Overview

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1. Introduction

This year's volume contains eight chapters reviewing a range of human rights issues in Sri Lanka during 2004. Although the cessation of hostilities between the Government of Sri Lanka and the Liberation Tigers of Tamil Eelam (LTTE) remained in force through 2004, no progress was made towards resuming peace talks between the two sides during the year and the human rights situation in the north east remained highly volatile. This was particularly evident in the run-up to the parliamentary elections on 2 April, and in the months following the split from the LTTE of the eastern faction under the leadership of Colonel Karuna. By the end of November, following LTTE leader Velupillai Prabhakaran's 'Heroes' Day' speech threatening a return to hostilities if peace talks did not resume on the LTTE's terms, there was considerable concern that a return to armed conflict might be imminent. However, no such action had been taken by 26 December, when the Indian Ocean tsunami hit Sri Lanka's coastline with devastating results, reportedly killing over 30,000 people and rendering over 400,000 more homeless. Communities located on the southern and eastern coasts were hardest hit. At the end of the year, it was starting to become clear that the response to the tsunami was itself likely to generate a range of new human rights concerns. However, as such issues were only just starting to emerge at the end of 2004 and would be more clearly articulated in the following months, they cannot be included in this volume.

2. Parliamentary Elections and the Right to Vote

The parliamentary elections of 2 April resulted in a coalition headed by President Kumaratunga's United People's Freedom Alliance coming to power following a campaign which was deemed to have been fair for the most part, with the notable exception of the north east. In the north east, the elections were marred by violence, intimidation and murders, particularly of candidates and supporters of parties opposed

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to the LTTE-backed Tamil National Alliance (TNA). In the event, the TNA won the great majority of seats in the north east. In the chapter in this volume on "The Right to Vote," Asanga Welikala makes the following important comment on the conduct of the election in the north east: "*Noteworthy here is that most of the intimidation and attacks were against candidates and parties opposed to the LTTE-backed TNA. The LTTE enjoys tangible political power in the North and East, even outside the Districts of Killinochchi and Mullaitivu. Given the LTTE's stated desire for an institutionally expressed role in the governance of the North-East, and its de facto power as an almost omnipotent non-State political actor in the region, it is cause for serious apprehension that the legitimacy of the election and the conditions for a free and fair campaign were to be in question only in areas under its influence.*"

Another area of concern during the election campaign, which would have had an impact on the conduct of the election in the south and is also discussed by Welikala, was the manner in which the state media institutions behaved during the election campaign, revealing "the real nexus between the state media institutions and the political party that controls them." When the Election Commissioner attempted to enforce guidelines on fair and balanced reporting to try to stem the blatant bias in the state media towards the ruling party, the Sri Lanka Rupavahini Corporation took the extraordinary step of attempting – unsuccessfully, as it turned out – to impugn his actions through a fundamental rights application to the Supreme Court.

Welikala devotes much of the discussion in "The Right to Vote" to reviewing the constitutional and statutory legal provisions for elections in Sri Lanka, the manner in which they are implemented and the status of the current debate on electoral reform. He notes that the April 1994 elections were the first to be held under the provisions of the 17th Amendment to the Constitution, introduced in 2001, which abolished the office of Commissioner of Elections and instead provides for the creation of an independent Election Commission to oversee the conduct of free and fair elections. Following the President's refusal to appoint a Chairman of the Election Commission on the basis of the Constitutional Council's recommendation, the Election Commission was not in fact appointed. Instead, its powers were exercised by a single Commissioner of Elections. The President's refusal to act on the recommendation of the Constitutional Council was probably itself unconstitutional, and militated against

the very spirit of the 17th Amendment: "*If the President as the leader of a political party and elected chief executive continued to retain a discretion in appointments to the new body, then the entire scheme of Article 41B is negated. In violation of the letter and the spirit of the Seventeenth Amendment, however, the Election Commission remains unconstituted to this day.*"

