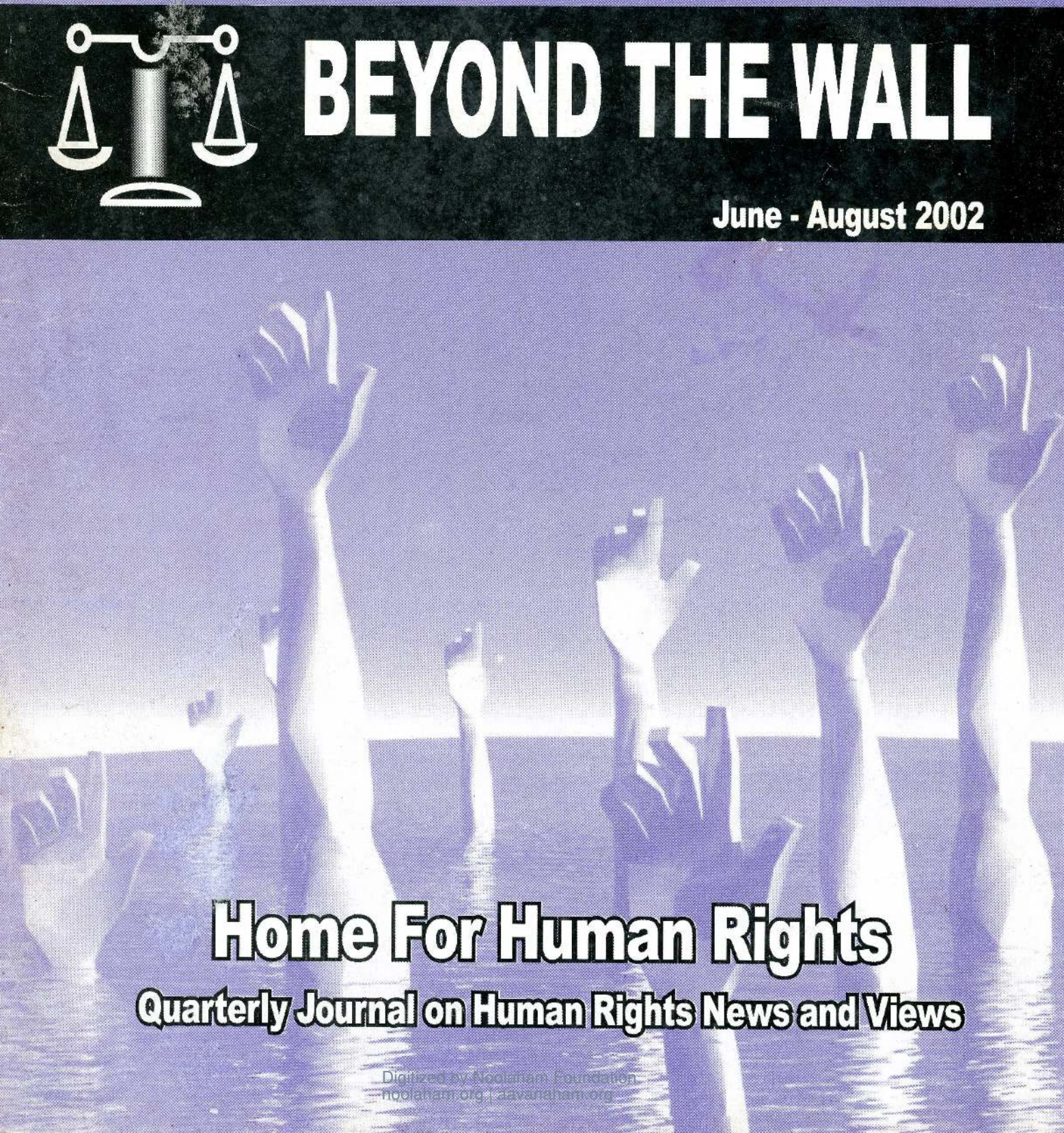
BEYOND THE WALL

June - August 2002



Home For Human Rights

Quarterly Journal on Human Rights News and Views

BEYOND THE WALL

Quarterly Journal

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The views expressed in the articles in this volume are those of their authors and do not necessarily reflect the views of the editorial board.

Beyond The Wall welcomes contributions from those involved or interested in human rights. The subject matter is restricted to news, views and academic papers on human rights issues In addition to papers and articles, we will welcome critical comments and letters to the editorial board.

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Home for Human Rights

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Chasing flies

By Sujith Xavier

Conceptualising *Beyond the Wall* was a tough and daunting task. It was initially intended to bring out legal issues surrounding human rights violations in the northeastern province of Sri Lanka. It was to be designed to show there was a complete and total lack of respect for human rights, by looking at specific issues and highlighting them.

However, all this quickly changed. The then executive director of Home for Human Rights (HHR) and I had many meetings to discuss what the contents of the journal would be and its future. My vision of Beyond the Wall materialised after my first trip to Vavuniya and the camps for the internally displaced persons (IDPs) in the area.

The trip itself was very taxing. Not only did the Sri Lankans in the HHR team have problems entering the area, there was also a foreigner (Heather Upadhay) with us. Because Heather and I did not have the requisite permissions from government authorities, we were held at the checkpoint for a number of hours. However, the trouble was worth it!

While in Vavuniya, we were fortunate to enter IDP camps with the help of Oxfam officials. Entering the camps was a monumental step for *Beyond the Wall*. It was here where the mission and purpose (my purpose for the journal) became very clear to me.

While there, we visited numerous camps. One of them has stayed in my mind and will do so forever. Though I am a Tamil by lineage, prior to my arrival in Sri Lanka, I had no notion of the situation or the plight of the people in the island. With this visit everything changed.

As we entered the compound, there was a large group of individuals busy watching television (in the middle of the afternoon) from a set that was supplied by the UNHCR. We were then escorted into the camp itself and shown the area where the IDPs lived. Both Heather and I were utterly shocked. As we passed, this striking, elderly woman approached us. Not only did she give a complete update on the happenings in the camp (from incest to rape to rampant use of alcohol) but also left us with a quote that we, or at least I, will never forget!

As she stood in front of the entrance to the main warehouse, which was once upon a time used to store wheat, she pointed to the small tents that were put up to accommodate the IDPs and said in Tamil, "We chase flies while we sleep, we chase flies while we are cooking and eating, so basically our lives are spent chasing flies!" Not only was this statement literally true but also it was very metaphoric. It explained the dilemma camp dwellers face day in and day out

They were basically prisoners who were given limited right to movement through the pass system imposed by the government. The system that was used to control them not only made it impossible for complete integration with the other communities in the area but also reduced their intrinsic value as a group and as individuals compared with the rest of the population. While they (the camp dwellers) had limited movement rights, the others (the people in the town) had much greater accessibility and freedom.

There was thus the creation of a new class system that had managed to erect barriers. The metaphor of chasing flies was perfect. The elderly woman was also referring to the complete lack of motivation or enthusiasm in the dwellers. They were used to handouts and learnt to expect it from the state and aid agencies.

Thus the metaphor was a basic reference to what lies beyond the wall in the outside world. It was by coupling this notion with the initial idea of documenting trends in judicial decision-making within the Sri Lankan courts system that *Beyond the Wall* was born.

Originally, *Beyond the Wall* intended to give voice to the judicial application of the law in terms of certain affected communities. Its basic focus was to look at how judges and even legal practitioners were grappling with two of the most discriminating and brutal legislation/ regulation used by the government to contain the Tamil movement, the emergency regulations and the Prevention of Terrorism Act. However, this was very simplistic as it ignored the vast number of problems faced by the community, which should be the framework within which these laws and regulations are examined.

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"We chase flies while we sleep, we chase flies while we are cooking and eating, so basically our lives are spent chasing flies!"

Valaichenai violence: what the public does not know

By S. Jayanadamoorthy

Then a group of Muslims who had come from the Oddamavadi side of the bazaar lobbed a grenade among the crowds, creating panic and pandemonium.

The 'hartal' in Valaichenai came unannounced on the morning of June 27. Tamils in Batticaloa knew that something was amiss in the Muslim towns and villages of the district when masses of burning tires blocked traffic between Kalmunai and Valaichenaion on the main coastal road .

No one knew why or by whom the 'hartal' had been called. Unaware of the general shut down protest in the Muslim towns of Eravur and Oddamavadi, two private buses owned by the AVS company bound for Colombo and an Eastern Bus Company bus on its way to Trincomalee, set out from Batticaloa town on Thursday morning.

On days 'hartals' are called for in the Tamil areas of the eastern district, life would go on as usual in the Muslim towns. "Tamil 'hartals' did not apply to Muslim areas except in the disruption of long distance bus services. We had good reason to think that it was a protest confined to Muslim areas," says an official of the Eastern Bus Company in Batticaloa.

A group of Muslims stoned the three buses in Oddmavadi. Several passengers were injured.

Meanwhile, the Valaichenai bazaar was getting busy, with crowds of morning shoppers and commuters from the large Tamil neighbourhoods of the town and from nearby Tamil villages such as Peythalai and Puthukkudiyiruppu. No one was aware that Muslims had called a 'hartal' that day; and the Tamils didn't consider the Valaichenai bazaar a 'Muslim place'.

Then a group of Muslims who had come from the Oddamavadi side of the bazaar lobbed a grenade among the crowds, creating panic and pandemonium. As the wounded - all Tamils - were rushed to the Valaichenai hospital, rumours spread like wildfire in the Tamil neighbourhoods that Muslims were attacking Tamils.

Memories can die hard in this eastern town. The gutted out remains of a cinema hall, a row of shops and houses still stand testimony to the havoc wreaked by Muslims mobs backed by the army in 1985. The town centre and main bus stand shifted from its east end to its present location since the destruction 17 year ago.

The Tamils say they are yet to regain their traditional economic dominance in Valaichenai. Most businesses are in the hands of the Muslims now despite attempt to start a Tamils only market in the mid nineties.

Tamil traders who met Economic Reforms Minister Milinda Moragoda on Sunday, June 30, said that they were slowly getting back on their feet after the MoU was signed between the United National Front government and the Liberation Tigers of Tamil Eelam.

"The 'hartal' was a pretext for the Islamic extremists to destroy the Tamil people's economy in Valaichenai. They used guns, claymore mines and grenades to attack us. The police stood by when Islamic extremists were attacking us with these weapons. Who gave them these weapons?" asked Ethirmannasingham Kamalranjith, the spokesman for the Tamil community leaders and traders, during a discussion with Moragoda and army commander, Lt. Gen. Lionel Balagalle.

Tamil traders told the government delegation that the army and police had, during the curfew, prevented them from removing their belongings from their shops and stores, saying that they would provide necessary protection.

However, all the Tamil shops and buildings in the bazaar were burnt on Thursday night while the army and police who promised to safeguard the area just stood by.

Bitter memories of 1990 July-August when the army moved into Valaichenai, assisted by Muslim home guards, allegedly abducting and killing scores of Tamil youth

remain, keeping the old fears alive beneath the veneer of normalcy that the outsider may presume, visiting the bazaar on any weekday.

Over the years, Tamil suspicions and apprehensions were regularly exacerbated by the activities of Muslim policemen and home guards and the Muslim soldiers in the army's National Guard Battalion camp at Navalady junction. Hemmed in by 10 army and police camps since 1990, Tamils in Valaichenai have, until 1999, endured shelling, shooting, deaths, maiming and destruction of property.

The area had the highest civilian casualty rate in the war-ravaged northeast for many years. Tamils continued to attribute many of the woes, including forced labour, to insidious conspiracies by Muslims in the security forces.

Hence the rumours of a Muslim attack fanned, in a trice as it were, embers of the fears and suspicions that had taken root among the Valaichenai Tamils since 1985, into mob anger. A Tamil mob found two innocent Muslims who had been hired to cook at the wedding of a local NGO notable. Both were abducted and killed. police found the bodies in Kalmadu on Monday.

As the night approached on Thursday, Tamils living behind the bazaar fled their homes, fearing a major attack by the Muslims. The LTTE refused to help Tamil youth from the area who approached it for weapons and grenades.

But 'Siva', the leader of the EPRLF (Varathar faction) that works with the army in Valaichenai came to the aid of the people, promising to beat back the Muslim mobs which were expected to attack the Tamil neighbourhood after dark. Siva's men and local youth formed patrols to guard the area at night. They claimed they counter attacked with grenades a Muslims mob that had set fire to some houses in the Tamil neighbourhood on Thursday night.

About twenty Muslims injured in the attack were admitted to the Maancholai hospital and were then transferred to the Polonnaruwa hospital.

Meanwhile, a 'theoretician' for the Muslim militants in Oddamavadi, spread alarm by claiming that the victims were injured in a mortar attack by the LTTE. (Maj. Gen. Sunil Tennekoon, GOC of the army's 23Division cleared the matter during a discussion with the LTTE in Batticaloa town).

The three Tamil National Alliance MPs of Batticaloa who visited the troubled area on Friday were waylaid by an angry mob of drunken men at Morakkoddanchenai, demanding the immediate release of an imaginary bus that has been hijacked with its Tamil passengers at Oddmavadi. The MPs charged in a letter to the Prime Minister that Muslim policemen in the area were involved in the attacks on Tamils in Valaichenai.

The Tamils say that the EPRLF (Varathar faction) allegedly helped them save their neighbourhoods by counter attacking Muslim mobs with grenades and providing them armed protection.

But the question still hangs over the source of the guns and grenades in the hands of the Muslim militants who ignited the Valaichenai conflagration on June 27.

"The Muslims here certainly need physical protection. The LTTE and we are discussing practical means of ensuring it. But it is not a good idea for Muslim youth to fall prey to the designs of elements that give them weapons with a view to creating havoc and destabilising the peace process," said a police officer in the east.

A Tamil mob found two innocent Muslims who had been hired to cook at the wedding of a local NGO notable. Both were abducted and killed. police found the bodies in Kalmadu on Monday.

Chasing...

Cont. from page 3

Thus, *Beyond the Wall* was intended to have both socio-political and legal aspects. It is meant to show the reality behind the veil that was drawn by certain experts in non-governmental organisations, international organisations and state agencies. It was to show how the civil war has managed to ravage this small island, not only to the outside world, but also to the people within (including the experts).

It is a concept that will not only provoke thinking, but maintain a judicious balance by ascertaining both sides of any question and evaluating the facts from highly specialised legal and social points of view, with specific focus on the legal aspects.

It should be remembered that this journal was conceptualised prior to my arrival at HHR. I was tasked with initiating the first issue. However, due to other pressing matters and later my departure from the organisation for academic reasons, this was put on the backburner. Almost a year later, I am writing a introductory piece for the first issue. It is with sincere gratitude that I would like to thank all those involved and I would like to dedicate this first issue to the countless victims of human rights violation. Injustice anywhere, is injustice everywhere.

The crime of genocide

By I. Francis Xavier

Even in times of emergency, armed conflict, insurgency or civil war, the right to life cannot be derogated, as Sri Lanka is a party to the International Convention on Civil and Political Rights (ICCPR)

The duty of the state is to safeguard the rights of its people. The interests of the people are its concern. Among the rights of human beings, the right to life is the most supreme or primordial right.

