of 28th August 1998 was past, bad in law. Thus it was held that these administrative actions and omissions impinged on the free exercise of the franchise enshrined in Article 4 (e) and that they violated the petitioners' right to equality under Article 12 (1), and their right to vote under Article 14 (1) (a) of the Constitution.

#### **Provincial Councils Elections (Special Provisions) Bill**

488. In November 1998 the Peoples Alliance Government introduced a Bill titled the "Provincial Councils Elections (Special Provisions) Bill" in Parliament. The preamble to this Bill read as "An Act to make provision enabling the Commissioner of Elections to fix a new date of poll for Western, Uva, Sabaragamuwa, Central and North Central Provincial Council Elections"

489. This Bill sought to achieve two objectives:

(a) To vest in the Commissioner of Elections the duty, within four weeks of the commencement of the Act, to appoint a new date of poll for the five provinces in lieu of the date already announced by the Commissioner's notice (clause); and

(b) To empower the secretary of a political party or the leader of an independent group to substitute, in place of the name of any candidate already appearing in a nomination paper (nomination process for these provinces were completed at the time of the postponement of the elections), the name of another person even without any notice being given to him (clause 3).

490. Six petitions were filed in the Supreme Court on 10th and 11th of November 1998 challenging the bill. The petitions averred that clause 2 and 3 of the bill were inconsistent with Article 3,4, 12, 154(2) and 154Q(a) of the Constitution.

491. With regard to clause 2, it was pointed out that the Provincial Councils Elections Act No. 2 of 1998 already contained a provision- Section 22(6), which gives the Commissioner of Elections the power to fix a new date of poll where an election cannot be held on the due date *due to any emergency or unforeseen circumstances*. Under that section, the Commissioner has the discretion to select the date of election for each province, subject to only the requirement that it must be less than 114 days after the publication of the Gazette notice.

492. The petitioners submitted that the bill was a legislative intrusion into the powers and discretion to fix a new date of poll in respect of pending electoral process, an area that, constitutionally, is the exclusive preserve of the Commissioner of Elections.

493. The entire petition was up for on the 16th November 1998 and judgement was delivered on 30th November 1998.

494. A Supreme Court bench constituting of Justices Fernando, Gunawardana and Weersekera observed that since the Emergency Regulation suspended the previous notices the Election Commissioner had gazetted announcing the date of the elections, he should have resorted to the powers vested in him by virtue of section 22(6). Hence, the Commissioner could have issued a notice appointing a fresh date for the poll which, being one issued in terms of that section, would not have been affected by the Emergency Regulations issued on August 4th.

495. The Court also held that clause 2 of the said Bill sought to compel the Commissioner to exercise his discretion in a manner different to all other Provincial Council Elections, past and future. This was considered an interference with the discretion given to the Commissioner by the Article 104 of the Constitution. While the position might have been different if clause 2 of the bill had been a general provision, amending section 22(6), clause 2 as was sought to be enacted applies only to the impending five elections of the five Provincial Councils. The Court imputed an improper motive for this special treatment for the five elections only.

496. It was observed that if the Commissioner had been allowed to fix new date under section 22(6), the election would have proceeded on the basis of the nominations already received, and the contest would have been between the candidates already on the respective lists.

497. What clause 2 sought to permit was an election of a completely different character, Clause 3 attempted to allow the substitution of new candidates in place of existing ones, possibly against the will of those existing candidates. The resulting contest could well be one between completely different candidates-a result, which could have been achieved under section 22(6).

498. The Court held that the Bill, under the guise of giving the Commissioner “necessary” power to fix a new date of poll, attempted to permit a virtually new nomination process and only for these five elections.

499. If the Commissioner's power to fix a new date for elections were dependent upon the enacting of the Bill, the election could be similarly delayed. However, it is clear that the 13th amendment, which created the Provincial Councils, did not envisage such a situation as it provides for automatic dissolution of a Council at the end of its term of office and makes no provision for a caretaker government.

500. The Supreme Court further held that clause 2 of the Bill was an interference with the franchise protected by Article 4(e) of the Constitution. The significance of this is that the text of Article 4(e) only refers to the exercise of the franchise at Presidential Elections, Parliamentary Elections and a Referendum. There was accordingly some doubt whether as to whether Article 4(e) protected the exercise of the franchise at Provincial Councils Elections. However, the Court held that Article 4(e) does not specifically mention elections to Provincial Councils simply because Provincial Councils were introduced subsequently by the 13th Amendment. Therefore, Article 4(e) must now be read and interpreted to include Provincial Councils Elections as well.

501. Clause 3 of the Bill, which allowed for the substitution of candidates, was held to be inconsistent with Article 12(1), as well as an interference with the franchise under Article 4(e) of the Constitution. Clause 3 of the Bill conferred on the Secretary of a Party and the Leader of an independent Group the power to remove the name of a candidate from a valid nomination paper without the candidate's consent, without a valid reason and even without notice. The Court held that this was a gross violation of the right to equal treatment of candidates standing for elections.

502. In its final determination, the Court held that clause 2 and clause 3 of the Bill were inconsistent, *inter alia*, with Article 12(1) of the Constitution.

503. In view of the Court's findings the Commissioner was possessed of power to fix a new date for polls, the Court ordered that clause 2 of the Bill be amended so as not to interfere with the discretionary power vested in the Commissioner of Elections under section 22(6) of the Provincial Councils Elections Act.

