

AN AGENDA FOR CHANGE THE RIGHT TO FREEDOM OF EXPRESSION IN SRI LANKA

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The report was compiled for ARTICLE 19 by Elizabeth Nissan, author and researcher on human rights in South Asia.

ACRONYMS

CRM	Civil Rights Movement of Sri Lanka
FMM	Free Media Movement
HRTF	Human Rights Task Force
ICCPR	International Covenant on Civil and Political Rights
LTTE	Liberation Tigers of Tamil Eelam
JVP	Vanatha Vimukthi Peramuna
PA	People's Alliance
UNP	United National Party

1. INTRODUCTION

Denial of the right to freedom of expression has been at the core of the political and social tragedy that has beset Sri Lanka for decades. Media freedom, the public's right to know and the individual's fundamental right to freely hold and express opinions have all been flagrantly trampled upon by successive governments. The consequences for Sri Lankan society have been both marked and severe, and their legacy will almost certainly be felt for many years to come.

Governments of Sri Lanka have used a wide range of methods — both formal and informal — to impose censorship. Many obstacles to freedom of expression exist in law. Emergency regulations, for example, have been used by governments to close newspapers, seal printing presses, imprison political opponents without charge or trial, and even to enable security forces to destroy evidence of possible extrajudicial executions.

Other methods of censorship, however, are informal, arbitrary and concealed from the public. These informal methods have in recent years included widespread threats and attacks — sometimes lethal — upon journalists, other media workers and writers for expressing views or publishing material which the authorities preferred to repress. The right to peaceful protest has been repeatedly violated. There have been numerous instances in which violence and intimidation have been used, with the apparent backing of the government, to break up peaceful meetings, preventing people from expressing their opposition to government policies and actions, and to attack demonstrators and strikers, as well as journalists covering these events.

The long running civil war in the north and east,¹ which has cost tens of thousands of lives, owes its escalation in no small part to past government attempts to stifle any peaceful talk of Tamil autonomy or secession. The right to information - and, therefore, the right to truth and justice - has also been denied to many thousands of Sri Lankans, Sinhalese as well as Tamils, whose relatives were "disappeared" or brutally murdered by government forces and the "death squads" who operated under them, during the period of the Janatha Vimukthi Peramuna (JVP) insurgency in the south and the ongoing conflict in the north and east. Insurgency groups too have been responsible for thousands of abductions, disappearances and murders. In the parts of the north and east under the control of the Liberation Tigers of Tamil Eelam (LTTE), freedom of expression has been firmly denied, and those who would criticise or dissent against the rule of the Tigers must know that to do so is to put themselves at peril.

But just as Sri Lanka's recent history has been marked by a lack of freedom of expression, and the violation of so many other related human rights, there have also been many examples of individual efforts to stand up for such rights. Some, like the broadcaster Richard de Zoysa, paid with their lives for speaking out against intolerance and human rights abuses; others endured threats and intimidation or sought refuge abroad.

Nevertheless, despite the obstacles, the small but vibrant human rights movement has survived and kept alive the hope that Sri Lanka will one day be ruled by a government prepared to respect the rights of its people and to honour to the full its international obligations, as set out in the International Covenant on Civil and Political Rights and other international human rights instruments. This human rights movement still has a crucial contribution to make towards the achievement of these objectives, and deserves all possible international support. Today, following the election victory of the People's Alliance (PA), led by Prime Minister Chandrika Bandaranaike Kumaratunga, Sri Lanka stands at a crossroads. The new government has taken office after an election campaign in which it promised to right many of the wrongs of the past,

¹ In this report, the term "north and east" is used to refer to Northeastern Province, and "south" refers to all other parts of the island.

to work for conciliation and peace, and to build a better future on the foundation of respect for basic human rights. In particular, the new government, in its early utterances, has repeated undertakings made before the election about the steps it will take to end censorship and restore freedom of expression, recognising no doubt that without this freedom all other human rights are in jeopardy.

ARTICLE 19 welcomes the priority that Prime Minister Kumaratunga's government appears to attach to restoring press freedom and the right to information. However, as noted above, the legacy of the past is a heavy one and the new government faces many obstacles as a result. In particular, the systematic censorship which permeated government institutions and led to a culture of self-censorship within Sri Lankan society will be difficult to eradicate. The government will need to demonstrate real strength of purpose and determination if it is to carry through successfully its programme to bring Sri Lanka to the position where it can be counted a full, open and flourishing democracy, one which pays due respect to the rights of all Sri Lankans.

This report is intended as a constructive and effective contribution to the cause of freedom of expression in Sri Lanka. It sets out recommendations for reforms which ARTICLE 19 believe are vital if freedom of expression is to be allowed to flourish in Sri Lanka in the future. These recommendations address ARTICLE 19's main areas of concern in Sri Lanka in the years before the most recent general election, and particularly as investigated during its visit to Sri Lanka in July 1993. Many of these concerns are of a long-standing nature: denial of the right to freedom of expression is institutionalized in Sri Lanka in manifold ways, and substantial reforms are necessary. These recommendations are not exhaustive, but represent the most urgent steps needed to create a legal and institutional framework within which freedom of expression and information can be encouraged and fostered, and to ensure that there are checks on future governments to prevent the gross violations of the right to freedom of expression that Sri Lankans have experienced in recent years.²

1.1 ARTICLE 19's Visit to Sri Lanka

ARTICLE 19, the International Centre Against Censorship, works impartially and systematically to identify and oppose censorship world-wide. It believes that freedom of expression and information is a fundamental human right without which all other rights, including the right to life, cannot be protected. ARTICLE 19 defends this right when it is threatened and opposes laws and practices which violate it.

ARTICLE 19 visited Sri Lanka from 18 to 30 July 1993 to investigate the extent to which the

² The recommendations do not address the full range of freedom of expression issues. For example, academic and artistic freedom and freedom of association, including trade union rights, are not covered here. In addition, the recommendations do not address the situation in the north and east of the island, the areas most deeply affected by the civil war between the secessionist LTTE and the government. ARTICLE 19 remains gravely concerned about the undermining of civil society in these areas and the degree to which, in the areas under its control, the LTTE denies people the right to freedom of expression. See, for example, *Sri Lanka: Freedom of Expression Cases in the North* (ARTICLE 19, 1992).

fundamental right to freedom of expression was respected in practice, and the legal and structural bases necessary for change. These were viewed in relation to the specific obligations to uphold human rights that Sri Lanka has undertaken as a state party to the International Covenant on Civil and Political Rights (ICCPR), and in particular its obligations to uphold the right to freedom of opinion and expression. The mission was based in Colombo, but also held a number of meetings in Kandy.

1.2 Freedom of Expression and Armed Opposition Groups

Censorship has not only emanated from governmental sources in Sri Lanka. Armed opposition groups in both the south and the north and east have attempted to silence their critics by murder and threats and have fostered a culture of fear. Within the areas of their control in the north, the LTTE has sought to suppress all voices of dissent or criticism, and only pro-LTTE newspapers are published in Jaffna. In addition to the thousands of Sinhalese and Muslim civilians they have killed or driven from their homes in the north and east, they have killed and imprisoned many Tamil people who they suspected of opposing them, as well as members of the civil administration in the north and east with whom they disagreed.

In the south, the JVP, a Sinhalese armed opposition group, began assassinating members of the ruling United National Party (UNP) and members of other parties which supported the Indo-Sri Lanka Accord after it was signed in 1987. During the 1987-89 insurgency in the south, the media also became a focus of JVP attack: the JVP called for a boycott of the state-owned media, attacked and killed some senior media personnel, as well as people selling government-owned newspapers.

ARTICLE 19 is aware that many — but by no means all — governmental violations of the right to freedom of expression have taken place in contexts of armed opposition to the government. It recognizes the difficulties that governments face in confronting armed opposition groups and is gravely concerned at the attacks on freedom of expression carried out by such groups. Abuses by such groups, however, can never justify human rights violations by governments. ARTICLE 19 believes that governmental attempts to stifle the expression of dissent and to control access to information through widespread censorship — both formal and informal — cannot be justified. International human rights standards provide clear guidance on the extent to which restrictions on freedom of expression are permissible in such contexts. The restrictions imposed by successive governments in Sri Lanka have far exceeded the permissible range envisaged under international law. Furthermore, a wide range of controls on expression and information also exist in laws which have no connection with public security issues.

Even leaving the framework of international human rights law aside, it is clear from Sri Lanka's recent history that extreme forms of censorship have been counter-productive, and have contributed to an escalation of the very violence that the restrictions were ostensibly intended to contain. In August 1983, for example, even the peaceful advocacy of separatism was banned under a constitutional amendment and all members of the largest parliamentary opposition party, the Tamil United Liberation Front, forfeited their seats. With democratic means of

expression denied, armed militancy within the Tamil community escalated in the following years. As the Civil Rights Movement of Sri Lanka (CRM) so correctly predicted in 1979, when a similar ban was being mooted:

It is necessary to point out the grave dangers inherent in using the power of the State to curb the democratic freedom of political debate, for this forces political opponents to resort to other means. A ban on the democratic expression of demand for Eelam will, far from achieving the stated purpose of curbing violence, in fact create a situation where lawlessness and violence may increase and where the holocaust which we all wish to avert is brought about.³

1.3 The New Government's Undertakings

Following parliamentary elections on 16 August 1994, the People's Alliance government, under Prime Minister Chandrika Bandaranaike Kumaratunga, was sworn into office. There is considerable hope that this government will enact significant reforms affecting freedom of expression. In its manifesto, the PA said:

The PA is firmly convinced that the freedom of the individual cannot be safeguarded without a viable system of checks and balances operating as a restraint on governmental power; and that the checks and balances required for this purpose can be applied with any degree of effectiveness only if there is healthy and vigorous expression of public opinion.

The PA, therefore, attaches the greatest importance to strengthening the media and providing a framework within which the media can function independently and without inhibition. This entails significant changes with regard to structures on ownership, policy objectives, the legislative instruments applicable, administrative policy in respect of such matters as facilities and the attitude of government to issues which are indispensable for a sound media policy.

In public statements since taking office, the new Minister for Information, Dharmasiri Senanayake, has reiterated the government's commitment to freedom of expression and said that he envisaged a gradual shift from government control to freedom of the media and that a new information policy is in preparation. In an interview published in the *Sunday Observer* on 4

³ CRM, *Freedom of Speech and the Cry for Eelam*, 4 July 1979.

September 1994, he said that the new policy would give particular attention to the following areas:

- ensuring untrammelled access to news and knowledge through a process of free and responsible flow of information;
- institution-building to encourage, maintain and establish professionalism in all sectors of media practice;
- utilization of media to provide enlightened awareness of issues and entertainment of high quality;
- evolving ethical guidelines to ensure fair media practice mainly through mechanisms of self-regulation;
- establishing an authority to arbitrate media issues and to strengthen the accountability of media.

