

# **STATE AND CIVIL SOCIETY IN SRI LANKA**

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INDIA  
2000**

*Dedicated to*  
*My Grandfather and Grandmother*





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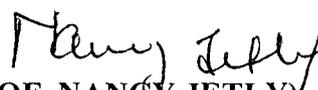
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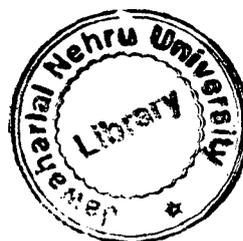
We recommend that this dissertation be place before the examiners for evaluation.

  
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## PREFACE

The term 'Civil Society' has attracted a lot of attention in the contemporary world. Its autonomous position and relationship with the state has created a lot of debate, discussion. It is found that the state and Civil Society are complementary to each other. Their unbalanced relationship invites crisis in a society. Whenever state faces any challenge, if it undermines the civil society, it creates an acute problem. It must compromise with civil society through the process of dialogue, discussion, etc. Wherever this is possible we found the crisis in the society is solved and again there is a harmonious relationship between state and Civil Society.

Whenever violence occurs in a society, the state tries to solve it by various coercive methods. This inevitably leads to violation of human rights, freedom etc.. In such a case common people become the worst sufferers. This situation demands for a strong Civil Society to protect the citizens from the atrocities of the government as well as other communities who encroach upon their rights. This is a growing concern for the whole world and especially for the third world countries. As for as Sri Lanka is concerned, the Society was more or less peaceful till the early 1980s. It was considered as a model democratic country for the third world countries. Though it had violence and peace in various phases of history, the early 1980's witnessed the beginning of a critical phase. The ethnic conflict resulting from identity assertion of groups, which reflected in their demand for autonomy and decentralization of power etc. brought about the question of relationship between the state and Civil Society.

So the present study will discuss about the relationship between state and Civil Society in the context of Sri Lanka. It will analyze what are the legal bases of Civil Society provided through various provisions in the constitution of Sri Lanka. Then it will analyze how the state in order to solve the ethnic conflict gradually hegemonized itself at the cost of civil society. Then it will discuss how the civil society through its various actors tries to gather momentum and asserts the rights of people and finally it will try to find out how a cordial relationship can be established between state and Civil Society in the present Sri Lankan context.

The main objectives of this study are:

- (1) to conceptualize the state and civil society in the Third world countries.
- (2) to analyze various causes of the ethnic conflict in Sri Lanka
- (3) to critically examine how the state marginalised the Civil Society in order to strengthen itself in times of conflict
- (4) to analyze how the Civil Society responded to state behavior.
- (5) to explore the ideal relationship between state and Civil Society in order to solve the problem in any given Society.

It's main hypothesis are:

- (1) State encroachment of the space provided for Civil Society will lead to crisis in the society
- (2) In normal as well as crisis period, Civil Society always tries to maintain it's independent and autonomous role in relation with the state.

The present Study is divided in to five Chapters. Chapter -I provides an analytical framework regarding the state and Civil Society relationship. Chapter-II is devoted to the Legal base of Civil Society in Sri Lanka. Chapter -III analyses the state response to the ethnic conflict. Chapter-IV critically analyses the response of Civil Society to the state behaviour. While summing up the discussion Chapter- V will try to find out the how a cordial relationship between state and Civil Society can be evolved.

The study has adopted analytical method based on primary and secondary source materials. Secondary source includes articles and books. The primary source is government reports and reports of fact finding teams.