### **17th Amendment to the Constitution**

504. The enactment of the 17th amendment to the Constitution was a culmination of a process initiated by civil society and espoused by the then main opposition party the United National Party and later adopted by the then government upon reaching a consensus with all the political parties represented in parliament as to the contents of the enabling legislation. Its legislative objectives are two fold. They are the achievement of open and transparent governance devoid of corruption and political victimization i.e. the rejection of patronage politics and the promotion of the values of consensual governance in preference to confrontational politics. It seeks to achieve these twin objectives by vesting the power of appointment, transfer and dismissal of public servants and the judiciary earlier exclusively re-positing in the executive to three independent commissions, namely the Election Commission, Judicial Service Commission and the Police Commission, appointed by the President on recommendations by a ten member Constitutional Council constituted to reflect plurality not only in terms of ethnicity but also political affiliations. These powers of recommendation of the Council also extends to appointments made by the President to the membership of the Human Rights Commission, the Permanent Commission to

Investigate Allegations of Bribery or Corruption, the Finance Commission and the Delimitation Commission. The enabling legislation does not leave any discretion to the President to reject the recommendations made by this Council on these appointments.

505. In addition to its powers of recommendation, the Council is also vested with powers of ratification in respect of appoints made by the president to membership of the Supreme Court and the Court of Appeal and also to the office of Chief Justice, President of the Court of Appeal, Attorney General, Inspector General of Police, Auditor General, Parliamentary Commissioner for Administration and Secretary-General of Parliament.

506. Of the ten members only the Prime Minister, the Leader of the Opposition and the Speaker who is also the Chairman of the Council are permitted to be members of a political party. Other members need to be persons of eminence and integrity who have distinguished themselves in public life and who are not members of any political party. Out of these seven members five are appointed jointly by the Prime Minister and Leader of the Opposition in consultation with leadership of political parties and independent groups represented in Parliament whilst the President appoints one member and the other is appointed by the political parties and independent groups represented in parliament, other than the ones to which the Prime Minister and the Leader of the Opposition belongs to. Although the Prime Minister and the Leader of the Opposition are entitled to appoint five members, three of these members need to be appointed in consultation with leadership of the minority ethnic parties represented in parliament i.e. Muslim, Up country Tamil parties and the parties representing the interest of the Tamils from the North and East, in order to ensure the representation of the principal minority ethnic groups of the country in the membership of the Council.

507. The *raison d'être* of stipulating that the majority of the membership of the Council be constituted by non-partisan individuals of eminence and integrity, accepted by society at large as having distinguished themselves in their chosen vocations is that the powers of appointment to the highest echelons of the government not be the sole monopoly of the President and the Cabinet of Ministers. This is the primary legislative objective of the 17th amendment, that of de-politicization of the business of governance. Inclusion of both the Prime Minister and the Leader of the Opposition in the membership of the Council, under the Chairmanship of an individual not possessing an original vote and bound by Convention to act in a non-partisan way, is meant to achieve the second objective of the seventeenth amendment to the Constitution, that of engendering consensual governance. The legislative intention of achieving this objective is further reinforced not only by the diversity reflected in the membership of the Council in terms of ethnicity and political affiliations but also by the stipulation that the “ Council shall endeavor to make every decision by unanimous vote” and that five appointments to the Council need to be jointly made by the Prime Minister and the Leader of the Opposition. This also is reflective in the process of termination from the membership of the Council. A member of the Constitutional Council could be removed on the grounds of physical or mental incapacity only if both the Leader of the Opposition and the Prime Minister form a common opinion on the member's inability to perform his duties due to such an incapacity. Given that if there is no unanimity among the members of the Council on a particular issue, there needs to be a minimum of five members supporting it for it to be adopted by the Council, which has a six member quorum requirement, there is always a need for wide consensus to be reached among the membership of

the council on the given issue before it is adopted. Therefore the danger of Council becoming an instrument of majoritarian objectives, whether in ethnic terms or political affiliations, is non-existent.

## **Public Service Commission**

### **Membership of the Commission**

508. The Commission consists of nine members appointed by the President on the recommendation of the Constitutional Council, for three-year terms renewable up to two terms. Among these nine members, three members should possess at least 15 years of experience working as a public official. Upon appointment to the Commission not only does a member who immediately prior to his appointment as a member of the commission served as a public officer or a judicial officer cease to function in that office but also becomes ineligible for further appointment as a public officer or judicial officer. Similarly, election to the Membership of the Parliament or of a Provincial Council or to a Local Authority is an automatic disqualification from serving as a member of the Public Service Commission.

### **Powers of the Commission**

509. The Public Service Commission is vested with the power of appointing, promoting, transferring, dismissing and disciplinary control in respect of public officers. However, the cabinet retains the powers of appointment, promotion, dismissing and transfer and disciplinary control in relation to heads of departments, although they are required to ascertain the views of the Commission before doing so. The Public Service Commission is entitled to delegate its powers to an adhoc three-member committee or to a public officer none of who can be members of the Commission. During the period of such a delegation the Commission is prohibited from exercising any of its delegated powers. However, the Commission is given an appellate jurisdiction in respect of an order made by such a committee or public officer. A special three-member administrative appeals tribunal appointed by the Judicial Services Commission is empowered to hear appeals against decisions made by the Commission. Further, the authority of the Supreme Court under its fundamental rights jurisdiction to hear cases appertaining to administrative wrongs is preserved.