In addition to these statements on freedom of expression, the new government has made some further undertakings on protecting human rights more generally. The Foreign Ministry has announced that a National Human Rights Commission will be established which will be independent and is expected to have powers "to deal with violations of human rights", and that enabling legislation will be put before Parliament as a matter of priority to give effect to the Convention against Torture, which Sri Lanka acceded to earlier in 1994. The Ministry said that legislation is also being drafted for the registration of deaths of persons who have disappeared, which will provide a special procedure enabling a death certificate to be issued in such cases.⁴

ARTICLE 19 welcomes the government's stated commitment to freedom of expression and human rights generally, and urges it to act speedily to bring about reform. ARTICLE 19 intends to closely scrutinize any government proposals on freedom of expression and believes that a full review of the many ways in which the right to freedom of expression has been curtailed in Sri Lanka is necessary in order that effective action can be taken to prevent any future abuse. The government must not only desist from using the full range of restrictive powers currently available; it must ensure that excessive powers are removed from the statute book and that constitutional and legal protections are put in place to guard against their reintroduction.

2. FREEDOM OF EXPRESSION AND INTERNATIONAL HUMAN RIGHTS LAW: SRI LANKA'S OBLIGATIONS UNDER THE ICCPR

⁴ Ministry of Foreign Affairs Press Release, No. 252/94, 2 Sept. 1994.

Freedom of expression and information has been recognized as an essential foundation of democratic society by institutions and governments around the world. The United Nations General Assembly, at its first session, declared:

Freedom of information is a fundamental human right and ... the touchstone of all the freedoms to which the United Nations is consecrated.⁵

Freedom of expression is proclaimed in the Universal Declaration of Human Rights and elaborated in the International Covenant on Civil and Political Rights (ICCPR). The government of Sri Lanka acceded to the ICCPR in 1980 and is, therefore, bound by its provisions.

Article 19 of the ICCPR sets forth the right to freedom of opinion, expression and information. Paragraph 1 asserts the absolute right of the individual to hold opinions "without interference". This right cannot be subject to restrictions under any circumstances. Paragraph 2 states the positive content of freedom of expression, namely:

freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

The rights set out in paragraph 2 may be subjected to certain restrictions under the ICCPR, but only in the specific circumstances described in paragraph 3 of Article 19. Paragraph 3 requires such restrictions to be provided by law, and specifies that they must be "necessary" for the respect of the rights or reputations of others, for the protection of national security or of public order (*ordre public*), or of public health or morals.

Article 20 of the ICCPR requires states parties to prohibit by law (though not necessarily to declare criminal) any propaganda for war and any incitement to discrimination, hostility or violence on national, racial or religious grounds. Article 21 protects the right of peaceful assembly, and Article 22 safeguards the right to freedom of association, "including the right to form and join trade unions". These rights can be subject to restrictions similar to those set forth in Article 19(3).

States are permitted to derogate from these rights under Article 4 of the ICCPR in exceptional circumstances which "threaten the life of the nation". Article 4 specifies that any restrictions must be only "to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law".

3. CONSTITUTIONAL AND LEGAL PROTECTION OF FREEDOM OF EXPRESSION

⁵ G.A. Resolution 59(1), 14 Dec. 1946.

3.1 Constitutional Protection

Recommendation 1: The Constitution of the Democratic Socialist Republic of Sri Lanka should be amended to provide full protection of all the rights guaranteed under the ICCPR, and especially of those rights guaranteed under Articles 19, 21 and 22 of the ICCPR. There should be no restrictions on these rights on any grounds other than those permitted by the ICCPR.

Chapter Three of the 1978 Constitution of Sri Lanka sets out the fundamental rights that are protected by the Constitution as well as the grounds upon which such rights may be restricted. Several of the provisions of the present Constitution are based upon the ICCPR. However, some rights are found in more limited form in the Constitution than in the ICCPR, and the Constitution provides for a considerably broader range of restrictions of rights than are permitted under the ICCPR. There is no need to demonstrate the necessity for, or reasonableness of, the restriction. Moreover, under Article 15(7), the law by which such restrictions may be imposed can include Emergency Regulations, which are issued by the Executive and not through an Act of Parliament.

Article 14 protects, among others, the rights to freedom of speech and expression (including publication), to peaceful assembly, to association, and to form and join a trade union. However, all of these rights can be restricted by law on broad grounds.

As noted above, restrictions on freedom of expression and information under the ICCPR are limited to those provided by law and "necessary" for respect of the rights or reputations of others, national security, public order, public health or morals. Under the Constitution, restrictions on fundamental rights may be provided by law "in the interests of" national security, public order, the protection of public health or morality, and a number of other matters including in relation to parliamentary privilege, contempt of court and defamation.⁶ "In the interests of" is much more broad and less testable than the requirement of "necessity" under the ICCPR.⁷ ARTICLE 19 urges the government to ensure that, at the least, no broader restrictions than are permitted under the ICCPR remain available under the Constitution of Sri Lanka.

Recommendation 2: Article 16 of the Constitution should be repealed or amended to ensure that all laws in force are in keeping with constitutional provisions protecting human rights. All existing law should be reviewed and

⁶ For example, Article 15(2) of the Constitution permits restrictions by law on freedom of speech and expression (including publication) "in the interests of racial and religious harmony or in relation to parliamentary privilege, contempt of court, defamation or incitement to an offence".

⁷ At the Human Rights Committee's consideration of Sri Lanka's performance under the ICCPR in 1991, Professor Rosalyn Higgins, a Committee member, noted that restrictions were "not permitted 'in the interests of' but solely on grounds of necessity" under the ICCPR.

amended as necessary to ensure that it is fully consistent with international human rights law.

Under Article 16 of the Constitution, all laws (both "written and unwritten") in existence at the time the Constitution came into force remain valid whether or not they are consistent with the fundamental rights chapter of the Constitution. In early 1991, the government announced that all such laws would be reviewed by the Law Commission, and that a report of the review would be tabled in Parliament within one year. However, ARTICLE 19 is not aware of such a review having been completed and believes that this task remains to be done.

Recommendation 3: The Constitution should be amended to ensure that it protects the fundamental rights of all persons under the jurisdiction of the state, including non-citizens.

At present the constitutional guarantees of freedom of expression and association apply only to "citizens", in contrast to other fundamental rights which, under the Constitution, apply to "all persons". The Constitution provides for the rights to freedom of expression and association to apply to other legally resident persons for a period of 10 years from the commencement of the Constitution, which came into force in 1978. In effect, this provision particularly discriminated against Tamils of Indian descent who had been deprived of their citizenship under the Ceylon Citizenship Act of 1948, almost immediately after independence.⁸ It also fails to protect more recent immigrants and temporary residents.

This provision constitutes a violation of Sri Lanka's international obligations. Article 2(1) of the ICCPR requires governments to guarantee the rights set forth in the ICCPR to all persons subject to its jurisdiction "*without distinction of any kind*", which has been widely accepted to include non-citizens.

Recommendation 4: The Sixth Amendment to the Constitution, which prohibits advocacy of a separate state, should be revoked in order to protect the right to freedom of expression.

This amendment was passed in August 1983 following widespread communal violence in the previous month in which thousands of Tamil people in southern Sri Lanka were attacked, killed, or driven from their homes by Sinhala gangs. The "trigger" for the violence had been the killing by Tamil armed militants in Jaffna of 13 Sri Lankan soldiers.

In banning advocacy of separatism, the government in effect sought to appease the

⁸ Citizenship was granted to those whose status was still unresolved shortly before the presidential election of Dec. 1988.

perpetrators of the violence in the south by prohibiting further "provocative" advocacy of separatism. One outcome of the Sixth Amendment was that all Members of Parliament of the Tamil United Liberation Front (which was then the largest opposition party in Parliament) forfeited their seats because they refused to take the obligatory oath, which requires commitment to uphold and defend the present Constitution, and not to support, promote or espouse in any way the establishment of a separate state within Sri Lanka's territory.

The Amendment makes no distinction between peaceful and violent advocacy of separatism, and thus effectively prohibits even the peaceful advocacy of an idea. There is no requirement to show that the advocacy poses a serious threat to national security or public order. It constitutes a clear infringement of Sri Lanka's obligations under the ICCPR and violates the government's duty to protect the right of any person to express his or her political views and engage in political debate.

Recommendation 5: The right to freedom of information should receive explicit protection under the Constitution and any restrictions on this right should be limited to those set out under the ICCPR. A Freedom of Information Act should be introduced to give effect to this right, and existing laws containing provisions which hamper the free flow of information in the public interest should be reviewed and amended accordingly.

The 1978 Constitution does not recognize an express right to seek and receive information of public interest, a right Sri Lanka has pledged to respect by acceding to the ICCPR. The Supreme Court of Sri Lanka has interpreted the right to freedom of publication to include the right to receive information, but there is no explicit recognition of this right in current Sri Lankan law.⁹ Indeed, considerable powers exist to stifle debate and deny access to, as well as to suppress the publication of, information on vital matters of public interest. The repeated censorship and banning of newspapers for extended periods of time, discussed below, can be cited as examples of these powers.

In 1990 the previous government, under President Ranasinghe Premadasa, published proposed amendments to the fundamental rights chapter of the Constitution which appeared to broaden the scope of constitutional protection of fundamental rights, including by adding the right to freedom of information. The proposed amendment (which would have continued to permit far broader restrictions on fundamental rights than are permitted under the ICCPR) was not put before Parliament, however, and did not become law.

During the 1970s, under the government of Prime Minister Sirimavo Bandaranaike, government control of news increased markedly:

⁹ *Visuvalingam v. Liyanage* (1984) 2 Sri Lanka Law Reports, p. 132.

[T]he government of Sri Lanka had, by mid-1973, created a powerful agency of press control and brought under its control the publishers of sixty percent of all newspapers The creation of the Press Council, the Lake House legislation and, perhaps most potently, the reserve emergency powers held by government, all made it possible to limit access to information within the island to a degree previously unknown. News management through government intervention became a concrete reality which Ceylon had not previously experienced except briefly during the crisis of 1958.¹⁰

Powers introduced in the Press Council Law by Mrs Bandaranaike's government were not in fact invoked until December 1980 by J R Jayawardene's government (see below). Despite the apparently more open start of the Jayawardene government, it soon began to threaten and exercise greater control over the media. Censorship of the press continued to be used at key political moments, such as during the 1982 referendum which extended the life of Parliament by six years, and following the signing of the Indo-Sri Lanka Accord in 1987. Extensive formal and informal controls on the media continued throughout the period of the UNP government, under both President Ranasinghe Premadasa and President Dingiri Banda Wijetunga.