It is legally and logically accepted that the primary and paramount duty of all the states is to guarantee this right – the right to life of all people whether citizens or aliens.

It could be asserted that the right to life of an individual imposes a corresponding duty on every other person to respect it. The duty of the state to guarantee and legally protect the right to life of all is enshrined in almost all constitutions and penal laws. This legal norm is accepted in all domestic law as well as in international law.

There is a growing tendency to abolish the death penalty. According to the latest information from Amnesty International, about 80 countries have abolished the death penalty and few apply the such punishment on a very limited basis.

Modern legal norms and concepts accept the view that all members of the population of a country whether citizen or foreigner, is entitled by law to certain rights. Sri Lanka has accepted this principle in the present constitution under Chapter III under the heading 'Fundamental Rights.' Sri Lanka is also a signatory to the Genocide Convention.

Penal law also guarantees this right except with a few exceptions like in self-defence. Even in times of emergency, armed conflict, insurgency or civil war, the right to life cannot be derogated, as Sri Lanka is a party to the International Convention on Civil and Political Rights (ICCPR).

In international human rights law the concept of the right to life has gained supreme importance. This is an inoperative norm where no derogation is allowed. This concept is contained in Article III of the Universal Declaration of Human Rights and Article VI of the ICCPR. In Article VI, the International Bill of Human Rights states:

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crime in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant of final judgment rendered by a competent court.

3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorise any State, party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.

4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.

5. Sentence of death shall not be imposed for crime committed by persons below eighteen years of age and shall not be carried out on pregnant women.

6. Any State, party to the present Covenant shall invoke nothing in this article to delay or to prevent the abolition of capital punishment.

The European Convention of Human Rights, the American Convention of Human Rights and African Charter of Human Rights also guarantee this right. The word 'inherent' and the word 'arbitrary' were used with the specific purpose to give the highest possible emphasis and importance to the concept of the right to life. During the debates and discussions there was much controversy and heated debate over the use of the word 'arbitrary' in the Article VI of the Covenant, but finally this word was used in order to give the utmost level of protection to human life.

In 1982, the UN Commission on Human Rights adopted that all peoples and individuals have inherent right to life and

safeguarding this right was an essential condition.

Crimes against humanity, genocide, disappearance, death resulting from torture, mass killings and massacres and unwarranted killings of civilian populations are all crimes against the right to life of human beings. These are generally termed arbitrary killings.

It is universally accepted there is no other issue or concern more urgent than exploring methodsand taking concerted action to prevent people from arbitrary killing and unwarranted deprivation of life. The organs of the United Nations dealing with human rights have taken upon themselves as primary function the safeguarding this right.

The root for this anxiety and alarm goes back to the untold human suffering, and annihilation of sizable number of the human beings in the two world wars, the subsequent arms race between powerful nations and stockpiling of the nuclear weapons by them.

The desire to punish war criminals of the Second World War and the need to stabilise and strengthen organisations to establish peace arose from the irreparable damage and destruction to human life during this war.

Leading members of the United Nations during the closing stage of the Second World War were inclined to punish those who were instrumental in conceiving, conspiring and conducting war and crimes against humanity. Members of the nine European countries, which were invaded by Hitler met in London 1942 and declared that they should punish those who committed violence against civilian populations in those countries. The statements made by them give force to this view.

The great powers – Russia, USA, UK and France – came to an agreement on August 8 1945, for the prosecution and punishment of the major war criminals of the European Axis Powers. In pursuant of this agreement and modifications made by the Protocol of Moscow on October 10, 1945, an International War Tribunal was established. This is what came to be known as the Nuremberg Tribunal. It had jurisdiction to try four types of crimes. These are contained in Article 6, of the Nuremberg Charter.

1. Conspiracy in connection with crime against peace, war crimes, crimes against humanity
2. Crimes against peace
3. War crimes

The Charter of the Nuremberg Tribunal (Article – 6C) defined crimes against humanity as follows:

"Murder, extermination, enslavement, deportation and other inhuman acts committed against any civilian population, before or during the war or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the tribunal, whether or not in violation of the domestic law of the country where perpetrated."

The inclusion of this charge was basically to punish the Germans for crimes committed against German nationals and aliens who were resident in Germany. Sixteen accused out of the 24 were found guilty under this definition. It is important to note that only at Nuremberg were crimes against humanity recognised for the first time. The word genocide appeared in the indictment of the war criminals. Subsequently in Poland, also in 1946, the prosecutor in the Supreme National Tribunal charged some persons for genocide.

Humanity should be indebted to the noted Polish scholar and jurist Raphael Limkin his untiring effort to make the Genocide Convention a reality. Almost all those who were involved in establishing this convention accept that it is because of this one-man crusade this convention was piloted successfully through all its stages and won the approval in the United Nations General Assembly in December 1948.

The crime of Genocide is as old as history. But the word Genocide was coined by Raphael Limkin from the Greek word 'Geno' meaning race or tribe and Latin word 'Cide' meaning killing. Genocide is directed against group as an entity with action (killing) directed against individuals as members of that entity.

According to Limkin, Genocide is the most glaring illustration of the crime against humanity. International law through the Genocide Convention makes provision to punish this crime over and above domestic jurisdiction. Genocide is a deliberate destruction of a racial, cultural, tribal ethnic or political group.

Crimes against humanity, genocide, disappearance, death resulting from torture, mass killings and massacres and unwarranted killings of civilian populations are all crimes against the right to life

(Genocide will continue to be be addressed in later issues of *Beyond the Wall*)

Beyond the wall: life in Sri Lanka's welfare centres

By Sujith Xavier

Some have reported that they have been displaced over 20 times within the past four years due the fighting between the guerrillas and the armed forces.

Implementing human rights norms set forth in the Universal Declaration of Human Rights, as envisaged by its framers, has become easier today than at the time they were conceived. The world has witnessed implementation of the norms in the Declaration of Human Rights from the latter part of the 20th century to the 21st century. Yet, this process has not reached its full potential judging from the mass violations of human rights one encounters today, some even as severe as the denial of basic rights. Hence, when one attempts to review certain specific notions, it becomes apparent how rampant these violations are.

Human rights violations of internally displaced persons (IDPs) are currently taking place. Throughout the world, it has become apparent the rights of particular groups of people are being denied under the veil of waging war against insurgents and other forces. Yet the implications of this denial of rights can be regarded as the fundamental factor behind the suffering of the many and the weak. Those in the hands of the oppressor are civilians whose only crime is to live in a particular region or place at a particular time.

The plight of the internally displaced in Sri Lanka can be viewed and examined within this context. Camps for the internally displaced is normal in the country. Every time there is a military operation in the northeast, hundreds get displaced. If one were to have a discussion with the many families that are still living in the north, one will be surprised at the multiple displacements they have gone through. Some have reported that they have been displaced over 20 times within the past four years due the fighting between the guerrillas and the armed forces. What is essential to understand is there is widespread acceptance that if you live in the conflict zone, you are liable to be displaced.

As the fighting increased, many people living in conflict areas were forced to vacate their homes due to fear of their lives and security. They lost their livelihoods, their employment and their ability to have peaceful and fulfilling lives. The conflict, due to years of discrimination by the majority population has led to the destruction of the social fabric of the Tamil population. According to the recently signed statutes of the International Criminal Court (ICC), this constitutes genocide. The plight of the IDPs, especially due to their status as such, has not been able to recreate the structure of their previous environment. The reported instances of mental and physical illness have increased. This is predominately apparent in the IDPs who are in welfare camps.

Thus the armed conflict has led to the degradation of Tamil society and culture. The perpetrators are both the militants and the army. Yet it must be realized that the cause of this conflict emerged as discrimination by the majority group against the minority. Nonetheless, the cost of the war has untold amount of misery and deprivation on the people.

Among the many state and non-state actor-sponsored atrocities and injustices, the most harmful is the elimination of the cultural fabric. For example, when temples are bombed and or occupied, the heart of the community - its religious beliefs - are affected. Culture, prior to the conflict was one of affluence. Today, culture among the displaced and those within the conflict zones has been replaced by something that is dependent on the aid of others and/or the government.

Self-reliance and independence that were once the essence of the community have now been converted into a mutated form of discrimination where the victims themselves are perpetuating the cycle without intention. The government in the name of eliminating the

insurgents has knowingly unleashed a severe form of discrimination that has spawned a number of social evils such as rape, incest and organised violence against the defenceless within these camps and outside. According to a Home for Human Rights staff, "Due to the lack of livelihood, the men, once the breadwinners are now faced with days that seem endless. They spend their time drinking and idling."

This is the context in which many internally displaced people live. They are faced with severe hardships and untold misery. According to a camp resident in Selvakulam in Vavuniya, "We chase flies as we cook, we chase flies as we eat and thus basically we are chasing flies as we live." This in essence articulates the extent to which the community has suffered. It also provides a lens into the level of discontent within the camps.

In order to fully understand the inclemency of the situation, it is essential to have an accurate reading of the scenario. However, the actual numbers of displaced are very hard

Jaffna District

(156 Welfare Centers, but do not have statistics due to the conflict):

Karaveddy D.S Division	R.D.S W.C	16 Families
	Neenguvil W.C	12 Families
	Kattupulam W.C	35 Families
	School Street W.C	35 Families
	Keerippillai W.C	58 Families
	Sudaroli	33 Families
	Kilan W.C.	11 Families
	Kumaran Kulam W.C	33 Families
	Kottapillai W.C	24 Families
	Kotikulippan W.C	33 Families
Point Pedro D.S. Division	Susaiyappar Road, W.C	14 Families
	Ubayakathirkamam W.C	10 Families
	Vallipura Kurichchi W.C	20 Families
	Katkovalam W.C	24 Families
Chankanai D.S. Division:	Amaithy W.C	34 Families
	Thoppu W.C	12 Families
	Pothagar W.C	09 Families
	Odakkarai I W.C	26 Families
	Odakkarai II W.C	11 Families
	Odakkarai III W.C	05 Families
	Neethavan W.C	65 Families
	Periyapulo W.C	42 Families
	Kampanai W.C	32 Families
	Kattupulam W.C	28 Families
	Kulippan W.C	28 Families
Sandilippay D.S. Division	Thoran Thottam W.C	32 Families
	Rajah Pallavan W.C	07 Families
	Sellamuthu W.C	09 Families
	Pulavar W.C	76 Families
	Attakiri I W.C	26 Families
	Attakiri II W.C	27 Families
	Kelankamam W.C	20 Families

Vavuniya District

Sithamparapuram A Division:	360 Families
Sithamparapuram B Division:	374 Families
Sithamparapuram C Division:	402 Families
Sithamparapuram D Division:	388 Families
Poonthottam Unit 1:	289 Families
Poonthottam Unit 2:	174 Families
Poonthottam Unit 3:	269 Families
Poonthottam Unit 4:	217 Families
Poonthottam Unit 5:	349 Families
Poonthottam Unit 6:	232 Families
Poonthottam Unit 7:	214 Families
Poonthottam Unit 8:	202 Families
Poonthottam Unit 9:	135 Families
Vepankulam:	286 Families
Nelukulam:	213 Families
Adapankulam:	383 Families
Sanasa Transit Camp:	148 Families

Mannar District

Cleared areas (Army controlled)	
Peasalai ORC:	1023 Families
Kadaspathini WC	58 Families
Jeevodayan WC:	345 Families
Katkaadanthakulam WC:	179 Families
Uncleared Areas (Rebel controlled)	
Palampiddy WC:	865 Families
Paliyaru WC:	251 Families
Wellankulam WC:	243 Families
Moonrampiddy WC:	633 Families
Vadattaltivu WC:	41 Families
Ilupaikadavai WC:	199 Families
Holy Site	
Madhu WC:	2293 Families

Kilinochchi District (Rebel controlled, Approximately 29,000 families)

40 Welfare centres 5,972 Families

Mullaitivu District (Rebel controlled, Approximately 33,000 families)

73 Welfare centres 7,939 Families

Batticaloa District

Valachchenai

Uthuchchenai WC:	153 Families
Vadamunai WC:	89 Families
Punanai WC:	68 Families
Vinayakapuram WC:	54 Families
Petalai WC:	116 Families
Mandoor	65 Families

Ampara District

Thirukkovil:

Kanchikudiarau:	64 Families
Thangavelauthapuram:	91 Families
Akkaraipattu:	
Alayadivembu:	48 Families

"Due to the lack of livelihood, the men, once the breadwinners are now faced with days that seem endless. They spend their time drinking and idling."

to gather. Many who have been displaced and who possess the means are able to create a new life outside the sphere of the conflict. These individuals do not have to face the rigors of the welfare centres. There are others who are able to stay with relatives and friends. The statistics given below are only of the poor and those with poor means of survival. Only statistics of those living in camps will aretaken for discussion in this monograph. Yet it must be emphasised that violation of the rights of those staying with relatives and others are also grave and harmful.

Those living within the camps are vulnerable since most of the welfare centres are managed by the military and considered detention centres. There will be a general statistical survey after which comments on the specific sectors will be made – for example, the notion of women and their struggle within the camps. .

There are also IDPs in Puttalam (Approximately 45,000 were displaced during 1991 and some have been resettled within that region. However, accurate statistics are unavailable). Accurate statistics are unavailable on Trincomalee, Pollanaruwa and Anuradhapura.

Analysis

Examined in this context, many of the rights guaranteed in national and international legal instruments are denied to the IDPs. If one were to view the local context in which these camps exist, human rights violations become glaringly evident.

Civil and Political Rights

According to the Human Rights Commission of Sri Lanka (Vavuniya coordinator), there were 365 complaints of arrests, detentions and disappearance. Of these, 140 were from the IDP camps within that region. This illustrates the severity of the violations within the camps. According to another source, the clear existence of the paramilitary and their renewed efforts to recruit and spy are some of reasons behind these complaints.

Thus if one were to take the camps themselves, people are "essentially packed like sardines" within certain closed-off spaces. These spaces represent the boundaries of their existence in terms of what they can and cannot do. The areas themselves are fenced off and there is military installation that "safe" guards the installations. Those who enter and leave are restricted through the pass system. There are severe restrictions of movement due to passes, which ought to be obtained from military and police checkpoints. Yet there is no safeguard against intruders, and the military may enter the camp and take away the inmates.

The essence of the problem within the camps is that the police, paramilitary groups and the military entertain a general suspicion of the inmates. Explanation for suspicion is never articulated. The mere fact that you are a male or female within a certain age group is enough to land you in the closest police station and then in prison.

The system of arrest and detention in Sri Lanka is such that information is extracted from detainees through confessions by using coercion, including torture. If violence is used as a means of extracting information, it must be underlined that the authorities also concoct charges. This whole notion is reminiscent of the "Tele-market that must sell the most amount of goods to get the highest amount of pay." The authorities too feel they must get as many confessions as possibe to be worth their pay!

The analogy may seem far-fetched, but there is a general consensus about this among legal practitioners.