## **Chapter - I**

# Chapter I

## STATE AND CIVIL SOCIETY: AN ANALYTICAL FRAMEWORK

The term 'state' has always been central to political analysis. according to Maciver, " the state has no finality, can have no perfect form".<sup>1</sup> The state is an instrument of social man, a product of social evolution. The state is a system of relationship which defines the territory and membership of a particular community, regulates its internal affairs, conducts relations with other states and provides it with identity and coherence. It consists of institutions and processes which distribute different social goods according to different principles. The state each important precisely because it is the system for determining then the boundaries and the role of all other systems of activity in a community. The state seeks its own legitimization in terms of the common interests of the community. It defines common objectives and aims. The state is thus a normative system as well as a regulating and self preserving one, setting standards of what society ought to be like. MacIver says that the state exists within society, but it is not exactly a form of society. The state regulates the outstanding external relationship of men in society.<sup>2</sup>

According to Garner " the state is a community of persons more or less numerous, permanently occupying a definite potion of territory, independent or nearly so, of external control and possessing an Organized government to which the great body of inhabitants render habitual obedience".<sup>3</sup>

### Elements of state:

There are four essential elements of a state. They are population, territory, government and sovereignty. They, in brief, constitutes the meaning of state. But it is

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<sup>1</sup> M.P. Jain, *Political Theory-Liberal and Marxiiian*, Authors Guided Pub., New Delhi, 1989, p.619.

<sup>2</sup> *Ibid.* p. 619.

<sup>3</sup> J. Garner, *Political Science and Government*, Calcutta, 1991, p.49.

important here that the state is basically an abstraction, is more than any of these characteristics. It is more than any independent government. It is not merely population or territory. It is a society or community characterised by independent government and populated territory. And, above all, international recognition must be there to accept the state.<sup>4</sup>

There is a difference between state and other association because state is a superior and distinct association. The state is distinguished from government, society, other associations, nation, etc.. This is due to the legal and poetical superiority in comparison with other social associations. So it proves that the state is something different, distinct and higher than society and other forms of social organisations.

Though the modern state emerged only in the 16th century, and machiavelli was the first thinker to use the concept in the present sense of the term, the state in the form of political order has existed from time immemorial and various thinkers, beginning from the ancient Greek philosophers, Plato and Aristotle, the medieval political thinkers and the modern political thinkers gave different opinions regarding the origin, nature and function of the state.

Early Greek thinkers like pythagoros and Democritus said that individual should subordinate him to the whole and should act at all times for the good of the state.<sup>5</sup> But sophists centered attention not on the group but upon the individual members of the group. They asserted the individuals ultimate worth and independence. They were basically individualists.

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<sup>4</sup> M.P. Jain, *Political Theory Liberal and Marxian Authors* Guild Publication ,New Delhi, 1989, p.619.

<sup>5</sup> G.H. Sabine, *A History of Political Theory*, Oxford and IBH Pub., New Delhi, 1973, pp. 35-50.

Plato and Aristotle gave an ethical notion of the state. They said that the state is the first and most important condition of virtuous life. It is the highest moral order, a supreme all-comprehensive, all-powerful and all-embracing institution. Without state, they believed, 'human being' can not be there as the state inculcates humanity in the being-man. The ethical notion of state regards state as an end in itself because self-perfection and self-fulfillment can only be achieved through state. State is the highest morality. It is necessary for intellectual, moral and material development of man.<sup>6</sup>

The legal notion of state viewed state as the highest law making power. Law has Universal character -these are applicable to both the governors and the governed. In the ancient time Roman empire emerged by merging the small city states of the Greek world and establishing unity, uniform law and order, strong administration. So this gave birth to the legal notion of the state.

In modern times the legal notion of state was primarily a negative notion of the state because laws can either be preventive or commanding. Through laws the state can ask the individuals to do or not to do something. Thus, this legal notion of the state makes it a negative or Police state whose main task is to maintain law and order. This view of state has found expression in the writings of Bodin, Hobbes, Bentham and Austin.<sup>7</sup>

With the development of democratic ideas, it was argued that people or their representatives should make laws. This gave rise to democratic laws and democratic state. The legal notion of the state gave birth to legalist democracy. The notions of sovereignty, rights, equality, liberty, etc., are associated with this.

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<sup>6</sup> M.P. Jain, *Political Theory-Liberal and Marxian Authors Guild Pub., New Delhi, 1989, p.98.*

<sup>7</sup> *Ibid.* p.98.