## **Elections Commission**

### **Membership of the Commission**

510. The membership of this Commission is constituted of five non-partisan individuals appointed by the President on the recommendations of the constitutional council for a five year term of office. They required to be persons who have distinguished themselves in any profession or in the fields of administration or education. Moreover, they cannot concurrently hold any elected political office or serve as a member of the judiciary or the public service in any other capacity during their tenure office as a member of the Commission. The procedure for the impeachment from the membership of the Commission is the same as the provisions pertaining to the impeachment of the appellate judiciary.<sup>48</sup>

### **Powers of the Commission**

511. The principal task of the commission is ensuring the conduct of elections and referenda in a free and fair manner devoid of violence. In this context, all other powers of the Commission have to be exercised. In fact the enabling legislation stipulates that it is incumbent both upon the Commission and the Commissioner General of Elections to secure the enforcement of entire gamut of laws required for the conduct of free and fair elections to secure the individual's right to franchise. The same provision also enunciates a corresponding duty on all state authorities to co-operate in the enforcement of such laws. In order to prevent the abuse and misuse of state resources for electioneering purposes, the Commission is empowered to make an order in writing either through the hand of its Chairman or the Commissioner General of elections, prohibiting the use of any movable or immovable property belonging to the State or any public corporation for the purpose of promoting or preventing the election of any candidate, political party or independent group contesting an election. A person in whose custody and control such property remains can be held accountable for breaching such a directive.

512. It has been recognized that the impartial non-partisan media reportage both immediately prior and during the conduct of an election, is a *sine qua none* for the conduct of an election whose outcome would reflect the will and the aspirations of the people. Indeed it is in this context that the Commission has been bestowed with the power to issue during the period of electioneering, guidelines to the media on ensuring impartial reportage on matters that have bearing on the outcome of an election. If the Sri Broadcasting Corporation (SLBC) or the Sri Lanka Rupavahini Corporation (SLRC), the principal state owned electronic media institutions are found to be in breach of these guidelines in their reportage, the commission has the power to appoint a competent authority to take over the management of the offending institution until the conclusion of the elections.

513. The Elections Commission subject to the approval of the Constitutional Council appoints the Commissioner General of Elections. Although he has no voting rights in the Commission, he is entitled to be present at the meeting of the Commission except when any matter relating to him is being considered by the Commission. In addition to the Commissioner General, the Commission can appoint any other officer it deems necessary for the conduct of free and fair elections and referenda. Supervisory power over these officials is vested with the Commissioner General subject to overall direction and control of the Commission. The powers of the Commissioner General and other officials responsible for the conduct of the elections are derived through the powers of delegation vested in the Commission. They are subject to its direction and are responsible to the Commission in exercising such powers. The appointment and naming of returning officers is also another power vested in the Commission. These returning officers are also mandated to work under the Commission's direction and are answerable to the Commission for their actions.

514. The Commission has the power to deploy the police officers needed for the conduct of free and fair elections. Hence the Commission can request the Inspector General of Police to make available to it any facilities and police officers needed for the conduct of free and fair elections. Such police officers are required to work under the direction of the Commission and

are also accountable for their conduct to the Commission. In addition, the Commission can make recommendations to the President on the deployment of the armed forces for the prevention and control of any action or incident prejudicial to the conduct of free and fair elections.

515. The Commission is accountable for its action both to the parliament and the Supreme Court for its actions. It could be held accountable via the Supreme Court through the Court's Fundamental Rights jurisdiction under article 126 of the Constitution or by invoking the court's writ jurisdiction<sup>49</sup> as bestowed by the 17th amendment to the Constitution.

## **The Police Commission**

### **Membership of the Commission**

516. The membership of the Commission consists of seven member appointed by the President on the recommendations of the Constitutional Council, for a three year term. Appointment to the Commission is a disqualification from continuing as a member of public or the judicial service. Similarly, election to the Membership of the Parliament or a Provincial Council or to a Local Authority is an automatic disqualification from serving as a member of the Police Commission.

### **Powers of the Commission**

517. The Commission has been given the powers of appointment, promotion, transfer disciplinary control and dismissal of Police officers other than the Inspector General of Police. However, it is required to exercise these powers in consultation with the Inspector General of Police. An important function of this Commission is to act in a proactive role in providing redress to the public against actions of the Police. Towards this end, the Police Commission is mandated to establish procedures that enable the members of the public to forward their complaints and also to provide for a transparent and independent investigation mechanism to provide effective remedies for those complaints, hence, giving recognition to the concept that policing is more about protecting the public rather than being the enforcer of the government's writ.

518. Further, the enabling legislation has bestowed upon the Commission a policy formulation role. It is empowered with a catalytic role in establishing and formulating policy aimed at enhancing the efficacy and the independence of the Police Service. As in the case of the Public Service Commission and the Elections Commission, the decisions of this Commission are subject to review via the Supreme Court's Fundamental Rights jurisdiction as provided by Article 126(1) of the Constitution. The Commission is also accountable for its actions to the Parliament.

## **Article 26. All Persons are Equal before the Law**

519. Article 12 (1) of the Constitution provides that all persons are equal before the law and are entitled to equal protection under the law. The Supreme Court has interpreted this Article to mean that all persons situated in similar circumstances be treated in a like manner whiles



allowing for inequalities and disabilities whether natural, social or economic to be taken into account in the interest of justice and fairness in making decisions. In other words they stated that equal protection entails a doctrine of classification done on a clear and intelligible basis with a rational relationship to the object sought to be achieved. Further, the Court has also enumerated the concept of equality to include the maintenance of honesty, openness and transparency in respect of executive and administrative acts. Similarly, Article 12(1) was also held to be concerned with the safeguards based on the rule of law which militate against the arbitrary and unreasonable exercise of discretion.