The present Prime Minister, Chandrika Bandaranaike Kumaratunga, has pledged that "honesty and transparency of government dealings is a cornerstone of our policy".¹¹ ARTICLE 19 believes that this policy should be implemented in the context of providing positive protections in law for freedom of information.

Laws which need reviewing from the perspective of freedom of information include the emergency regulations, the Prevention of Terrorism Act, the Official Secrets Act, the Parliament (Powers and Privileges) Act, the Press Council Law and the law of defamation and sedition (discussed below).

Recommendation 6: The remedies — both national and international — available against violation of fundamental rights should be reviewed and strengthened. The government should extend the jurisdiction of the Supreme Court in fundamental rights cases and allow the right of individual petition to the international tribunals established under the ICCPR and the Torture Convention.

The Constitution provides for applications to be made to the Supreme Court by people whose fundamental rights have been violated by executive or administrative action, provided that the application is made within one month of the occurrence of the alleged violation. The Supreme Court can grant compensation to the victim, but there is no requirement for the Court to establish individual responsibility for the violation, or to punish the perpetrator. Indeed, there have been cases where the government has

¹⁰ James Jupp, *Sri Lanka: Third World Democracy*, Frank Cass, 1978, pp. 169-170.

¹¹ *Daily News*, Colombo, 7 Sept. 1994.

promoted police officers who had previously been found responsible for committing violations of fundamental rights by the Court.

The one month rule may provide insufficient time for application to be made to the Supreme Court in some circumstances, and should be substantially relaxed. A proposed amendment to the Constitution, put forward in January 1991, would have increased the time limit to four months. If a time limit is to be retained, there should also be provision for persons who apply to the Supreme Court outside the time limit to have their applications considered in the interests of justice.

At present, there is no provision for fundamental rights applications to be made to the Supreme Court in the public interest.¹² The current provisions allow only for the aggrieved person him or herself to make the application.

There is no provision at present for a law to be challenged in court on the ground that it contravenes a fundamental right. In fact, the Constitution explicitly protects all "existing law" from challenge; laws passed after the present Constitution came into force in 1978 can only be challenged at the Bill stage. The jurisdiction of the Supreme Court should be extended to allow it to hear challenges to all laws and regulations.

The government should also ensure that Sri Lankans have access to the international remedies available for victims of human rights violations. Sri Lanka has not signed the (first) Optional Protocol to the International Covenant on Civil and Political Rights, which enables individuals who claim their rights have been violated to appeal to the Human Rights Committee of the United Nations, an independent international tribunal established under the Covenant to monitor its implementation. Similarly, when Sri Lanka ratified the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment in January 1994, it did not make the declarations under Articles 21 and 22 which enable the international tribunal set up under the Convention to entertain complaints from other states parties or from individuals.

3.2 Emergency Powers

Recommendation 7: The Constitution should specify that emergency powers may only be used in exceptional circumstances as defined under international human rights law. They must never be used as a matter of expediency to circumvent the normal legislative process. The necessity for a state of emergency should be stated fully at the time of declaration, and whenever it is renewed, together with a statement of the conditions which must be achieved for the state of emergency to be lifted. Provision should be made for the courts

¹² The proposed amendments to the fundamental rights chapter of the Constitution published in January 1991 did include provision for applications to be made in the public interest on behalf of an aggrieved person who is unable to make the application themselves.

to assess whether the declaration of a state of emergency and its prolongation are indeed justified.

Sri Lanka has been ruled under a declaration of emergency for a considerable proportion of its modern history. A continuous and island-wide state of emergency was in force for more than 11 years, from May 1983 to July 1994, except for a five-month period between January and June 1989. Earlier states of emergency included approximately 10 months from May 1958 to March 1959; two years from February 1961; and more than three years from March 1971. On 16 August 1994, the emergency was reimposed island-wide, but on 4 September it was lifted by the new government in most parts of the south. It remains in force throughout the north and east and in certain other specified areas.

Emergency rule has been enforced for long periods of time, even in areas of the country which the government has claimed have returned to normality. The Civil Rights Movement strongly criticized the last government for "using emergency rule as a mode of normal governance" with no attempt to limit use of emergency powers "to the extent actually needed to cope with a given situation in a given place at a given time".¹³

Article 155(3) of the 1978 Constitution confirms the President's authority (initially stated in the Public Security Ordinance of 1947) to declare a state of emergency and to issue emergency regulations. Emergency regulations prevail over all other laws except the Constitution, and the decision to declare a state of emergency cannot be questioned by any court of law. Once an emergency has been declared, Parliament is required to vote monthly on its continuation. But Parliament cannot vote on the necessity for the declaration of emergency itself, and cannot vote on the necessity or desirability of any individual emergency regulation.

Article 4 of the ICCPR permits derogations from the right to freedom of expression in times of public emergency, but only when such emergency "threatens the life of the nation", and only "to the extent strictly required by the exigencies of the situation" provided such measures are not inconsistent with any other obligations under international law. The Constitution's authorization of emergency powers does not include any of these safeguards, and does not provide for judicial review of the declaration of an emergency or of its continuation. These safeguards are clearly necessary to prevent any further abuse of emergency rule in Sri Lanka.

Recommendation 8: The Constitution should specify that no restrictions on fundamental rights — including on the right to freedom of expression and information — are permissible save in the exceptional circumstances specified in Article 19(3) of the ICCPR. All emergency regulations in force must be reviewed and amended to ensure that they comply fully with international

¹³ CRM, *Emergency Regulations - The Recent Amendments*, E 03/2/93.

human rights law and cannot be used to violate the right to freedom of expression and information. In particular, provision should be made for prompt and substantial judicial review of all detentions under emergency regulations.

The powers of censorship available under the emergency have far exceeded those envisaged under the ICCPR. They have had a severe effect on freedom of expression, including in areas of the country and at times when there has been no discernible threat to national security. As Chief Justice Sharvananda warned:

Laws that trench on the area of speech and expression must be narrowly and precisely drawn to deal with precise ends. Over-breadth in the area has a peculiar evil, the evil of creating chilling effects which deter the exercise of that freedom. The threat of sanctions may deter its exercise almost as patently as the application of sanctions. The State may regulate in that area only with narrow specificity.¹⁴

Successive governments have, since the 1950s, used broadly-phrased emergency powers to silence critics and dissenters. They have repeatedly closed newspapers critical of their policies and actions and have sealed printing presses. For example, the presses of the leftist party papers, *Aththa* and *Janadina*, were closed by the UNP-led government in 1966; *Dawasa* and the *Sun*, published by the privately-owned Independent Newspapers, were closed by the Sri Lanka Freedom Party-led government in 1974; and *Aththa's* press was again sealed by the UNP government in 1982. Others who have fallen victim to these powers include people who were prosecuted for distributing leaflets which contained no incitement of violence, and a civil rights worker seeking justice for people who had "disappeared" in the custody of the security forces, who was prosecuted for spreading "false rumours".

In the last several years, emergency regulations have been used at various times to prohibit the affixing of posters or distribution of leaflets without the permission of the Inspector General of Police; forbid public meetings and processions; ban newspapers; seal printing presses; censor publications and broadcasts; violate the important journalistic principle of protecting the confidentiality of sources; define civil disobedience as "sedition"; and outlaw political parties.

The government's control of large sections of the media, and its broad powers to censor those media that it does not directly control, has had a critical effect on public access to information, and on the ability of opposition politicians and others to make their views known. At times — such as during the 1982 referendum which extended the life of Parliament by six years — it has been nearly impossible for dissenting voices to be publicly heard. The referendum was conducted under emergency rule in conditions of severe repression which included attacks on, and arrests of, Sri Lanka Freedom Party organizers; the banning of certain opposition newspapers and the sealing of printing presses; seizure of leaflets; and manipulation of the state-owned media, which carried

¹⁴ *Joseph Perera v. Attorney-General*, S.C. Nos. 107-109/86.

almost exclusively pro-government items. Again, following the signing of the Indo-Sri Lanka Accord in July 1987, and at the height of the JVP insurgency in 1989, newspaper reports were subject to prior censorship by the Competent Authority appointed under the emergency regulations. The Civil Rights Movement of Sri Lanka's own statement, urging caution in the exercise of powers of censorship following the signing of the Accord, had itself to be approved by the Competent Authority prior to issue.¹⁵

Emergency regulations have also been used to prevent publication of information relating to human rights violations. In one notorious case, the Competent Authority ordered the closure of a newspaper, the *Saturday Review*, for stories that called attention to incidents of brutality by the Sri Lanka Army and police.¹⁶ The Competent Authority justified the closure on the ground that "[t]he *Saturday Review* ... constantly highlighted grievances and injustices committed against the Tamil community which were capable of arousing communal feelings among this community and encouraged conduct prejudicial to the maintenance of public order and security." The Supreme Court upheld the closure.

Several emergency provisions which infringed on freedom of expression were removed from the emergency regulations when they were revised by the last government in February and June 1993, and such provisions have not so far been reintroduced.¹⁷ Some provisions which seriously restrict the right to freedom of expression still remain in the regulations. These include the broad powers of search and seizure of documents, and powers of inquiry which require that every person assisting the investigation of offences under the regulations must:

truthfully answer all questions put to him and notwithstanding anything to the contrary in any other law shall disclose all information including the contents of any document touching the subject matter of the investigation, irrespective of the capacity in which such person has received such information or knowledge of the contents of such document.¹⁸

Such provisions could clearly infringe upon journalistic freedom, and provide no grounds on which journalists may lawfully protect the confidentiality of their sources.

Other regulations still in force may facilitate the cover-up of deaths resulting from human rights violations. The emergency procedures relating to the investigation of deaths due to the action of, or in the custody of, the police or armed forces do not require the full investigation and disclosure of all the available evidence relating to the death. A High Court inquiry may be held but only on application by the police themselves; the judge is only required to record evidence provided by the police and the Government Medical

¹⁵ CRM, *The Political Settlement of the Ethnic Conflict and the Indo-Sri Lanka Accord*, E 1/8/87.

¹⁶ *Visvalingam v. Liyanage* (1984) 2 SLR 123.

¹⁷ A regulation on sedition, which severely infringed upon the right to freedom of expression, was reintroduced in December 1993 but was not included in the new set of regulations issued in September 1994.

¹⁸ Emergency Regulation 38(b).

Officer; no notice of the hearing need be given to any other person; the findings are submitted to the Attorney General alone; and they are not publicly available. ARTICLE 19 considers that this procedure is grossly inadequate and open to abuse. Its secrecy and reliance on the police to provide all evidence other than the post-mortem report has meant in practice that the full truth about the circumstances of many deaths has not been made known.