In the medieval period there were some people who propounded in favour of church state. But it was a very weak state as it had no sovereign power and political power was divided among feudal lords and papacy. This led to conflicts and chaos. Moreover, the state was not secular. Religion dominated all aspects of social life and hindered the development of scientific thinking.<sup>8</sup>

According to the contractualist philosopher, the state is an artificial man made institution. During 17th century the English philosopher Hobbes in his social contract theory provided a rational basis to the state and maintained that it is a man -made institution, a product of social contract among individuals. The state is necessary because human nature is such that individuals cannot live without the state or political power in the society. John Locke also supported this view, though he differed slightly from Hobbes in his analysis. Hobbes emphasized the need for an absolute power (Leviathan) because this alone could save men from anarchy and chaos. Locke supported a limited constitutional state. He gave the view that the state is an artificial creation. It is the result of a free social contract among free individuals.<sup>9</sup>

Similarly Rousseau said that the state was the result of a social contract.<sup>10</sup> He pleaded for small states. Sovereignty, according to him, resides in general will. He advocated popular sovereignty and subordinated the individual to the general will.

The individualists, supporters of negative freedom of the individuals, regarded the state as an evil because it limits the freedom of the individual<sup>11</sup> every law and action of the state limits the free choice and free action of the Individuals. Hence it is an evil. Adam Smith, Bentham, Spencer are the supporters of negative state- the state with minimum functions. According to Smith, the best state exists only when individuals are permitted to engage in unrestricted competition. However the state is regarded as necessary because without it the law and order cannot be maintained in the market society composed of selfish and egoistic individuals.

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<sup>8</sup> *Ibid.* p.102

<sup>9</sup> M.P. Jain, *Political Theory-Liberal and Marxian*, Guild Pub. New Delhi, 1989, p.102.

<sup>10</sup> A.C. Kapoor, *Principles of Political Science*, S. Chand and Company, 1990, p. 88.

<sup>11</sup> *Ibid.* p.90.

The anarchists regard the state not only an evil but also as unnecessary.<sup>12</sup> they maintain that the state is an instrument of oppression and with the more development of men and society it will become redundant. Anarchism believes in stateless society. It aims at destroying the state and placing society under control of self-governing associations. Proudhon, Bakunin, Kropotkin are supporters of this philosophy.

According to the totalitarian view, the state must have absolute powers, and individuals cannot be allowed any rights against the state.<sup>13</sup> The state cannot do wrong and it can not be opposed by any individual, group or association of the society. Though this view can be seen in the ethical notion of state, it came to prominence after emergence of fascism. Hegel, Nietzsche, Bernhardt, Treitschke, Mussolini and Hitler rendered support to this view. According to Hegel, the state and the institutions continue the temporal manifestation of the idea only when the individuals subordinate themselves to the state and its institutions, they will be free. He said that "The State is the march of god on earth". The pluralist notion of state strongly opposed the absolute sovereignty of the state and pleaded for the decentralization of political power. they regarded state as merely an association in society and in no way superior to other associates performing the most important functions.<sup>14</sup> Laski and MacIver were supporters of this view. The notion gets prominence due to supporters of pluralist sovereignty.

According to Marxism the basis of the society is the economic, sub-structure the mode of production which determines classes in society.<sup>15</sup> On this basis the cultural, moral and political super-structure of society is determined. The state is a coercive instrument belongs to one particular class of society. The class that owns the means of production also controls the state and uses it to oppress the other classes. Marx saw the state as the form, or set of institutions, by which the bourgeoisie asserts its common interests. As an "executive committee" of the economically dominant class, the state directly reflects class power.

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<sup>12</sup> M.P. Jain, *Political Theory-Liberal and Marxian*, Guild Pub. New Delhi, 1989, p.108.

<sup>13</sup> M.P. Jain, *Political Theory-Liberal and Marxian*, Guild Pub. New Delhi, 1989, p.108.

<sup>14</sup> *Ibid.*, p.109.

<sup>15</sup> *Ibid.*, p.110.

