

Sri Lanka

Tamil litigants and lawyers face serious language problems, particularly in Colombo: interpreters are not available, few judges can function in Tamil, publication of legislation and emergency regulations in Tamil is not up to date and law reports and text books are not available in Tamil. In the areas held by the LTTE a court system has been developed by the LTTE which does not function at all as an independent judiciary. The conflict between the LTTE and the government continues to claim both combatant and civilian lives.

On 4 February 1948 Sri Lanka, known then as Ceylon, was granted its independence and became a member of the Commonwealth. The original Constitution was to a large extent a codification of the British parliamentary system, and created a unitary state.

Under the 1972 Constitution the name of the country was changed from Ceylon to Sri Lanka and it became a republic, while remaining within the Commonwealth. The office of President replaced that of Governor General but it is a largely ceremonial office, with effective power remaining in the hands of the Prime Minister.

Sri Lanka has had a democratic political system ever since independence. The conflict in the north and east of the country, however, continues to undermine respect for human rights. Politics have been dominated by two main parties, the United National Party (UNP) and the Sri Lanka Freedom Party (SLFP). Historically, the UNP has been associated with a market or mixed economy and the SLFP has been associated with socialist economic policies, but with the collapse of socialism as an economic theory there is now little ideological difference between the two parties.

A new constitution, based on the French constitutional system, was adopted in 1978. This constitution, with some later amendments, is the present Constitution of Sri Lanka. The President is the head of state and the head of the government, and is directly elected. In August 1994 the parliamentary elections were won (by a majority of one) by the People's Alliance (PA), a coalition consisting of the SLFP together with some small parties. The PA leader, Chandrika Bandaranaike Kumaratunga, was appointed Prime Minister. In November 1994 Ms. Kumaratunga was elected President and in December 1999 she was re-elected.

The 225 members of the unicameral parliament are elected by proportional representation. Amendments to the Constitution require the supporting votes of two thirds of the total number of members of parliament and, in certain cases, approval by referendum as well. A new Constitution is being drafted, a project that began in 1994. The division in the parliament makes it, however, unlikely that the two third majority necessary to adopt it will be possible.

The Conflict Between the Sri Lankan Government and the LTTE

For sixteen years a conflict between the Sri Lankan Government and the Liberation Tigers of Tamil Eelam (LTTE), who fight for a separate state, has continued, mainly in the north and the east of the country. LTTE bombs occasionally explode in the capital Colombo. A state of emergency has been in force in all or part of Sri Lanka since 1971.

The Sinhalese make up 74% of the total population of Sri Lanka, and the Tamils 18%. Following independence, the Tamil community became increasingly concerned with the

oppressive use of majority power by the Sinhalese, such as the declaration of Sinhala as the official language, changes in the system of admission to universities which reduced the proportion of Tamil students and the promotion of Buddhism and Buddhist symbols.

Tamil politicians, alienated by the failure to achieve a settlement of their grievances by negotiation, moved from campaigning for federalism to campaigning for independence for a separate state of "Tamil Eelam" in the north and east of the island. In the 1977 elections a separatist party, the Tamil United Liberation Front (TULF), won all the seats in Tamil majority areas. In 1978 a number of militant separatist groups began to emerge, notably the Liberation Tigers of Tamil Eelam (the "Tamil Tigers" or LTTE).

The Sixth Amendment to the Constitution, which came into effect on 8 August 1983, made it a criminal offence to advocate the establishment of a separate state within the territory of Sri Lanka. The Amendment also introduced an oath, to be sworn by members of parliament (MPs) and holders of official posts, which included a promise not to support the establishment of such a state within Sri Lanka. The Amendment, in so far as it criminalised peaceful support for separatism and excluded supporters from public office, involved a breach of Articles 19 (2) (freedom of expression) and 25 (right to take part in public life) of the International Covenant on Civil and Political Rights.

The Thirteenth Amendment to the Constitution established nine provinces (the Northern and Eastern ones have Tamil majorities) and created elected Provincial Councils with powers over an extensive list of devolved matters. However, considerable powers of control over the Provincial Councils were reserved for the Governors of the Provinces, who are appointed by the President. The Amendment also gave the Tamil language, in law, equal status with Sinhala.