Within the welfare centres there are frequent complaints of arrest and detention. The people within are seen as easy targets, given their close proximity to certain military installations and the security forces manage that since the centre itself. According to same source, 50% of the complaints received are from the camps.

Economic, Social and Cultural Rights

Apart from violations of civil and political rights, citizens in the camps face other violations as well. These are centred on economic, social and cultural rights. The camps themselves are complete violation of the individual's right to housing. If one were to take any of the camps within Vavuniya or Valachenai or even Mannar, the inhabitants are confined to space that is not bigger than 5' x 12'. Within this space people have to cook, eat and live. Since families tend to grow even after being confined in the camps space is a big issue.

The large structures that house these camps are also of poor quality. They were built as warehouses or for other uses, but now are converted into living space. If one were to see the Vepamkulam Camp, one of the more habitable in the Vavuniya area, there is no ventilation. The camp itself is behemoth structure that looks like a factory from the outside. Once inside, one cannot see one end of the structure from the other end. Within there are about four, five light bulbs that are never turned off. There are small windows at the top of the structure, which is 20 feet tall. Thus the amount of light that enters the space is very limited. The amount of fresh air is also limited. However, this supposedly one of the 'best' camps.

If one were to take any of the camps within Vavuniya or Valachenai or even Mannar, the inhabitants are confined to space that is not bigger than 5' X 12'. Within this space people have to cook, eat and live.

An overview of children's rights

By Eugene Mariampillai

Rights and Duties

Rights, traditionally, have been given the definition of legally protected interests. Human rights are therefore interests of a human person qua person, which are legally protected. The topic of human rights is very much in vogue today. Rights are normally contrasted to duties. Duties are obligations imposed upon a person, a group of persons generally. Even while speaking about human rights some authors have stressed the importance of duties. V. T. Thamilmaran, for example, has done so in his book 'Human Rights in Third World Perspective.'[1]

Fr. Mervyn Fernando referring to a suggestion to include human rights in school curriculum has this to say: "Human Rights has become the fashionable slogan of the day and the panacea for all social ills. And now it seems that even education will not be right without human rights.

"I am reminded of the saying of the Chinese Sage Lao Tzu: 'Those who have virtue (dharma) attend to their duties; those who have no virtue, attend to their claims (rights).' By this yardstick, we should be ashamed of the poverty of virtue in our society. We are so preoccupied with rights that it seems there is no such thing as duty and obligation.

"But is it really possible to secure the rights of anyone without a corresponding discharge of obligations by another? It is pointless, for example, to talk of the rights of the child, or the U.N Declaration on the Rights of the Child without insisting on the obligations of parents regarding childcare.

"The U.N Declaration should have been on the obligations of parents. If parents discharge their duties, children's needs (rights) are satisfied automatically. We are trying to stand the man on his head when he should be on his feet. Or to change the metaphor, we are looking through the wrong end of the telescope.

"Instead of teaching human rights to children in school it would be far more beneficial and socially productive to teach parents and teachers their duties, obligations, which are so badly neglected nowadays. Instead of seminars and workshops on human rights we should set up Island-wide "Schools of Duty/Obligation" for all those wielding authority from parents to President"[2].

This is indeed true. If all men start insisting on their rights, ultimately there would be quarrels. Thus the way we view life, the philosophy that we adopt are important. Sir Thomas Moore in his book 'Utopia' was thinking about a society where men are eager to help others and not a society where everyone wanted to insist on his rights. No doubt Utopia remains a Utopia but the attainment of it should be the ideal that we should strive for.

V. T. Thamilmaran has stated how there has been a shift from' rights-oriented' ideology of human rights to 'duties-oriented.' By demanding their economic, social and cultural rights, third world countries try to establish within the U.N a New International Economic Order, which is conducive to the realisation of the rights and freedoms set forth in the international instruments. In other words, an era of' enthroning duties of man has been initiated by these countries.[3]

Thamilmaran here was speaking about the economic development of third world countries. But even apart from this narrow domain duties are important.

The Aim of Life

A general philosophical view with respect to the meaning and purpose of life should next be studied for if we are not clear about the purpose of life, any talk with regard to human rights may become meaningless.

Before we get into a bus, we must make sure that the bus takes us to the correct destination. If we want to go to Galle, we must get into the Galle bus. If by some mistake we had got into the Kandy bus, however much we may examine a road map inside the bus, the exercise would be futile.

Buddha when he propounded his eightfold path towards Nirvana has mentioned 'Right views' as the very first path. Hence our views regarding life must be clear and right.

I am reminded of the saying of the Chinese Sage Lao Tzu: 'Those who have virtue (dharma) attend to their duties; those who have no virtue, attend to their claims (rights).

1. V.T. Thamilmilran. Human Rights in Third World Perspective. Har. Anand Publication. New Delhi (1992). Chapter I,
2. The Island, 7th June, 1994- p. 6.
3. V.T. Thamilmaran, Human RightS in Third World Perspective. Op. cit .p. 18

Further in the East, religion occupies a central place in life. Sometimes people indulge in irrational activities out of religious beliefs. Thus certain commonplace illnesses are traditionally treated as having a divine origin and the protein necessary to treat those diseases are treated as taboo.[1]

In the Western countries by contrast religion today does not hold a central place. In the medieval period of course the situation was different. Even in the West, religion then occupied a central place. Touching upon religion, I would analyse certain basic concepts of Christianity, Hinduism and Buddhism.

What is important is the impression that is created in the mind of an average reader. The members of some separatist movement may think that it is their duty to fight and thus go on fighting

Christianity

Many pious Christians, especially Catholics believe that the purpose of life is to glorify God. In addition, many catechisms teach that God created us to serve him, love him, and thereby enter Heaven. St. Ignatius Loyola, the founder of the Society of Jesus, a religious congregation well known for its educational activities had as his motto "Ad Majorem Dei Gloriam" - for the greater glory of God; thus the glory of God seems to be paramount.

Arguably this view of life is not consonant with the dignity of man. In the Charter of the United Nations and in the International Covenant on Civil and political Rights (ICCPR) and also the International Covenant on Economic Social and Cultural Rights (ICESCR), the 'dignity of man' is a recurrent theme. One finds it often in the preambles of these documents and also in other international covenants.

Referring to the Christian point of view, one may ask, "Why should I live for the glory of another person? Should I not live for my own betterment and also for the betterment of other suffering and mortal human beings?"

No doubt, if we go through history we find that many crimes and atrocities have been committed owing to self-glorification, the glorification of a State, of a race etc. Probably that is why the glorification of God has been brought in as a useful antidote.

Hinduism

Hinduism stresses the importance of duties. The Santhiparva one of the books of the Indian epic 'Mahabaratha,' for example, sets out in great detail the rules governing the conduct of rulers. These appear in the discourses of the sage Bhisma in reply to King Yudisthira. This work contains a systematic body of political ideas and embodies a comprehensive theory of kingship and government[2].

Similarly the Indian treatise 'Arthasastra' speaks about the duties of a king rather than about his divine prerogatives.[3]

While admitting all these and more and the many beneficial aspects of Hinduism, as a critic, I wish to point out to a weakness in the Hindu philosophy. 'Bhagavad Gita,' an important book in Hindu religion, relates the lesson that was taught by Lord Krishna, the charioteer during a war that has been described in the 'Mahabaratha.' The whole crux of the 'Bhagavad Gita' is that one must do one's duty without looking to the results

If such a lesson had been taught with respect to any activity other than war, the matter would not have been controversial. Here, however, it is being taught in respect of war. Arjuna is commanded by God to fight a war. One may ask why a political solution could not have been envisaged instead of a military solution. Or to use a modern jargon why an All Party Conference was not thought of.

Hindu scholars may give various explanations to 'Bhagavad Gita.' For example, this war has a metaphorical meaning – it is a war between Good and Evil. This essay is not the place to discuss all these explanations. What is important is the impression that is created in the mind of an average reader. The members of some separatist movement may think that it is their duty to fight and thus go on fighting. If the founder of the Red Cross Movement had been in the battlefield would he have agreed with the lesson taught by Lord Krishna? It seems hardly likely!

Buddhism

The aim that Lord Buddha proposed to his followers was the alleviation of suffering and towards this aim he went about methodically. He proposed the four Noble Truths, which ought to be the concern of any intelligent human being. They are: (1) Suffering (2) the cause of Suffering (3) the cessation of Suffering and (4) the path leading to the cessation of Suffering[4].

First, we must realise that suffering exists.

1. **Sri Lanka State of Human Rights 1993,Law and Society Trust, Colombo. p. 237**
2. **V T. Thamilmaran up cit p 46**
3. **Ibid. n. 47**
4. **Buddhism and Human Rights L.P.N.Perera. Karunaratne and Sons Ltd. (1991), Colombo. p. 12**

Secondly, we should analyse the cause of suffering – desire or thirst, which is accompanied by lustful passions and other impurities. The third truth speaks about the possibility of overcoming suffering. We should not feel that it is beyond our powers. The fourth truth states that we must make an attempt to follow the path and to keep to it.

Thus Buddhism is anthropocentric in its approach to life. It is not concerned about worshiping or glorifying an extraneous (or external) God.

I have compared three religions with respect to the aim of life and have picked up certain weak points in Christianity and Hinduism. I have not spoken about the many noble aspects and truths contained in these religions. That would go beyond the scope of this essay.

But it has to be emphasised that our aims in life are important. To extend Fr. Mervyn Fernando's metaphor, not only should we look through the correct side of the telescope, we must point the telescope in the correct direction. Very often when an aim is fixed in our life, we do not tend to question the aim, we question only the means. The aims tend to be what lawyers would call entrenched clauses. Many consider it an anathema to question age old doctrines

What should be our aim in life? Our aim should be life itself - abundant life. As Christ said "I came so that they may have life and have it abundantly"

The Universal Declaration of Human Rights (UDHR) mentions in Art. 3 that "Everyone has the right to Life" This should be the ultimate aim, abundant life, not an emaciated life. Some have as their aim: control, regimentation and discipline. Children in homes and schools should learn to enjoy the pulse of life and should not be smothered by the ideal of obedience. Very often adults look for someone whom they can control and children become the ideal target.

If we are to have life a necessary step leading to it is truth. As Christ said -"I came to bear witness to the truth". Very often we are concerned more with fables, myths and dogmas[8]. Mahathma Ghandhi has said "It is said that God is Truth but I prefer to say that Truth is God". Once more as Christ said "Truth shall make you free" In other words, freedom cannot be exercised unless we are aware of the Truth.

8. V.T. Thamilmaran. Op. cit. p 9.

To many, the questioning of age-old religious doctrines may seem blasphemous and reproachable. But here we should follow the instruction of Lord Buddha who in his famous speech to the Kalamas said "Come, Oh Kalamas do not accept a thing because it had been handed down by tradition or from generation to generation or from hearsay. Do not accept a thing because of mere scriptural sanction not by mere logic or inference nor by superficial knowledge nor yet because of your fondness for some theory nor because it seems to be suitable nor yet out of respect for some religious teacher. But Kalamas, when you know for yourself that certain things are unprofitable, blameworthy, censured by the wise, and when performed or undertaken conduce to loss and suffering, then you should reject them."[1]

Thus for Buddha experience is the touchstone, not some age old doctrine. Since he was concerned with the eradication of suffering he was not hemmed in by dogmas and doctrines. The present days persecution of the feminist Taslima Nazrene in Bangladesh and abroad shows what harm can be done by a strict adherence to age old doctrines and by a literal interpretation of the scriptures.

Analysis of the rights of the child

1. Importance of the concept

What are the rights of a child ?

Is it proper to speak about the rights of a child? Children are human beings after all. If so all the rights mentioned in the international human rights instruments such as the ICCPR and the ICESCR should be applicable to them too. Children are not a distinct species[2]. This would explain why many of the rights mentioned in the Convention on the Rights of the Child adopted by the United Nations in 1990 are very similar to the rights mentioned in the International Covenant on Civil and Political Rights and the International Covenant on the Economic Social and Cultural Rights. Children deserve the same respect that we show to an adult. Time and again International instruments have

Children deserve the same respect that we show to an adult. Time and again International instruments have spoken about the dignity of the human person

1. Cited in the Value of Dissent (I). The Civil Rights Movement of Sri Lanka (1992) p. 17

2. Cf. R. Dworkin -Taking Rights Seriously, London Duckwollh. 1977 Ch. 6.

3. Sce eg. The Preamble of the Charter of the United Nations, The Universal Declaration of Human Rights, The International Covenant on Civil and Political Rights and the International Covenant on Economic Social and Culteral

4. Cultural Rights. Cf. R. Dworkin -Taking Rights Seriously -Ch. 6.

spoken about the dignity of the human person[3]. A child being a human person also possesses the same dignity. object which gives us relaxation.

A child is not merely a plaything or an object which gives us relaxation[4].

Further, the Rights of a Child is an important topic because if we are going to reform society, We must start with children. As a poet had said "Child is the father of man." Moreover, some modern psychologists say the way that a person would behave would be determined by the way that he or she was treated when he or she was under the age of five. Thus childhood is an important age -a determining age. We must start at that age if we are to refashion the society.

What the States Parties or the Governments should do is to create conditions which are conducive to the fulfillment of these needs

2. "Needs" Theory

Though children are persons, they have special needs. Hence the requirement of a separate Convention on the Rights of the Child and a special study regarding those needs. I would view the concept of human rights itself as one of' Human Needs'. The Norwegian Jurist A. Eide also prefers to view Rights from this angle.

Another proponent of this view is J. Feinberg[1] This may be called the 'manifesto' theory. Rights are being used in a 'manifesto' sense. for example, man has a human right for leisure. This means that this right is basic. One may relax by drinking. another may relax by smoking a cigarette and still another by watching the television. But underlying all these is the basic need for leisure. Viewing of human rights as basic needs has some validity. One may say: "I need a cigarette". But this does not mean that he has a human right for a cigarette. His need for leisure is being fulfilled in a manner which is not ideal. One may say that he should not ideally smoke a cigarette. But one cannot say that he should not have leisure.

Anthropocentric religions such as Buddhism lays emphasis on these needs. Buddha was very much concerned about human suffering. The existence of suffering was the first noble truth of Buddha. The second noble truth was about the cause of suffering[2]. What is suffering? Suffering occurs when a human need is not fulfilled. If food is not available, there is suffering

Similarly, if there is no leisure, there is suffering. If there is no education ultimately man will suffer.

This type of approach is not to be found to the same degree in theocentric religions such as Christianity. In fact in Christianity, suffering is extolled to some extent as a stepping stone to happiness in the after life. Theocentric Religions emphasize the worship and glorification of God and are not so much concerned about human suffering, at least in this world. Even the worship of a crucified Christ seems to make suffering something scared.

Dealing with the needs of the children, let us come to another problem. If we say that children have a right for food, who in Somalia or New Guinea would have the duty to give it to them ? United Nations Declaration on the Rights of the Child of 1959 does not say it. But the United Nations Convention on Rights of the Child of 1990 gives an answer to this question. For example, article 4 in part states: 'States' parties shall undertake all appropriate legislative, administrative and other measures for the implantation of the right recognises in the present Convention'. Thus this Convention places the duty on the States.