Similarly according to Weber, the state is a human community that claims the monopoly of the legitimate use of physical force within a given territory.<sup>16</sup> He regarded modern state institutions as essential for ordering complex society whatever their political ideology. He said that the growth of bureaucratic administration led to the emergence of centralized state.

Contemporary liberal notion of the state is of a welfare state.<sup>17</sup> Green, Laski, MacIver and many American writers were the main supporters. They expect much more from the state than mere law and order function. The activities of the state must be seen with reference to the whole society. The state should be understood as the whole of the political system, which is operating in society to perform certain functions. This notion of the state views it as an active system, operation in society. It includes all policies and activities concerning authority, institutions influencing authority political parties, pressure groups etc. the traditional meaning of the state regards these states as a political system having certain functions, activities and process in the whole social system. It is a political system, which performs the functions of maintaining stability and equilibrium, policy making and undertaking welfare activities of society.

### **The meaning of Civil Society and its Activities**

States are much more than governance. States invariably seek to control and limit the political practices of society by constructing the boundaries of politics. In other words it can be said that state rests on political discourse only. Politics is about dialogues, debates, discussions, contentions that society has with the state. The site at which these mediations and contentions takes place, or the area where the society enters into a relationship with the state can be defined as civil society.<sup>18</sup>

The values of civil society are those of political participation, state accountability and publicity of politics. The institution of civil society are associational and representative forums, a free press and social organisations. The inhabitants of this sphere are the citizens. The protection of the members of civil society is encapsulated in

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<sup>16</sup> M.P. Jain, *Political Theory-Liberal and Marxian*, Guild Pub. New Delhi, 1989, p.112.

<sup>17</sup> *Ibid.*, p.113

<sup>18</sup> Neera Chandoke, *State and Civil Society*, Sage, New Delhi, 1995, p. 10.

the vocabulary and institutions of rights. Civil society has been privileged by various democratic theories as a vital pre conditions for the existence of democracy.

Broadly the concept of civil society has two dimensions.<sup>19</sup> Negatively, it implies that the reach of the state should be limited, that it is prevented from controlling all social activities. Positively, it implies that, it is through which people can act as channels of popular opinion and pressure upon government. It is imperative that all associations within civil society such as political parties, economic institutions, trade unions, media, human rights groups, religious bodies etc. should be democratic in order to enable the civil society to function successfully.

Civil society is a modern concept, though it's existence can be traced back to the time when man thought to create a rational association, that is a 'state'. civil society is associated with the idea of the rational human subject, the notion of rights and the idea of an impersonal state based on the rule of law. It is a concept, that is associated with the need to limit the state power, and with the requirement that each individual has the right to participate in decisions that provide the frame of his life.

Civil society is based on the assumption that individuals have to associate in a common public sphere to remove the isolation and the individualization of modern life.<sup>20</sup> It considers a person as rational thinking individual, who is concerned about oppression and domination in the society, and who is aware that individual self interest can be realised in the common good of society. Civil society is the home of these individuals, who care about mutual respect in society. Therefore, a revitalized civil society has been considered as a necessary condition for the success of democracy.

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<sup>19</sup> N.P. Vijapur, Towards Creating a Civil Society, *The Radical Humanists*, October, 1996.

<sup>20</sup> John Keans, *Democracy and Civil Society*, Verso, London, 1988, pp.11-17.

Civil society is the arena in which modern man legitimately gratifies his self-interest and develops his individuality. But it is precisely in this sphere that the individual also learns about the value of group action, social solidarity and dependence on others, which educate him for citizenship and prepare him to participate in the activities of the state.<sup>21</sup> Thus, it can be said that civil society is the arena of atomized self interest, it is also an arena where individuals came to recognize themselves as social beings. Members of this sphere learn about civility, the importance of treating others with respect and tolerance, because individuals self- realisation is bound up with and dependent upon the self- realization of other individuals.