The Indian Government agreed in 1987 to send a Peace-Keeping Force (the IPKF) to take control of the Tamil areas of Sri Lanka and to restore order. The agreement sparked off a serious uprising by the Janatha Vimukthi Peramuna (JVP) in the Sinhalese areas in objection to the Indian intervention in the internal affairs of Sri Lanka. The JVP, at that time an extremely violent organisation, used tactics of terror and assassination which led to reprisals and counter-terror by the government. Many thousands of people were killed by each side. Estimates of the numbers killed range from 30,000 to 60,000. The JVP now exists as a legitimate political party and has some strength in local government and is no longer violent.

The government resumed negotiations with the LTTE and on 8 January 1995 a cease fire agreement came into force. However, on 18 April 1995 the LTTE denounced the cease fire and resumed hostilities. In the latter part of 1995 government forces undertook a campaign to regain control of Jaffna and its peninsula. Jaffna fell to them on 5 December. There remain, however, some areas which are controlled by the government by day but by the LTTE by night. The LTTE does not have universal support among Tamils.

State of Emergency

A state of emergency has been in force in all or part of Sri Lanka since 1971. The government has relied mainly on Emergency Regulations made under the Public Security Ordinance 1947. Part I of the Ordinance confers on the President power to proclaim a state of emergency in all or part of Sri Lanka if a public emergency exists or is imminent. When an emergency has been proclaimed, Part II of the Ordinance confers on the President power to

make such emergency regulations as appear to her to be necessary or expedient in the interests of public security and the preservation of public order and the suppression of mutiny, riot or civil commotion, or for the maintenance of supplies and services essential to the life of the community. As shown, the President has enormous powers under the Emergency Regulations and parliamentary control is lacking.

Emergency regulations may override existing laws. Neither the existence of an emergency nor an emergency regulation nor an order, rule or direction made under such a regulation may be called into question in any court. No action or prosecution lies against any person for any act in good faith done in pursuance or supposed pursuance of an emergency regulation or an order or direction made under it. This creates an opportunity for abuse and impunity.

The Emergency Regulations and the Prevention of Terrorism Act (PTA) may, among other things, authorise the detention of persons without court approval. With regard to confessions the normal rule in Sri Lanka is that confessions to police officers are not admissible as evidence; confessions are only admissible if made before a magistrate. However, confessions to a police officer of the rank of Assistant Superintendent or above are admissible in the trial of offences under the act. The admissibility of confessions in such cases encourages the use of torture. The defendants in PTA cases even have to prove that the confessions were made under coercion. In 1999 there were no cases under the PTA or the ER that came to trial, although there were more than 1,000 cases pending.

Human Rights Background

Sri Lanka is a state party to all the six UN human rights treaties, including the International Covenant on Civil and Political Rights and the International Covenant against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Sri Lanka's reports to the treaty monitoring bodies, however, are all overdue.

Massive human rights violations occur routinely in Sri Lanka, such as killings, disappearances and rape. The conflict between the LTTE and the government continues to claim both combatant and civilian lives and has, over the years, claimed thousands of victims. In addition, the conflict results in internally-displaced peoples (IDPs) and refugees which are specifically vulnerable groups. The humanitarian situation of the IDPs worsened in 1999 because of the obstruction by the LTTE of the work of humanitarian organisations.

Both sides in the conflict commit serious human rights abuses such as arbitrary detention, torture, arbitrary execution and enforced or involuntary disappearances. The conflict is complicated by the role of paramilitary actors that fight on the side of the government and against each other. Fatal attacks on politicians, lawyers and human rights defenders, such as Neelan Tiruchelvam (see Cases below), occur frequently and are also committed by both sides to the conflict.

No freedom of the press is guaranteed in Sri Lanka. The government uses national security grounds to justify its restriction on the freedom of speech and expression. Journalists have been arrested and even killed for covering the events in the north and east of the country.

In general the security forces can commit their human rights abuses with impunity. In 1999, however there were some positive developments as the government held the security forces in some cases accountable for their abuses, or at least started to investigate complaints:

- A new Presidential Commission on Disappearances was established in 1998 to investigate the thousands of disappearances since the start of the conflict until 1994. In January 1999, an interim report was released. As many cases are still pending, its mandate was extended.
- A former soldier claimed to know the location of mass graves in Chemanni, near Jaffna and in June 1999 the exhumation began. The exhumation is being handled by a team of Sri Lankan and foreign forensic experts and so far several bodies have been exhumed.
- In several cases government officials were convicted for human rights abuses.
- Although criticised for lack of authority, a national Human Rights Commission operated throughout the year, with 11 offices in the country.

Disappearances

It is widely believed that since the beginning of the conflict tens of thousands of people have disappeared in Sri Lanka due to actions of the security forces.