### **Article 27. Minority Rights**

520. In terms of Articles 10 & 14 of the Constitution, every person is entitled to the freedom of thought, conscience and religion as well as the freedom to manifest ones religion or belief by practice and the freedom to promote a person's language and culture. Minority groups are given further protection under the Directive Principles of State Policy embodied in the Constitution, which state that the State shall strengthen national unity by promoting co-operation and mutual confidence among all sections of the people of Sri Lanka, including racial, religious, linguistic and other groups, in order to eliminate discrimination and prejudice [Article 27 (5)].

521. The minority Tamil and Muslim communities in Sri Lanka have the right to practise and enjoy their culture. Days of cultural and religious significance to the Tamils and Muslims are public holidays and they are celebrated at the national level with State patronage. The media promotes and reflects the pluralistic nature of the Sri Lankan culture. The Sri Lanka Broadcasting Corporation has three distinct services catering for the Sinhala, Tamil and Muslim listeners. The Sri Lanka Rupavahini Corporation runs its TV programmes in Sinhala, Tamil and English. The State and private newspaper companies publish dailies and weeklies in all the three languages.

522. Every effort is being made to maintain the identity of different ethnic groups. The programmes on radio and television and the newspaper coverage are liberally made use of in furthering the interest of a pluralistic society. Tamil, the language of the Tamils and also the majority of Muslims, was made an official language in 1987 in recognition of the fact that language is an important symbol of culture. Every effort is being made to promote tri-linguism in Sri Lanka so that language becomes a vehicle for promoting peace, co-existence and prosperity.

### **Language Rights**

523. Article 18 [(1) & (2)] declares Sinhala and Tamil as official languages and English as a link language [Article 18 (3)]. Furthermore, Article 19 explicitly declares Sinhala and Tamil to be national languages of the land.

524. The present Constitution as amended by the 13th and the 16th amendments gives equality of status to the language of the majority and the minorities. Sinhala and Tamil are both official and national languages of Sri Lanka and English continues to be the link language.

525. In terms of the Constitutional provisions, both Sinhala and Tamil are the languages of administration and those of the courts. Sinhala is used as the language of administration and that of the courts in all the provinces other than in the Northern and Eastern Province where Tamil is used. Thus, Tamil is used for the maintenance of public records and for the transaction of all official businesses in the Northern and Eastern provinces. The Constitution, however, ensures the right of a person in any province to receive communications from and to communicate and transact business in Sinhala, Tamil or English and to inspect and obtain copies of or extracts from any official register, record, publication or other document or a translation thereof in Sinhala, Tamil or English as the case may be.

526. Similarly, every person is entitled to institute proceedings and submit court pleadings and other documents as well as participate in the proceedings of courts in either Sinhala or Tamil. Any person who is not conversant with the language used in a court is entitled to have it translated into Sinhala or Tamil and is also entitled to obtain any part of the record in either Sinhala or Tamil as the case may be.

527. The law also recognises the right of persons to be educated in either Sinhala or Tamil and imposes a duty on the state to publish all laws and subordinate legislation in all the three languages. There is also a duty imposed on the State to enact legislation and provide adequate facilities for the implementation of the provisions in the Constitution.

528. The Official Languages Commission was established under the Official Languages Act, No. 18 of 1991. The Commission has, inter alia, the following powers:

- (a) To initiate reviews of any regulation, directives, or administration practices, which affect or may affect the status or use of any of the relevant languages;
- (b) To issue or commission such studies or policy papers on the status of or the use of the relevant languages as it may deem necessary or desirable; and
- (c) To undertake such public educational activities, including sponsorship of publications or other media presentations on the status of or the use of the relevant languages as it may consider desirable.

529. Any person whose language rights have been infringed can apply to the Official Languages Commission for an appropriate investigation (Vide section 18). At the conclusion of the investigation, the Commission is required to make a report and submit its recommendations to the head of the public institution concerned (Vide section 23). Where the institution defaults on giving effect to the necessary recommendations within the prescribed time period, the Commission is authorised to apply to the Provincial High Court (Vide section 25). Under certain circumstances, the Supreme Court (on an application made by the Attorney-General or the Commission) can direct the Provincial High Court to transfer the relevant application to it. (Vide section 26). Both the Provincial High Court and the Supreme Court will grant relief which it considers to be just and equitable. (Vide section 27).

530. When a public officer wilfully fails or neglects to transact business or issue copies or extracts in the relevant language he can be found guilty of an offence and shall, on conviction after summary trial before a Magistrate, be liable to a fine not exceeding Rs. 1,000 or to imprisonment for a term not exceeding three months or to both such fine and imprisonment [Section 28(1)].

531. Despite the adoption of a policy of trilinguism aimed at providing facilities for the members of the public to use any of the three languages, there are at present certain difficulties in implementing this policy effectively and meaningfully.

532. These difficulties are caused by the following factors:

(a) The inadequate trilingual/bilingual capacity in public offices which may be attributed to the fact that most school leavers are monolingual and in consequence entrants to the public service tend to be monolingual.

(b) The dearth of support services such as translators, interpreters and stenographers to provide support services.

533. The Government, through the Department of Official languages which is responsible for the implementation and monitoring of the language law, is aiming to overcome these constraints by concerted action. The Department's islandwide public advocacy programme uses various strategies such as poster campaigns, distribution of handouts and brochures, seminars, workshops, book exhibitions, public meetings and publication of newspaper articles to educate the public servants on their duties and to enlighten the public as to how the language law affects them.