But there are some instances where the duty is cast upon the parents. Thus Article 18 states in part: " States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents, or as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. " .But by and large the duties are cast upon the States parties. After all, it is the States Parties who have signed the Convention, not the parents. What the States Parties or the Governments should do is to create conditions which are conducive to the fulfillment of these needs. In some instances, the States parties can directly enforce the rights. Thus a State Party can make education compulsory. Further, in some instances, it is the State Party and not the parents who can cater to certain rights. Thus there should be no discrimination in the treatment of children e. g. in education. It is the Government that can enforce this right

3. The best interests of the child

Another salient factor in the Convention is that the best interests of the child shall be a primary consideration. Article 3 (I) of the Convention states, "In all actions concerning

1. **J. Feinberg -The Nature and Value of Rights. in Rights. Justice and the Bounds of Liberty - Princeton. University PI 49- See also A Theory of Human Need. Len Doyal and Ian Gough, Macmillan Education Ltd., London. 1991**

2. **Buddhism and Human Rights -L.P.N. Perera. Karunaratne and Sons LId.. -Colombo. 1991 -D. 12**

children , whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

Very often, when we say that something is good, we say so because it is good from the point of view of the person making the judgment. Thus we say a hen is good if it lays eggs in abundance. Similarly, we say a bull is good if it is good for harness, if it can pull a cart for many miles, even though while doing so it suffers a lot. Similarly, we say that the fodder for a bull is good if it achieves this particular aim of ours

It is wrong to adopt a similar approach in the case of children. It is not correct to say that what is pleasing to either of the parents should be done. We must see what is really good for the children concerned. The correct approach has already been adopted in the matter of the custody of children in many countries. When there is divorce or judicial separation, the Roman Dutch Law states that the father has a preferential right for custody. The very phrase the preferential right of the father is misleading. What about the rights of the child? In fact when we speak about the best interests of the child, we are really speaking about the rights of the child. In some Sri Lankan cases, the best interests of the child has been given a primary place[1].

The United Nations Declaration of 1959 Principle 7 states in part: "The best interests of the child shall be the guiding principle of those responsible for his education and guidance". But the scope of article 3 of the Convention appears to be much wider than the scope of Principle 7 of the Declaration as far as the best interests of the child are concerned .

The phrase "the best interest of the child" appears in a variety of contexts throughout the Converntion on the Rights of the Child. In particular it is used in relation to: the separation of the child from the family setting (article 9); the upbringing and development of the child (Article 18) ; adoption and comparable practices (Articles 20 and 2 and the child's involvement with the Police and Justice Systems (articles 37 and 40) .

Its use in Article 3 (1) quoted above however is of particular importance. Article 3 (1) states: "the best interest of the child shall be a primary consideration." The use of the word Primary is of fundamental significance. Sometimes the rights of others also will have to be balanced as is clear from article 3 (2).

Art 3 (2) states: States Parties undertake to ensure the child such protection and care as is necessary for his or her well being, taking into account the rights and duties of his or her parents, legal guardians or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

Thus the Convention admits the rights of the parents and other guardians. A careful balance is called for but the primary concern should be the best interests of the child

4. Equality of Children

Of all moral theories, it is Rawl's notion of equality at the stage of a hypothetical social contract[2] which comes closest to expressing the idea of treating persons as equals with respect to their capacity for autonomy.

The principles of justice which Rawls believes we would choose are equal liberty and opportunity and an arrangement of social and economic inequalities so that they are both to the greatest benefit to the least advantaged and attached to offices and positions open to all under conditions of fair equality of opportunity[3].

Rawls therefore firstly believes that persons should be treated as equals. A child is equally a person as an adult. This may seem strange to persons who treat children as playthings or as "cute'. As I mentioned earlier, a child deserves the same respect that we show to an adult.

Secondly, a child should be given full opportunity for autonomy. This is the very essence of respect for a person. As Richards puts it: "The central mark of ethics is not respect of what people currently are or for particular ends. Rather, respect is expressed for an idealized capacity which if appropriately treated, people can realize, namely, the capacity to take responsibility as a free and rational agent for one's system of ends"[4]. People may have their own system of ends. As long as they are not demeaning they should be respected. It is wrong to force one's own vision of life on to

A child should be given full opportunity for autonomy

1. Samarasinghe V. Simon (1941) 43 NLR 129. Kamalawathie v. De Silva (1961) 64 NLR 252

2. see Rawls, A Theory of Justice, Cambridge, Mass. Harvard University Press

3. Ibid . p.302

4. D.A. J.Richards 'Rights and Autonomy' Ethics 92 (1981) p.15.& 16

another person. Though we say this is the ideal everyday we find people disregarding this rule. In this way the autonomy of a person is being stultified. However, this autonomy should be tempered by another factor: the child is in a less advantageous position. Hence he or she should be given greater protection.

This means that children should be allowed to make mistakes. There is a difference between having a right to do something and doing the right thing

This brings us to the concept of paternalism. Since the capacities of children are not well developed, that is, since their capacities are unequal to those of others, they must be protected so that their autonomy may not be hampered in later years. Thus always the final aim is full autonomy. Thus intervention may be justified to prevent irrational actions. Richards too has expatiated on this topic of autonomy. He suggests three constraints on the scope of paternalism vis-a-vis irrationality. Firstly, the notion of irrationality must be defined in terms of a neutral theory that can accommodate the many visions of the good life that are compatible with moral constraints. Hence as stated earlier, one should not as a general rule impose one's views or ends on others.

Secondly, Richards requires the irrationality to be "severe and systematic" for there to be an intervention. This means that children should be allowed to make mistakes. There is a difference well described by Ronald Dworkin between having a right to do something and doing the right thing. Someone may have a right to do something that is wrong for him to do[1]. This emphasizes the fact that we learn through mistakes. A person who is not prepared to make mistakes may not attempt anything

Thirdly, intervention is justified only to the extent necessary to obviate immediate harm or to develop the capacities of rational choice by which the individual may have a fair chance to avoid such harm on his or her own[2].

Freeman says that children should be allowed to make decisions on matters such as, say, sex, on whether to use contraceptives or not. But here there are two principles involved which should be balanced. (i) Equal respect and concern for persons. Applying this, and short of situations of exploitation it would be difficult to justify either restrictions on sexual behavior by adolescents or contraception or abortion. (ii) Liberal paternalism legitimating intervention directed at conduct that is irrational judged by a neutral theory of the good[3].

5. Religious Perspective

Dealing with autonomy, the approaches adopted by theocentric religions should be discussed. They merely stress the second principle mentioned above -paternalism. God or some religious leader is supposed to have given a certain rule and it must be followed at all costs. Here not enough emphasis is placed on autonomy. It should be remembered that autonomy is the final aim provided we don't harm others through the exercise of our autonomy. The approaches of these religions do not take into consideration the fact that certain basic needs or urges must be satisfied.

Religious dogmas, prohibitions and moral theology should be based on what is good from a neutral point of view, not on what God might have ordered a thousand or two thousand years ago. Further, what is good may vary according to the social setting of a society. One has only to refer to the sociological school of jurisprudence to understand this matter. Though one need not assert that it is the view of the Sociological school "that is the best possible," one cannot deny that absolute dogmas are a hindrance to the progress of society. The right to dissent should always be upheld.

Buddha emphasized self-reliance. He used such phrases as 'personal effort,' 'human strength' to show how man should achieve salvation. He also believed that Buddhahood is itself within the reach of all human beings. Not being the creation of a Creator, men are subject only to non deterministic causal laws and their destinies are therefore in their own hands. Thus the concept of autonomy is very well brought out in Buddhism.

6. The Need of a Child for Love and Affection:

Having expressed my preference for viewing rights as needs, I would approach one of the basic needs of a child -the need for love and affection. Mother Theresa, the winner of the Nobel Prize for Peace and Founder of the Congregation that looks after the poor and destitute in India and abroad has stated in an interview as follows:

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1. Cf.R. Dworkin Taking Rights Seriously London Duckwor1h 1'177 p. 188-9

2. Richards 'The Individual. the Family and the Constitution 0'\ Jurisprudential Perspective, New York, University of Law Review. 55 (1980) p. 59.

3. M.D.A. Freeman, The Rights and the Wrongs or Children. Francis Pintes (Publishers) London. 1983.p. 59

"In these twenty years of work amongst the people, I have come more and more to realize that it is being unwanted that is the worst disease that any human being can ever experience. Nowadays, we have found medicine for leprosy and lepers can be cured. There is medicine for T.B. and the consumptives can be cured. For all kinds of diseases there are medicines and cures. But for being unwanted, except there are willing hands to serve and there is a loving heart to love, I don't think this terrible disease can ever be cured."[1]

Mother Theresa was mainly speaking about destitute people. But the same can be said about children. In fact Mother Theresa, speaking about the children she was looking after says in the same interview, "Many of these children are unwanted by their parents; some we pick up, some we get from hospitals; they have been left there by their parents. Some we bring from the jail, some are brought to us by the Police."[2]

From an early age many children have come to know that they are not being wanted, that parents and adults are not truly interested in them. If many children and adults today feel insecure the true reason for it is this.

The Convention on the Rights of the Child states in the preamble "Recognizing that the child for the full and harmonious development of his or her personality should grow up in a family environment in an atmosphere of happiness, love and understanding."

Thus the right for love and affection is implied here. It is not mentioned in the substantive part of the Convention and understandably so for a State Party cannot give love and affection. It can only create conditions, which are conducive to the founding of families where love and affection are present.

What Shakespeare said about mercy in the 'Merchant of Venice' may also be said above love: "But Mercy is above this sceptered sway. It is enthroned in the hearts of kings." Law is really about the sceptered sway. Love speaks a different language. A Convention is really a legal document Therefore we cannot expect it to expatiate on love. Perhaps those who framed the Convention had inserted the need for love in the preamble in order to show that this is something that underlies the whole Convention, though strictly it is not a term in the Convention itself.

The 1959 United Nations Declaration on the Rights of the Child states in Principle 6. "The Child, for the full and harmonious development of his personality needs love and understanding. He shall, wherever possible, grow up in the care and under the responsibility of his parents and in any case in an atmosphere of affection and of moral and material security." In spite of the fact that the declaration does not state on whom the duty to fulfil this need lies, it is creditworthy that the need is spelled out clearly in the substantive part of the Declaration.

Mia Kellmer-Pringle has identified a number of needs which children have. There are she argues four basic emotional needs which have to be met from the very beginning of life to enable a child to grow from helpless infancy to mature adulthood. These are the needs for love and security, for new experience, for praise and recognition and for responsibility[3]. It is significant that she had mentioned as the very first need, the need for love and security. The meaning of this phrase has been aptly explained by Mother Theresa in the passages quoted above.

Protection from Violence

I. Cruelty inflicted at home

An extreme form of lack of love and affection is Violence Bestowing love and affection is a positive act; if one does not bestow it harm would already have been done but violence and inflicting physical injuries is far more serious. Strange as it may seem these do take place at homes.

The Convention on the Rights of the Child states "State Parties shall take all appropriate legislative, administrative social and educational measures to protect the child from all forms of physical and mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse while in the care of parents, legal guardians or any other person who has the care of the child." (Art. 19(1))

To begin with we should deal with the cruelty that is often inflicted on the child at home mostly from parents especially the father. Let us start with certain religious concepts.

From the early age many children have come to know that they are not wanted, that parents and adults are not truly interested in them

1. Something Beautiful for God. Malcolm Muggeridge, Fontana Books 1976, London. P. 98.

2. Ibid p. 99.

3. Cited in the Rights and the Wrongs of Children -M.D.A. Freeman. op.cit p. 147

Cont. on page 19

EDITORIAL

A new venture to mark the 25th anniversary of HHR

Beyond the Wall, a quarterly periodical published by Home for Human Rights (HHR), Sri Lanka, is a new project of the organisation. It comes out on the eve of HHR's 25th anniversary. HHR had its origin on a small scale in the year 1977, after the Sinhala – Tamil race riots. It started with documentation of human rights abuses during and after the riots. It prepared the documentation for the Sansoni Commission. Credit must be given to two individuals whose untiring efforts and sweeping vision contributed in no small measure to sustain and guide HHR over the last quarter of the last century. We refer to the late Mr. Kathiravetpillai, M.P. for Kopay who was later joined by the late Mr. Kanthasamy, whose untimely death took place in the hands of the Tamil militants. A word of remembrance is due to them. Their initiative and encouragement was a tremendous boost in the formative years of HHR.

The last quarter of the 20th century was tumultuous for Sri Lanka. Changes in the political economy of the country in 1977, were followed by a separatist war based on a nation's quest for identity and statehood. The years saw an insurrection by southern militants for a more equitable share of the economic pie as well as in opposition to the direct intervention by the Indian state in Sri Lanka's affairs.

War and conflict inevitably bring human rights violations. HHR had to contend with the vagaries of fortune during this period. It had both ups and downs. Though initially a one-man organisation, by 1981 it had become an unincorporated society, or a non-governmental organisation. Ten years later, it became a charitable trust by instrument.

Though it was first established for the purpose of documenting human rights violations, it metamorphosed into one that defended the rights and liberties of the oppressed, the poor and the downtrodden who lacked the wherewithal to defend themselves. It defended and continues to defend, the hapless who are arbitrarily arrested and detained under the infamous PTA and Emergency Regulations under Public Security Act.

In 1995, HHR extended its mandate, aims and objectives. HHR is now engaged in: documenting and disseminating information on human rights violations nationally and internationally; encouraging legal intervention of individuals and groups affected by rights violations and supporting fundamental rights claims; supporting survivors of torture by helping them medically and rehabilitating them; utilizing the existing legal framework and human rights regime to address directly various forms of violence against women in conflict zones; designing and implementing human rights training programmes for frontline community workers and programmes to combat sexual violence and abuse against women and children.

HHR has added a new venture to its spectrum of activities by introducing a legal (human rights) literacy programme. *Beyond the Wall* is based on this concept. For too long has the lack of a publication that looks beyond the 'news value' of human rights abuse affected individuals and communities in Sri Lanka. Local journalism confines itself to reporting on the sensational aspects of rights violations, or legal proceedings if the matter does come to court. It fails to look beyond that. Human rights issues in the post-Cold War world are taking dimensions as they confront acts such as genocide and ethnic cleansing by states and non-state parties, while capital punishment, which was a perfectly acceptable retribution for certain types of crime a generation ago, has become abhorrent to the civilised world.

Similarly there is also a deafening silence among the advocates of fundamental rights of certain types of liberties such as the right to self-determination. If spoken at all it is referred to in hushed tones as if it was an obscenity.

Beyond the Wall is published with the intention of examining such concepts and debates in human rights in some depth. It will try to go beyond the news value of a massacre, an ilegal arrest, or child abuse and look at the social and political milieu that creates it as well as the legal foundations of the instrument whereby they may be combated.

