

Chapter - VI

Role of Non-Judicial Institutions

Under Article 126 of the Constitution, the Supreme Court, shall have sole exclusive jurisdiction to hear and determine any question relating to the infringement or imminent infringement by executive or administrative action of any fundamental right declared and recognized in the Chapter on rights.¹

Moving to the Supreme Court situated in the metropolis of Colombo within a prescribed period of one month was practically a difficult process for the people in the provinces. Furthermore, in the initial instance, leave to proceed with their case is to be got from the Supreme court which will grant such leave only after two judges had at first agreed on it. Another grave, if not graver impediment, is to secure the services of a lawyer, senior and competent enough to appear at the Supreme Court and argue a case of infringement of the human right. Eminent lawyers practise only in the Appeal and Supreme Courts in the metropolis. Senior lawyers charge very high fees which are difficult for the average citizen. The Constitution of Sri Lanka provides another avenue of gaining redress and relief for those who suffer violations and denials of human rights. There is an Ombudsman. Later legislation created a National Human Rights Commission. This body can also attend to complaints of transgressions of human rights.

According to Article 156 of the Constitution, a Parliamentary Commissioner for Administration also known as the Ombudsman can be appointed² to perform the duty of investigating in accordance with and subject to the provisions governing such rights or law and reporting upon complaints or allegations of the infringement of fundamental rights by public officers, officers of public corporations, local authorities and other similar institutions. The Ombudsman is independent, receiving his office from the President of Sri Lanka and being

irremovable as long as he conducts himself with integrity. Security of tenure in office is secured to the Ombudsman through procedure akin to the removal of a Supreme Court Judge.³

The Parliamentary Commissioner for Administration Act No. 17 of 1981.⁴ clearly provides for the Ombudsman to be free of other official commitments, or prejudices arising from holding any other responsibilities. It ensures that the Ombudsman is free to inquire into complaints without fear or favour. More vitally, applicants complaining of a violation of a right can do so without making any payment whatsoever. Lawyers are not permitted to appear at an Ombudsman's examination of a complaint. Complainants get their grievances attended to without incurring any costs. From 1995 onwards access to the Ombudsman became more liberal than ever before⁵ as there was no need to channel them through Members of Parliament as earlier.

Additionally, the handling of complaints was quick and devoid of complicity unlike a filing of a case in court and consequent judicial trial; the petitioner posts, or hands in, a complaint of the violation of one's right. The Ombudsman calls for a report on the contents of the complaint from the official or institution concerned. This response is forwarded to the petitioner and if he disagrees with the explanation, the Ombudsman proceeds to conduct an inquiry. The complainant and the respondent authority, along with witnesses if any, and other evidence, have to attend the inquiry for examination. Questions and answers are allowed and the Ombudsman performs an impartial scrutiny⁶ to ascertain the truth in a representation about a denial of the freedom from torture or cruel degrading treatment.

After this process the Ombudsman, in his report, fixes responsibility on a department or official for having violated the fundamental right. Once the Ombudsman is satisfied that a wrong had occurred he prescribes the redress, the report of the Ombudsman is sent to the department that has been found to be culpable and guilty of

trespassing the law, and a copy of it is also sent to the Parliamentary Petitions Committee⁷, and often, to the Minister concerned.

While the objective in creating an Ombudsman was laudable, unfortunately however, the office of the Ombudsman has achieved negligible positive results over the years. The determination after an inquiry reached by the Ombudsman has only the validity of a mere recommendation. It does not have any mandatory force. Consequently official authorities and institutions have often ignored the Ombudsman's determinations. Although the Parliamentary Petitions Committee also receives copies of the determinations of the Ombudsman, unfortunately the Members of Parliament who are expected to do so, ascertain whether Ombudsman's determinations have been acted upon. This lackadaisical attitude of Members of Parliament has contributed to render in the Ombudsman's determinations to become nugatory. Relatively little success has attended the Ombudsman's efforts to get violations of rights remedied. Regrettably, the citizens therefore have been compelled only to make the Supreme Court their first and last resort. The Ombudsman was expected to provide speedy, redress of grievances informally and without technicalities. Unfortunately, in this sense he was found to be wanting. Thus over the years the Ombudsman was not eagerly looked up to for redress of grievances. Nevertheless, securing adherence to human rights, received Sri Lanka's grave attention.