The UN Working Group on Enforced or Involuntary Disappearances expressed concern in its report to the 1999 UN Commission on Human Rights that the Sri Lankan Government has not made any amendments to the Prevention of Terrorist Act (PTA). The PTA allows for up to 18 months of detention on administrative order, under three-monthly renewable detention orders. It also said that the procedures laid down in the Emergency Regulations for post-mortems and inquests into deaths resulting from actions of security force personnel continue to facilitate extrajudicial executions by the security forces.

There are also allegations that detainees are held in secret places of detention and that safeguards relating to the maintenance of registers of detainees, including a central register of detention, provided for within the framework of the Human Rights Commission of Sri Lanka and presidential directives to the security forces, are not being fully implemented. Furthermore, families of disappeared persons face intimidation if they inquire about their relatives.

The Working Group on Enforced or Involuntary Disappearances conducted a mission to Sri Lanka from 25-29 October 1999. The mission's report was, however, not yet available to the public at the time of writing of this publication.

Torture

As stated above, torture is committed by all parties to the conflict: the security forces, pro-government Tamil groups and the LTTE. The Convention against Torture Act makes torture an offence only under specific circumstances. So far, however, security personnel have not been prosecuted under criminal law for acts of torture but have only been fined under civil law. Nobody has yet been convicted under the act and torture by security forces can be committed with almost complete impunity.

In his report to the 1999 UN Commission on Human Rights, the Special Rapporteur on Torture stated that he had received information indicating that torture and other forms of ill-treatment are employed on a widespread basis by members of the security forces, particularly against Tamils held in detention. Despite judicial pronouncements against these practices, various methods of torture were said to continue to be used in police stations and other

detention centres where individuals are forced to confess that they are LTTE members or sympathisers. Worse forms of torture and ill-treatment are believed to be inflicted on persons arrested under the Prevention of Terrorism Act and detained in police stations or army camps.

Harassment of Human Rights Defenders: the Trial of Dr. Jayawardena

Dr. Jayalath Jayawardena, a qualified medical officer, was charged in 1998 with drawing a salary from the state for three years without performing duty. This refers to the time that Dr. Jayawardena served as a medical officer to two former presidents. He resigned in 1994 to enter parliament for the opposition United National Party (UNP). Dr. Jayawardena was also charged with cheating in respect of public property. It is widely believed that these charges were brought against Dr. Jayawardena because of his humanitarian work in the north and east of Sri Lanka.

Dr. Jayawardena is known to be a courageous human rights defender. It seems that he is being pursued because he provides basic medical assistance to people irrespective of their ethnicity. The International Commission of Jurists (ICJ) and other international organisations sent observers to the trial of Dr. Jayawardena. The trial was, however, postponed several times on the request of the prosecution. The International Bar Association raised the issue with the Attorney General of Sri Lanka, expressing the fear that the delays were made to prevent the proceedings from being observed by independent observers. At the time of writing the trial still had to be concluded.

A Red Cross driver, Mr. Duraisamy Padmanathan, who took Dr. Jayawardena to the northern Wanni district in June 1998, was arrested, held for 10 days and threatened with assault and torture in order to make him confess that Dr. Jayawardena had had meetings with the LTTE. The Supreme Court has ordered the release of the driver, stating that the arrest was illegal, and ordered a payment of compensation to him. Dr. Jayalath Jayawardena received death threats after he was publicly accused of facilitating contacts between the UNP and the LTTE.

The Judiciary

Article 105 of the Constitution establishes a Supreme Court, a Court of Appeal and a High Court. Lower courts are established by acts of parliament. The Judicature Act No. 2 of 1978, as amended by the Judicature (Amendment) Act No. 16 of 1989, established District Courts, Magistrates Courts and Small Claims Courts.

Supreme Court and Court of Appeal

According to the Constitution the Supreme Court consists of the Chief Justice and not less than six or more than ten other judges. It is the final court of civil and criminal appeal. In a matter which involves a substantial question of law an appeal can be made from the Court of Appeal to the Supreme Court, in which case either court can grant leave for appeal. If the question to be decided is of public or general importance leave has to be granted.

The Supreme Court also has original jurisdiction in several important matters. The most significant of these is the court's exclusive jurisdiction to hear actions relating to the infringement by executive or administrative action of any fundamental right declared by Chapter III of the Constitution. Cases involving its fundamental rights jurisdiction take up about 75% of the time of the Supreme Court. The Supreme Court has also used its

fundamental rights jurisdiction to gain some control over the exercise of the government's powers under the Emergency Regulations and the Prevention of Terrorism Act (PTA).