534. For the implementation of the language policy, which is the cornerstone of the Government's efforts at removing disabilities which tend to prevent minorities from enjoying language rights, several steps have been taken by the Official Languages Department. The Department has been enhancing the bilingual/ trilingual capacity in public offices by providing language courses throughout the country to train public servants in Sinhala, Tamil and English in order to improve the bilingual/trilingual competency of public servants. These classes are conducted in Divisional Secretariats, Government Departments, Ministries and other State Institutions. Personnel of the armed forces are also provided with this facility. Furthermore, seminars and workshops for public officials have been organised to make them understand their obligations to the general public.

535. The Public Service in Sri Lanka consists of approximately 300,000 persons. Annually approximately 10,000 public servants undergo language training provided by the Department. Presently, the Department is in the process of establishing a language laboratory to facilitate its training activities and to provide refresher and follow-up courses.

536. The Department is also involved in other language policy related activities. A number of booklets have been published to make the public aware of the language law and citizen's right. Other steps taken to implement the language policy include publication of glossaries to facilitate

translation of documents, recruitment and training of translators, publication of all official forms in the official languages, display of name boards in the city and outside in all three languages, publication of circulars in all three languages and carrying out public awareness programmes relating to the language law.

### **Reverse Discrimination**

537. The Supreme Court in *Ramupillai v. Minister of Public Administration, Provincial Councils and Home Affairs* and others stated that reverse discrimination on the basis of ethnicity is valid subject to the following conditions:

(a) Discrimination must be objectively established by evidence or by relevant findings of competent bodies; perceptions and opinions are insufficient. The object affirmative action is to remedy the present effects of the past discrimination and not to perpetuate fixed quotas. Preferential consideration for victims is preferred to rigid quotas. Remedial action must be short term with appropriate review mechanisms;

(b) Racial quotas cannot be imposed simply for the purpose of “correcting” an existing racial imbalance, except perhaps where there is serious, chronic and pervasive under representation to raise or over representation to raise a presumption of past discrimination; and

(c) The proposed remedy would be more strictly scrutinised on account of other compelling needs and interests such as efficiency, higher levels of respectability involved upon promotions and legitimate expectations of employees that merit and loyal services would be rewarded.

### **THE PEACE PROCESS (Updated as of April 2002)**

538. In terms of the clear mandate received at the last election, for a resolution of the ethnic conflict, the present government initiated a peace process with the facilitation of Norwegian Government to reach a durable settlement through negotiations with the LTTE.

539. By reciprocating the unilateral cease-fire announced by the LTTE on the 24th of December 2001 and by relaxing the restrictions imposed on the transport of essential goods to the uncleared areas, the government demonstrated its clear commitment towards providing relief to civilian population affected by the conflict.

540. The two unilateral ceasefires were been formalized in a mutually agreed Ceasefire on 22, Feb. 2002. (Copy of the Agreement is attached). The Agreement envisages a series of incremental steps addressing the urgent humanitarian problems confronting the people in the conflict-affected areas and implementing confidence building measures. Principal provisions of the Agreement are as follows:

(a) Refraining from initiating offensive operations against LTTE. (Ref. Article 1.2 of the Agreement);

(b) Lifting restrictions on transport of food, medicine and other essential items to the uncleared areas except for seven items, which can be used for military purposes. (Ref. Annex A of the Agreement);

(c) Relaxation of the restrictions imposed on fishing in the North and East. (Ref. Article 2.11 of the Agreement);

(d) Relaxation of restrictions on the movement of people between the cleared/uncleared areas and the review the existing checkpoints and security measures in order to prevent harassment of the civilian population. (Ref. Article 2.5 of the Agreement);

(e) Review of the cases of detainees under the Prevention of Terrorism Act with a view to releasing those against whom no charges have been brought. The Government has also agreed to suspend search operations and arrests under the Prevention of Terrorism Act. However, this will not prevent the arrest and detention of persons according the procedure laid down in the Criminal Procedure Code. (Ref. Article 2.12 of the Agreement);

(f) The Agreement provides for unhindered access to the Jaffna-Kandy A9 road for civilians and unarmed troops of Government by 60 days from the date of signing of the Agreement (Ref. Article 1.10 of the Agreement) In addition, it was agreed to keep open the Trincomalle-Habarana road open on a 24 hour basis (Ref. Article 2.8 of the Agreement) and to facilitate the extension of the rail service on the Batticaloa-Welikanda line (Ref. Article 2.9 of the Agreement);

(g) Withdrawal of Security forces from buildings that can be used for civilian purposes. (Ref. Article 2.2 and 2.3 of the Agreement); and

(h) Under the Agreement, the Government has permitted unarmed LTTE cadres carrying identification papers to enter areas dominated by the Government on incremental basis to engage in political work (Ref. Article 1.13 of the Agreement). They are also permitted to visit immediate family members in connection with wedding and funerals. (Ref. Article 1.12 of the Agreement) Any other visits are only permitted for the purpose of visiting family and friends (Ref. Article 1.11 of the Agreement).

541. At the same time, the government has decided to establish a new court for expeditious disposal of cases relating to detainees under the Prevention of Terrorism Act in line with the relevant provision of the Ceasefire Agreement. The Ministry of Defence has also lifted the restrictions imposed on foreigners including journalists travelling to the un-cleared areas. Arrangements have also been made to open A-9 road linking Jaffna Peninsula with the mainland for civilian traffic.