As Welikala states, "In deeply divided societies like Sri Lanka, characterised by ethno-political tensions, democracy, and how it works, are inherently problematic issues." The first-past-the-post system which was in force from 1931 to 1989 entrenched majoritarian rule, while proportional representation (introduced under the 1978 constitution) should enhance pluralism and inclusivity. Yet proportional representation as practised in Sri Lanka also has its weaknesses, as discussed in Welikala's review. In conclusion, Welikala advocates reform based on the German model of democracy, whereby voters have two votes – one for a constituency representative and one for a political party – which "*provides for the best aspects of FPP and PR to be blended in a system that also takes into consideration matters like the appropriate role of political party leaderships in the electoral process, the need for stability, and fair representation of most, if not all, stake-holders in society.*"

3. The 17th Amendment to the Constitution and the Institutions arising from it

It was seen above that considerable controversy surrounded the failure to appoint an Election Commission in 2004, following the President's disagreement with the recommendation of the Constitutional Council. The Constitutional Council had been created in 2002 under the provisions of the 17th Amendment. As explained by M C M Iqbal in his chapter on this subject, "One of the prime objectives in creating the Constitutional Council was to free the Commissions created by the 17th Amendment from political interference." Thus, it became the role of the Constitutional Council to recommend appointments to independent commissions such as the Public Service Commission, the Judicial Service Commission, the Election Commission, the Police Commission, the Bribery Commission and the Human Rights Commission. The President no longer has any power to make such appointments independently, but can only appoint persons recommended by the Constitutional Council. This most significant attempt to reduce the possibility for political interference and corruption in

the administration of the country, however, itself contains serious flaws, as discussed by Iqbal in this chapter. With regard to the very membership of the Council, Iqbal summarises his concerns as follows: "*The Constitutional Council is one of the most important bodies created by the Constitution to ensure justice and fair play in the governance of the country, yet its members have no binding interest in the institution. At a critical moment such as when the Parliament stands dissolved, the Speaker, the Prime Minister and the Leader of the Opposition could not justifiably be expected to perform their functions in the CC diligently and judiciously when they would need to be busy electioneering to ensure their re-election. It can also be argued that when Parliament is dissolved, there is no Speaker and no Leader of the Opposition, and that the Prime Minister exists only as the caretaker Prime Minister. Hence, they cannot legitimately continue to be members of the Constitutional Council at such a time. What is more, article 41E of the 17th Amendment states that it is the Speaker who is authorised to convene meetings of the Constitutional Council and he cannot legitimately summon a meeting while he is no longer Speaker, as Parliament would have ceased to exist at such time.*" The haste to push this piece of legislation through, which is also discussed by Iqbal, has clearly left its mark.

We have already seen that the President refused in the case of the Election Commission to appoint the person recommended by the Council as Chairman. Delays stemming from other problems with the recommendation procedure also affected the Bribery Commission, which remained with unfilled vacancies for some two years, during which period of time it was not able to function. Iqbal reviews the provisions for and the work of the Bribery Commission, the Public Service Commission and the Administrative Appeals Commission in detail. He sees the institutions created under the 17th Amendment as "undoubtedly a significant step towards establishing a culture of good governance in the country," despite the flaws in their constitution and the practical obstacles they face in putting their remits into practice. He urges those charged with the responsibility of the work of these institutions to "live up to the expectations placed on them" and also calls for changes to be made to the Constitutional provisions establishing these institutions to enable them to become fully independent and effective.

The work of another institution created under the 17th Amendment – the National Police Commission (NPC) – is discussed separately by Basil Fernando. Fernando describes the NPC as "one of the most potentially powerful institutions created by the 17th Amendment." Its task is no less than to eliminate the politicisation of the police force which in the past has led to the police being used by members of the party in power as a tool for their own ends.

Fernando reviews the powers and functioning of the NPC and reaches the conclusion that while its "constitutional mandate … is enormous," its resources are "miniscule". Fernando argues that, "of all national institutions created in recent times, perhaps the one that bears the most vital mandate is the National Police Commission, because without a radical reform of the police, brought from within, the issues of social stability and the increase of crime and corruption in Sri Lanka cannot be controlled." For the NPC to be able to fulfil its mandate, however, it will need to develop an imaginative and innovative strategic plan which Fernando hopes will provide the basis for material support from multilateral and bilateral agencies.