Cont. from page 17

(a) Christianity

Europe has been a Christian world for the last seventeen centuries and a totally catholic one at least for about ten centuries. Hence Christianity's religious teachings would be an underlying philosophy in the life of the Europeans and those who have acquired the culture of Europe. Hence this brief survey.

There are, inter alia, three basic doctrines in Christian (especially Catholic) faith:

1. God is our Father

2. He is all-benevolent or all-loving, that is, his love is measureless.

3. If a person dies in mortal sin, that is, if he has committed some grievous fault and dies without repenting he will after his death be sentenced to punishment in hell. Hell is a place or a state where there is eternal fire. The person concerned will have to undergo this eternal fire without any end.

Now if these doctrines are connected together we reach certain serious and disastrous conclusions. God who is an all-loving father is sending persons to eternal fire. This is a preventive and exemplary measure. If this is so, even human fathers can adopt certain extreme measures in order to prevent children going astray. It should also be noted that God has been portrayed as an all-loving person. Therefore even all-loving fathers can adopt this measure – of inflicting severe punishment on children. It would not detract them from their love.

I do not mean that all cruel parents have been influenced by these doctrines. Very often cruelty emanates from the impatience or hot temper of the person inflicting it. But these doctrines would help to rationalize their behaviour. They may think that this perfectly natural way or rearing children.

(b) Buddhism

The Buddhist conceptualisation is entirely different. Professor L.P.N. Perera commenting on Article 1 of the Universal Declaration of Human Rights which begins with the sentence "All human beings are born free..." has this to say: "...Not being the creation of a Creator, they (human beings) are subject only to non deterministic causal laws and their own hands."[1] According to this philosophy, persons are not forced to follow a pattern of life by an extraneous third party. There are only non-deterministic causal laws. So ideally a parent should be able to teach these causal laws to the child and not rely upon punishment whether mild or cruel.

Factual survey

Speaking about the cruelty of parents towards children, one should not think that this is rare. M. D. A Freeman in his book 'The Rights and Wrongs of Children' speaking about an American survey on this matter has this to say: "A national Probability sample of 2,143 families conducted in 1976 disclosed that 63 percent of the respondents who had children between the age of three and 17 living at home mentioned at least one violent episode during the survey year (1975) .The proportion of those reporting at least one violent occurrence in the course of raising a child was 73 percent. Milder forms of violence were common. But there was a large amount of serious violence, which included threatening the child with a gun or a knife. Three percent admitted that at some time they had done this; that is an indication that between 900,000 and 1.8 million American children between three and seventeen have at least some time been threatened with a deadly weapon by a parent.

"Astonishing though such figures are, they must underestimate the true incidence. The families interviewed were all intact families and the evidence suggests that there is more violence against children in one-parent family. Furthermore, we would expect under-reporting rather than exaggeration. Perhaps however what is more disturbing is that parents admitted their violence against their children, for this may indicate that they do not even consider such behaviour to be deviant; that, in other words it is a perfect legitimate way of rearing children"[2].

So that is the reality. We should not labour under a misguided impression that all parents have a God-given natural love for children. Given this reality let us analyse the possible reasons for cruelty and abuse of children as shown by parents.

Reasons for cruelty

Freeman discusses the possible causes. Today three possible explanations have been given for this phenomenon of cruelty[3]. The first one emphasises the problem within the parent

The first one emphasises the problem within the parent himself. Second sees the explanation in the social environment of the parent, particularly poverty. The third one finds fault with culture

1. L.P.N. Perera Op. cit. p. 21

2. M.D.A. Freeman 'The Rights and Wrongs of Children' Op. cit. p. 112.

3. M.D.A. Freeman, Ibid p. 117.

himself. Second sees the explanation in the social environment of the parent, particularly poverty. The third one finds fault with the culture. This gives an ideological explanation.

In the first explanation, one sees the father (or sometimes the mother) as a sick person or at least partially so. He is one who is unable to control his temper. This type of explanation may be appealing to some persons because they don't consider themselves as sick and therefore they are not abusing their children. The sickness may also be found in the desire to control others. In a family, children are the easiest persons to control.

There is also another connected factor. Parents who themselves had been abused when they were children, treat their own children cruelly and at least there is a great likelihood of it. They had been taught that this is the way to bring up children.

Coming to the second explanation, parents who are living in a stifling atmosphere tend to become impatient. The factors that would contribute to this stifling atmosphere may be varied. Some see poverty as the main fountain. When there is poverty parents may not be able to bring up the children properly. The parents may not have enough for the food and education of the children. Thus some parents would see the children as being 'responsible' for the situation and their impatience towards the children would be reflected as aggressive actions.

It is difficult to give a name to the third explanation. The whole cultural trend contributes to abuse. In the modern times in Europe, parents do not consider children as property. But in the East, many still consider small children as a source of entertainment. In this type of situation, children tend to get pampered and thus get spoilt.

But treating children as property may create the opposite phenomenon too - cruelty and abuse.

In a provocative article David Gil argues the cause of child abuse is to be sought in: "a cluster of interacting elements, to wit, a society's basic philosophy, its dominant value premises, its concept of humans, the nature of its social, political and economic institutions, which are shaped by its philosophy and value premises and which in turn reinforce that philosophy and these values and finally the particular quality of human philosophy, values and institutions. For in the final analysis, it is the philosophy and value premises of a society, the nature of its major social institutions and the quality of its human relations that determine whether or not individual members of society will develop fully and in accordance with their inherent potentialities.[1]

Rights of the child ultimately revolves around the autonomy of the child True enough religions have many good points but they may and often do have weak points

As mentioned earlier, in the West many people nowadays do not take their religious doctrines seriously. But here in the East, many people still do. For many it is religion. Parallel examples can be given regarding such matters as the freedom of expression and of opinion and thus of autonomy. Rights of the child ultimately revolves around the autonomy of the child True enough religions have many good points but they may and often do have weak points.

Legal Provisions

Freeman explains the situation in the Western countries in these words:

"In Britain we are most reluctant to abolish corporal punishment. As yet all attempts to do so have been limited to institutional corporal punishment Three Bills since 1973 have failed to progress through Parliament. In Sweden by contrast, legislation has removed from parents the right physically to chastise their children. When a clause to do this was added to the Parenthood and Guardianship Code, it passed the Ricksdag by 259 votes to 6. When the House of Commons Select Committee issued its first report on Violence in the Family in 1977, it made 58 recommendations aimed at alleviating the problem of child abuse but it did not even criticise or question the use of corporal punishment. Its Canadian counterpart, the Robinson Committee in its report, 'Child Abuse and Neglect,' considered the problem but it too refused to recommend the abolishment of physical punishment"[2]

In Sri Lanka there has been no endeavour to abolish corporal punishment in homes. This however, would be a welcome move.

Many persons would think that a certain amount of physical chastisement is necessary to bring up children There is a

1. D.Gil 'Unraveling Child Abuse' American Journal of Orthopsychiatry 45 (1975) p.350

2. M.D. A. Freeman The Rights and Wrongs of Children op.Cit. p. 113

proverb' spare the rod and spoil the child. In our vernaculars too, we have similar proverbs. This is a matter, which will have to be thought out by psychologists and educationists. But certainly the ideal is the abolishment of physical chastisement. And equally certainly in homes love is a more potent tool than the rod. There are many educational socialisation techniques, which uses this. Further, it is difficult to see how the evil of the physical abuse of children can be eradicated so long as certain physical attacks on children are considered legitimate.

Remedies for Child abuse

Sri Lankan Practice

In Sri Lanka, the legislation that speaks specifically about cruelty to children in our enactments is The Children and the Young Persons Ordinance, No.48 of 1939. In Part V of this Ordinance Section 71(1) says: "If any person who has attained the age of 16 years and has the custody; charge or care of any child or young person wilfully assaults, ill-treats, neglects, abandons or exposes him or causes or procures him to be assaulted, ill-treated, neglected or abandoned or exposed in a manner likely to cause him unnecessary suffering or injury to health (including loss of sight or hearing or limb or organ of the body and any mental derangement); that person shall be guilty of an offence and shall be liable to a fine not exceeding one thousand rupees or to imprisonment of either description for a term not exceeding three years or to both such fine and imprisonment."

This speaks about cruelty to children. But unfortunately Part V of the Ordinance (in which the particular section is to be found) has not been brought into operation.

Under section 34 of this Ordinance (which has been brought into operation) a magistrate is empowered to deal with a child 'in need of care and protection' where the child has no parent or guardian or a parent or guardian unfit to exercise care and guardianship. If the child is to be declared to be in need of care, he/she must be falling into bad association or exposed to moral danger or beyond control. Children in respect of whom specific offence have been committed and those who live in the same household as a child against whom such an offence has been committed also fall into the category of children in need of care [(Ibid sec. 34 (1) (b)][1].

Cruelty to children cannot be tackled only through law. But the law would reflect a philosophy, which should be found in a society. If there are laws regarding the matter, parents, educationists and others would have a certain amount of fear that they can be penalised for what they do. They would also realize that being cruel to children is wrong.

CONCLUSION

The main purpose of this essay has been to show that a child needs love and affection for his or her growth. For this mere abstention from violence or abuse is not enough. The former is a positive concept and the latter is a negative concept. Further this love cannot be extorted under threat or by force. It is a spontaneous activity. But there are certain factors, which are conductive to its existence. Firstly if a person has himself been treated cruelly, it is hardly likely that love and affection would emanate from him. Secondly, his human needs should have been well catered to. If not, he himself would be irritable and his impatience would show up in the form of aggressive actions. Thus there should be a minimum of economic adequacy. Poverty is an enemy to the fulfilment of human rights. Those who are living a hand to mouth existence cannot be expected to experience the joie de vivre. The phrase 'joie de vivre' may be translated as the, joy of living. It is not enough simply to live. One should be able to 'enjoy' living.

The Convention on the Rights of the Child, Article 6 states:

1. States Parties recognise that every child has the inherent right to life.

2. States Parties shall ensure to the maximum extent possible the survival and development of the child,

The words in sub-article 2 are significant – 'maximum' -It is not enough just to allow a child to live. His or her life should be fruitful and abundant. Similarly 'development' also should be catered to. The child should develop his potentialities and capabilities.

It is also significant that though the Constitution of Sri Lanka dose not include the Right to Life, the Sri Lankan Charter on the Rights of the Child says clearly in article 6: "The State shall recognise that every child has the inherent right to life and ensure to the maximum possible the survival and development of the child."

But one factor, which was clearly evident was the lack of communication and liaison[5]. Often noted is the failure to call a case conference. It is through case conferences that communication and co-operation can be effectively conducted.

1. Sri Lanka State of Human Rights 1993 op. cit. p. 251

PTA violates international human rights standards

By S. V. Ganeshalingam

The PTA was the government's answer to the problems it believed stemmed from these groups. The PTA sought to treat violently the symptoms instead of peacefully curing the malaise

"When an individual stands trial on criminal charges, he or she is confronted by the whole machinery of the state. How the person is treated when accused of a crime provides a concrete demonstration of how far that state respects individual human rights. Every criminal trial tests the state's commitment to respect for human rights; the test is even more severe when the accused is a political prisoner- when the authorities suspect the person of being a threat to those in power" - Fair Trial Manual, Amnesty International

Background

As stated in the preamble to the Sri Lankan Prevention of Terrorism Act, 1979 (PTA), it was ostensibly enacted to deal with elements or groups of persons or associations that advocate use of force to accomplish governmental change, when grievances should be redressed by constitutional means. The elements referred to in the PTA (and thus its target groups) were arbitrarily widened to include the Tamil ethnic minority, which had failed to its grievances redressed by constitutional means particularly through agreements with successive governments since Sri Lanka gained independence in 1948.

This ethnic group was not interested in toppling an established central government but asserted its right to nationhood, based on the internationally recognised principle of self-determination. In May 1976, at a national convention held at Vadukkoddai it resolved to create a new state 'Eelom' comprising the northern and eastern provinces of Sri Lanka, which were climatically, topographically, ethnically, linguistically culturally and even religious wise different from other provinces of Sri Lanka. The election that followed in 1977, overwhelmingly endorsed the resolution of May 1976 in the northern and eastern provinces. This was followed by mass agitation since no action was taken to redress their grievances and finally to the rise of armed groups of Tamils – mostly youths – of which the dominant group was the LTTE. The PTA was the government's answer to the problems it believed stemmed from these groups. The PTA sought to treat violently the symptoms instead of peacefully curing the malaise.

The constitutionality of the PTA could not be challenged, for the reason that Article 80 (3) of the Constitution provides: "No court or tribunal shall inquire into, pronounce upon or in any manner call in question, the validity of an Act of Parliament on any ground whatsoever." As a former Chief Justice of Sri Lanka, Justice Sharvananda has commented (see Justice Sharvananda, 'Fundamental Rights in Sri Lanka' p-140). "Article 80 (3) vests enacted law with finality in the sense that the validity of an Act of Parliament cannot be called in question in any court or tribunal. In this constitutional scheme, there is no room for the introduction of the concept of 'due process of law' or notions of reasonableness of the law and natural justice as has been done by the Supreme Court of India in Maneka Ghandi's case A.I.R (1978)."

Even though the Supreme Court under Article 120 has jurisdiction to determine the constitutionality of any bill, the PTA bill could not be challenged as stated by Justice Mark Fernando: "When the PTA Bill was referred to this court, the court did not have to decide whether or not any of those provisions constituted reasonable restrictions on Articles 12(1), 13(1) and 13(2) permitted by Article 15(7) (in the interests of national security, etc), because the court was informed that it had been decided to pass the Bill with two-thirds' majority (SC SD No.7.79,17.79). The PTA was enacted with two-thirds' majority, and accordingly, in terms of Article 84, PTA became law despite many inconsistencies with the constitutional provisions. "(Weerawansa V Attorney General & others (2000) 1Sri LR 395)

The right to a fair trial is a basic human right, non-observance of which undermines all other human rights. These rights are guaranteed under Articles 9 and 14 of the International Covenant on Civil and Political Rights (ICCPR). The extensive body of interpretation it has generated illustrates the significance and importance of these rights and this is highlighted further by a proposal to include them in the non- derogable rights provided for in Article 4(2) of the ICCPR. The concept of fair trial is relevant in the Sri Lankan context because many have been arrested, tried and sentenced under the PTA to long jail terms running, in

one case to 70 years. Those arrested under the PTA are political prisoners because they are arrested for being a member of the LTTE, supporting it or having failed to give information to the state about the organisation. Admittedly the LTTE is a movement that is advocating self-government by conventional warfare and guerrilla tactics having witnessed the futility of constitutional agitation.

Whilst the Sri Lankan Constitution and its legal system contain some fair trial safeguards, the PTA and practices under it fall far short of those safeguards and of Sri Lanka's commitments as a State party to the ICCPR. Let us consider the PTA and its practices in two ways. First, we would analyse the legislation itself, referring to how it differs from the normal criminal procedure that operates in Sri Lanka, and showing that the PTA contravenes fair trial norms under the ICCPR, which Sri Lanka is bound by. Secondly, we would examine not merely the law on paper, but also on how the PTA is executed in practice. Hence we would show that there are many instances where the letter of the law may not breach fair trial norms, but the practice under the law does. There is, of necessity, some overlap between the two sections to this paper, but this seems a necessary price to pay for fullness and coherence.