In addition to the Courts of Justice and the Ombudsman diverse other means then were adopted to ensure especially an active promotion and protection of the right to be free of torture, cruel and inhuman degrading treatment or punishment of citizens, when a number of cases of excessive use of torture and humiliating treatment came to light⁸. Moreover, a politically sensitive intelligentsia in Sri Lanka firmly believed that the right to be free from torture was an obvious right to be honoured in a civilized society. The Human Rights Task Force of the nineteen nineties, for instance, was foremost

committed to protect the right to life, liberty and security of the person outside the field of war, and notably to ensure that no one is subjected to torture or to cruel, inhuman or degrading treatment at time of arrest or in detention. As, these rights were non-violable, the Human Rights Task Force was unequivocal in condemning extra-judicial killings which had become common in association with 'disappearances', and invariably torture, cruel, inhuman and degrading treatment of captives, and of those arrested or detained and even of those who surrendered in Sri Lanka. In fact, the Human Rights Task force reckoned torture to be the worst enemy of democracy. A callous disregard and blind indifference to the fate of torture victims and other such sufferers was judged to be a threat to Sri Lanka.

The Human Rights Task Force arose as an answer to strong local public and international opinion that criticized negligence in honouring human rights. It was established by Regulations enacted under enabling provisions of the Sri Lanka foundation Law No. 31 of 1973. Section 5 of the Law mentions the promotion of an understanding and belief in the democratic way of life, and the protection of human rights. The enabling provisions of section 19 of the foundation were further fortified by Emergency Regulations proclaimed on 31 July 1991 to cover setting up of the Human Rights Task Force. In the Government Gazette of 10 August 1997 "Monitoring of Fundamental Rights of Detainees Regulations 1991" were published. The Human rights Task Force was given wide powers and fair assistance to promote observance of human rights. They had the power of inspection of places and persons in security office custody, to inquire into complaints and representations about conditions of detainees and similar wide-ranging authority. Incidentally, the Human Rights Task Force was to move strongly to prevent torture by promptly responding to conditions of arrest and detention conditions. The Task Force was allowed by the state and government to function as an independent institution and was not politically or administratively pressured or influenced. The Board of Management of the Human

Rights Task Force consisted of a retired respected Supreme Court Judge as Chairman and two other eminent legally knowledgeable personalities as members.

For a good part of its post-independence years, Sri Lanka had been assailed by conflict and hence governed under Emergency Regulations.⁹ These emergency regulations usually have wielded an adverse impact on Fundamental or Human Rights. Some of the older emergency regulations of 1989 were replaced by newer regulations in June 1993 which was a desirable measure. But still improvements were needed. Emergency enlarged powers of the police and armed forces and allowed room for arbitrary secret actions to be taken more or less with impunity. The Human Rights Task Force acted promptly in attending to complaints of violation of the right to remain free of torture and inhuman, degrading treatment. Individual complaints and inquiries from various community based and non-governmental organizations were received and attended to.¹⁰ Financial aid from a welfare fund was offered to those who suffered from offences like torture so as for them to afford the services of a counsel if the victims were poor. In late 1993, and in 1994, following the assassination of President R. Premadasa of Sri Lanka, ethnically discriminatory arrests and detention of particularly Tamil citizens sharply and steeply followed. There occurred some torture contrary to the Second Republican Constitution of 1978. Around 1991 again the Human Rights Task Force learned that indiscriminate arrests and torture were liberally practised. In particular, for example, Sivagnanam Sathurukooralan of the Telecommunications Department underwent excruciating torture and assault.¹¹ Similarly, Pillaipody Suntheralingam was taken into custody by the Koduwamadi Army Officers and subjected to unbearable torture. His penis was placed on a chair and beaten with a stick. Thence he was transferred to Kommathurai Army camp and strung up by his legs and beaten. He could not urinate owing to the assault as the Chairman, Human Rights Task Force learnt. But officers used to pernicious practices like assault of arrestees made no difference even

when they took into custody Sinhalese people too. In south Sri Lanka Ananda Withanachchi was detained and subjected to cruel and inhuman treatment. Consequently, he could move about only with the help of crutches.¹² Moreover, police officers extorted confessions by duress and torture as the Human Rights Task Force realized when inquiring into the case of Sellathurai Thurairatnam.¹³ Some of the cases examined by the Human Rights Task Force revealed common cruel torture occurring fairly regularly perpetrated by police and armed forces personnel.