4. National Human Rights Commission

Fernando also reviews the work during 2004 of the National Human Rights Commission. During the year under review, the new Commissioners, who had been appointed in mid-2003, put forward a three year strategic plan to guide its work. Priority areas included developing programmes for the prevention of torture through a "zero-tolerance policy" and developing the Commission's capacity to undertake fact-finding missions to investigate systematic human rights violations on a wide range of important issues. While the plan was ambitious in conception, in Fernando's analysis it was disappointing in practice, as the Commission was not able to undertake much of the proposed work during the year. Many of the problems of implementation are seen to derive from resourcing issues. Commission staff are poorly qualified, lack professional inquiry and mediation skills, and have not been encouraged to foster a human rights culture in the workplace in the past (indeed, some have reportedly worked against the very mandate of the Commission); the Commissioners are not employed full-time and so cannot exercise adequate supervision; the Commission's education programmes have been ineffective. There are, however, also external

factors that impede the work of the Commission, as Fernando notes. For example, officers of the Commission attempting to make unannounced visits to places of detention came under attack at Paiyagala and Jaffna Police Stations, and the Inspector General of Police has denied the Commission the right to make unannounced visits, requiring that notice be given and thereby undermining the very purpose of such visits. In conclusion, Fernando urges the Commission to resolve the difficult issue of the quality of its staff. He also cites as a model for the future the swift, proactive response of the Commission to the shooting dead of torture victim Gerald Perera before he was due to give evidence in the High Court in November 2004.

Further aspects of the Commission's work are also discussed in the chapters on 'Integrity of the Person' and 'Rights of the Child'.

5. Integrity of the Person

Just as the National Human Rights Commission made the prevention of torture a priority issue, so too does Amila Jayamaha see as a major concern the high levels of torture in police custody that continue to be reported, sometimes leading to death, together with the often linked issue of arbitrary arrest and detention. As well as describing a range of such cases, Jayamaha also examines the casework of the Torture Prevention and Monitoring Unit (TPMU) established by the HRC as part of its torture-prevention strategy.

A particularly worrying trend in reports of extrajudicial killings by the police is also described. The shooting of Gerald Perera before he was due to give evidence against the police, mentioned above, is discussed more fully in this chapter alongside a number of other suspicious killings by the police during a crack-down against criminality. A number of criminal suspects were shot dead by police during the year. The police claimed that their victims had been shot while "resisting arrest" or "attempting to escape". In numerous cases, however, police described similar circumstances as the context for the killing, leading to suspicions that the police had decided to wage their campaign against crime illegally. Indeed, the police versions of these killings kindling memories for the Civil Rights Movement of the manner in which the leaders of the JVP insurgency had been killed in 1989. Clearly any trend

towards extra-legal methods of crime control must be decisively curbed through thorough and impartial investigation leading to the prosecution of any person responsible for extrajudicial execution.

The chapter on "Integrity of the Person" also discusses the continuing high levels of abuses reported in the north east, in areas under the control or influence of the LTTE. The vast majority of ceasefire violations involving integrity of the person, investigated by the Sri Lanka Monitoring Mission, were committed by the LTTE. Of particular concern in this regard were killings, torture and abductions committed by the LTTE, and their continuing recruitment of child soldiers. As Jayamaha says, "*continued recruitment of children on the part of the LTTE is a violation of the Ceasefire Agreement and also reneges on numerous commitments made by the LTTE to end their recruitment and use of child soldiers. This is evidenced by the disparity between the number of recorded recruitments and the number of child combatants released by the LTTE. Between January 2002 and 01 November 2004, UNICEF documented a total of 4,600 cases of under-age recruitment. During the same period, the LTTE was reported to have released only 1,208 children from its forces.*"

An interesting international development relating to integrity rights was the outcome of an individual submission made to the Human Rights Committee by Nallaratnam Singarasa concerning his arrest, detention, torture, trial and conviction under the Prevention of Terrorism Act. Singarasa had been arrested in July 1993 and convicted in September 1995. In October 1995 he was sentenced to 50 years' rigorous imprisonment, based on an alleged "confession", a sentence which was reduced to 35 years in July 1999. In short, the Committee found that Singarasa had been denied a fair trial and that the State was obliged to provide him with "an effective and appropriate remedy, including release or retrial and compensation." In addition, the Committee required the State "to avoid similar violations in the future and … ensure that the impugned sections of the PTA are made compatible with the provisions of the Covenant."