The Supreme Court also has jurisdiction to determine whether any bill is inconsistent with the Constitution and, in the case of a bill to amend the Constitution, whether it requires approval by a referendum under Article 83 of the Constitution. This jurisdiction can only be invoked by a petition filed within one week of the bill being placed on the Order Paper of parliament. Apart from this procedure, the Supreme Court has no power to declare a bill or act of parliament to be unconstitutional. The Supreme Court has exclusive jurisdiction to determine questions relating to the interpretation of the Constitution, and if any such question arises in a lower court it must be referred to the Supreme Court for determination.

The Supreme Court has consultative jurisdiction on questions referred to it by the President, and original jurisdiction in relation to certain election petitions, breaches of parliamentary privilege and any other matters determined by parliament.

The Court of Appeal consists of a president and not less than six or more than eleven other judges. It has jurisdiction to hear appeals on matters of fact or law from courts of first instance or tribunals, and to hear applications for judicial review and most election petitions. It has original jurisdiction to issue writs of Habeas Corpus, though the court may (and usually does) refer applications for Habeas Corpus to a court of first instance to inquire and report to the Court of Appeal on the facts of the case.

Both the Supreme Court and the Court of Appeal are based in Colombo and sit in divisions, normally of three judges in the Supreme Court and two in the Court of Appeal, though in cases of exceptional constitutional importance there may be a larger panel. For example, the case concerning the Thirteenth Amendment to the Constitution Bill was heard by nine judges.

High Courts

The High Courts are the courts of first instance for serious criminal cases. They also have jurisdiction as civil courts of first instance in commercial matters. They hear appeals from Magistrate's Courts and Small Claims Courts and they have jurisdiction to make orders of Habeas Corpus in respect of persons illegally detained within the relevant province and to exercise judicial review in certain circumstances.

There is a separate High Court in each province. The functioning of the High Courts is difficult in the northern and eastern provinces. Most trials of defendants from the northern and eastern provinces charged with serious offences take place in Colombo, which is very inconvenient for them and their families, particularly in the case of defendants from the Jaffna peninsula as overland travel to the south is still impossible. There are now seven High Courts sitting in Colombo.

District Courts, Magistrate Courts and Small Claims Courts

District Courts are the main first instance courts for civil actions, and also act as family courts. Magistrates' Courts deal with all criminal offences except those tried in the High Court. Small Claims Courts have a very limited civil jurisdiction, mainly concerned with small debt cases.

Appointment

Appointments to the offices of Chief Justice, President of the Court of Appeal and judge of the Supreme Court, the Court of Appeal or the High Court are made by the President. Judges of the Supreme Court have constitutional tenure until the age of 65, and judges of the Court of Appeal until the age of 63.

District Court judges and magistrates are appointed and may be transferred, dismissed or disciplined by the Judicial Service Commission. This commission consists of the Chief Justice and two judges of the Supreme Court, appointed by the President for renewable five-year terms. The secretary of the Commission is appointed by the President.

The majority of senior judicial appointments are made by promotion, normally on the basis of seniority, from judges of the court of the next lower level. However, a certain number of appointments are made directly from lawyers of appropriate seniority, who are members of the Attorney General's department and other government lawyers. When there is a vacancy in the office of the Chief Justice or of the President of the Court of Appeal, the next senior judge of the court is normally appointed to the office, but by convention the Attorney General may be appointed to fill a vacancy in the office of Chief Justice.

Appointments are occasionally made from lawyers in private practice, and in one case (former Chief Justice Neville Samarakoon) the Chief Justice was appointed directly from private practice. However, successful lawyers in private practice earn far more than judges and are reluctant to accept such an appointment. By convention the President consults the Chief Justice before making such appointments.

As mentioned above, judges of the lower courts are appointed by the Judicial Service Commission. Appointments are usually made from relatively junior lawyers.

Removal

Judges of the Supreme Court and Court of Appeal can only be removed from office by an order of the President, made after an address of parliament, and with the support of a majority of the total number of MPs for such removal on the grounds of proved misbehaviour or incapacity. The procedure for investigation and proof of the alleged misbehaviour or incapacity is governed by Parliamentary Standing Orders. Only one attempt has been made so far to remove a judge under this procedure.

Judges of the High Court are removable by the President, on the recommendation of the Judicial Service Commission. Dismissal and disciplinary control of the judges of lower courts is a matter for the Judicial Service Commission.