Many thousands of people have been detained without charge or trial under the emergency regulations. For many years the regulations provided for indefinite administrative detention on renewable, three-monthly detention orders, with no judicial review of the grounds for detention and with virtually no safeguards against physical abuse in custody. Relatives did not need to be informed of the detention, and people could be held for long periods in *incommunicado* detention.¹⁹ Torture and "disappearances" were rife in these conditions. Following severe criticism both locally and internationally of Sri Lanka's human rights record, the previous government introduced a number of safeguards against abuse into the regulations, including that certificates of arrest should be issued and that arrests should be reported to superior officers and to the Human Rights Task Force.²⁰

The regulations issued by the new government on 4 September 1994 limit the period for which a person can be detained on renewable three-monthly administrative detention orders without judicial review to one year. For the detention to be extended beyond this period, the detainee must be brought before a magistrate, together with a report from the Secretary to the Ministry of Defence setting out the grounds for continuation of the detention. The regulations specify that "the report shall be prima facie evidence of its contents". They also provide that "the Secretary shall not be required to be present or called upon to testify by the Magistrate", thereby preventing his version of events from being challenged. The magistrate may then order further detention for periods of three months, with no time limit on the total period of detention.

Prime Minister Chandrika Bandaranaike Kumaratunga has promised Parliament that her government will never misuse emergency powers to stifle political adversaries,²¹ and the new regulations issued on 4 September 1994 do not contain many of the broader powers to stifle dissent that were provided at various times in the past. ARTICLE 19 welcomes the new Prime Minister's assurances but urges the government to review the regulations currently in force as a matter of priority in order to remove or revise those which continue to violate the right to freedom of expression and information. ARTICLE 19 believes it is imperative that the government does more than simply desist from using the range of powers at its disposal: it must ensure, through the introduction of full constitutional safeguards, that such excessive powers are no longer

¹⁹ For more detail on these emergency provisions, see Law and Society Trust, *Sri Lanka: State of Human Rights, 1993*, pp. 15-19 and 53-60.

²⁰ The Human Rights Task Force was created by the government in August 1991 to establish and maintain a central register of detainees, and to monitor their welfare.

²¹ *Daily News*, Colombo, 7 Sept. 1994.

available to it or any future government. Without constitutional safeguards, there is nothing to prevent their reintroduction, or the introduction of new provisions curbing free expression, at any time while a declaration of emergency remains in force.

Recommendation 9: Each emergency regulation should have a preamble explaining why it is necessary and the conditions which need to be achieved in order for it to be lifted. The right to challenge any emergency regulation before the courts should be protected under the Constitution.

Matters dealt with under emergency powers have included numerous items with no bearing at all on public security concerns. Regulations in force in 1993, for example, included matters such as edible salt, games of chance, the appointment of assistant controllers of immigration and emigration, driving licences and the registration of motor vehicles, school development boards and provincial boards of education, and monitoring of receipts and disbursements of non-governmental organizations, to name but some.²² In addition, amendments have been made to permanent legislation through the device of issuing an emergency regulation by executive action.

The use of emergency powers to promulgate law dispenses with the need for public or parliamentary scrutiny or debate on the matter. The issue is decided and implemented through executive fiat. ARTICLE 19 considers this bypassing of the democratic process to constitute a serious violation of freedom of expression and information. A requirement for each regulation to be explained, both in terms of its necessity given the prevailing situation and in relation to the exceptions permitted under the ICCPR, would help curb the abuse of emergency powers. It would also enable the necessity, or the continuance in force, of the regulation concerned to be publicly debated and challenged.²³

Under Section 8 of the Public Security Ordinance, the regulations, orders, rules or directions made under a state of emergency cannot be questioned by any court of law. However, the validity of certain emergency regulations, and of orders made under them, have been raised in Sri Lanka's courts on several occasions, on the basis that the 1978 Constitution only protects Acts, and not regulations, from judicial review. These challenges resulted in changes to an emergency regulation in at least one freedom of expression case.²⁴

²² For the full list of emergency regulations in force in 1993, see Law and Society Trust, *Sri Lanka: State of Human Rights 1993*, pp. 24-26.

²³ As recommended in a study undertaken by the University of Colombo Centre for the Study of Human Rights in 1992 on the emergency regulations in force at that time.

²⁴ In this case (*Joseph Perera v. Attorney-General*, S.C. No.107-109/86), the court decided it was competent to question both "the necessity of the emergency regulations and whether there is a proximate or rational nexus between the restriction imposed on a citizen's fundamental right by emergency regulation and the object sought to be achieved by the regulation". The court found that Emergency Regulation 28, which imposed restrictions on the public distribution of leaflets and fixing of posters, violated Articles 12 (right to equality) and 14(1)(a) (freedom of speech) of the Constitution. Regulation 28 was subsequently changed.

Recommendation 10: All emergency regulations should be publicized and made readily available to government officials, members of the legal profession and the public. An official compilation of all regulations should be published with an index of amendments and regular updates.

For many years, the piecemeal manner in which emergency regulations were issued and amended made public access difficult and created uncertainty about which regulations were in force at any given time. New regulations were often not publicized and amendments were frequently made without notice. The regulations and orders in force were often inaccessible to lawyers, law enforcement personnel, government officials and members of the public. Even judges of the Supreme Court were not necessarily informed about changes to emergency law. In a recent judgment in a fundamental rights case, Justice Wijetunge drew attention to the dangers inherent in such a situation:

... copies of certain Regulations are not sent at all or in time to even the Supreme Court, although it is required to adjudicate upon matters relating to the laws set out in such documents. Errors might result from the applicability of wrong provisions.²⁵

In addition, the absence of a regularly updated index of the regulations has meant that people can never be sure that they have access to the complete set of regulations in force at any given time. ARTICLE 19 is not aware of any changes made by the new government so far to the manner in which emergency regulations are issued.

3.3 Prevention of Terrorism Act

Recommendation 11: The Prevention of Terrorism Act should be reviewed and amended to ensure that it is consistent with international human rights law and that it cannot be used to violate the right to freedom of expression and information.

When the Prevention of Terrorism (Temporary Provisions) Act (PTA) was enacted in 1979 it was intended to remain in force for three years. In 1982, however, it was amended to become a permanent law.

The PTA contains many provisions which violate a range of fundamental civil and political rights, including freedom of expression and information. It grants wide powers of arrest and search to the police, and provides for up to 18 months' administrative detention on renewable detention orders. These detention orders "shall not be called in question in any court or tribunal" (Section 10). As under the emergency regulations, prisoners can be held in conditions which facilitate abuse, with no access to lawyers or relatives. The

²⁵ SC Application Nos. 146/92-155/92.

Act also empowers the Minister of Defence to issue restriction orders which could infringe on freedom of association and expression. Such orders can prohibit or restrict a person's "activities in relation to any organization, association or body of persons of which such person is a member", for example, or prohibit or restrict them from "addressing public meetings" (Section 11).

Under Section 14 of the PTA, the Minister of Defence may issue an order requiring that, for a specified period of time, a competent authority must give prior authorization in writing for any newspaper to publish on any matter relating to the commission of offences under the PTA, or the investigation of such offences. The distribution of any newspaper containing such material is also prohibited without the written authority of a competent authority. Although ARTICLE 19 understands that these provisions have never been used, they should, nevertheless, be removed from the Act to prevent their use in the future to infringe upon press freedom.

3.4 Parliament (Power and Privileges) Act

Recommendation 12: The 1978 amendment to the Parliament (Power and Privileges) Act of 1953 should be repealed. If the offence of contempt of parliament is retained, it should be subject to the freedom of expression safeguards set down under international law, and any contempt proceedings should be tried fairly before the courts, and not by parliamentarians themselves. The right to disclose information in the public interest, including about the activities of Parliament and its members, should be fully protected in law.

The law of parliamentary privilege, as amended in 1978, gives Parliament itself the power to punish any statements or actions that are deemed to interfere with its work, including actions or statements directed either against the Parliament as a whole or against an individual member in his or her capacity as a member. The potential for abuse of the privilege is clear, particularly against newspapers which report or comment on Parliament and its members, as well as against individuals who express opinions on parliamentary matters.

The new government has said that it intends to review and amend the law relating to parliamentary privilege. The Minister of Information, Dharmasiri Senanayake, said in September 1994 that it would be preferable for the appropriate courts alone to exercise penal powers under the Act, as had been the case prior to the 1978 amendment.²⁶ ARTICLE 19 urges the government to amend the Act without delay. Whether or not there is any intention to use the powers it confers at present, the fact that they remain available by law leaves open the potential for abuse. In addition, the threat of possibly lengthy and costly legal proceedings may in itself deter the publication or broadcast of critical commentary.

²⁶ *Island*, Colombo, 12 Sept. 1994.

Under the original Parliament (Powers and Privileges) Act No. 21 of 1953, the Supreme Court alone was empowered to punish breaches of privilege by fine or imprisonment, following a trial. The only offence relating to publications which Parliament itself could punish was the publication of committee proceedings before they had been reported to the House, and the only punishments available to the Parliament were admonishment and removal from the premises of the House.

In 1978, an amending Act was rushed through the National State Assembly on the grounds that it was "urgent in the national interest". The Parliament (Powers and Privileges) (Amendment) Law No. 5 of 1978 substantially broadened parliamentary powers.²⁷ It gives Parliament concurrent powers with the Supreme Court to impose fines or imprisonment (for up to two years) for breach of privilege. The offences relating to publication which Parliament itself could now punish include:

- (a) wilful publication of any false or perverted report of any debate or proceedings of the House or a Committee or wilful misrepresentation of any speech made by a member in the House or in Committee;
- (b) wilful publication of any report of any debate or proceedings of the House or a Committee, the publication of which has been prohibited by the House or Committee;
- (c) publication of any defamatory statement reflecting on the proceedings and character of the House; and
- (d) publication of any defamatory statement concerning any member in respect of his conduct as a member.

In 1980 a further offence was added, namely "the wilful publication of any report of any debate or proceedings of Parliament containing words or statements after the Speaker has ordered such words or statements to be expunged from the official report of Parliamentary debates".

The first cases of breach of parliamentary privilege following the 1978 amendments serve well to illustrate the potential of these powers to threaten and censor both the press and other potential critics. On the day after the National State Assembly gained its new powers in February 1978, it summoned the editor and associate editor of the *Ceylon Observer*, and, sitting as a Committee of the whole House, it heard and fined them for breach of privilege. The case concerned their publication of a photograph of a man relaxing in a boat with a young woman. Because of an error in which two captions had been transposed, the man had been wrongly identified as the Foreign Minister.

Shortly after, Somasunderam Nadesan, former President of the Bar Association and a founder member of the Civil Rights Movement, wrote a critical commentary on the law

²⁷ For a more extensive critique of this amendment and the way in which it has been applied, see CRM, "The Exercise of Judicial Power by Parliament", 1 Oct. 1991.

of parliamentary privilege and the exercise of judicial power by Parliament in the *Ceylon Observer* case, which was published in the *Sun* newspaper. Mr Nadesan was charged with breach of privilege, but the House chose to refer the matter to the Supreme Court for hearing. The court ruled that Mr Nadesan had been within his rights and accordingly dismissed the charges in June 1980.