The concept of civil society embraces an entire range of assumptions, values and institutions such as - political, social, economic, civil rights,- human rights, fundamental rights, rule of law, an independent, impartial and autonomous judiciary, representative, institutions, a public sphere and above all a plurality of association which are necessary for its existence.

One of the essential duty of civil society is to establish a system of rights and give them a legal and constitutional status.<sup>22</sup> Rights are significant in society because they address the fundamental question of how human beings should be treated. Rights define the fundamental invariability of persons. If every individuals will be treated with dignity and on the basis of political morality and civility, then rights become weapons in the hands of individuals. so rights can be asserted against the societies. To quote Mr. Upendra Baxi “The human rights rhetoric offers powerful insurrectionary devices for marginally ameliorating the plight of the disadvantage, deprived and oppressed .. In historical time, human rights carry the promise of the right of all human beings to be human”<sup>23</sup>

Sometimes it happens that somebody or some group is excluded from civil society, either because of their social location or due to pressure and objection from some group or due to the ongoing marketisation of society etc. but this is not a healthy symbol as far as dynamic civil society is concerned. The common principles, agents, objectives must be debated, discussed among various forces, participants inside the

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<sup>21</sup> Neera Chandoke, *State and Civil Society*, sage, New Delhi-1995, pp.13-15.

<sup>22</sup> *Ibid.*, p.204.

<sup>23</sup> *Ibid.*, p.205.

civil society. So these must be based on participatory political discourse. If civil society has to be appropriated properly, it needs a principle based on equality, impartiality, all comprehensive which can include various diverse groups, organizations, individuals from various strata which can give it a coherent and thematic space.

Civil society is essentially a concept, which belongs to the tradition of political modernity founded on individualism and defence of human rights.<sup>24</sup> As a product of political modernity, the concept is based upon the analytical separation of the civil and political sphere. So it came out automatically to establish a reciprocal relationship between these spheres. It can be interpreted in other way also. The inhabitant of civil society is the socially conscious “individual”. Membership of the sphere is not based on inherited status but open to all. It is this modern usage of civil society that has created a lot of discussion in this topic.

Whatever may be the norms and conditions for the creation and function of the civil society and what ever might be it's relation with a particular state concerned, the existence of a strong civil society reflects the positive development in any state. Civil society protects the rights, freedom, privilege of the citizens and demands the space meant for the individuals to participate in the development process of the state. Different people might have various opinion regarding the nature of relationship between state and civil society, but they will agree on this point that for the smooth functioning of democratic governance system, there is need of an active and vibrant civil society.

### **The debate on the state & civil society relationship**

Whether the relationship between state and civil society is complementary or contradictory in nature till now a debatable topic. Whether civil society can exist and function properly without the active co- operation from the state or whether it can exist independently without any help from this state is the main theme of this debate. To some people civil society represents autonomous associations that exist independently for the state. These association curtails the power of the state while allowing the individuals and groups in society to manage their affairs directly. By this meaning civil society reflects another name for voluntary organisations starting from football associations to theatre groups trade unions, churches and caste Panchayat etc.. All can be included in

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<sup>24</sup>Neera Chandoke, *State and Civil Society*, sage, New Delhi-1995, p.244.

civil society. Irrespective of the goals these associations pursue, all forms of collectivities are seen as agencies of civil society. Instead of ensuring that the state provides equal rights to all citizens, its retreat from the public arena is presented as a condition necessary for strengthening reinventing democracy.<sup>25</sup>

Another school of thought believes that as civil society exists on the concept of civility which is based on the rule of law. A variety of institutions, from hospitals to schools that exist outside the state and possess a rational legal structure of organisation constitute the realm of civil society. So here the presence of an open system of stratification with a neutral stand becomes the primary attributes of civil society. Similarly, democracy challenges existing hierarchies based on status, property, birth etc. and seeks to institute a more open system based on equal rights of citizenship. Within a democracy all social and political institutions are expected to abide by this norm of openness. Assuming that civil society heralds an open and secular system there is no reason to separate civil society from state.<sup>26</sup>

In this context it is relevant to discuss the views of Locke, Hegel and Maxian Scholars on the nature of state and civil society relationship. Writing in the late 17th century, Locke made a clear distinction between state of nature and civil society. It comes into existence when men, possessing the natural right to life and liberty come together to sign a contract and constitute a common public authority.<sup>27</sup> The public authority or the supreme sovereign established through a voluntary contract. It has the right to promulgate and administer laws. According to Locke in the state of nature men have equal natural rights but there is no legal authority to punish the offenders. Since the state of nature lacks rules and institutions, it represents an uncivil condition.

