

# Lawyers' Rights Watch Canada

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## GENERAL TRENDS FOR SRI LANKA CONCERNING THE INDEPENDENCE OF JUDGES AND LAWYERS

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### Overview

Judges and lawyers as the guardians of equality and justice are the primary advocates for human rights in a democracy. As such, judges and lawyers often became the first targets of an oppressive regime. In Sri Lanka, judges and lawyers who speak out against attacks on fundamental human rights are at grave risk of intimidation and harassment.

Sri Lankan judges involved in cases concerning opposition political parties were, and are, often targeted with unfair disciplinary measures, such as removal from office, transfer to distant courts, and/or demotion. Since appointments to the Sri Lankan judiciary are not merit-based, they are frequently subject to political interference. The implication arising from this flaw is self-evident: the judiciary's ability to impartially determine cases based on the law is seriously impeded.

### 17<sup>th</sup> Amendment and the Constitutional Council

In October 2001, the Sri Lankan Parliament passed the 17th Amendment to the Constitution establishing a Constitutional Council (CC), a ten-member body with the power to make recommendations and approve appointments to the independent commissions, such as the Judicial Services Commission, the National Police Commission, the Human Rights Commission, the Election Commission and the Public Service Commission, and to approve the appointment of persons to senior positions in the public service, such as the Attorney-General, the Inspector General of Police, the Chief Justice and other judges of the Court of Appeal and Supreme Court. Once the CC approves or makes these nominations, the President is authorized to make the appointment.

As of 2005, the 17th Amendment has not been implemented as the President has failed to appoint Commissioners to the body after the initial Commissioners' terms expired. The President has reverted to making direct appointments without any external scrutiny, thus politicizing the appointment process to key public institutions. The International Bar Association Human Rights Institute (IBAHRI), in its report *Justice in Retreat: A report on the independence of the legal profession and the rule of law in Sri Lanka*, states that "the non-implementation of the 17th Amendment represents one of the most critical unresolved rule of law issues in the country, and necessarily affects the independence of the judiciary."<sup>1</sup>

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<sup>1</sup> International Bar Association Human Rights Institute (IBAHRI), *Justice in retreat: A report on the independence of the legal profession and the rule of law in Sri Lanka* (May 2008) Available online <<http://www.ibanet.org/IBAHRI.aspx>>, at 23-24.

The IBAHRI reports that it is “extremely concerned at the lack of institutional safeguards for the independence of judicial appointments, and considers that the bypassing of constitutional processes by the executive has had an adverse impact on the perceived independence of the judiciary in Sri Lanka.”<sup>2</sup>

Bypassing the 17<sup>th</sup> Amendment has a negative impact on the perceived and actual independence of the judiciary.

### **Appointment of Judges:**

Although appointed by the President, the Judicial Services Commission (JSC) is also responsible for the promotion, discipline, transfer and dismissal of all High Court and lower court judges. The JSC is also responsible for the appointment of lower court judges. The members of the JSC are the Chief Justice and two other Supreme Court Judges appointed by the President. While the criteria for and procedures regarding appointments are not publicly available, it is customary practice that appointments are based on seniority. However, the former Chief Justice who exercised de facto control over JSC appointments, often ignored this custom and according to the IBAHRI, “anomalies might have arisen because decisions reached were neither recorded nor followed.”<sup>3</sup>

### **Removal of Judges**

In late 2008 Supreme Court Justice Saleem Marsoof, P.C. was threatened with impeachment proceedings resulting from a speech he delivered in August 2008 criticizing the Government’s failure to implement the 17th Amendment. Although there were no actions taken against Justice Marsoof, the IBAHRI notes that “the threat of impeachment proceedings in this case, even though ultimately not carried out, may in itself have a chilling effect on other members of the judiciary wishing to speak out on similar or other rule of law-related issues in the future.”

In addition the IBAHRI reports that the Chief Justice has misused his role on the JSC to summarily dismiss or transfer judges without any apparent or objective reasons. There are several instances where lower court judges had been wrongfully or arbitrarily dismissed or disciplined, including: District Judges Sunil Perera, Geraldin Ganlath, Harold Wijesiri Liyanage, DM Siriwardhana, DMTBI Dissanayake and Magistrates NV Karunathilake and Hiran Ekanayake.<sup>4</sup>

In addition, the case of the dismissal of Mr. Soratha Bandaranayake from his position as a High Court Judge, was found by the UN Human Rights Committee to be arbitrary, unreasonable and procedurally unfair. The Human Rights Committee observed that “Sri Lanka’s dismissal procedures under the JSC for lower court judges do not adhere to the requirements of basic procedural fairness and fail to ensure that individual judges benefit from the necessary guarantees to which they are entitled in their capacity as judges, thus constituting an attack on the independence of the judiciary.”<sup>5</sup>

### **Hostile Environment for Lawyers**

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<sup>2</sup> *Ibid*, at 26.

<sup>3</sup> *Ibid*.

<sup>4</sup> *Ibid*, at 29.

<sup>5</sup> *Ibid*, at 30.