The parliamentary privileges law contains no rules of procedure for hearings before the House. In one case known to ARTICLE 19, the accused in a parliamentary privileges case was not even informed that the hearing was taking place, and so had no opportunity to offer a defence. In March 1991, *Ravaya*, a Sinhala-language weekly, had alleged that UNP Member of Parliament Kalinga Obeywansa had failed to pay a bill of Rs 9640.20 for food and drink at the Lalanika Guest House, Ambalangoda. Mr Obeywansa raised a question of privilege in Parliament about the news item, and the editor, Victor Ivan, expected to be summoned to a hearing to supply the facts supporting the story. However, Mr Ivan was informed in a letter from the Secretary General of Parliament on 16 June 1993 that an inquiry had been held by the Parliamentary Privileges Committee, which had concluded that *Ravaya* had defamed the Member of Parliament. The paper was asked to publish a correction to the story as well as an apology. No notice of the hearing had been given to the newspaper.

In July 1993 the Parliamentary Privileges Committee published guidelines for news reporters and editors which provided a further tool for censoring parliamentary reporting. Guideline b reads:

Once the Hansard is published it shall be considered as the official report and any report appearing in the papers shall be based only on this. Any report which is not in line with the Hansard shall be considered a breach of Privilege.

In September 1993 the then Prime Minister, Ranil Wickremasinghe, said that the government would be flexible about reports published before Hansard had been issued, but that any reports published thereafter should adhere strictly to the official version. Such a policy prevents journalists from challenging the accuracy of Hansard, even if they have evidence of a discrepancy between the actual proceedings and the published version.

In order to prevent such *ad hoc* means of censorship being devised again, and in order to send a clear signal that the present government will not censor the press in such ways, ARTICLE 19 believes that it is essential for the right to report on parliamentary proceedings to be explicitly protected by law, provision for which could be included in a freedom of information law.

3.5 Press Council Law

Recommendation 13: Repeal the Press Council Law in order to safeguard press freedom and the principle of editorial independence.

The Press Council Law (No. 5 of 1973) was introduced by the coalition government under Prime Minister Sirimavo Bandaranaike. The law provided for the appointment of a Press Council

to regulate and to tender advice on matters relating to the Press in Sri Lanka, for the investigation of offences relating to the printing or publication of certain matters in newspapers and for matters connected therewith or incidental thereto.

The creation of the Council brought the press under direct government control, and this law has been criticised on several counts. The Council is not an independent body, but has quasi-judicial powers which inhibit freedom of publication and the free flow of information.

Under the law, the seven-member Council is composed of the Director of Information (a government official), and six members appointed by the President. Of these six, one is appointed as a representative of working journalists and one as representing the interests of the employees of newspaper businesses. The remaining four members have tended to be political appointees. Independence is further impaired by Section 24, which instructs the Council to "comply with such general directions as may be given to the Council by the Minister [of Information and Cultural Affairs] in accordance with the provisions of this Law", and Section 4(3)(c), which permits the President to remove any member for any act which the President believes "is likely to prejudice or damage the interests of the Council".

The Council has powers to order an apology or correction for an untrue or distorted story, and may censure a proprietor, printer, publisher, editor or journalist for professional misconduct.

ARTICLE 19's most serious criticism of the Press Council Law concerns Section 16, which makes it an offence for newspapers to publish details of Cabinet proceedings or decisions without prior authority or to publish false reports about issues under consideration by any Minister or Ministry. It also prohibits publication without prior authority of statements relating to monetary, fiscal, exchange or import control measures said to be under government consideration. Section 16 clearly is antithetical to the free flow of information and to the democratic process as a whole.

Section 15 is also problematic: it prohibits the publication of any profane, indecent or obscene matter. Profane matter is defined as any material "which intends to insult (i) any religion or the founder of any religion, or (ii) any deity or saint venerated by the followers of any religion".

Finally, Section 12(a) authorizes the Council to find any person in contempt who, "without sufficient reason, publishes any statement or does anything that brings the Council or member thereof into disrepute during the progress or after the conclusion of any inquiry conducted by such Council". Once the Press Council has made a finding of contempt, the Supreme Court will award punishment as if the contempt had been committed against the Supreme Court itself. This provision thus confers judicial power on a body composed of government appointees who most likely will not possess either any legal training or the independence required to exercise judicial powers. As stated by the Civil Rights Movement:

To make ... the Press Council a judge in its own cause, and to confer powers of a penal nature on such a body, which by reason of its composition may be a partisan instrument, is to create the possibility of serious abuse and injustice.²⁸

The powers available under Section 16 of the Press Council Law were not in fact enforced by the government of Mrs Sirimavo Bandaranaike. In December 1980, however, the UNP government under President Junius Richard Jayawardene announced its intention to enforce Section 16. In 1981 cases were brought under Section 16 against two private newspapers (*Sun* and *The Island*) for publishing an article pertaining to the proceedings of a Cabinet meeting. The prosecution withdrew the cases when the newspapers gave undertakings in court that they would not publish such material again without prior authorization. In 1990, the government issued a further warning to the press that it would enforce Section 16. Whether or not they are pursued, the threat of such prosecutions in itself impinges upon freedom of information.

The new government has said that it intends to amend the Press Council Law. In an interview with the *Sunday Observer*, published on 4 September 1994, the Minister of Information, Dharmasiri Senanayake, said:

The Press Council, the composition of its members, powers, duties and the objectives for which the Press Council functions will be reviewed. It would not be allowed to be a stumbling block stultifying and jeopardising the PA policy of freedom of the media. The Press Council would be brought to function in line with the present thinking.

ARTICLE 19 urges the government to repeal the Press Council Law without replacement because it constitutes an unacceptable infringement on editorial freedom. The Law's use in the past to threaten dissident publications has undoubtedly contributed to self-censorship amongst journalists and editors. ARTICLE 19 believes that the press should be subject only to the ordinary law, and that matters of professional ethics should be regulated on a voluntary basis by independent media bodies, free of government control.

²⁸ CRM, *The People's Rights* (Colombo: 1979), p.48.

3.6 Defamation

Recommendation 14: Defamation law should be reviewed and amended to ensure that the media are able to freely perform their twin roles of informing the public and acting as watchdog of government. In particular, Section 479 of the Penal Code, which makes libel a criminal offence, punishable by imprisonment, should be repealed, and politicians and other public officials should be expected to tolerate a higher level of criticism than private individuals in defamation cases.

Defamation may be prosecuted as either a civil or a criminal offence. Successive Sri Lankan governments, of whatever party, have resorted to prosecutions for criminal defamation concerning statements critical of government ministers, using the resources of the state to prosecute the case, even though civil defamation would have been available to the alleged victim.

Section 479 of the Penal Code provides for up to two years' imprisonment and a fine for a person convicted of having made or published "any imputation intended to harm, or knowing or having reason to believe that imputation will harm, the reputation of [any] person". Ten exceptions are recognized, including truth for the public good, fair comment and publication of reports of judicial proceedings. Private individuals may bring a prosecution for criminal defamation, but only with the approval of the Attorney General (Code of Criminal Procedure, Section 135).

ARTICLE 19 is concerned by the use of criminal defamation prosecutions by previous governments to punish statements critical of government ministers and policies. Such prosecutions discourage the legitimate expression of political dissent.

The European Court of Human Rights has established the democratic principle that politicians must tolerate more intense criticism than others:

[F]reedom of political debate is at the very core of the concept of a democratic society The limits of acceptable criticism are, accordingly, wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must display a greater

degree of tolerance.²⁹

3.7 Sedition

Recommendation 15: Amend Section 120 of the Penal Code on sedition to protect the legitimate expression of dissent.

Although the emergency regulation on sedition was not renewed in the regulations issued in August and September 1994, sedition remains an offence under Chapter 6 of the Penal Code. Article 120 of the Code, which deals with offences against the State, makes it a crime punishable by up to two years' imprisonment to utter words which "excite or attempt to excite" ill-will against the President, the national government, the administration of justice, or "different classes of people" in Sri Lanka.³⁰

While the ICCPR and other statements of international law allow governments to punish incitement of hostility, violence and discrimination on racial, religious or ethnic grounds, the above provision of Sri Lankan law cannot be justified on those grounds. Without a requirement that sedition entail incitement to violence, Article 120 can be used to silence peaceful criticism of the government. In one notorious case in 1992, Section 120 was used to suppress information about allegations of government involvement in death squad killings. The editor of the *Rajaliya* newspaper was charged with sedition under the Code for publishing an article and photographs about the alleged death squad killings.³¹ Although the charges were later dropped, the case serves as a stark illustration of the danger such broad-ranging offences pose to the right to information.

3.8 The Official Secrets Act

Recommendation 16: Amend the Official Secrets Act to ensure that it does not threaten the right to seek, receive and impart information in the public interest.

The Official Secrets Act (No. 32 of 1955) authorizes the government to restrict access to "official secrets" and "secret documents" and to prevent unauthorized disclosure of their contents. However, its definition of an "official secret" is considerably broader than that envisaged in international standards, and the Act provides no exemption for disclosures that promote the public interest.

²⁹ *Lingens v. Austria*, Judgment of 8 July 1986, Series A no. 105.

³⁰ Section 120 reads: "Whoever by words, either spoken or intended to be read ... excites or attempts to excite feelings of disaffection to the President or to the Government of the Republic, or excites or attempts to excite hatred to or contempt of the administration of justice ... or attempts to raise discontent or disaffection amongst the people of Sri Lanka, or to promote feelings of ill-will and hostility between different classes of such people, shall be punished with simple imprisonment which may extend to two years.

³¹ For more information about this case, see the section on impunity below.

Section 27 defines an "official secret" to include any information at all relating to a prohibited place or its contents; to the armed forces, its weapons or any equipment, organization or establishment capable of being used for the defence of Sri Lanka; and any information at all "relating directly or indirectly to the defence of Sri Lanka". Any secret information which is made public without proper authorization is presumed to be harmful to state interests (under Section 6(2)(a)).

The Official Secrets Act, which contains a presumption of secrecy in favour of the government, should be replaced with legislation which shifts the burden of proof to the government to demonstrate why official information should not be released.

4. MEDIA FREEDOM

The new government of Prime Minister Chandrika Bandaranaike Kumaratunga has stated its intention to remove existing legal fetters on media freedom and to end informal methods of censorship. The Prime Minister has promised that the opposition will be free to express its views and that there will be no more political harassment of, or threats and attacks upon, journalists. The government has also promised to "broadbase" ownership of Associated Newspapers of Ceylon Ltd, thereby ending state ownership and control of this major newspaper publisher.