According to Locke civil society is a specific kind of political society, where the rights of individuals receive primary over everything else. This principle of 'primary rights' that distinguishes civil society from other forms of political society, community and associations. As a collective body it is based on the principles of individual rights. So civil society does not stand outside the state. Rather the presence

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<sup>25</sup> G. Mahajan, *Civil Society and its Avatars*, E.P.W. May 15, 1999, p. 1188

<sup>26</sup> *Ibid.*, p.1188.

<sup>27</sup> *Ibid.*, 1190.

of civil society signifies a collective body that cherishes individuals rights and legally protects the freedom of its members. It symbolize a conditions that is necessary for the existence of a democratic state. Locke had conceived civil society as a democratic state in which the rights of individual receive priority. Writing in the 19th century, Hegel reaffirmed this idea by intriguing the liberal Lockean understanding of freedom, law and state.<sup>28</sup> Hegel maintained that civil society represents a system of relations that support and enhance freedom of all. But he disagreed with Locke. According to Hegel, Locke counterpoises individuals subjective will to universal law. For Hegel, the universe law represents 'reflective' or 'self-conscious' will.

Hegel defines civil society as a from of ethical life where the subjective and objective coexist in harmony. This recognition of rights allows for the construction of a system through which the idea of freedom is actualized in the world.<sup>29</sup> Civil society becomes in the world as recognizes the mutual rights of the self and the other. For Hegel, Civil society is a collective body, whose members are conceived as 'self-subsistent persons'.

Hegel also points out that , rights come with certain obligations for the self and the collectivity. In the case of civil society, for instance, individual members have rights of their own and at the same time they have an obligation to respect equal them to acknowledge the Jurisdiction of the courts and accept its decision. Heger elaborates the theme of rights and duties by taking the case of a corporation the spirit of civil society.<sup>30</sup> Even though members of the corporation are separate and self-subsistent persons, they have also responsibility towards the welfare of the fellow human beings. Even the wealthy have an obligation to assist the poorer members.

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<sup>28</sup> G.S. Sabine, A History of Political Theory, Oxford and IBH Pub., New Delhi, 1973, p.492.

<sup>28</sup> *Ibid.*, 492.

<sup>29</sup> *Ibid.*, p.598.

<sup>30</sup> G.S. Sabine, A History of Political Theory, Oxford and IBH Pub., New Delhi, 1973, p.600.

According to Hegel, police or public authority was an integral part of civil society and there was no question of civil society functioning without the presence and regulation of that public authority.<sup>31</sup> Hegel saw the state interference as a principle operating in civil society. Hegel feared that civil society would cease to be a collective body without the presence of public authority. It would not be able to secure the rights and welfare of its members. While it allows for the production of wealth and property, it exists to secure the freedom and welfare of all its members. Due to this reason it put some restrictions on profit making and free market. The concern of freedom and welfare also create space for the principle of redistribution to operate in society, thereby ensuring that the ideals of justice and equality permeate the life of civil society.

The writings of Hegel have a special position in the debates related to civil society not only because he elucidates the idea of civil society and its relationship with democracy. His analysis gives a systematic and coherent form to the theme that is the idea of "freedom for all" is the basis of civil society. According to Hegel civil society involved the existence of institutional arrangements that were built neither upon the principle of hierarchy nor upon a closed system of stratification. Further relationship between the state and civil society. The state apparatus, in particular, law and public authority was a part of civil society and vice-versa also. Thus, they determine each other. Civil society points to the existence of a particular kind of state and the law promulgated by the state regulates the conditions which are necessary for the proper functioning of civil society.