Human rights activists have long argued for the repeal or reform of the Prevention of Terrorism Act in keeping with Sri Lanka's international human rights obligations. The Sri Lankan government, however, chose to ignore the Committee's findings. Despite

the Committee's insistence that its findings be enforced within 90 days, no steps had been taken to reform or repeal the PTA by the end of 2004 and Singarasa himself remained imprisoned.

6. Judicial Protection of Human Rights

Torture persists unabated in Sri Lanka despite numerous directions by the Supreme Court for effective preventative action to be taken by the National Police Commission, the Police Department and other relevant bodies. In some cases sizeable awards have been made as compensation – although victims certainly do not always receive what is due – and the use of public funds to meet the State's liability has raised some controversy. In her chapter on "The Judicial Protection of Human Rights", Kishali Pinto Jayawardena shifts the emphasis firmly away from this issue: "It is high time … that the discussions moved away from the question as to the quantum of compensation that ought to be awarded by the Court in these cases (an absurd question in any event) to more significant issues of impunity…" In numerous cases, individual officers have been identified as being responsible for torture and the Court has directed that disciplinary action should be taken by the authorities, but impunity is nevertheless allowed to prevail. Jayawardena asks, "*Why is it that even where police officers (junior as well as senior) have been identified as personally responsible, we have seen no internal departmental action taken against them or successful prosecution in courts of law? The deterrent effect of such action or prosecution would be incalculable. These directions of the Supreme Court have been rendered nugatory and of no avail in the most profound sense of the term.*"

Important judicial issues also arise when a victim of torture dies in police custody. Can the victim's relatives have *locus standii* in a fundamental rights case on behalf of the deceased? Jayawardena discusses the important judicial developments on this question so far in Sri Lanka, whereby a person's heirs have been recognised as having an entitlement to bring a case to the Court when a death has occurred as a result of torture. At present, this is based on the recognition that violation of the rights of the victim must have a remedy, access to which in effect devolves to their relatives. Jayawardena, however, draws on the reasoning of the UN Human Rights Committee to demonstrate how this line of judicial reasoning could be further expanded: "*This*

would involve an extended interpretation of Article 11 read together with Article 126(2) as including a direct violation not only of the rights of the victim but also the rights of his family members not to be subjected to torture or to cruel, inhuman or degrading treatment as a result of the treatment meted out to the victim."

Turning to judicial issues arising from cases concerning freedom of expression, the case of a television news editor and his crew who were denied entry to the President's House to film the swearing in of then Prime Minister Ranil Wickremasinghe led to a determination on the limits of Presidential immunity. The Court found that the refusal constituted "naked discrimination", and went on to hold that a subordinate cannot use the defence of a Presidential directive to justify an illegal and unconstitutional act.

The Supreme Court's defence of constitutionally guaranteed rights is further discussed with regard to the right to equality in an important case regarding land acquisition for the Southern Expressway. Here the "public trust" doctrine was strongly expressed in the Court's decision. As explained by Jayawardena, this means "*that powers vested in public authorities are not absolute or unfettered but are held in trust for the public, to be exercised for the purposes for which they have been conferred, and that their exercise is subject to judicial review by reference to those purposes.*"

Jayawardena expands the coverage of her chapter to include not only discussion of the Supreme Court's decisions in fundamental rights cases, but also its deliberations on the constitutionality of a Bill prohibiting religious conversions and another which sought to make Buddhism the official religion of the Republic. She also discusses the growth of writ applications to the Court of Appeal under Article 140 of the Constitution alleging denial of a legal right, presenting details of case material to show that "[w]hile the inter-linking of fundamental rights protection and the invocation of writ remedies became stronger, these developments were buttressed by judicial observations in regard to the manner in which the constitutional enshrining of fundamental rights has impacted positively on the writ jurisdiction of the appellate courts."