542. Parallel to the negotiation track, a carefully coordinated programme is being undertaken with the assistance of national and international partners, both at bi-lateral as well as multilateral levels, for the rehabilitation and reconstruction of the areas affected by the conflict. The rehabilitation programmes have been formulated to empower the affected people and to enable them to participate in the democratic process respecting the rights of all communities.

### **Integrating Human Rights in the Peace Process**

543. In terms of the Ceasefire Agreement the parties to the conflict are bound by international law that prohibits hostile acts on civilian population, including such acts as torture, abduction, exhortation and harassment. Similarly, they agreed to allow for the free movement of goods and people from the LTTE held areas to other parts of the country. Further, as part of the Ceasefire Agreement the government undertook to observe a moratorium on the use of search and arrest powers vested in the government by the Prevention of Terrorism Act. The Agreement provides that the normal law of the Country will prevail, and that criminal offences will be dealt with under the Criminal Procedure Code.

544. Moreover, since the signing of the Ceasefire Agreement, there has been a marked improvement in the human rights situation. Thousands of lives have also been saved following the ceasefire.

545. International Law referred to in Article 2.1 of the Agreement includes both the general principles of International Law and International Human Rights and Humanitarian Law. As the focus of this provision is on the prevention of 'hostile acts against the civilian population', it is important to point out that a wide range of the International Human Rights Law is applicable in the implementation of Ceasefire Agreement.

546. Article 3 of the Ceasefire Agreement vests in the Head of the Sri Lanka Monitoring Mission (SLMM) the necessary authority to interpret its terms and conditions in addition to inquiring into specific allegations of violation committed by the parties. In exercising this authority the Head of SLMM through a broader interpretation of the provisions relating to Human rights and humanitarian law is expected to strengthen the Ceasefire monitoring process. In discharging its responsibility under the Agreement in a manner that would promote human rights and humanitarian principles, SLMM role is crucial. Consequently, any act, which has not been specifically listed in the Agreement as prohibited, but has been declared a violation under international human rights instruments, for example conscription of children by the LTTE could be held as a violation of the Agreement

547. The observance of human rights in the North-east is continuously engaging the attention of the local and international community since the LTTE and the Government have concluded the Ceasefire Agreement. The Government has agreed to receive an Amnesty International mission whose focus is to integrate human rights component in the peace process. The Government has also agreed to a visit by Mr. Olara Outunu, the Special Representative of the United Nations Secretary-General on Children in Armed conflicts. The recommendations made by them are expected to strengthen the human rights component in the peace process.

548. It is expected that the direct negotiations which would commence between the Government and LTTE in Thailand would have two phases. The first phase would focus, inter alia, on the need to arrive at an interim arrangement, whereas the second phase would be devoted to evolving a mutually acceptable political solution. The imperative that any arrangement, final

or interim, should provide for democratic safeguards and for protection and promotion of human rights is being increasingly emphasized by both the Government and the civil society. It is also seen as an essential ingredient of participatory democracy, which could encompass all sections of the population inhabiting the North-east in peaceful co-existence and pluralism, while protecting their civil, political, cultural and economic rights.

### Notes

- <sup>1</sup> Annual reports from 1996 to 1999 is attached as annex 1.
- <sup>2</sup> The enabling act and the annual report of the Human Rights Commission for the year is attached as annex 2.
- <sup>3</sup> Legislation passed in 1947 to provide for the enactment of emergency regulations or the adoption of other measures in the interest of the public security, the preservation of public order and for the maintenance of supplies and services essential to the life of the community.
- <sup>4</sup> In spite of this provision which seeks to restrict judicial control over the issuing of these orders, the court sought to re-assert its authority through interpreting the powers of the minister under S9 of the PTA, congruous with the right to the freedom from arbitrary detention. In *Jayasinghe v. Samarawickrama*, Kulathunge J, holding that the Minister had signed the detention order mechanically at the request of the police without giving his mind to the preconditions imposed on him by S9 when doing so, said: “If such arrest is challenged, they should justify their conduct objectively by means of sufficient evidence”.
- <sup>5</sup> In *Abasin Banda v. Gunaratne* (1995) 1 SLR 244, at pp-256-257 Amersinghe J., noted that under Article 2.1 of the United Nations Convention Against Torture and other Cruel, Inhuman or degrading Treatment or Punishment, which entered into force in Sri Lanka with effect from 2nd April, 1994 requires the state to take “effective legislative, administrative and judicial or other measures to prevent torture”. The learned judge also quoted Articles 10, 11, 12, 13 and 16 of the Convention.
- <sup>6</sup> The first schedule to the Code of Criminal Procedure lays down those offences under the Penal Code that are cognisable offences. Any offence under any other law for which a person can be punished with death or with imprisonment for three years or more is also a cognisable offence. Various other statutes also declare the offences which, under them, are cognisable.
- <sup>7</sup> Section 36 of the Code of Criminal Procedure Act, No. 15 of 1979.
- <sup>8</sup> Section 37 of the Code of Criminal Procedure Act, No 15 of 1979.
- <sup>9</sup> (1989) 1 Sri L.R. 394.
- <sup>10</sup> (1988) 1 Sri L.R. 173.
- <sup>11</sup> FRD (2) 426.

<sup>12</sup> (1988) C.A.L.R. Vol. I, p. 85.

<sup>13</sup> Under regulation 17 of the Emergency (Miscellaneous Provisions and Powers) Regulations made on 20 June 1989, 17 June 1993 and 4 November 1994, the Secretary to the Ministry of Defence was/is empowered to order the detention of any person, inter-alia to prevent him from acting in any manner prejudicial to the national security, or to maintenance of essential services. Not only police officers, but also members of the Army, Navy and Air Force were/are empowered by the regulations to carry into effect the orders of the Secretary, using “all such force as may be necessary for the purpose”.