Language Problems

Sinhala is officially used as the language of the courts except in the parts of Sri Lanka where Tamil is the language of administration, in which case it is also the language of the courts. Parties and their lawyers who do not understand the language of the court are entitled to use the other language in court and to the services of an interpreter provided by the state. The Minister of Justice may authorise the use of English in any court. In practice, the proceedings of the Supreme Court and the Court of Appeal are conducted in English.

Tamil litigants and lawyers face enormous problems in this respect, particularly in Colombo. The right to the services of an interpreter is not observed because interpreters are not available. In addition, few judges can function in Tamil, publication of legislation and emergency regulations in Tamil is not up to date and law reports and text books are not available in Tamil.

Case Challenging the Appointment of Mr. Sarath Silva as Chief Justice of Sri Lanka

Mr. Sarath Silva, the former Attorney General, was appointed by the President as Chief Justice of Sri Lanka on 15 September 1999, after the term of the former Chief Justice, Mr. G.P.S. de Silva, ended. His appointment was challenged before the Supreme Court in three separate cases on the grounds that it was unconstitutional. At the time Mr Sarath Silva was appointed Chief Justice two cases against him were pending before the Supreme Court which seek to dismiss him as a lawyer for gross misconduct.

One petition against Mr. Sarath Silva is being inquired into by Justice Asmeer Ismail and the other is being inquired into by Justice Shirani Bandaranayake. The first petition was filed against Mr. Sarath Silva by Mr. Jayasekera, whose wife had an extra-marital affair with Mr. Sarath Silva. He is accused of threatening the lawyer of Mr. Jayasekera and obstructing the divorce case while holding the position of the President of the Court of Appeal, and abusing power for his personal benefit.

The second petition was lodged against Mr. Sarath Silva by Mr. Victor Ivan, editor of Ravaya, a Sinhala weekly newspaper. He accused Mr. Sarath Silva of covering up a rape and the embezzlement of funds by Mr. Lenin Ratnayake, a magistrate and alleged relative of Mr. Sarath Silva, by suppressing documents and providing false information.

The bench of the Supreme Court decided to request the Chief Justice to refer the cases to an appropriate larger bench due to the importance of the matter. The Chief Justice directed the matter and on 7 and 8 February the cases were heard on the preliminary objection of challenging the constitution of the full bench. Two of the counsels have raised objection to the participation of three of the judges on the ground of bias. The cases were adjourned until 26 and 27 June 2000.

LTTE Courts

In the areas held by the LTTE a court system has been developed by the LTTE which does not function at all as an independent judiciary. The system does not follow a specific code or rules of procedures. Young law graduates from within the LTTE serve as judges. During the year there were several reports of executions upon decisions of these courts, after which the bodies were disposed publicly.

Cases

The LTTE has threatened to kill the judicial and other public officials serving the courts in Jaffna and other areas.

Kumar Ponnambalam (lawyer and leader of the All Ceylon Tamil Congress): Mr. Ponnambalam was killed on 5 January 2000, allegedly out of revenge for a suicide bomb explosion that had killed 11 people and wounded 29 some days earlier. Mr. Ponnambalam

was a lawyer and leader of the All Ceylon Tamil Congress. On 17 December 1998 the CIJL sent a letter to the Attorney General to inquire about the situation of Mr. Ponnambalam following a television interview he gave on 17 November 1998 and upon which there were reports that he would face charges upon return to Sri Lanka.

Neelan Thiruchelvam (lawyer, human rights activist and Member of Parliament): Dr. Neelan Thiruchelvam, a prominent constitutional lawyer and a moderate opposition member of parliament, was killed on 29 July in a suicide attack. Dr. Thiruchelvam was also the founder and head of the International Centre for Ethnic Studies and the Law and Society Trust.

Dr. Thiruchelvam was a strong believer in constitutional reforms and actively supported the devolution process as one of the means for ending the ethnic and political conflict. He is believed to have been killed by a LTTE suicide bomber in Colombo.

Percy Wijesiriwardena (judicial officer): On 23 October 1998, Mr. Wijesiriwardena was sent on compulsory leave. On 8 March 1999, the Judicial Service Commission (JSC) proposed to Mr. Wijesiriwardena that he take retirement as an alternative to instant dismissal. Later that month, Mr. Wijesiriwardena received a letter from the JSC that he was to take compulsory retirement.

The action of the Commission was prompted by a police report, the contents of which was not made available to Mr. Wijesiriwardena. In addition, no criminal proceedings commenced against him.