On 4 January 1994 Sri Lanka acceded to the Convention Against Torture and other Cruel, Inhuman or degrading Treatment or Punishment.¹⁴ Here torture implied any act that causes severe pain or suffering, whether physical or mental, intentionally inflicted on a person for obtaining information or confessions, or punishing one for an act committed or likely to be done. Article 11 of the Constitution forbids torture and infliction of torture infringes fundamental rights. The Penal Code imposes penal sanctions for perpetration of torture. Nevertheless as cases quoted by the Human Rights Task Force demonstrate or imply indicates that "in Sri Lanka we have Government tolerated torture."¹⁵ Moreover, "Torture cases when brought to light rarely attract governmental action."¹⁶ The victim ultimately can only apply with some hope for redress to the Supreme Court. The provisions in the Constitution in respect of torture are of very great importance. "Yet in practice only a very small number of torture victims have the resources and the will to brave possible reprisals to have recourse to Court action"¹⁷ succinct but quite correct as the Human Rights Task Force exemplifies. The fear of reprisals even on family members by torturing officials hung like the sword of Damocles over heads of tortured victims. Furthermore, as the Human Rights Task Force adumbrates, the principal objective of torture in Sri Lanka is to elicit confessions which finally however do not often stand the test of legal assessment. The infliction of pain and suffering sadistically on others is also aimed at deflating the personality and dignity of the victim – his degradation,

really. Numerous and sophisticated torture methods are designed to spread panic and fear and frighten citizens into abject defeatism and hopelessness. The ingenuity in inventing newer and more painful methods of torture was a trait in Sri Lankan security personnel.

The Human Rights Commission of Sri Lanka created by Act No. 21 of 1996 through the Parliament of Sri Lanka in August¹⁸ needs attention. The Commission comprises five members chosen out of citizens with a knowledge of or practical experience in matters connected with human rights. Appointments were made with the concurrence of responsible leaders, on recommendation of the Prime Minister in consultation with the Speaker of Parliament and the Leader of the Opposition initially. Later, a representative Constitutional Council of eminent public personalities were to select successors. Though appointment was by Executive President. The members of the Commission were allowed independence of action during their three-year term of office. The first Chairman of the Commission was a former Supreme Court Justice. The Chairman and members of the Commission enjoyed security of tenure.¹⁹

The National Human Rights Commission appeared to be like the State's successor to the earlier Human Rights Task Force. The Commission was empowered to inquire into and investigate into complaints regarding any failures to comply with the provisions of Sri Lanka's Constitution relating to fundamental rights including Article 11 of the Constitution. Even an imminent infringement of a right could be inquired into and prevented by conciliatory means of resolution. A vital obligation of the Human Rights Commission was to advise and assist Government in formulating legislation and administrative directives and procedures as to further promote and protect the fundamental rights enunciated in the Sri Lankan Constitution. Similarly, the Human Rights Commission was to recommend to Government measures to ensure that laws and administrative practices conformed to institutional standards and norms governing human rights. The Commission too

had to promote awareness of and instruction relating to human rights,²⁰ and their significance to the rule of law and democracy.

In the outer provinces, the Commission could set up subcommittees to carry out functions entrusted to them and exercise powers delegated by the National Commission in the interest of ensuring a ban on torture and other degrading treatment or punishment. With the permission of court the Human Rights Commission could intervene in proceedings relating to infringement or imminent infringement pending before Court. Another significant responsibility of the Commission lay in monitoring the welfare provided to detainees by regular inspections and recommend improvements in the condition of detainees, particularly to deter violations of rights or use of torture or degrading treatment.²¹