Members of the legal profession in Sri Lanka have been harassed, intimidated, threatened, attacked and even killed for simply fulfilling their professional obligations and duties. There is a pattern of intimidation of lawyers filing fundamental rights applications, representing accused terrorism suspects, and acting in bribery and anti-corruption cases, that has been developing in recent years.

The IBAHRI reports that “making complaints against the police and/or other authorities has become an increasingly dangerous activity over the past 12 months.”<sup>6</sup> In particular there is widespread accounts of intimidating behaviour of police officers towards lawyers at police stations. The IBAHRI reports states that cases of lawyers being harassed by police officers, “including verbal and physical abuse as well as other forms of intimidation such as plain-clothes policemen waiting outside lawyers’ offices in white vans with no registration plates.”<sup>7</sup> In addition there are concerns regarding reports that police officers are frequently present during interviews with clients and in some cases taking notes on the conversation.

For example, on 24 October 2008, attorney-at-law, Mr. DWC Mahotti, was harassed by police officers at the Bambilipitya police station when he accompanied his client.<sup>8</sup> Mr. Mahotti was assaulted and verbally abused by police officers while trying to represent his client.

The IBAHRI reports that on 27 September 2008, Mr. JC Weliamuna suffered a grenade attack at his family home. Mr. Weliamuna is the Executive Director of Transparency International Sri Lanka acting in many fundamental rights cases, some of which involve allegations of torture, extra-judicial killings and disappearances. Two grenades were thrown at Mr. Weliamuna’s house, which is in close proximity to the Kohywala police station which has many checkpoints in the vicinity. Only one of the grenades exploded, damaging part of his house and the wall of a neighbouring house. Mr. Weliamuna and his family were fortunately unharmed in the attack.

Responding to this incident, the former Chief Justice stated that, in his view, “Mr Weliamuna had brought the attack upon himself through his high-profile advocacy on bribery and anti-corruption issues as Executive Director of Transparency International Sri Lanka.”<sup>9</sup>

On October 21, 2008, a notice was sent to the registrars of all lower courts and a number of attorneys-at-law specializing in human rights cases from a group calling itself ‘Mahason Balakaya’ to threaten lawyers representing suspected terrorists. The notice labeled such lawyers as ‘traitors’ and warned that they will meet the ‘same fate’ as innocent victims killed by terrorists.

The International Crisis Group reports that professional organizations, such as the Bar Association of Sri Lanka (BASL) provides little effective constraint on judiciary or protection against intimidation. The report states that “lawyers representing criminal and military detainees, and even former judges, variously label the BASL “docile”, “a mouthpiece for those in power” and a “disaster”.”<sup>10</sup>

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<sup>6</sup> *Ibid*, at 45.

<sup>7</sup> *Ibid*, at 40.

<sup>8</sup> International Crisis Group, Sri Lanka’s Judiciary: Politicised Courts, Compromised Rights (30 June 2009) Available online: <<http://www.crisisgroup.org>>, at 15

<sup>9</sup> *Supra* note 1 at 44.

<sup>10</sup> *Supra* note 8, at 15

The International Crisis Group also asserts that lawyers and litigants are constrained by the threat of contempt of court. A lack of clear rules for imposing contempt sanctions yields uncertainty about the consequences of criticizing the courts.<sup>11</sup>

### **Publications on Ministry of Defence, Public Security, Law & Order Website**

The Ministry of Defence, Public Security, Law & Order has on several occasions published the names of attorneys insinuating they are traitors to the nations.

On 14 November 2008 an article entitled 'Who are the human rights violators?' was posted on the Ministry of Defence website with the names, and in some cases photos, of lawyers filing fundamental rights petitions in 11 terrorism cases.<sup>12</sup> The article stated that the lawyers representing terrorism suspects were 'the anti national, anti social, organizations that are supporting the LTTE (Liberation Tigers of Tamil Eelam), under cover of protecting human rights'. The IBAHRI raised concerns that this type of rhetoric is "inflammatory and seriously compromises the physical safety of those lawyers named."<sup>13</sup>

Most recently, on Friday July 10<sup>th</sup>, the Ministry website posted a scathing article with no byline, naming lawyers appearing on behalf of the Leader Publications (Pvt) Ltd., publishers of the Sunday Leader under the headline "Traitors in Black Coats Flocked Together?"<sup>14</sup> The article described President's Counsel Srinath Perera, Upul Jayasuriya Attorney-at-Law, M. A. Sumanthiran, Attorney-at-Law, Viran Corea, Attorney-at-Law and Athula Ranagala, Attorney-at-Law as having "a history of appearing for and defending LTTE suspects in the past." Military Spokesperson, Brigadier Udaya Nanayakkara and Lakshman Hulugalle, Director General for the Media Centre for National Security (MCNS) have dismissed criticism of the opinion post stating that the Defence Ministry website is open for public opinion and this is an "expression of media freedom".