ARTICLE 19 welcomes the pledges the government has made so far. If they are implemented, and if safeguards to prevent their reintroduction are put in place, several of the major obstructions to media freedom which ARTICLE 19 has identified in recent years will be addressed. Some further important issues, however, do not yet appear to have been considered by the government. These include control of the broadcast media, and the investigation of attacks on journalists in recent years. ARTICLE 19 hopes that these, too, will receive early attention.

The issues which are summarized in this section, together with the recommendations for constitutional and legal reform set out above, reflect ARTICLE 19's most serious concerns about freedom of the media in Sri Lanka in recent years. The recommendations arising from this review set out principles which ARTICLE 19 hopes will be reflected in the government's forthcoming information policy. ARTICLE 19 believes that the overall objective of this policy, as it affects the media, should be to end state control of media organizations and actively encourage independence, diversity and pluralism in the media.

For a truly independent media to develop in Sri Lanka, covering a plurality of views and contributing to the public's "right to know", it is essential that all media institutions, both electronic and print, are free to collect and disseminate news, information and discussion, including minority viewpoints, on all matters of public interest. This is fundamental to the realization of freedom of expression. As expressed in a recent Supreme Court judgment:

Every legitimate interest of the people or a section of them should have the opportunity of being made known and felt in the political process. Freedom of speech ensures that minority opinions are heard and not smothered by a tyrannizing majority. It is the only way of enabling the majority in power to have an educated sympathy for the rights and aspirations of other members of the community... . Moreover, in a representative democracy there must be a continuing public interest in the workings of government which should be open to scrutiny and criticism.³²

4.1 State Control of Broadcasting and Newspapers

Recommendation 17: End state ownership and control of Associated Newspapers; ensure the independence of the Sri Lanka Broadcasting Corporation, Sri Lanka Rupavahini Corporation and Independent Television Network by creating a governing board and financial structure for these bodies which is independent of government and which allows them to fulfil their public service functions; establish an independent broadcasting authority with sole discretion to grant licences to privately-owned broadcasting stations.

The largest media organizations are all under government control and have been used as propaganda machines by successive governments. Associated Newspapers of Ceylon Ltd (known as "Lake House") is the largest newspaper group and was brought under state control in 1973 under a special law. Radio broadcasting was a state monopoly from its inception in 1925 until 1993 when two private radio stations, which are purely entertainment channels, were permitted. Television broadcasting was introduced in April 1981 and remained a state monopoly until 1993, when two private channels were licensed. None of the private radio or television channels were permitted to broadcast independent news items on local events.

The new government has said that it will "broadbase" ownership of Associated Newspapers of Ceylon Ltd in keeping with the original intentions of the 1973 legislation, providing safeguards against any individual, organization or group being able to own or control more than 20 per cent of the stock. Priority in the initial issue of shares will be given to journalists and employees of Lake House, journalists and organizations that encourage freedom of expression, trade unions and professional organizations.

The new government has not, however, addressed the issue of government control of the main broadcasting organizations.

The governing boards of all three state-controlled broadcasting institutions are appointed directly by the President or government ministers, and ministers and other government officials also serve as members. Both the Rupavahini and the Sri Lanka Broadcasting Corporation (SLBC) Acts grant the Minister of Information absolute powers in several

³² SC Application Nos 146/92 - 155/92 (the "Wadduwa" case), decided on 17 June 1994.

areas. The Minister may dismiss any Board member without giving any reason, and may issue special directions and make additional regulations to the Acts. The SLBC Act stipulates that the Corporation shall comply with the general policy of the government with respect to broadcasting. Under the two Acts, the three broadcasting institutions — SLBC, Rupavahini and Independent Television Network (ITN, also state-owned) — are obliged to ensure that nothing is included in any programme which offends against good taste or decency or is likely to incite crime or lead to disorder or offend any racial or religious susceptibilities or be offensive to public feelings. All news must be presented "with due accuracy and impartiality and with due regard to the public interest".

Additionally, Rupavahini Corporation is required to exercise supervision and control over the making of television programmes, including those produced by foreign and other television crews for export. No person may produce or market television programmes without first registering with the Corporation, and the Corporation can refuse to register an applicant or may cancel their registration if they are "unable to maintain the requisite standards that would be required in the public interest". Appeals may be made to the Secretary to the Information Ministry; there is no independent appeal board.

From its interviews in 1993 with the then Chairmen of the three state-owned broadcasting institutions, ARTICLE 19 concluded that there was little concept of a public service duty of broadcasting in these institutions. The chairmen rejected the argument that there was a need for the broadcast of informed debate or criticism about government policy, as an instrument of democratic monitoring. Sri Lankan broadcasting was seen as "too young" to cover debates at present.³³ The Chairmen were clear that subjects such as civilian casualties in the conflict in the north and east, "disappearances" and other human rights concerns should not be covered. Controversial issues — especially controversial political or social issues — would be avoided, and the emphasis was instead placed on culture, education and entertainment. The Chairmen emphasized that law and order, peace, and religious and cultural harmony were the dominant values which should constantly be reflected in broadcasting.

ARTICLE 19 was concerned at the manner in which the "public interest" tended to be conflated with the interests of the government, and at evidence of direct governmental interference in editorial decision-making. Broadcasts paid considerable attention to governmental activities and very little indeed to the activities of the opposition, even on major political issues. During the attempted impeachment of President Premadasa in 1991, for example, the President was given 90 minutes of television airtime to speak on the impeachment resolution. The sponsors of the resolution were given no time at all. There were also instances when the government apparently felt its interests were not being served, and so intervened to prevent an item being broadcast. During provincial council elections in May 1993, for example, the leader of the opposition Democratic United National Front, Gamini Dissanayake, gave a television interview for broadcast

³³ Radio broadcasting in Sri Lanka, which began some 60 years ago, is among the oldest in South Asia.

on Rupavahini.³⁴ Following a telephone call from the President's press secretary to the Chairman of the Rupavahini Corporation, however, the journalist who had recorded the interview was ordered to take compulsory leave, and the Chairman cancelled the broadcast, despite the fact that the Election Commissioner had authorized it.

The interests of the government, rather than of the public, also appeared to influence the choice of international news items broadcast. For example, news about impeachment proceedings against former Brazilian President Fernando Collor de Mello and Russian President Boris Yeltsin was not carried on state television.

In July 1993 the Cabinet issued a set of "Guidelines on the Prudent Use of the Electronic Media" which elaborated "how the electronic media should function in the public interest". These guidelines, applying to both state- and privately-owned institutions, illustrated yet again the fusion of "public interest" with the interests of the government itself. They also demonstrated the total lack of any sense of governmental responsibility to foster pluralism in the electronic media. The second guideline specifies that the electronic media "must provide opportunities for the Government to place its policies before the people without getting undue political advantage in the process". It then goes on to specify that government projects should be given priority attention in this coverage, but says the intention of such publicity is "that information pertaining to these activities should be placed before the people. In this exercise credibility is all important". There is not one mention in the guidelines of any need to ensure that alternative views, and the activities of other parties, are also covered. The guidelines also address standards and practice in relation to commercial advertising on the electronic media. "Public Interest should be considered significantly important in the making of advertisements. ... Hence programme makers, both for entertainment and advertising, should make honest efforts to prepare their programmes to provide harmless entertainment."

Another method by which the last government attempted to influence the content of electronic broadcasts was through an informal, non-statutory body called the National Information Strategy and Coordination Committee (NISACC), which was set up in 1990 by President Premadasa to monitor television broadcasts, apparently in order to recommend ways to protect the state media from public criticism. The members, under the chairmanship of Bradman Weerakoon, the then Presidential Adviser on International Affairs, included the Chairmen of ITN, Rupavahini, SLBC, the Director of Information and the Director-General of Foreign Affairs. The Committee apparently met about once or twice a month, at least until the assassination of President Premadasa on 1 May 1993, to make suggestions for future improvements in broadcasts. ARTICLE 19 was told by the then Director-General of Foreign Affairs that NISACC's purpose was to encourage "a lighter touch" in covering government activities and, in particular, "to ensure that people did not get bored". To achieve this goal, the Committee recommended reducing the length of news items.

³⁴ Gamini Dissanayake has since rejoined the United National Party and is their presidential candidate in the forthcoming election.

The new Minister of Information has said that the government will "allow the opposition parties to express their views freely", including on state-owned television,³⁵ which is to be welcomed, and that "instructions have been given to the state-controlled media to act impartially and state involvement will be withdrawn gradually." However, "permission" and "instructions" provide only an insecure basis on which to protect the fundamental democratic right of media freedom; they can be withdrawn at whim. For freedom of the media to be *protected*, important changes need to be made, both to the control of media institutions and to the laws governing the media. Only then will a framework be created in which the democratic values of free expression can flourish.

4.2 Broadcasting of News by Privately-Owned Stations

Recommendation 18: Permit the gathering of information and broadcasting of local news by private radio and television stations.

The licences granted to private radio and television stations prevent them from gathering and broadcasting local news. The People's Alliance election manifesto said that "[t]he PA will recognise the right of privately owned electronic media to have their own news services free of any governmental control". ARTICLE 19 welcomes this pledge and urges the government to ensure that this right is both granted and fully protected by law as soon as possible.

4.3 Attacks and Threats Against Media Personnel

Recommendation 19: Ensure that all attacks and threats against journalists and other media workers, as well as media institutions and printing presses, are investigated and punished.

There have been numerous attacks on journalists in recent years. The Free Media Movement (FMM) estimated that there were over 50 incidents involving harassment of journalists between January 1992 and March 1993.³⁶

Death threats and physical attacks on journalists, especially those who attempted to report on human rights violations committed by government forces, became common in the period of the government's counter-insurgency campaign against the JVP (1988-1990), a period when tens of thousands of people are believed to have been extrajudicially executed or "disappeared" at the hands of government forces.

³⁵ Interview with the Minister of Information, *The Island*, 4 Sept. 1994.

³⁶ See also Inform, *Incidents of Harassment and Intimidation of Journalists and Media Personnel as Recorded in 1992*, and *Freedom of Expression 1993*.

The murder of Richard de Zoysa, who was abducted from his home in Colombo in February 1990 by a group of gunmen who his mother later said had included police officers, attracted particular public attention. Richard de Zoysa was a well-known broadcaster, writer and actor. He was a correspondent for Inter Press Service, and had reported on human rights violations. He is said to have been involved with the production of a play entitled "*Me kauda? Mokada karanne?*" ("Who is he? What is he doing?"), the title of which was understood by some to be a satirical reference to President Premadasa, who had used this slogan during the presidential election campaign.³⁷ The police inquiry into his murder has brought no results, and the last government refused to institute an independent inquiry. ARTICLE 19 urges the new government to reopen the investigation into Richard de Zoysa's murder, and to ensure that it is conducted by an independent authority, following procedures which fulfil the standards of investigation required under the United Nations Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions.³⁸ ARTICLE 19 also urges the government to ensure that full investigations are held into the cases of journalists and others who have been abducted and "disappeared", attacked or killed.