The National Human Rights Commission had a fair range of responsibilities to fulfil. It had to act, when directed by the Supreme Court, by taking steps to deal with a matter concerning the transgression of the right to be free of torture and degrading treatment. In addition it had to research into and promote an awareness and respect of human rights in diverse ways money spent for lodging a complaint with the Commission in respect of a grievance relating to an infringement of a right could be reimbursed by the Commission. When the Supreme Court was dealing with a human rights violation under Article 126 of the Constitution, the Court could harness the right of the Commission to inquire and report on any connected issue. Furthermore, the Human Rights Commission could on its own, or on a complaint of an aggrieved party, investigate into an allegation of an infringement or imminent infringement of a right. Even infringement of against the fundamental right under the notorious Prevention of Terrorism Act of 1979 could be investigated and dealt with by the Commission. The Commission could act to prevent the infringement of an human right whenever its investigation disclosed such likelihood. This could be done through conciliation or mediation, or otherwise by

advising prosecution in Court if violation had taken place, and also by warning the culpable party to desist from infringement of the human right. Remedying the harm caused, perhaps by commensurate compensation, was also possible.

It is noteworthy that the Human Rights Commission could counsel on preventive measures. These can mean changes in practice, policy or even personnel employed in the administration of government bodies. However, the Commission had to first hear the supposed to be violator of a right. Related documents were to be copied to the aggrieved person, the head of his institution and the Minister under whom it functions. Recommendations should be acted upon and reported elaborately to the Commission on Human Rights (Sri Lanka). If the action taken to avoid such infringements of rights by the culpable authority is inadequate or deficient these facts should be reported to the President of Sri Lanka who shall have a copy of them placed before Parliament for any further improvement. The Commission is entitled to receive notice of arrests or orders or detention of anyone made according to the Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979 or under a regulation of the Public Security Ordinance, Chapter 40, within a specified period of 8 hours. Likewise, any change in the venue of detention by the police or armed forces too had to be notified to the Commissioner. The Commission can ascertain for itself the conditions of detention by visiting the place of detention. Non-compliance with the obligation to maintain conditions of detention in proper fashion is punishable. The actions of the Sri Lankan Human Rights Commission executed bona fide will be immune from suit, and protection of action strengthens the institution in practice. The Commission is made accountable through the obligation to present an annual Report on its activities to Parliament.²²

A report in the 'Sunday Times' of 2 November 2003, headed "Human Rights? The Commission and its bad joke."²³ in pages 4 and

10, was however severely critical of the Human Rights Commission. It is described as "One of the most ludicrous documents ever to come out of the presses of any Sri Lankan organization monitoring conflict related development (that) must be the recent report released by the Human Rights Commission." It is condemned as being partisan and the number of cases dealt within a time from 1990 – 1998. The criticism centred upon the Commission's choice of "select complaints". It added that the report did not "put things in perspective" and that "some atrocities were not complained about –." There was a response to this criticism by the Chairman, Committee on Disappearances, rebutting several condemnatory assertions in the newspaper's article. Nonetheless, the Political Editor who originally penned the scathing criticism stood by his report in an answer to the Chairman, stating that the copy of the report was titled, "Committee on Disappearances of the Human Rights Commission of Sri Lanka." This confounded confusion. And the Political Editor of the Sunday Times maintained that "in an up-close and personal interview with the Representative of the Human Rights Commission in Jaffna he had learnt some other interesting facts about how the Commission operates in that city. It's not very different to the way in which this biased report of the HRC passes off for a fair and correct assessment. Even the Chairman's report for the first years issued by the National Human Rights Commission was criticized as not impressive. The Commission was found not so effective in regard to dealing with torture investigating, identifying torturers, and in stemming the incidence of torture among the security official's offences regularly committed as a rule.

The present Chairperson, Human Rights Commission, a former Rapporteur for the UN, appears to be more pro-active, and constructive but yet realistic about the Commission's role regards safeguarding the practice of observing human rights by officials in the course of their official work. A lack of human resources has restricted the work of the Human Rights Commission. During an interview with The Sunday Leader, February 8, 2004, the Chairperson admitted, "Firstly the

complaints of torture have been on the increase. We have adopted zero tolerance policy on torture."²⁴ Now, "On any complaint of torture that comes to the Commission, an investigation would begin within 24 hours. Any death in custody means (that) the OIC would be summoned before the Commission."²⁵ Moreover the Chairperson adds that "We have also had discussions with the Inspector-General of Police (IGP) on how to stop torture as a practice. One of the main reasons for torture was that policemen are not trained in other investigative skills."²⁶ Therefore, interactions were had with the IGP "about training in investigative skills as well as human rights training for the policemen."²⁷ "all police stations were to carry posters about the "rights of the suspects" detained. Additionally, "family members and lawyers" were to "be allowed to visit the people held in detention". The Head of the Police Service was very cooperative.