### **Impunity and the Failure of Presidential Commissions of Inquiry**

Impunity has long been the rule in countries where violations of international humanitarian law are concerned. The failure of the formal justice system in Sri Lanka to check grave violations of human rights has been a focus of domestic and international pressure on the Sri Lankan government for decades. That pressure has sometimes led the government to appoint ad hoc commissions of inquiry to look into particularly high profile cases.<sup>15</sup> These have proved equally ineffective in combating impunity. The latest of these attempts is a Presidential Commission of Inquiry (COI) into 16 cases of "serious violations of human rights". In more than half of these cases, violations are alleged to have been committed by Sri Lankan government forces in the context of its operations against the LTTE.

Amnesty International's report, *Twenty Years of Make-Believe: Sri Lanka's Commissions of Inquiry*, documents the failure of the Sri Lankan government to investigate and prosecute grave human rights violations and provide accountability for the atrocities. Emphasizing the growing

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<sup>11</sup> *Ibid*, at 16

<sup>12</sup> Saroj Pathirana, "Lawyers put Sri Lanka in the dock" BBC online (1 July 2009) <http://news.bbc.co.uk>

<sup>13</sup> *Supra* note 1, at 42.

<sup>14</sup> "Ministry of Defence names Sunday Leader lawyers as traitors" Sunday Leader online (12 July 2009) <http://www.thesundayleader.lk>

<sup>15</sup> Amnesty International, "Twenty years of make believe: Sri Lanka's Commissions of Inquiry" (June 2009) Available online: <<http://www.amnesty.org>>, at 2.

problem of impunity in Sri Lanka, the report states that Commissions of Inquiry lack the necessary autonomy, independence and authority to prosecute the perpetrators of human rights violations in Sri Lanka over the past 20 years.

Recognizing the inherent limitations of commissions of inquiry (non-judicial, ad hoc in nature, short term, narrow in scope with Presidential appointments requiring no public consultation), Amnesty International suggests that its failure in Sri Lanka was inevitable.

The report concludes that “In Sri Lanka, Commissions of Inquiry have not performed successfully, and the formal justice system is in tatters. Serious human rights violations (including torture, arbitrary arrest and detention, and violations of the right to life) continue to be committed, and perpetrators continue to be protected from prosecution by a government that is more concerned with pleasing its narrow political constituency than in protecting the citizens’ human rights and ensuring equal access to justice.”<sup>16</sup>

The failure of the COI as a justice strategy has been demonstrated most clearly by the findings of the International Independent Group of Eminent Persons (IIGEP), a group of 11 international experts formed in February 2007 to observe the work of a Presidential Commission of Inquiry. IIGEP concluded that the government of Sri Lanka was not willing to “investigate cases with vigour, where the conduct of its own forces has been called into question.” It also noted the state’s unwillingness to uncover “the systemic failures and obstructions to justice that rendered the original investigations ineffective.”<sup>17</sup>

The IIGEP concluded that the Presidential Commission of Inquiry was not meeting international standards in five key areas, namely: (1) serious conflicts of interest that compromised the independence of the Commission (2) lack of effective victim and witness protection; (3) lack of transparency and timeliness in the proceedings; (4) lack of full co-operation by state bodies and (5) lack of financial independence

In April 2008, the IIGEP after only 13 months, was forced to terminate its mission prematurely due to lack of cooperation from the Sri Lankan government. Another significant concern of the IIGEP was the inappropriate role of the Sri Lankan Attorney General department in the Commission of Inquiry since in many of the cases the Attorney General department was a party to the initial investigation and was itself the object of investigation. There is clearly a conflict of interest – the Attorney General’s department advised the police on the original investigations into cases that are now under consideration by the Commission of Inquiry. Drawing attention to several conflicting roles, Amnesty International criticizes the Commission’s Panel of Counsel of serving as legal advisors to the government (including the President) on the work of the Commission.

“The attorney general cannot be the chief of the prosecuting branch with the responsibility to fearlessly prosecute anyone, including police and military officers accused of human rights abuses, and at the same time be the government’s spokesman denying that such abuses occur.” Basil Fernando, Director Asian Human Rights Commission.<sup>18</sup>

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<sup>16</sup> *Ibid*, at 47.

<sup>17</sup> *Ibid*, at 4.

<sup>18</sup> *Ibid*, at 41.

## **Recommendations:**

That the Government of Sri Lanka:

- Implement the 17<sup>th</sup> Amendment to the Constitution to restore independence to important public institutions such as the JSC.
- Allow independent international investigation into allegations of war crimes committed during the period of the armed conflict.
- Establish and support an adequately resourced, carefully instituted and technically well-supported witness protection system.
- Allow the Office of the UN High Commissioner for Human Rights to establish a human rights field operation mandated to monitor human rights abuses, protect civilians and perform capacity building in support of domestic institutions.

*Lawyers Rights Watch Canada (LRWC) is a committee of lawyers who promote human rights and the rule of law internationally by protecting advocacy rights. LRWC engages in research and education, campaigns for advocates in danger because of their human rights advocacy and works in cooperation with other human rights organizations. LRWC has Special Consultative status with the Economic and Social Council of the United Nations.*

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