A final welcome addition to the chapter is inclusion of the decisions of the UN Human Rights Committee in response to individual communications under the Optional Protocol of the ICCPR. In 2004, the HRC found that *Ravaya* editor Victor Ivan's right to freedom of expression had indeed been violated by the bringing of three defamation charges against him in 1996 and 1997. That these charges were then left pending for several years had a "chilling effect" on his freedom of expression. The second decision of the HRC in the Singarasa case was already discussed above in the context of integrity rights, resulting in the HRC's stipulation that the government must amend or repeal the Prevention of Terrorism Act if it is to fulfil its international obligations. Jayawardena points out that these decisions of the HRC buttress those made by the Sri Lankan Supreme Court, and lauds the Court for drawing on the ICCPR in reaching its own determinations.

7. The Rights of the Child

In the chapter on children's rights, Manori Gunatilleke provides an update on events during 2004 pertaining to child rights covering the following main issues: the continuing recruitment by the LTTE of children into the armed cadres; legislative developments relating to children's rights; new measures undertaken by the police and the Ministry of Justice to monitor and prevent child abuse as well as to expedite the backlog of criminal cases in which child abuse is alleged; and the work of the National Child Protection Authority.

Child abuse continues at an alarming rate in Sri Lanka, as the statistics cited by Gunatilleke show: "Police Women & Children's Bureau statistics reveal 2,242 cases of grave offences against children and 1,026 minor offences against children for the year 2004," which represents a significant increase from the 1,579 cases reported in the previous year. One response during 2004 was for the Attorney General's Department to initiate a special unit to expedite the backlog of an estimated 1,500 child abuse cases that had built up at the time the unit was established. These cases include charges of statutory rape, grave sexual abuse, cruelty to children and sexual harassment.

Another major issue is the continuing recruitment by the LTTE – sometimes by forcible means – of child soldiers during 2004. According to Gunatilleke, over 1,015 children were recruited by the LTTE and 650 were formally released during 2004.

8. The Right to Religion

The cases referred to above, involving the Supreme Court determining the constitutionality of two Bills on religion, arose in a context of heightened concern within some religious communities about the activities of evangelical Christian churches in Sri Lanka, and the rapid rise in number of such churches in recent years. In his chapter on "The Right to Religion," R K W Goonesekere discusses the background to the issue and the manner in which decisions of the Supreme Court have restricted the fundamental right to freedom of religion in its determinations on these matters. In refusing the constitutionality of various Incorporation Bills presented before parliament on behalf of evangelical churches, the Court ruled in one case that economic activity by such a group was not strictly religious, and suggested that a "fetter of allurement" might taint people's freedom to choose their own religion. Similarly, two years later the Court ruled that the process of "uplifting" socio-economic conditions for altruistic reasons might distort the freedom to observe a religion of one's choice. In 2003, the objection to an Incorporation Bill was based on the argument that propagating Christianity by providing material benefits would threaten the future existence of Buddhism. In response, the Court reasoned that the right to manifest a religion did not include spreading a religion, a determination which Goonesekere argues "has wrongly cut down the scope of religious freedom in Articles 9 and 10 to the rights in Article 14(1)(e)."

With the continuing growth of the evangelical churches, pressure grew in some quarters for an anti-conversion law to be passed. In the event, it was a Buddhist monk who introduced a Private Members Bill entitled "Prohibition of Forcible Conversion of Religion" to create a new offence. The constitutionality of the Bill was challenged by 21 petitioners and supported by exactly the same number of intervenient petitioners. Goonesekere's discussion examines the reasoning of the Court with respect to various clauses of the Bill, and concludes that in the end "[t]here were no winners or losers. Both sides were given something by the Determination, which has

put stumbling blocks in the way of an anti-conversion law." Discussing various difficulties of interpretation arising from the determination, Goonesekere argues that "*[w]here the Determination fails is in not giving a clear interpretation of the scope of religious freedom. The right to religious belief and the right to adopt a religion may be unconditional but there still remains the question whether and what limits could be placed on the right to spread a religion.*" This matter, as yet, remains unresolved.