The PTA on paper

In this part of the paper we consider the PTA more or less section by section. We flag up how it differs from the Criminal Procedure Code (CPC) and consider how it stands in relation to the ICCPR

Under Sec.2, read with Sec. 31(1) of the PTA, persons holding certain positions in government have been classified as 'specified persons.' If misdemeanours under the PTA are committed against specified persons, they would bring into play a different trial procedure and greater punishments than contained in the ordinary law the CPC and the penal code. Specified persons include any member of the armed forces and police.

Sec 5 of the PTA creates a new type of offence previously unknown both to domestic law and to human rights' law by making an act of omission (failure to give information) an offence.

Sec 6 (1) of the PTA allows for arrest without warrant. Under this section any police officer not below the rank of Superintendent or any other police officer not below the rank of sub inspector authorised in writing by such superintendent in his behalf can arrest any person or enter and search any place, stop and search any person or any vehicle or seize any document 'connected with or concerned in or reasonably suspected of being connected with or concerned in any unlawful activity' without a warrant issued by a magistrate. By contrast, under CPC arrest could only be made on the authority of a warrant issued by a magistrate except in circumstances permitted by Section 32 (1) of the CPC, in which event the arrested must be produced before a Magistrate within 24 hours of arrest.

Sec. 7(1) of the PTA permits continued detention of the person arrested without being produced before a magistrate initially for 72 hours and thereafter to be kept on an administrative detention order made by the minister in charge of Defence up to a maximum period of 18 months which could be followed by remand till the conclusion of trial.

Under Sec. 7 (1) any person arrested in terms of Sec. 6 of the PTA and produced before a magistrate and any person who appears, or is produced in connection with any offence under the PTA before any court under Sec 7(2), shall be remanded until the conclusion of his trial. This is subject to that person being released before the end of the trial where the attorney general (AG) consents to this. No mechanism however is provided in the statute for the arrested person to secure such consent. Thus the magistrate stands deprived of his judicial right to inquire into the validity or reasonableness of the application for remand. He cannot even refuse to remand. He must make this order without any evidence to show that trial is in contemplation, whereas under the CPC, the magistrate has the discretion to refuse remand.

This provision appears contrary to Article 9 (3) ICCPR, which has a presumption of release before trial "...It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees..." There must be means to consider each issue on a case-by-case basis. As the HRC has said, "bail should be granted, except in situations where the likelihood exists that the accused would abscond or destroy evidence, influence witnesses or flee from the jurisdiction of the State party" (Hill and Hill v Spain (526//93) 2 April 1997 paragraph 12.3) The presumption against release before trial in the PTA therefore appears to contravene Article 9 (3) ICCPR.

Under Sec 9 (1) of the PTA, where the minister has reason to believe or suspect a person is connected with or concerned with unlawful activity, the minister may order that such person be detained initially for three months periods, which may be extended up to a maximum aggregate of 18 months. The detention may be in a place determined by the minister, not necessarily a prison, on conditions decided by him. The minister being a politician, political considerations no doubt could influence this decision. By contrast, under the CPC anybody arrested without a warrant must be produced before a magistrate within 24 hours of arrest and could be held only in a prison.

The magistrate must make this order without any evidence to show that trial is in contemplation, whereas under the CPC, the magistrate has the discretion to refuse remand

if the minister has reason to believe or suspect that any person is connected with or concerned in the commission of any unlawful activity, he may impose prohibitions or restrictions on the suspect

Further, under the PTA there is no legal requirement that a detained person should be informed of the reasons for the arrest or that a copy of the detention order be served on him. This could be argued to constitute "arbitrary arrest or detention" for the purposes of Article 9(1) ICCPR. The Human Rights Committee has stated that "arbitrary" goes beyond meaning merely detention, which is "against the law." The concept of arbitrariness is something that stands above the law and judges the law itself. It includes elements such as lack of predictability, injustice and inappropriateness (Albert Womah Mukong v Cameroon, (458/1991), 21 July 1994, UN Doc. CCPR/C/51/D/458/1991, p.12).

It might be argued that the power contained in S9 (1) of the PTA

- may be exercised on mere 'suspicion'
- warrants a person to be held for up to 18 months under the provision; and could disregard any rights of appeal/challenge which are extremely limited (as explored below).

Sec. 9 (1) of the PTA may also contravene a number of aspects of Articles 9(3) of the ICCPR. "Anyone...detained on a criminal charge shall be brought promptly before a judge or other officer... and shall be entitled to trial within a reasonable time or to release." Under the PTA, a person detained under Sec. 9 (1) has no right to be brought before a judge or other officer. In practice, the Human Rights Committee has said that "delays should not exceed a few days"(Human Rights Committee General Comment 8, paragraph 2) and it has ruled in a death penalty case that a delay of one week before the detainee was brought before judge was a violation (McLawrence v Jamaica, UN Doc. CCPR /C/60/D/702/1996,29 September 1997, para 5.6)

Further, detention under the PTA is not necessarily with a view to trial. Although Sec. 15 of the PTA holds that every person who commits an offence shall be triable under provisions of that law, a person may be held under Sec. 9 of the PTA on suspicion and need not be charged with an offence. There have been several instances of those arrested being released after several months and some times years of detention without any charge.

It is possible that even if a person is brought to trial, it might not be within "a reasonable time". The Human Rights Committee has considered the concept of "reasonable time" on a case-by-case basis. It has been held that detaining a person charged with murder for 16 months before trial was a violation of the detainee's right to be tried within a reasonable time or released. (McLawrence v Jamaica, UN Doc. CCPR /C/60/D/702/1996,29 September 1997, paragraph 5.6) In another case, a detainee's trial by military court began after five to eight months, and he had been held incommunicado for between four and six months. The Human Rights Committee held that Article 9(3) of the ICCPR had been violated because he was not brought promptly before a judge, and because he was not tried within a reasonable time.(Pietraroia v Uruguay, (44/1979), 27 March 1981, paragraphs 13.2 and 17)

Sec. 10 of the PTA holds that an order under Sec. 9 of the Act is final and cannot be questioned by any court or tribunal in any way. This contravenes Article 9 (4) of the ICCPR which holds that anyone deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, so that it may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

It might be argued in response to this that Sec. 13 of the PTA creates an Advisory Board and that a detainee under Sec. 9 of the Act is able to make representations to this Board. However, this does not satisfy the right under Article 9 (4) if the ICCPR to challenge the lawfulness of a detention. The Human Rights Committee has made it clear that the body reviewing the lawfulness of detention must be a court. For example, it has ruled that the possibility of review by the Ministry of Interior of the detention of an asylum-seeker fell foul of Article 9 (4). Similarly it held that the review by a superior military officer of a disciplinary measure, which involved detention failed to meet the requirements of Article 9 (4). The Advisory Board set up by Sec. 13 of the PTA does not constitute a court and thus PTA does not satisfy Article 9 (4) of the ICCPR.

Under Sec. 8 of the PTA, a judicial officer can be compelled by the police. The magistrate must record the statement of any person conversant with any fact relating to the commission of an offence under the PTA if he or she is produced before him by a police officer. There is no such provision in the CPC.

Under Sec. 11 of the PTA, if the minister has reason to believe or suspect that any person is connected with or concerned in the commission of any unlawful activity, he may impose prohibitions or restrictions on the suspect in respect of – amongst other things – movement, residence, employment and activities. Case law suggests that the right to liberty under Article 9(1) ICCPR does not extend to restrictions on travel etc. It is conceivable, however, that if a number of these restrictions were used together, they could, in certain circumstances, be considered to be so restrictive as to constitute a beach of Article 9 (1).

Under Sec 15.of the PTA, a person who commits an offence shall be triable without a preliminary enquiry before a judge of the high court sitting alone without jury, or before a high court at bar of three judges without jury, as may be decided by the chief justice. Under the CPC, trial before high court shall be by a single judge siting with jury and after a preliminary inquiry by a magistrate, who commits to the high court if a prima facie case is disclosed at the inquiry held by him , except in cases where the chief justice decides to have a trial-at-bar by the judges

Sec. 15 (2) of the PTA holds that in every case where a person is indicted in the high court of an offence under the PTA, the court shall order the remand of the person until the conclusion of the trial. This provision is contrary to Article 9 (3) of the ICCPR's presumption of release before trial.

Under Sec. 15A of the PTA, the secretary to the Minister in charge of the subject of defence may exercise his power, "if he is of the opinion that it is necessary or expedient to do so, in the interests of national security or public order." The power allows him to direct that a person under remand under Sec. 15A or Sec. 19(a) of the PTA be kept in the custody of any authority, in such place and subject to such conditions as may be determined by him having regard to such interests. This is subject to directions given by the high court "to ensure a fair trial of such person." Whilst there is safeguard in terms of the high court directions, it is important that the high court plays an active part in defending the detainee's right to a fair trial, which is contained within the ICCPR.

As well as those already discussed above, the following rights should be considered in particular.

· To be informed of the charge against him, promptly and in detail, in the language he understands (Article 14 (3) (a)

· To legal counsel before trial (the Human Rights Committee has said, "All persons arrested must have immediate access to counsel." Concluding observations of the HRC: Georgia, UNDoc.CCPR/C/79/Add.74.9April 1997, paragraph 28)

· Time and facilities to communicate with counsel and to prepare a defence (Article 14 (3) (b))

· Humane conditions of detention (Article 10). The Human Rights Committee has stated that people deprived of their liberty may not be "subjected to any hardship or constraint other than that resulting from the deprivation of their liberty."(Human Rights Committee General Comment, 21, paragraph 3)

· Freedom from torture (Article 7)

· A possible right not to be placed in incommunicado detention (it might violate Article 7 or Article 10) (Albert Womah Mukong v Cameroon, (458/1991), 21 July 1994, UN Doc. CCPR/C/51/D/458/1991)

· El-Megreisi v Libyan Arab Jamahiriya (440/1990), 23 March 1994, UN Doc, CCPR/C/50// D/440/1990)

· Segregation from convicted persons, except in exceptional circumstances. (Article 10(2(a))

· Women in custody to be held separately from men. (The Human Rights Committee expressed concern at the practice in the USA of allowing male prison officers access to women's detention centres. Observations of the HRC ; USA,UN Doc. CCPR/C/79/Add.50, 7 April 1995,para 20)

It will be shown below that many of these are not safeguarded in practice.

Sections 16-18 of the PTA focus upon evidential rules. Under the CPC only confessions made to a magistrate are admissible in evidence. Under the PTA Sec. 16(1) a confession made to a police officer not below the rank of an assistant superintendent is admissible in evidence. Under Sec. 16 (2) the burden of proving that a confession was obtained under duress is shifted onto the accused. This might be considered a breach of Article 14 (2) ICCPR – the presumption of innocence on the basis that the rules of evidence must ensure that the prosecution bears the burden of proof throughout the trial.

Sec. 19 of the PTA states any person convicted of an offence under the PTA and who appeals, will be kept on remand until the determination of the appeal. This is subject to the Court of Appeal releasing such person on bail 'in exceptional circumstances.' The same issues were identified earlier in relation to Article 9(3) and the presumption of release before trial. What are 'exceptional circumstances' have not been spelt out. Under the CPC a right to bail is both recognised and given effect to.

Sec. 20 of the PTA does not apply certain provisions of the Code of Criminal Procedure Act No. 15 of 1979. This section takes away the power of the judge to impose suspended sentences and considering mitigating circumstances whereas he continues to have that power under the CPC.

Sec. 26 of the PTA prevents anyone from bringing an action against any person for anything purported to have be done under the PTA in good

Sec. 19 of the PTA states any person convicted of an offence under the PTA and who appeals, will be kept on remand until the determination of the appeal

faith. It is possible that this breaches Article 14 (1) ICCPR, which guarantees equality before the courts of law. It is clear that for a person to be given total immunity from suits is incompatible with Articles 14 (1), (HRC Concluding Comments on Zambia (1996) UN doc. CCPR/C/79/Add.62) but the case in relation to qualified immunities is unclear. It may also effectively breach Article 9 (5) ICCPR, which provides a right of compensation to all who have been unlawfully deprived of their liberty. Without the ability to initiate proceedings, the right to compensation is severely curtailed. The Supreme Court has in recent times granted limited compensations by virtue of its fundamental rights jurisdiction.

Under Sec. 27 of the PTA the Minster has the power to make certain regulations. By making use of this power the Minister (President as Minister in charge of defence at that time) consequent to the lapse of Emergency Regulations (ER) had made a regulation that all those remanded under the ER shall be deemed to have been remanded under the PTA.

There is no requirement in the PTA that a copy of the detention order should be served on the detainee

A crucial question is how far any of these derogations from Sri Lanka's commitments under the ICCPR might fall under Article 4(1) of the ICCPR. Article 4 (1) allows derogation if certain conditions are fulfilled. Most important of these are that there must be a "public emergency which threatens the life of the nation," the existence of that public emergency must be officially proclaimed and the measures taken as a result must be proportional. Further guidance can be found in the General Comment on Article 4, paragraph 2, which states, "Measures derogating from the provisions of the Covenant must be of an exceptional and temporary nature."

We would suggest that the PTA falls outside of Article 4 ICCPR on a number of counts. Sec. 29 of the PTA provided that the PTA should remain in operation for three years from the date of its commencement in 1979. This section was repealed in 1982. An amendment act was passed, and the PTA is now a permanent piece of legislation.. Hence the legislation exists regardless of whether or not there is a public emergency which threatens the life of the nation, and whether it has been officially proclaimed. Therefore, when there is no emergency proclaimed, the PTA seems to fall outside one of the limbs of Article 4(1). Further, the fact that the PTA is permanent means that it cannot be considered to be a measure of "an exceptional and temporary nature" as required by the General Comment on Article 4. There is a further question of whether there is in fact a "public emergency, which threatens the life of the nation." This is beyond the scope of this paper.

It should also be noted that Joseph, Schultz and Castan (Joseph, S,Schultz,J & Castan, M(2000). 'The International Covenant on Civil and Political Rights cases, material and Commentary' (New York, Oxford University Press) argues that in reading Article 4(1) weight should be given to the Siracusa Principles and the Paris Standards, both of which suggest that in effect, most of Articles 9 and 14 of the ICCPR are effectively non derogable.

We will now examine the PTA in relation to pre-trial rights, and then in relation to rights at trial.

Pre-trial rights

The right to fair trial is not limited to rights at trial but also include pre trial rights as well. General Comment No 13 makes it clear that the right guaranteed by Art 14 (3) (c) relates not only to the time of trial but covers all stages from the time of arrest until appeal is finally disposed of

"The second sentence of Article 14, paragraph 1 provides that "everyone shall be entitled to a fair and public hearing". Paragraph 3 of the Article elaborates on the requirements of a "fair hearing" in regard to the determination of criminal charges. However, the requirements of paragraph 3 are minimum guarantees, the observance of which is not always sufficient to ensure the fairness of a hearing as required by paragraph 1" General Comment 13 (21)

Denial of rights whilst in custody

Article 13(1) of the Sri Lankan constitution (relevant sections of the constitution are included in the appendix to this paper) states that "any person arrested shall be informed of the reasons of the arrest." As evidenced by numerous fundamental rights (FR) applications this is rarely observed. It should be noted that this constitutional provision is limited in nature and does not stipulate as to when the arrested person should be informed.