More recent threats to the lives of journalists appeared to be because of their coverage of military issues, human rights, corruption, or other criticism of the government. In the case of Iqbal Athas, defence correspondent of *The Sunday Times*, death threats were made after he criticized the number of casualties and weaponry lost during military operations in the north in October 1993. He received repeated threats, at least one of which was said to have come from the Commander of the Army, and a funeral wreath in the name of a regiment involved in the operations was delivered to his wife. The Army Commander subsequently denied any involvement. Some of the newspapers which publicized this incident were themselves reportedly threatened.

Numerous incidents have been reported in which the security forces have prevented journalists from freely reporting on matters such as strikes, the assassination of President Premadasa, and the visit of the Presidential Mobile Secretariat to Batticaloa in 1993.

Prime Minister Chandrika Bandaranaike Kumaratunga has said that her government will not stifle freedom of expression, and "will act fast" if it is notified of any incident of state powers being used in such a manner.³⁹ ARTICLE 19 believes that it is also necessary to ensure that past abuses of power are fully investigated, in order that no veil of impunity can be drawn across the past.

³⁷ Richard de Zoysa's murder was believed by some to be linked to the "disappearance" on 26 Jan. 1990 of Lakshman Perera, a UNP member of the Mount Lavinia Municipal Council who was also involved in producing this play.

³⁸ Principle 11 requires that "[I]n cases in which the established investigative procedures are inadequate because of lack of expertise or impartiality, because of the importance of the matter or because of the apparent existence of a pattern of abuse, and in cases where there are complaints from the family of the victim about those inadequacies or other substantial reasons, Governments shall pursue investigations through an independent commission of inquiry or similar procedure."

³⁹ *Daily News*, 7 Sept. 1994.

4.4 Use of Advertising and Other State Resources to Influence the Media

Recommendation 20: Provide protections in law against the use of government advertising and other state resources to influence, threaten or reward newspapers or other media.

Under the last government economic pressures were reportedly frequently used to exert leverage on publications which opposed its policies. Access to government advertising, which provides a lucrative source of funds, was largely confined to the state-owned press, and the mainstream privately-owned newspapers have carried little or no state advertising in recent years. In addition, it was alleged to ARTICLE 19 that in early 1993 President Premadasa had asked the Chairmen of two major business groups to withdraw advertising from Upali newspapers, one of the mainstream, privately-owned newspaper groups. The smaller, independent "tabloid" newspapers reported that they had no access to public sector advertising and that private companies did not advertise with them because they feared adverse repercussions from the government.

The last government was said to have used other indirect pressures to influence or threaten newspapers, including withdrawal of loans from state-owned banks. Previous governments have also used tariffs on newsprint and a newsprint quota system to threaten opposition publications. There are no protections in law, to ARTICLE 19's knowledge, to prevent a future government from exerting such pressures again.

Other forms of harassment of sections of the press included, in February 1993, a concerted wave of visits and checks on certain newspapers critical of the government, and associated presses, by an array of different government departments: officers from the Inland Revenue, the Labour Department, Colombo municipality and the electricity and water boards were all involved in scrutinizing the payment of taxes, the statutory minimum wage, and rates and services bills. No prosecutions resulted from any of these visits, which appeared to be primarily intimidatory in intent. A range of papers which were critical of the government were visited: *The Sunday Times* and *Lankadeepa*, published by two mainstream, privately-owned publishing houses; *Yukthiya*, *Lakdiva* and *Ravaya*, independent "tabloid" papers; and *Aththa*, the Communist Party newspaper. The Navamaga Press, which prints *Yukthiya*, and Lalithakala, which prints *Ravaya*, were also visited. The offices of *Lakdiva* were sealed by Colombo municipal officials on the night of 5 February, allegedly for non-payment of rates and unauthorized sub-letting of part of the premises. The Supreme Court later ordered the Municipality to reopen the premises.⁴⁰ The visits had been preceded by a series of public attacks on dissenting publications by members of the government, including President Premadasa himself, and by the state-owned press.

⁴⁰ See Inform, *Human Rights Situation in Sri Lanka, 1993*, for more on these incidents.

In its manifesto, the People's Alliance said that its government "will not use its advertising to control, influence or threaten any newspapers or media organizations." Again, ARTICLE 19 would emphasize the importance not only of desisting from exerting such pressures, but of providing a legal obligation on government to allocate advertisements and other resources to the media in a non-discriminatory manner.

4.5 Reporting the Conflict in the North and East

Recommendation 21: Permit full reporting of the conflict in the north and east, including of any human rights abuses that have been committed. Provide ready access to the north and east for journalists who wish to cover the conflict, and issue full information on the conflict to the public.

Information on the conflict in the north and east has been very limited indeed in the Sri Lankan media. Most news reports have relied on press statements put out by one or other party to the conflict — the Sri Lanka military or government, or the LTTE — which are often propagandist in tone. There has been little direct reporting from the conflict zones, and journalists' visits to these areas are generally controlled by the military. The government issues very little information about the course of the conflict or its true costs; security concerns are used to justify silence on a wide range of issues relating to the war. There has been more direct reporting on the conflict in the north and east by foreign correspondents than by local journalists, and many people within the country have turned to foreign broadcasts, such as those of the British Broadcasting Corporation or Radio Veritas, for news on Sri Lanka.

The appalling lack of information available to the public about the conflict and its implications was summed up by one Sri Lankan journalist as follows:

What do our people know about the war that is taking such a toll of lives of Sinhala, Tamil and Muslim citizens? Do we really know how many Tamils ... have been killed in the past two years since the fighting resumed? Can we not see that official sources of information about the battlefield have fallen victim to the Westmoreland Syndrome which was seen in the Vietnam war? ... When 3 soldiers are killed, we are told that three times three Tigers were also killed. Fancy estimates of Tiger deaths are given which can never be verified. Journalists have often noted that the casualty rates for Tigers given by official sources tend to make it five to ten times the government casualty rate in major operations.

Should not the people know why Sinhalese and Tamil youth are dying in such numbers? Is there a need for such killing? Do they not have a right to be informed of such things? Should not the people know how much is spent on the purchase of a single tank? Should this be kept a secret from the public of this country? If an aircraft crashes, should not the public, who paid for it, know how it happened? Are these military secrets? Why did an aircraft which carried explosives also carry fuel and 13

airmen? Is it democracy to deny this information to the people?

Isn't this the principle of accountability which flows from the financial burden the people are called upon to bear for the prosecution of this war? This is what we seek when we ask for the right to information. This is the essence of democracy.⁴¹

Since the new government came to office, there has been an increase in reporting from the north both in the electronic and the print media, a development which ARTICLE 19 hopes will be encouraged. ARTICLE 19 also urges the government to ensure that the ability to report on the conflict and associated issues will be guaranteed, and not subject to arbitrary decisions by government or military personnel.

5. IMPUNITY

The scale of gross human rights violations committed in Sri Lanka in recent years reached horrifying proportions. Tens of thousands of people are believed to have been tortured, extrajudicially killed or "disappeared" by government forces combatting armed opposition in both the south and the north and east, and very few attempts have been made to investigate these crimes or bring those responsible to justice. The relatives of many thousands of "disappeared" young men and women known to have been taken into the custody of security forces have spent years in a fruitless search for their loved ones. So far, they have come no closer to knowing the truth about what happened and have met with denial and obfuscation from government officials. The persistent refusal of the previous government to investigate properly the vast majority of these violations constitutes a most serious violation of the right to information.

ARTICLE 19 believes that there is a "right to know the truth" which is contained within the right to "seek, receive and impart information", guaranteed by Article 19 of the ICCPR. It is imperative that every effort be made to establish the truth about the past, for several reasons:

- 1) Human rights violations of this kind are often committed in secret with few witnesses other than the perpetrators and victims themselves; the perpetrators and their accomplices take steps to conceal the fact that such a crime has been committed, the identities of those who committed them, and the identities of the victims. The emergency powers granted to the security forces in Sri Lanka have at times enabled them to cover-up illegal killings by simply burning the bodies without any inquiry whatsoever into the death. Other methods of concealment have included the use of plain-clothed death-squads driving unmarked vehicles, who abducted people in the night, under cover of curfew. Surviving victims and relatives of the "disappeared" are entitled to a full explanation of what happened.
- 2) Establishing the truth about such abuses is a precondition for preventing their

⁴¹ From a speech by Lucien Rajakurunayake, journalist and founder member of the FMM, published in *Tamil Times*, 15 Jan. 1993.

recurrence in the future. Once the truth is known, those responsible can be punished and a clear message can be conveyed that such acts will never again be tolerated. International instruments such as the Convention Against Torture, which Sri Lanka acceded to in 1994, require states parties to bring criminal proceedings against alleged perpetrators. Similarly, the United Nations Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions require governments "to ensure that [all such executions] ... are punishable by appropriate penalties which take into account the seriousness of such offences." Prevention will also involve the identification and reform of the laws, special powers and security agencies which made human rights violations possible. This can only be achieved effectively if there is a full examination of past practices.

- 3) Establishing the truth about the past, and giving official acknowledgement to a history which many know to be true but have had to suppress, is a precondition for providing proper redress for the victims. The process of telling the truth may itself be part of the reparation which the government owes to victims of human rights violations. It may also remove some of the stigma attached to the victims by demonstrating, in effect, that the victim was wronged.

5.1 Indemnity Laws

Recommendation 22: All laws which contain an indemnity provision should be amended to ensure that the truth about human rights violations can be established and made public, and that those who commit human rights violations cannot escape justice.

Laws in Sri Lanka which contain explicit indemnity clauses need urgently to be repealed. They obstruct the full investigation of human rights violations and encourage a sense of impunity.

The Indemnity (Amendment) Act of 1988 protects security forces personnel and other public officials against prosecution for acts committed "in good faith" in the period from 1 August 1977 to 16 December 1988. The Prevention of Terrorism Act contains a similar, but broader, protection against prosecution in Section 26, which reads: "No suit, prosecution or other proceeding, civil or criminal, shall lie against any officer or person for any act or thing in good faith done *or purported to be done* in pursuance *or supposed pursuance* of any order made or direction given under this Act" (emphasis added). At times, the emergency regulations have also contained an explicit indemnity provision, as for example in Emergency Regulation 71, which was in force prior to June 1993; it specified that no civil or criminal action could be instituted in any court in respect of anything done "in good faith" under the provisions of the emergency regulations, unless consented to or initiated by the Attorney General.

Impunity and the obstruction of investigation does not result from the existence of such legal provisions alone, however. Other powers granted under the emergency regulations have also contributed to a climate of impunity, including the emergency regulations on post-mortem and inquest procedures which have facilitated the cover-up of illegal killings. The regulations have at times also granted the security forces powers to destroy the evidence of illegal killings by burning the bodies without post-mortem examination or inquest.