9. Women's Rights

The chapter on "Women's Rights" concentrates on discussing two Bills aimed at strengthening the legal framework for women's rights in Sri Lanka: the Prevention of Domestic Violence Bill and The Women's Rights Bill. The author, Ambika Satkunanathan, reviews the national and international legal frameworks relating to domestic violence before critically examining the provisions of the Bill and finding it lacking. In particular, the Bill focuses exclusively on the issue of protection orders and fails to take a holistic approach to the issue of domestic violence, failing even to convey the message that domestic violence is a serious crime. In Satukunanthan's analysis, "the Prevention of Domestic Violence Bill appears to be an instance of the government drafting legislation to merely fulfil international obligations without regard for the effect of the law or the socio-economic realities facing women." Satkunanathan's review of The Women's Rights Bill is considerably more positive. This Bill seeks to convert the National Committee on Women into a Commission on Women with enhanced powers. Satkunanathan reviews the provisions relating to the Commission's objectives, membership, powers and financing and concludes that the Bill is "an example of a genuine effort to protect and promote the rights of women." She cautions, however, that women's status is not solely dependent on law reform, and urges the government to adopt an approach which takes into account "historical, socio-economic and cultural realities and seeks to eliminate systemic and institutional inequality."

10. The Right to Health

This chapter reviews Sri Lanka's constitutional and statutory provisions relating to the right to health, as well as judgements of the Supreme Court relating to this right, and

also asks whether the country has an adequate institutional and administrative framework to fulfil it statutory obligations. The author, J de Almeida Guneratne, finds that “the Supreme Court has impliedly recognised a Constitutional right to health” in Sri Lanka and that this right is justiciable. Nevertheless, through comparing the Sri Lankan situation with that in Argentina, India, South Africa and Venezuela, Guneratne is led to conclude that “*objective express constitutional provisions must be incorporated in the Constitution, perhaps with additional entrenched provisions providing that the health budget cannot be cut with further provision to increase the health share of the budget should such demands arise. Only then would there be a framework to make real the right to health with all its concomitant connotations. The other avenues in relation to the right that exist at present are only lesser options*.”

11. Bio-technology, bio-safety and socio-economic rights

As Avanthi Weerasinghe writes in her chapter on bio-technology, “Biotechnology has immense potential to provide solutions to the growing demand for food and health required by the increasing world population.” On the other hand, there are also risks to human health and the environment involved in biotechnology – and in particular, in recent developments in the production of genetically modified (GM) organisms and crops. Further, ethical issues also arise in the context of the patenting regime embodied in the World Trade Organisation’s Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS). In an attempt to address these concerns, the Cartagena Protocol on Bio-safety was adopted in 2000, and was ratified by Sri Lanka in 2004. Sri Lanka is thus now “obliged to develop its own national regulatory framework for the safe transfer, handling, use and release of genetically modified organisms (GMOs) and products resulting from modern biotechnology.”

Weerasinghe provides a detailed review of developments relating to these important issues, providing an overview of the international agreements relating to bio-safety before discussing Sri Lanka’s own response in establishing a National Sub-Committee on Legal Issues under the National Bio-safety Framework to look into the legal aspects of biotechnology and related issues. The Sub-Committee made a range of detailed proposals during 2004 concerning the legislation required to regulate biotechnology but by the end of the year no new laws had yet been passed.

Weerasinghe discusses these proposals in the context of the sometimes conflicting international norms which apply in this field, particularly where regulation by one state party could be interpreted as being overly trade-restrictive by another. She proposes that such conflict could be avoided by adopting an approach "which serves the interest of the public at large."