The Chairperson of the Commission furthermore confirmed that "When we go around to police stations and meet with policemen, initially they tell us torture does not take place but when we get into candid conversation with them they point out that they have no training in investigation and therefore torture is often the first resort."²⁸ The IGP confessed that police culture has to change and that will take a few years.

The foregoing account is on the new Human Rights Commission's Chairperson's discussion with the press and holds out some hope. But even a cautious optimist fears that it is no easy task to get the police force to honour human rights and to refrain from using torture despite it being an infringement of a most major constitutionally furnished right to citizens. To handle the armed forces' abuse of the respect due to the right of a citizen to be free from torture, cruel, inhuman and degrading treatment will be even more obstinately formidable. These commissions or bodies can do little to stem the widespread use of torture by security officials however well intentioned

and inclined the commissions or bodies be. The Supreme Court is presently the refuge.

The World Conference on Human Rights encourages the establishment and strengthening of national institutions²⁹ to handle human rights abuses. It is hence incumbent on the Government of Sri Lanka to create the machinery that can cope with abuses of human rights and must hone its own structures needed to promote and protect human rights. The actual function of protecting human rights is rightly a national one for which the Government of Sri Lanka is primarily responsible. In 1993, the World Conference on Human Rights had reaffirmed the vital and constructive role to be played by national human rights institutions and urged governments to strengthen such institutions. It is in this light that the Sri Lankan state must view the effort of the National Human Rights Commission to counter the practise of torture through the police and obtain its help to attain its ends of³⁰ enforcing the provision on freedom from torture and or degrading treatment.

In discussing non judicial institutions one has inevitably to refer to the role played by non governmental institutions. Currently in Sri Lanka there are a few non governmental institutions that focus their concern on infringements of rights and on the protection and promotion of human rights. These concerned non-governmental organizations are all not equally well equipped or competent. However, some provide supplementary support for getting the implementation of international human rights standards such as effort to restrain the practice of torture by security officials. The non-governmental institutions, by their character, exercise a freedom of expression, a flexibility of action and a liberty of movement. This permits them under certain conditions to undertake tasks which governments and inter-governmental organizations either are unable or unwilling to execute.³¹

From the general consensus of reports compiled from both governmental and non- governmental non-judicial organizations on Human Rights in Sri Lanka it is clear that deaths in custody occur often owing to inhuman incidents of torture. Evidently, difficulties experienced by law enforcement officials of the Attorney General's Department and even the police in investigating have contributed to incidents of torture. The criminal justice system needs careful refinement for it to prove effective in preventing torture and death in custody.³² Furthermore, as seen from a study by a lawyer V.S. Ganesalingam,³³ there have been reported several inhuman cases of death in custody. In April 1983, in one case, the deceased at an army camp in Jaffna, disclosed 25 external and 10 internal injuries. A lawyer in south Sri Lanka died in September 1983 while in police custody with over a hundred injuries found on his body. On 6th and 7th January, 2000, two Tamil inmates in Kalutara Prison in south Sri Lanka died owing to assault with a club and by gunshot. In July 1983, inhuman and gruesome deaths in custody of 53 Tamil prisoners occurred.³⁴ Also, whenever a person arrested or in detention is reported to have "disappeared" invariably he would have been found tortured or shot to death. Custodial violence and torture have been far too common so much so that human rights institutions, whether they are governmental or not, have not been able to squash to any remarkable extent the tendency to take easy and matter of fact recourse to torture, cruel, inhuman and degrading treatment, indulged in by the Sri Lankan police or armed forces. While the institutions of a non- judicial nature have not been able to cause any worthwhile reduction in torture or similar practices the Supreme Court alone has to labour to deal with the manifestation of this evil in the island. And there are too many infringements of the right and too few Supreme Court Judges.