<sup>14</sup> This regulation empowered any police officer or any member of the Army, Navy or Airforce to search, detain for purposes of such search, or arrest without warrant any person who is committing or has committed or whom he has reasonable ground for suspecting to be concerned in or to be committing an offence under any emergency regulation.

<sup>15</sup> Such releases occur under nine stipulated conditions as per the Prevention of Crime Ordinance. Prisoners so released have to be supervised by a Welfare Officer for the prescribed licensed period and are expected to achieve certain specified targets. This scheme aims to facilitate the prisoner’s smooth re-absorption into the mainstream of society.

<sup>16</sup> An application for travel documents can be declined on the following grounds:

- Required documents not having been furnished
- Documents produced are not genuine or doubtful
- Previously issued travel documents are not declared

<sup>17</sup> The commonest cause for the rejection of applications is non-declaration of previously issued travel documents that are detected while processing them.

<sup>18</sup> Article 154 (p) provides that there shall be a High Court for each province.

<sup>19</sup> Article 120 of the Constitution.

<sup>20</sup> A court-martial cannot pass sentence of death on any person without the concurrence of at least two thirds of its members. Under the Navy Act, a court martial cannot pass a death sentence on any person unless, where the number of members of the court martial does not exceed five, at least four of the members are present, and, where the number of members of the court-martial exceeds five, not less than two-third of the members present concur in the sentence.

<sup>21</sup> Normally it is the practice that a competent counsel from the Attorney General’s Department is appointed in every court martial as the Judge Advocate.

<sup>22</sup> Article 109 of the Constitution.

<sup>23</sup> According to the Constitution, judicial officer means any person who holds office as a judge, presiding officer or member of any Court of First Instance, tribunal or institution created and



established for the administration of justice or for the adjudication of any labour or other dispute, but does not include a Judge of the Supreme Court or of the Court of Appeal or of the High Court or a person who performs arbitral functions, or a public officer whose principal duty is not the performance of functions of a judicial nature.

<sup>24</sup> According to the Constitution, a “scheduled public officer” means the registrar of the Supreme Court, Registrar of the Court of Appeal, the Registrar, the Deputy Registrar or Assistant Registrar of the High Court or of any Court of First Instance, the Fiscal, the Deputy Fiscal of the Court of Appeal or High Court and any court of First Instance, any public officer employed in the registry of the Supreme Court, Court of Appeal or High or any Court of First Instance included in a category specified in the fifth schedule or any such other categories as may be specified by order the Minister in charge of the subject of Justice and approved by parliament and published in the gazette.

<sup>25</sup> This legislation said that courts could only review decisions of tribunals covered by ouster clauses if in the exercise of they have either committed an error of law on the face of the record (ex-facie) or not adhering to the rules of natural justice in their conduct or not having to adhered to the stipulations of the enabling statute such not adhering to the requirements concerning the number of adjudicators that need to be present when making decisions.

<sup>26</sup> See supra pp 62-63.

<sup>27</sup> See *Wijerama v. Paul* 76 NLR 241.

<sup>28</sup> See supra note 25.

<sup>29</sup> Article 168(1) only allows for laws enacted under previous constitutions to be in force only if the constitution has not otherwise expressly provided for.

<sup>30</sup> In *Karunathilaka and Deshapriya v. Dissananayake* and others Justice H.N.D. Fernando in the Supreme Court held “Article 35 only prohibits the institution (or continuation) of legal proceedings against the president while in office; it imposes no bar whatsoever on proceedings (a) against him when he is no longer in office, and (b) other persons ( i.e., officials etc) at any time. That is the very nature of immunity: immunity is a shield for the doer, not for the act.... Article 35, therefore, neither transform an unlawful act into a lawful one, nor renders it one which shall not be questioned in any Court.”

<sup>31</sup> In *Joseph Perera v. Attorney General and others*, Sharvananda CJ, spelt out the scope of the constitutional guarantee of freedom of expression as follows: “Freedom of speech and expression means the right to express one’s convictions and opinions freely by word of mouth, writing, printing, pictures or any other mode. It includes the expression of one’s ideas through banners, posters, signs etc. It includes the freedom of discussion and dissemination of knowledge. It includes the freedom of the Press and the propagation of ideas... There must be untrammelled publication of news and views and of opinions of political parties, which are critical of the actions of the government and expose its weakness... One of the basic values of a free society to which we are pledged under our Constitution is founded on the conviction that

there must be freedom not only for the thought that we cherish, but also for the thought that we hate. All ideas having even the slight social importance, unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion have the protection of the constitutional guarantee of free speech and expression”.

<sup>32</sup> In *Joseph Perera v. Attorney General and others*, Sharvananda CJ stated that the freedom expression could be restricted only if there is a rational or proximate nexus between the restriction imposed and national security or public order. Further, he also stated any system of pre-censorship, which confers unguided and unfettered discretion upon an executive authority without narrow, objective and definite standards to guide the official, was unconstitutional.

<sup>33</sup> In *Dissanayake v. Sri Jayawardenapura University*, on the question whether the vice-chancellor of an University was entitled to question the propriety of the petitioner publishing a memorandum to outsider, Sharvananda CJ stated: “ The correct test is: was the statement made in criticism of the official conduct of the Vice Chancellor or was a false statement made by the petitioner with a high degree of awareness of its probable falsity. A student may also exceed his constitutional rights of speech and expression by adopting methods of expression that materially and substantially interferes with the vice-chancellor’s right to his reputation”.