Provisions under the ICCPR go further. Article 9(2) ICCPR requires "that anyone arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed on any charges against him." Under Article 14 (3) (a) the person has the right to be informed "promptly and in detail in a language which he understands of the nature and cause of the charge against him." In practice, even when the arrested person is produced before a magistrate, copy of the report submitted to the magistrate which describes the offence and the law breached (called the B report) is still not served on the detained person. There is no requirement in the PTA that a copy of the detention order should be served on the detainee. It is only when he is indicted before a high court a copy of the indictment will be served on him and he comes to know of the reasons for the arrest.

Often the language of the law enforcement authority differs from that of the detainee. The so-called confessions are most often taken down in a language alien to the detainee.

It is neither a requirement under the law or a practice to notify the detainee of his right to counsel under Article 14 (3)(d) of the ICCPR. This results in long detentions without the means of challenging its validity. Wijakanthan, (15) who was arrested by the police on 27.7.1998 and remanded by a magistrate (without a lawyer representing him) was visited by a lawyer for the first time on 31.7.2001 nearly three years after arrest. The visit took place when his mother who was regularly visiting him in remand, came to know accidentally that her son's remand could be challenged and that there were NGOs providing legal aid. Thereafter he was indicted before high court Ratnapura and following the withdrawal of the indictment he was released on 4th June 2002

Denial of right to legal counsel before trial

Right to access to legal counsel and the right to confidential communications are not guaranteed rights in Sri Lanka. The right to access and to the assistance of a legal counsel before trial is severely restricted. The state does not provide legal aid at the pre-trial stage before indictment. It is generally lawyers attached to human right NGOs and individual human rights lawyers who visit them at places of detention. Whilst there is no explicit right under the ICCPR, the Human Rights Committee has said "all persons arrested must have immediate access to counsel." (Concluding observations of the HRC: Georgia. UN Doc. CCPR /C/79/Add.74.9 April, para 28.)

The Minister / Secretary of Defence determines place and conditions of initial detention after arrest under PTA. They include a police station, STF camp or an army camp and not necessarily a prison. The relatives of the arrested are often not informed of the place of detention and it is during the first few days of detention that they are tortured and confessions obtained to maintain a charge. It is only after this that they are allowed to receive visits and seek the assistance of a lawyer. Lawyers never visit them at the army camps or STF camps, but visit them if they are at a police station or a prison.

The visit to the police requires the prior written permission of the IGP. The purpose of such visits is usually defeated because there will almost always be some police personnel seated right across the table when the lawyer interviews the client, thus preventing the exchange of any confidential communications. The interviewing lawyers are often told that no communications may be had regarding investigations. This is a clear breach of Article 14 (3) (b) of the ICCPR, which requires a detainee to have "adequate time and facilities for the preparation of his defence and to communicate with counsel." The Human Rights Committee has explained that this requires "counsel to communicate with the accused in conditions giving full respect for the confidentiality of their communications."(Human Rights Committee General Comment 13, paragraph 9)

To quote an example, in FR application No.186/ 2001 Yogalingam Vijitha v OIC Negombo, it was disclosed that while a lawyer visited her the first time at the Terrorist Investigation Division of the police, there were 5 police personnel seated around her and therefore she could not communicate with the lawyer freely and was not in position to disclose torture inflicted whilst in custody. It was only after her transfer to a prison that she was able to communicate discreetly with a lawyer and a fundamental rights application alleging torture was filed.

Denial of access to the outside world

The right to access with the outside world is usually highly restricted. The conditions that detainees face are often a breach of Article 10 ICCPR which holds that all persons deprived of their liberty shall be treated with humanity and with respect for dignity. Such denial of access facilitates conditions, which breach Article 7 of the ICCPR, which prohibits torture and cruel, inhuman or degrading treatment.

The relatives who visit are usually only able to communicate with the detainee for a few minutes, usually in the presence of a police officer mostly from the CID. Each detainee is given two half sheets of paper each month to write letters which will be sent several weeks later and only after censoring. Letters addressed to lawyers or human rights organisation containing information about torture or conditions of detention, or other ill treatment will have those sections deleted

It is the common practice of the police after torturing a detainee, to obtain a confession. After obtaining confession they take the suspect before a District Medical Officer (DMO) chosen by the police (and not necessarily the DMO of the area) who will complete the medical legal examination form supplied by the police in which there will not be any report of injuries. These would be produced in court to show that the detainee was not tortured. The CPC prohibits the practice of the police subjecting the detainee to medical examination without his consent.

Sec 122 (1) of the CPC states, "Where any officer

The right to access and to the assistance of a legal counsel before trial is severely restricted

in charge of police station considers that the examination of any person by a medical practitioner is necessary for the conduct of any investigation, he may with the consent of such person, cause such person to be examined by a Government medical officer ..."

(2) "Where the person referred to in subsection (1) does not consent to being so examined, the police officer may apply to a magistrate within whose jurisdiction the investigation is being made for an order authorising a Government medical officer named therein to examine such person and report thereon."

Further, the medical examination provided for in the CPC is only for the purpose of helping investigation, whereas the practice under the PTA is to use it in defence when torture is alleged in FR applications.

In several FR applications, medical re-examination of detainees on the orders of court revealed several injuries. As a result, the courts have held that medical reports produced by police obtained as above, cannot be relied upon as trustworthy and have rejected them. To quote an example-in the case of Nesarajah Sivakumar v OIC Thirukkovil, five medical reports on the suspect obtained from doctors by the police of their choice at their initiative (neither with the consent of the detainee nor on the orders of magistrate) while he was in custody, stating that there were no injuries were rejected by court when the subsequent medical examination on orders of court revealed 16 injuries and the court awarded compensation for torture.

Denial of the right to be brought promptly before court

Right to be 'brought promptly' before a judge or other judicial officer is not a guaranteed right in Sri Lanka.

Article 13 (2) of the Sri Lankan constitution only states that persons in custody, detained or otherwise deprived of personal liberty shall be brought before a judge. In this there are two significant omissions compared to the wording in Article 9(3) of the ICCPR: the requirement to do this promptly and that it be for the purpose of allowing the judge to exercise judicial power.

In fact PTA denies these two rights. On a detention order issued by the Minister of Defence a person can be detained for an aggregate period of 18 months (renewable every three months). There is no requirement that he should be produced before a judicial officer and there is no requirement that a copy of the detention order be served on him (Sec. 9 (1) PTA). There is no requirement that he should be produced before a magistrate at any time. Sec. 10 of the PTA states that an order made under Sec. 9 shall be final and shall not be called in question in any court. This is supplemented by Sec. 26, which states that no proceedings may be brought against any person for anything done in good faith under the PTA.

Right to challenge the lawfulness of detention

Even though Sec. 10 of the PTA states that the order of detention made under Sec. 9 is final and conclusive, the Suprema Court in its exercise of its jurisdiction under Art.126 of the constitution held that it has the right to pronounce on the lawfulness of the detention order. However there is a practical difficulty in invoking the SC to challenge it due to the 'one-month rule,' which means that a detention must be challenged within one month of being made. The problem of time

However there is a practical difficulty in invoking the SC to challenge it due to the 'one-month rule,' which means that a detention must be challenged within one month of being made

Name of arrested	Date of Arrest		Date of indictment
1. Thangarasa David	22.12.1996		22.03.2000
2. Murugesu Murugavel	05.02.1998		30.08.2000
3. George Aurlraj	21.03.1996	HC. 70/00	08.06.2000
		HC.71/00	06.07.2000
4. Rajah Aruleswari	02.09.1996		22.05.2000
5. Thangavel Vijayakanthan	27.07.1998		05.04.2001
6. Thambirasa Pulendran	27.07.1998		14.06.2001
7. Sivasithambarathesigan	21.08. 1999		13.9.2001
8. Chandrakumar Robert Pushparajah	23.02.2000		not indicted up to 30.06.2002

limit arises because time is taken for the relatives of the arrested to locate the suspect and to contact a lawyer in Colombo to take up the matter before the SC. Even though Supreme Court has been liberal in enforcing the one-month rule in cases of allegation of torture, it is strict on the one-month rule when the allegations are only illegal arrest and unlawful detention and in fact had dismissed several applications on that ground.

Denial of right to trial within a reasonable time or release

The right to trial within a reasonable time is not a guaranteed right and the victim has no legal remedy. This is a breach of Article 9(3) of the ICCPR. Those arrested under PTA usually wait for long periods to face the trial. In practice it has been found AG takes a minimum period of 12 months to serve the indictment and there have been instances of detainees waiting for between two and four years. (Please see box)

When applications are filed before the Supreme Court alleging illegal arrest and unlawful detention, the AG usually explains the delay by stating either that investigations were not over or that the authority that made the arrest and investigated the case had not forwarded the relevant file. Under CPC if any arrested person is not indicted within three months, he is entitled to be released on bail. Under the PTA however, there is no right to bail and due to the discriminatory attitude of the AG in practice, the detainee suffers in detention.

In Gonzalez del. Rio Peru (263/87) the Human Rights Committee held that delay of five years in the working of the judicial systems in respect of the author violated his right, under article 14 (1) to fair trial.

Rights during interrogation

Those arrested on suspicion under the PTA are held in police stations and interrogated. The interrogators will be Sinhala-speaking police officers with no knowledge of Tamil language; the interrogated person will be Tamil-speaking without knowledge of Sinhalese language. The person doing interpretation between the two is generally a Muslim police officer who is supposed to be knowledgeable in both languages, but who neither is a qualified nor an independent interpreter. He usually works under the direction of the interrogating police officers. Even where confessions were recorded in Tamil, the interpreting Muslim officers have often been found by high courts to be utterly incapable, giving rise to doubts as to who in fact interpreted between police and accused. The recording will be done in Sinhala, which the maker of the statement cannot read nor understand but will be forced to sign, often under torture. This breaches, amongst other things, Article 14 (3) (g) of the ICCPR, which gives a right not to be compelled to testify or confess guilt. Legal representation is not allowed at the time of interrogation and tends to take place after several months of isolated detention.

Presumption of innocence

In trials under the PTA, the accused are often indicted solely on the basis of a confession obtained under torture. The Human Rights Committee has stated, "the law must prohibit the use of admissibility in judicial proceedings of statements or confessions obtained through torture or other prohibited treatment"(Human Rights Committee General Comment 20, paragraph 12). The only other documentary evidence provided tends to be statements purported to have been made to the police. The witnesses are the Assistant Superintendent of Police to whom the confession is allegedly made 'voluntarily' and the police constables who interpreted and typed the confession. According to Sec. 16 of the PTA, such a confession is prima facie admissible in evidence and the burden of proving that it was obtained under duress or improperly, is on the suspect. This goes against the presumption of innocence in Article 14 (2) of the ICCPR.

Article 14(2): Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

Another serious denial of justice is that the courts hold that once the confession is admitted in evidence there is a presumption as to its trustworthiness and the truth of its contents. This therefore casts a further burden on the suspect of rebutting it.

In the case against Singarasa (CA 208/ 95) the Court of Appeal held, "In the course of his evidence [the applicant] did not impugn or assail aforesaid presumption and guarantee of testimonial trustworthiness and truth of the contents of the confession." He has omitted in his evidence to state facts refuting conspiracy to act together on their part to commit the imputed illegal act nor stated that he never attacked the army camps. In these circumstances the learned high court judge was correct in her adjudication as regards the truth and veracity of the contents of the confession."

Further, Section 16 (2) of the PTA shifts the burden to the accused to prove that any statement, including a confession, was not made voluntarily and therefore should be excluded

In trials under the PTA, the accused are often indicted solely on the basis of a confession obtained under torture

from evidence, and as such is itself incompatible with Article 14 (2) of the Covenant. The Act, as applied in this case, put the burden of proof on the accused and not on the prosecution, establishing a 'presumption of guilt'. In particular, where the confession was elicited without safeguards and with complaints of torture and ill- treatment the application of Sec. 6 (2) of the PTA amounts to a serious violation of Article 14 (2).

In the Singrasa's case the onus was placed on the accused to prove: 1) that the confession was not made voluntarily, 2) that it was not truthful 3) and that he was not responsible for the crime of conspiracy, in the light of that alleged confession. The multiple violation of the presumption of innocence is thus manifest.

Torture, denial of proper food and restriction on the time for visitors are amongst the deplorable conditions at police stations and STF camps

Facilities at trial

Only the indictment is served in Tamil, neither a translation of the confession nor the statement alleged to have been made to the police is provided. It is left to the suspect's lawyer to get it translated at the expense of the accused. The record of the proceedings are maintained in Sinhala only in areas outside north and east and a translation of it is never provided

On the date indictment is served, the court assigns a counsel for the accused who often will not have the necessary experience nor competence to conduct a trial of a serious nature such as one concerning conspiracy to overthrow the government .

Humane conditions

Under the PTA normal prison rules do not apply and the minister decides which of the rules should apply. Torture, denial of proper food and restriction on the time for visitors are amongst the deplorable conditions at police stations and STF camps. Breaches of Articles 7 and 10 ICCPR occur regularly.

Anthonipillai Napolian, a young man from Vavuniya who disappeared onAugust 5,1996 when he went out to purchase provisions was later traced by his mother to the Kalutara jail through information received from one of those who got released from the same jail. When she visited him at the jail on 07.01.2002, it was found that he was insane and was unable to communicate nor recognise his mother. An examination of the relevant court record revealed that he was arrested on or about 18.10.2000 by the Aralangangwella police, produced before Polonnaruwa magistrate on 27.11.2000 and that he had ordered his remand till conclusion of trial under Sec. 7 (2)and an application for bail had been refused.

Law itself provides for inequality

There may be several trials, one after the other against the same person based on the same confession. Sometimes after a suspect had been discharged in a case, he would receive summons in another case. Kidnapillai Bageerathi was arrested on July 17, 1997 by the Criminal Investigation Department and was detained at the police. Thereafter, on September 13, 1997 she was produced before a magistrate who ordered her remand under the PTA till the conclusion of the trial.

Based on one and the same confession extracted while in police custody she was served with five indictments in five different cases one after the other is given below:-

High Court of Colombo	Date on which Indictment served
Case No. 208/99 Court No.04	08.12.1999
Case No. 212/99 Court No.01	10.12.1999
Case No. 261/00 Court No.05	05.12.2000
Case No. 237/00 Court No.03	08.01.2001
Case No. 239/00 Court No.05	18.01.2001

There are many instances of suspects being released for the reason witnesses were not present for several dates of the trial, who after rejoining their families were served with indictments and brought to trial again for the same offences and being remanded till the conclusion of trial.