From the inception, the Human Rights Commission of Sri Lanka advanced two early reports covering the periods, March 1997 to March 1998 and the next report surveying the years April 1998 to December

1998.³⁵ With two Judges, one retired from the Supreme Court, the other from the High Court, and an Attorney-at-Law, the work performed makes no mention of dealing with cases of the violation of the right to be free of torture. More mundane matters such as unfair promotions or irregular public service punishments occupied the Commission's concerns. The Commission received reports of arrests and missing persons but apparently showed hardly any initiative to conduct inquisitorial scrutiny. Disappearances of an alarming sort and "mass graves" were examined but there was no follow up action to identify culprits fully and punish them. Complaints of violations of fundamental rights or even references by the Supreme Court seem to have not been examined in a rewarding manner. There were regional offices and some attempts to install an awareness of the necessity to honour human rights but they were routine, desultory and lacklustre.³⁶

¹ Ibid Article 126 (1), (2), p. 81

² Law & Society Trust: LST Review, Volume 10, Issue 1118, February 2000; The Office of the Ombudsman, see especially Professor G.L. Peiris, "The importance of the Office of the Ombudsman" p. 1 – 07; Rohan Edrisinha, "A Critique of the Office of the Ombudsman", p 16 – 23.

³ Department of Government Printing: Parliamentary Commissioner for Administration, Government Publications Bureau, Colombo, November 26, 1981.

⁴ Ibid.

⁵ Department of Government Printing Parliamentary Commissioner for Administration, Government Publications Bureau, Colombo, December 30, 1994.

⁶ LST Review Volume 10, Issue 148 February 2000 o. cit. See "Discussion" p 24 – 30; also "Public Sector Trade Unions and the Role of the Ombudsman." P 31 - 42

⁷ Parliamentary Commissioner for Administration, op. cit. and Parliamentary Commissioner for Administration (Amendment) Act, op. cit.

⁸ See Annual Report – Human Rights Task Force, 10 August 1993 to 10 August 1994 – Chairman, Human Rights Task Force, Colombo 07, Sri Lanka, 13 August 1994 and two earlier reports. The Introduction p 1 – 4 to the cited first report is critically informative and so is Chapter II on "The Creation of the Human Rights Task Force" p. 5 - 7

⁹ op. cit see "Emergency Regulations", p. 9 - 12

¹⁰ Op. cit. "The H.R.T.F. At Work" p 13 - 25; also see for comments Law and Society Trust, Vol. 13, Issue 178, August 2003, National Human Rights Commissions and Internally Displaced Persons by Mario Gomez, Colombo n.d.

¹¹ op. cit. p. 19

¹² op. cit. p. 23

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- 13 op. cit. p. 24
- 14 op. cit. p 31
- 15 op. cit. p 31
- 16 ibid.
- 17 ibid.
- 18 Parliament of the Democratic Socialist Republic of Sri Lanka: Human Rights Commission of Sri Lanka Act No. 21 of 1996, Department of Government Printing, Colombo, August 1996.
- 19 Ibid. See Part I, p 1 – 4.
- 20 Ibid. See Functions of the Commission, p 4 - 5
- 21 ibid. Part II, Powers of Investigation of the Commission, p 5 - 9
- 22 ibid. Commission to report, p 16
- 23 The Sunday Times: Sunday, November 2, 2003, Colombo, p 4 and p 10
- 24 See The Sunday Leader, Colombo, February 8, 2004 – Interview, p 6 by Wilson Gnanadass
- 25 Ibid.
- 26 ibid.
- 27 ibid.
- 28 ibid.
- 29 Centre for Human rights, Geneva: National Human Rights Institutions, United Nations, New York and Geneva 1995 – (quoted)
- 30 ibid.
- 31 ibid.
- 32 LST Review – Law Society Trust, “Death in Custody” by v.s. Ganesalingam, p 1 – 08, Colombo 8 n.d.
- 33 ibid.
- 34 ibid.
- 35 Human Rights Commission of Sri Lanka: See Annual Report 1998, Report submitted to Parliament under Section 30 of the Human Rights Commission Act, Colombo, n.d.
- 36 ibid. See p. 1 - 12