The impunity granted by such regulations at the time they were in force cannot easily be overcome, as they enabled the evidence itself to be destroyed. Implementation of the recommendations proposed earlier on constitutional protections and emergency powers, which require that emergency powers be exercised only within the framework provided by international human rights law, should, however, prevent the recurrence of conditions so conducive to the gross violation of human rights in the future.

5.2 The Need for Impartial Investigation of "Disappearances" and Extrajudicial Killings

Recommendation 23: Ensure that full, impartial investigations are held into the tens of thousands of "disappearances" and extrajudicial killings committed in Sri Lanka at least since 1983; that the investigations are conducted according to the standards set out in international human rights instruments; that the findings are made public so the truth is made known; and that the perpetrators are brought to justice and the victims compensated.

The People's Alliance promised in its 1994 election manifesto that it would investigate "murders, disappearances, unresolved crimes and political victimization which occurred in the recent past" and that "within three months of coming into power we will take immediate steps to provide to families information about the disappeared." Since coming to power it has attempted to establish Commissions of Inquiry into "disappearances" which took place after 1 January 1988, but has been unable to do so because the President of Sri Lanka, Dingiri Banda Wijetunge, has refused to sign the warrant. The government has said that it intends to amend the relevant legislation to enable the Prime Minister to authorize commissions of this kind.

ARTICLE 19 is not aware of any explanation given by the new government as to why the commissions into "disappearances" will not be empowered to investigate "disappearances" which took place prior to 1 January 1988. Before 1988, many hundreds of youths "disappeared" in the custody of the police, military and Special Task Force. There can be no justification for excluding this period from investigation.

In addition to the proposed commissions, the new government is undertaking excavations of certain mass graves in the south which are believed to contain the remains of people who "disappeared" in the custody of the security forces between 1988 and 1990.

ARTICLE 19 welcomes this development, believing that all available means of investigation must be pursued for the truth to be made known. As there is little prior experience of forensic investigation of this type in Sri Lanka, it urges the government to make use of the expertise available internationally and to make provision for the development of local capacity in this field.⁴² ARTICLE 19 also urges the government to ensure that the sites are investigated in accordance with the standards set out in the UN Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, which contains a Model Protocol for the Disinterment and Analysis of Skeletal Remains.

The few investigations held into extrajudicial killings during the period of the last government were not generally conducted by an authority which was fully independent of those suspected to be responsible for the killings. The investigation of the broadcaster and writer Richard de Zoysa's abduction and killing in February 1990, for example, was entrusted to the police, despite the fact that his mother had named police officers who she said had come to her house and taken him away. This investigation has produced no known results. In the rare case when an independent investigation was carried out, the procedures followed did not fulfil the standards for inquiry envisaged by the UN principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions.⁴³ The Commission failed to exercise its full powers to obtain all of the available evidence on the killings; it did not require the soldiers potentially implicated in the killings to give evidence or to be cross-examined. Few perpetrators of extrajudicial killings have been brought to justice, and those that have generally have not been convicted of murder but have been sentenced on lesser charges.

The previous government set up a Presidential Commission of Inquiry into the Involuntary Removal of Persons (PCIIRP) in January 1991 to investigate "disappearances" which took place after 11 January 1991. By the end of March 1994, the PCIIRP had submitted reports on 56 cases of "disappearance" to the President, as is required under its mandate, at least six of which had been submitted in early 1992. No known action was taken in any of these cases, and although the President was said to have authorized publication of at least the first six case reports as Parliamentary Sessional Papers, none have been published so far.

In its annual reports issued in August 1992 and 1993, the Human Rights Task Force set out its findings in certain cases of "disappearances", which including the names of soldiers who had been identified as being responsible for detaining people who subsequently "disappeared". Despite the evidence presented, the government took no known action to investigate and prosecute those believed to be responsible for the "disappearances" of 159 people, including women and children, from the Eastern University, Batticaloa

⁴² ARTICLE 19 understands that an international expert in forensic investigation is due to visit Sri Lanka shortly at the invitation of the government.

⁴³ An independent Presidential Commission of Inquiry was appointed to investigate retaliatory killings by soldiers of at least 67 civilians at Kokkadichcholai, Batticaloa District, on 12 June 1991.

District, in September 1990. In the case of at least 32 youths who "disappeared" in the Embilipitiya area in late 1989 and early 1990, the government took no effective action to bring those responsible to justice. Since the change of government, a number of people have been arrested in connection with these "disappearances".

ARTICLE 19 hopes that these cases will be brought to trial without delay, taking into account the requirements of a fair trial, in order that the truth about these "disappearances" can be established and the relatives of the victims can at last have some redress.

5.3 Protection of Witnesses

Recommendation 24: Ensure that those undertaking inquiries into human rights violations have the necessary powers and resources to provide adequate protection for witnesses where necessary.

The new government has said that it is committed to investigating past human rights violations and bringing those responsible to justice. In order that cases can be fully investigated and brought to the courts, it is essential for witnesses to be offered protection whenever necessary. In recent years, a number of lawyers and witnesses appearing in human rights cases have been subjected to death threats and murder, and many people have been afraid to speak out about the atrocities they have witnessed or experienced. Even in a changed political environment, there may still be fear that those who are threatened by a new climate of accountability, and who may previously have believed themselves immune from prosecution, may resort to violence and intimidation to prevent evidence against them from coming to light. Those undertaking inquiries should therefore have the necessary powers and resources to give protection against such threats, should they arise, and to instill confidence in those who may otherwise fear coming forward to testify.

5.4 Further Means Used to Prevent Disclosure of the Truth

Recommendation 25: Ensure that the publication of information in the public interest is fully protected in law; charges such as defamation or sedition should not be used to render issues sub-judice, thereby obstructing debate on

important issues of public interest.

There was a marked tendency in recent years to prevent discussion of important issues of public interest by filing cases of defamation or sedition against those who publicized the issue, in attempts to render the matter sub-judice and preventing further public disclosures. Such actions have been brought by the state itself, and by individual public officials who have been named as being involved in human rights violations.

One example of cases brought by the state against newspaper editors and publishers concerned the revelations made by a former Deputy Inspector General of Police (DIG), Premadasa Udugampola. DIG Udugampola had been implicated in a High Court judgment in March 1991 which had found three other police officers guilty of the wrongful confinement of a lawyer, Wijedasa Liyanarachchi, in 1988, but not of his murder in custody. The High Court had recommended that investigations be reopened into the murder, and noted "highly incriminating circumstantial evidence" implicating DIG Udugampola. Mr Udugampola was then appointed head of the Bureau of Special Operations in Colombo, but was subsequently sent into early retirement. After a magisterial inquiry into Wijedasa Liyanarachchi's murder was reopened, the retired DIG went underground and left Sri Lanka.

In April 1992 Mr Udugampola issued affidavits and a press statement listing victims of death squad killings and alleging, amongst other things, that prominent UNP politicians may have been involved in the killings. *Aththa* newspaper published his allegations on 8 April with a list of 95 people whose killings in North Central Province he attributed to the "Black Cats". Within 24 hours of publication, the editor and publisher of the newspaper had been charged with sedition under the emergency regulations. This rendered the affair sub-judice, in an apparent attempt to halt any further disclosures or public discussion.⁴⁴ Premadasa Udugampola himself was charged with providing information to *Aththa*, and with sedition.

In May, the editor of the *Yukthiya* newspaper was charged with criminal defamation under Section 480 of the Penal Code following the newspaper's publication of another affidavit purporting to be from Mr Udugampola, which made allegations allegedly damaging to the reputation of the Inspector General of Police. Also in May, the editor of *Rajaliya* was charged with sedition under Section 120 of the Penal Code for publishing an article and photographs on the alleged death squad killings.

Following the assassination of President Ranasinghe Premadasa on 1 May 1993, Mr Udugampola returned to Sri Lanka. On 8 July 1993 he filed a further affidavit in the Colombo High Court withdrawing his earlier allegations. The next day the Attorney General withdrew the charges of criminal defamation against him and later also withdrew the cases against the newspapers which had published the allegations. None

⁴⁴ In November 1992 the Colombo High Court dismissed the case against *Aththa*, holding that the press is free to publish news and opinions which may be distasteful to the government, as long as such news and opinion do not incite the people maliciously.

of Premadasa Udugampola's allegations of death squad killings were investigated by the state, and nor was he subjected to any further investigation for his possible involvement in the murder of Wijedasa Liyanarachchi. Shortly after his return to Sri Lanka, Mr Udugampola was appointed Vice Chairman of the Sri Lanka Ports Authority.

In another notorious case, a Senior Superintendent of Police (SSP), Ronnie Gunasinghe, filed a civil defamation case against the mother of a murder victim. On 1 June 1990 Dr Manorani Saravanamuttu had named SSP Gunasinghe in an affidavit as having been among those who abducted her son, Richard de Zoysa, from their home in February 1990, shortly before he was found murdered. There were numerous deficiencies in the investigation conducted by the police into this killing, and the magisterial inquiry into the death was discontinued at the request of Dr Saravanamuttu's legal counsel. This meant that the case was no longer sub-judice, enabling Dr Saravanamuttu and other concerned people to lobby the government for an independent inquiry to be established into his death, without running foul of the law on contempt.

On 25 September 1990 the Leader of the Opposition in Parliament proposed a motion calling for the setting up of an independent commission of inquiry into Richard de Zoysa's death. On 1 October SSP Gunasinghe filed proceedings against Dr Saravanamuttu for defamation. Many believed that the motive for bringing this case was to place the matter *sub-judice* to prevent any parliamentary debate. The parliamentary motion was, in fact, debated but was defeated. The defamation case continued over a protracted period with many postponements. It was withdrawn after Ronnie Gunasinghe was killed in May 1993 in the same bomb-blast which killed President Premadasa.

6. CONCLUSION

The right to freedom of expression and information has come under sustained and severe attack in Sri Lanka over many years, and under successive governments, as the state attempted to stifle voices of dissent or criticism and to exert increasing control over access to information on a range of issues of public interest. The pervasive denial of freedom of expression, through both formal and informal means, has had devastating effects on Sri Lankan society, and reform of both the laws and practices which allowed censorship to prevail is urgently needed if Sri Lanka is to overcome the terrible legacy of its recent past.

The People's Alliance government has pledged itself to safeguard the right to freedom of expression and media freedom. ARTICLE 19 welcomes these commitments and urges the government to implement the recommendations set out in this report, which address the most urgent constitutional, legal and institutional reforms necessary to protect and promote the fundamental right to freedom of expression. ARTICLE 19 hopes that this report will assist in the development and implementation of new government policy on freedom of expression and information, and a new climate of openness and respect for individual rights in Sri Lanka.