Kanapathipillai Thasan, a 17-year-old Tamil youth, working as an agricultural labourer, in January 1996 was stopped by the STF of the police of Akkaraipattu while going to work and his national identity card was taken from him and he was asked to report at the said camp on every Friday of the week to do manual work, without any payment. He had been regularly doing this work on 62 Fridays since then and on 25 April 1997 while he was at work he was arrested and detained at the camp and on May 18, 1997 under torture a self-incriminating statement was obtained from him and he was forced to sign that statement. On the basis of this statement he was indicted under PTA before the high court, Ampara in four cases bearing Nos. 231/97 – 233/97 and No. 227/97 and indictment dated 19.11.1997.

Case No. 231/97 – 233/97were postponed for 19 dates and No. 227/97 for 21 dates and on 01.12.2000 he was discharged from all the cases for the reasons that the prosecution witnesses were not present on the dates of trial. Following discharge he went home to receive summons to appear in the same high

court on 10.09.2001 and was served with another set of 4 indictments (case Nos. 467/01 – 470/01). and was remanded again till the conclusion of trial. He was charged in the new cases on the very same confession and for the very same offences for which he was discharged earlier. Trials went for 8 dates and he was finally acquitted on 16.01.2002

Denial of right to be tried without delay

Sec. 21 of the PTA states, "Every court shall give priority to the trial of any person charged with, or indicted for any offence under this Act and to the hearing of any appeal from conviction of such offence and sentence imposed on such conviction." But in practice trials often go on for years mainly because official witnesses are absent breaching Article 14(3)(c) of the ICCPR, which behoves to be tried without undue delay. To be tried within a reasonable time is not a guaranteed right under the constitution and therefore is not an enforceable right . Delay is common. There are instances of trials going on even for seven years . Details of a few such cases are given below:

Veerakathy Vinayagamoorthy was arrested on May 2, 1997 by the Bambalapitiya police and indicted on three counts before the High Court of Colombo on the following dates:

Case No. 78/99	Court No. 7	15.09.1999
Case No. 80/99	Court No. 2	07.09.1999
Case No. 81/99	Court No. 3	06.10.1999

The cases are still pending before courts and his remand continues for the last five years. No steps are taken to have all cases based on the same confession to be tried by the same court. Different judges hear cases against the same accused based on the same confession and their determinations ultimately are varied.

Yogarajah Lingamoorthy was arrested on August 15, 1998 by the Kaluwanchikudy police and on the basis of a confession obtained he was indicted in three different courts as follows: In HCV/586/00 he was indicted along with his wife before the high ourt of Vavuniya on cindictment dated 24.04.2000.

In Case No. 47/2000 he was indicted along with one Maheswaran Jeevarasan before high court of Anuradhapura on indictments dated 04.04.2000.

In Case No. 139/2000 he was indicted in the high court of Negombo on an indictment dated 24.04.2000.

However, high court, Vavuniya following the failure of the witnesses for the prosecution appearing in court even on the 12th date of trial, discharged the accused on March 15, 2002.

An English translation of the said order of the high court is given below:

"The 1st accused in this case is indicted of committing an offence under the Terrorism Act by having in his possession approximately 650 grams of very powerful explosives. The 1st Accused charged in this case is Arumaithurai Yogarani alias Lingamoorthy and the 2nd Accused is Yogarajah Lingamoorthy. There are two Accused in this case. In this case (they) should have been referred to as "You" (plural form). In this case Accused were produced in Court by the Prison authorities on 20.06.00. Since that date, this case has been going on for nearly two years. Today it's the 12th occasion. On 19.2.02 the State Counsel moved that PC Yamauna be cited as the seventh witness for which I made an order. That day I postponed the trial to 5.3.2002 and sent summons to the 7th witness. On 5.3.2002 the State Counsel moved for a date as the 7th witness was not present. The Attorney at law for the Defence said that there was no objection. The trial was postponed for today. That day I sent a copy of the summons to the 1st witness through the Legal Division of the Police Head Quarters CID Chayithiya Road, Colombo 1. However, today too the 1st witness is absent without any reason. This case is being taken up today on the 12th occasion. Both accused in this case have been granted bail. In spite of it, the Attorney at Law for the Accused made an application for the discharge of the Accused. It appears that there is a case against these Accused in Colombo. It also appears that the 2nd Accused in that case is in remand. However, he states that the order in this case could be sent to that court. Therefore I deem that such application be accepted I saw in the news papers that if there is no sufficient evidence and no proper reasons for continuing to keep an accused the Attorney General should not be too strict. In these premises, rejecting the application of the State Counsel for postponement and accepting the application made by the Defence, I do hereby discharge the two Accused in this case."

These Accused are also released from the detention order made in Colombo Chief Magistrate's Court Case No. 1326. High Court Judge, Vavuniya, 15.03.2002

However, the other two cases against him are still pending trial before the high courts of Anuradhapura and Nugegoda.

No steps are taken to have all cases based on the same confession to be tried by the same court. Different judges hear cases against the same accused based on the same confession and their determinations ultimately are varied

The counsel for the defence pointed out to the trial judge that the alleged confession only bore the signature of the assistant superintendent of police to whom the confession was said to have been made and not that of the accused

Multiplicity of indictments on a single confession

There have been many instances of accused being served with several indictments based on a single confession and tried in several high courts one after the other, just to prolong his trial. Even if one court acquits the accused rejecting the confession still cases in other courts continue. But sometimes the other cases are concluded based on the determination made in the first case. To quote one such instance

Chittampalam Piraisoody aged 27 from Thiriyai, Trincomalee moved with his wife to Trincomalee. When he went to Trincomalee police on 30.03.1996 to register himself as required by ER, he was arrested and detained. He alleged that he was subjected to severe torture and was asked to sign in several sheets of typed paper which were later produced as confession in the trial against him. Based on the confession he was indicted in 32 cases in different courts. The first case that was taken up for trial (case No. 8798/97) before HC Colombo No. 6, at the Voir dire inquiry the confession was rejected by court and he was discharged on 14.12.2000. Since the confession was rejected he was discharged in respect of the other 31 cases .

Charge based on confession neither signed nor authenticated

Kalimuthu Suresh aged 21 was arrested by Passara police on September 30, 1999 was indicted in nine cases, out of which six cases (Case Nos. 565/2001to 570/2001) were before the high court of Ampara in the Eastern Province and three cases were (case Nos. 130/2001 to 132/2001) before the high court of Badulla in the Uva Province. All indictments bore different dates in September 2001. All the indictments were based on one and only confession said to have been made to an Assistant Superintendent of Police.

When his cases before the Ampara high court was taken up for trial on 28.05.2002, after two years and eight months of his arrest, the counsel for the defence pointed out to the trial judge that the alleged confession only bore the signature of the assistant superintendent of police to whom the confession was said to have been made and not that of the accused. On the state counsel informing court that other than the said confession there was no other evidence, the accused was discharged.

What is most interesting is that when the other three cases based on the same confession came up before high court, Badulla on 30.07.2002 and the order of the high court of Ampara was brought to the notice of court by the defence and an application was made on behalf of the accused, the state counsel moved for a long date to consider the application and the accused continues to be in remand.

This supports the position taken by several suspects under the PTA that voluntary confessions were never made to any ASP. But the AG mechanically submits indictments under PTA based on the so called confessions.

Reliance on Confession as sole evidence

An examination of the cases filed under PTA will show that in 99 percent of the cases the sole evidence relied upon is a confession the statement alleged to have been made to a police officer of the rank of ASP and above. The only witnesses are the ASP and the policeman who translated and typed the confession . In short, the witnesses testify only as to the making of the document and not to the crime. In virtually all cases where confessions were relied on as evidence, the accused have complained that confessions were obtained under torture. Courts have convicted persons on the sole evidence of such confessions despite that:

(a) medical evidence of torture was before court;

(b) the accused had no legal representation at the time of interrogation or when produced before magistrate; and

(c) there was no independent nor competent interpreter at the time of interrogation.

Detainees rarely complain to the magistrate about torture, usually due to ignorance that such a complaint should be made to the magistrate at first available opportunity or due to fear of reprisals. The trial courts however, tend to draw adverse inferences from this and do not interpret the failure to complain as relatively natural in the context. In Colombo High Court Case No.6825 /94, where the accused, Singarasa took up the position that he did not inform the magistrate about torture inflicted on him while in custody for fear of reprisal, because of his knowledge of another detainee being beaten up for informing the magistrate about torture, the trial judge held "on a clear examination of the evidence it is clear to me that at the very first opportunity he would have informed an official of such assault described by him in this court had taken place and he could have obtained protection. That is the behaviour that can

be expected from a normal human being."

Furthermore trial courts hold that once a confession is produced in court the burden is upon the accused to prove that it is irrelevant under the law (Vide Sec. 16(2) PTA) and that once it is admitted in evidence there is a presumption as to its truth and the trustworthiness. This adds a further burden to the accused of disproving the contents of the confession. This amounts to a violation of basic "due process" rights.

An interesting case comes to mind. A person was charged under PTA for attack on a military camp and killing several soldiers solely on the basis of a confession alleged to have been made voluntarily to an ASP while in custody. The high court judge declined to convict in the absence of evidence as to the existence of the said army camp and information as to the soldiers who were alleged to have been killed. In effect he held that conviction based entirely on a confession without proof of the existence of the essential facts at the relevant time was contrary to law and logic. The prosecution did not appeal against the judgment. But other courts have not followed this judgement.

A case against a suspect based on a confession which said amongst other things that he had undergone arms training from the LTTE was dismissed when it was brought to the notice of the trial judge that he was a polio victim.

"Prosecutors and judges should not require conclusive proof of physical torture or ill treatment (much less final conviction of an accused perpetrator) before deciding not to rely on confession or information alleged to have been obtained by such treatment. Indeed, the burden of proof should be on the state to demonstrate an absence of coercion." (SR report on Turkey, E/CN.4/1999/61/ Add.1para 113(e).

"Where allegation of torture or ill-treatment are raised by a defendant during trial, the burden of proof should shift to the prosecution to prove beyond reasonable doubt that the confession was not obtained by unlawful means, including torture and ill-treatment" (SRT recommendation (j) GA report 2001,A/56/156)

Pre-trial remand

Sections 7 (1) & (2) of the PTA provides for pre trial remand .Under Sec. 7 (1)when any person arrested under Sec. 6 of the PTA is produced before magistrate, the magistrate on application made by the police not below the rank of a superintendent shall remand him till the conclusion of his trial. Sec 7(2) states that any person arrested in connection with any offence under this Act other than in terms of Sec. 7 (1) when produced before any court, that court shall remand that person till the conclusion of his trial, if an application is made for remand by the police not below the rank of a superintendent. In practice, the police in their application for remand submit to court that investigation notes and connected papers had been forwarded to attorney general and move for remand till the receipt of instructions from him. The magistrate makes order of remand without ascertaining whether there was a prospect of trial or whether there was sufficient material to indict. This results in prolonged pre-trial remand.

To cite two such instances: Ponnuthurai Ganeshan, a 48-year-old father of four, was arrested on September 28, 2000 and after eight days of detention at a police station was released on condition that he should report at the police station when ordered. When he reported on May 24, 2001 at the Kotchena police he was arrested by Vavuniya police, initially detained therein, thereafter transferred to Peliyagoda police and produced before a magistrate on September 3, 2001 who ordered his remand till the conclusion of his .trial. However, no case was filed against him and when a FR application was filed challenging his arrest and detention and came up before court on july 19, 2002, the court was informed that he would be released within two weeks.

Chandrapala Rusantha, (21) who was arrested on July 27, 19.99 by the Ampara police, from the premises of Ampara magistrate's court where he had come to stand surety for his girlfriend who was under arrest, was produced before magistrate on 16.9.1999 and remanded by the magistrate till the conclusion of trial. He was ultimately discharged without any charge on February 16,.2000 following a FR application seeking his release.

Kanapathippillai Senathirasa, (44), father of seven children was arrested by Welikantha police. After four months detention at the police station, on 18.8.2000 he was produced before magistrate, Polannruwa and was remanded till the conclusion of trial. Consequent to his filing a FR application challenging his arrest and detention on 18.7.2002, the Aginformed court that he would be discharged.

Post-trial remand

When an accused person is acquitted or discharged by the high court he will not be released from remand by the prison authorities

Thus detention in prison is prolonged due to administrative reasons, not rooted in any legal provision either in the CPC or in the PTA

It is quite evident from the above that PTA provisions are incompatible derogations. It is now a permanent law applicable throughout the country at all times

until such time as his initial remand order (made by the magistrate before whom he was produced to get remand order made under 7 (2) PTA) is cancelled. Sometimes it takes months for the accused to be released from jail despite the order for a discharge made by a higher court (the High Court). Thus detention in prison is prolonged due to administrative reasons, not rooted in any legal provision either in the CPC or in the PTA. This is contrary to law for a number of reasons. First, a Sec. 7 (2) PTA order can only operate till the conclusion of the trial. Second, the high court on production of an accused, is required to make a fresh remand order under the PTA which (being an order of a higher court) supersedes the magistrate's earlier order. Finally, such detainment is a breach of Article 9(1) ICCPR as it is an unlawful detention, even if the initial detention was lawful.

To cite a case Kidnapillai Bageerathi who was arrested on July 17, 1997 was indicted before high court of Colombo in five different cases. Following the rejection of the alleged confession in one of the cases (237/99/3), she was acquitted on March 21, 2001. Consequent to this, indictments in the rest of the cases were withdrawn. However, she was produced before Colombo magistrate and released only on January 30,2002, after eight months of her acquittal.

Conclusion

In this context another question arises - whether derogation under the PTA is permissible under the Covenant. Article 4 of the Covenant is of paramount importance for the protection of human rights. It allows for a state party to unilaterally derogate only temporarily

General Comment on Article 4 adopted at 1950th meeting on July 24, 2001 para 2 states:

"Measures derogating from the provisions of the Covenant must be of an exceptional and temporary nature. Before a State moves to invoke Article 4, two fundamental conditions must be met : the situation must amount to a public emergency, which threatens the life of the nation and the state party must have officially proclaimed a state of emergency..."

Appendix

Relevant excerpts from the Constitution of Sri Lanka

Art 12 (1) All persons are equal before the law and are entitled to the equal protection of the law .

Art. 12 (2) No citizen shall be discriminated against on the grounds of race, religion, language, caste, sex, political opinion, place of birth or any one of such grounds....

Art 13 (1) No one shall be arrested except according to procedure established by law. Any person arrested shall be informed of the reasons for his arrest

Art. 13 (2) 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 the procedure established by law.

Art. 13 (3) Any person charged with an offence shall be entitled to be heard, in person or by an Attorney-at-Law, at a fair trial by a competent court.

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

Art. 13 (5) Every person shall be presumed to be innocent until he is proved guilty: Provided that the burden of proving particular facts may, by law, be placed on an accused person.

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

Art 17 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 such person is entitled under the provisions of this Chapter.

Art 126 (1) The Supreme Court shall have sole and exclusive jurisdiction to hear and determine any question relating to the infringement or imminent infringement by executive or administrative action of any fundamental right or language right.