<sup>34</sup> Attached as annex 6.

<sup>35</sup> Attached as annex 7.

<sup>36</sup> The Ministry of Interior under whose purview the subject of citizenship comes under has initiated a process at amending the citizenship act of 1949, which allow both the non Sri Lankan spouse and the children of a Sri Lankan women to acquire nationality as of a right by marriage and descent.

<sup>37</sup> A copy of the amending legislation is attached as annex 7.

<sup>38</sup> A copy of the national plan of action and its matrix is attached as annex 9.

<sup>39</sup> A copy of the act and the NCPA annual report for the year 2001 is attached as annex 10.

<sup>40</sup> The initial proposal was to have child ‘rights’ committees. However, this met with opposition both from parents as well as teachers. Hence, the change in the nomenclature.

<sup>41</sup> Three meetings held for the judiciary, the 4th meeting is planned this year with ISPCAN help.

<sup>42</sup> In the Criminal Procedure Code, another enactment was amended: In case of alleged perpetrators of child abuse arrested without a warrant, the magistrate was given the powers to order the detention of the suspect up to 3 days (previously one day) for purpose of investigation. This amendment also provided for priority for cases of child abuse, and introduced a form for referral of victims of child abuse. The penal code was amended by the Presidential Task Force (Act No. 29) of 1998 to prohibit the use of children for purposes of begging, procuring for sexual

intercourse and trafficking in restricted articles. It also imposes a legal obligation on developers of films and photographs to inform the police of indecency or obscenity in relation to children.

<sup>43</sup> Attached as annex 11.

<sup>44</sup> In early 2000, the University Teachers' Human Rights-Jaffna (UTHR-J) reported that compulsory self-defence training was instituted for civilians between the age of 16 and 45 in LTTE controlled areas from April 1999. Trainees are reportedly used in the Border Force for defensive and ordinance tasks.

On 5th May 2000, a more intensive LTTE propaganda and recruitment campaign began celebrating a key Tiger's victory at Elephant Pass. Classes were suspended for compulsory military training above grade 9 (aged 14/15up). Statistics from one school in Mallavi show the escalating scale of child recruitment from 4 children in April 1999, to 15 by early 2000, to 24 children in June 2000. Nine of these children were believed to have been killed within one year: the bodies of six former students were displayed as "martyrs" to other pupils at the school. At another school, 20 girls were recruited, their uniforms burnt and then taken to a military camp. Five of the girls aged 14 between 15 who wanted to leave were locked up and ill-treated; three finally managed to escape. The UTHR-J estimates that the majority of the new recruits are girls. Orphanages and homes for the destitute are also important sources of recruits.

The UNICEF also warned that the LTTE has been breaking its promises to Mr. Otunnu on child recruitment. In July 2000, UNICEF accused the LTTE of renegeing on its promises and said that the situation had in fact worsened for children since 1998 when promises had been made.

<sup>45</sup> The United Nations Secretary-General Kofi Annan, in a September 2001 report to the United Nations Security Council noted that, despite LTTE commitments, children "continued to be targeted in the ongoing conflict of Sri Lanka." Annan noted that the Sri Lankan government was one of only two to set the minimum age for voluntary enlistment at eighteen and acknowledged efforts in the country to demobilize child soldiers, but said prevention of recruitment and re-enlistment was an overwhelming concern. He stressed the need for adequate resources, structures, and programs to ensure successful reintegration into society of demobilized children.

<sup>46</sup> Attached as annex xii is a document titled "Electoral process in Sri Lanka". The Foreign observer reports of the presidential elections 1999, Parliamentary elections of 2000 and 2001 is also attached.

<sup>47</sup> *Deshapriya and Amaratunga v. Nuwara Eliya Municipal Council and Others* [S. C. Minutes 10th March 1992].

<sup>48</sup> See supra pp 72.

<sup>49</sup> The 17th amendment gave the Supreme Court the power to issue writs earlier bestowed by the Constitution under article 140 to the Court of Appeal, in relation to acts of the Commission.

**List of Annexes**

1. Annex 1 - Reports of the Parliamentary Commissioner for Administration (Ombudsman) from 1996 - 1999.
2. Annex 2 - Human Rights Commission of Sri Lanka Act, No. 21 of 1996 and Annual Report of the Human Rights Commission for 1998.
3. Annex 3 - Statistics on gender composition of Members of Parliament, Provincial Councils and Local Authorities.
4. Annex 4 - Regulations made by the Minister of Defence under Section 48 of Immigrants and Emigrants Act No. 20 of 1948.
5. Annex 5 - Legal Aid Organizations in Sri Lanka
6. Annex 6 - Sri Lanka Law Reports (1996) 1
7. Annex 7 - Industrial disputes (amendment) Act, No. 56 of 1999 & Minimum Wages (Indian labour) (Amendment) Act, No. 25 of 2002.
8. Annex 8 - National Child Protection Authority Act, No. 50 of 1998 and report of the NCPA.
9. Annex 9 - National Action Plan to address the problem of children and youth affected by the present conflict in Sri Lanka.
10. Annex 10 - Reports of the International Observer Groups on Parliamentary and Presidential Elections in Sri Lanka.
11. Annex 11 - National Plan of Action to Combat Trafficking of Children for Exploitative Employment in Sri Lanka & final draft of the Formulation of Public Policy and a National Plan of Action to Combat the Trafficking of Children for Exploitative Employment.

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