Marx emphasized the nexus between economic interests and political institutions focussing on the right to property provided in the civil society. He maintained that Hegel lacked the ability to express universal interests common to society as a whole.<sup>32</sup> Like the capitalist state, the voice of the ruling class prevails here. Gramsci developed this analysis further by relating the instruments of state coercion and hegemony to it. As the apparatus of state relies on coercive power to legally enforce discipline on groups, civil society organizes spontaneous consent given by the great masses of the population to the general direction imposed on social life by the dominant fundamental group:

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<sup>31</sup> *Ibid*, p.602.

<sup>32</sup> G. Mahajan, *Civil Society and its Avatar*, *E.P.W.* May 15, 1999, p.1192.

In western countries it was found that the voices of associate democracy are dissatisfied with the centralized, imposing and alienating structures of the modern bureaucratic state. So they want to organize local bodies and associations in the hope of transferring greater degree of decision making power to the citizens. Various institutions such as neighborhood councils, parent-teacher associations, church organizations were seen as ways of providing more autonomy to citizens and limiting the leviathan. As small, local communities were seen as the main units of democratic governance it is possible that state might withdraw from its present activities and will be a secondary public power.

Similarly, in the communist countries where totalitarian regimes exist, the state does not appear as the embodiment of freedom, rather it puts restrictions on the civil and political liberties of the citizens.<sup>33</sup> Under these circumstances, the state is spitted against civil society, which protects individual rights and freedom. For the people who are against the totalitarian state, civil society stands outside the state and exists, in sharp contradiction to it. The task of civil society is to transform the state completely by making it responsive to the rights of the individual. As the states are the potential and actual transgressors of individual liberty, all the components of civil society are getting unified gradually. Ultimately civil society is seen as an instrument of democratizations.

### **CIVIL SOCIETY AS AN INSTRUMENT OF HUMAN GOVERNANCE.**

In the third world countries, people express their dissent through various social movements. Popular movements are expressions of people's struggle against exploitation and oppression and for the survival of their identity.<sup>34</sup> These movements are attempts at instruments of democratic self-empowerment of the people. In the third world countries, region, locality, residence, occupation, stratification, race, colour, ethnicity etc. are elements and instruments of domination and liberation. Social movements reflect the complex economic, political, social and cultural structures and processes of these societies.

The problem that most of the developing countries are facing today is the detrimental effects of its actual exercise on civil society. That is, a state based on

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<sup>33</sup> J.A.Hall, *Civil Society, History and Comparison*, Polity Press, Cambridge, 1995, pp.6-11.

<sup>34</sup> G. Mahajan, *Identity and Rights, Liberal Democracy in India*, O.U.P., New Delhi 1998, pp. 11.24.

particularistic authority as opposed to universalistic and legalist authority, operates in a soft manner. It may command greater resources but exercises little systematic control—such a state is detrimental to civil society.<sup>35</sup> More or less this is a common problem with most developing countries. Under such circumstances, public agencies are likely to be inefficient to tackle the issues which is coming for them. So civil society has to play a crucial role in these societies as an instrument of human governance.

Some marxist scholars believe that the post-colonial bourgeois state cannot accommodate the interests of the weaker sections of society. The democratic struggle of people takes place in civil society. Gradually, it became the movement struggling to free themselves from unresponsive and tyrannical postcolonial elites.<sup>36</sup> So there are demands for decentralized responsive and participatory states. The path of development adopted in these countries has always focussed on 'market efficiency,' 'profitability,' 'development,' 'national security' etc.. This made them ir-responsive to the basic rights of common man. With its coercive apparatus, the state frequently violates and suppress the essential liberties of the people. Against such an undemocratic and elite state, civil society is placed as the arena where marginalised protest and struggle for the essential human and democratic rights.

Some other Liberal social thinkers want to empower the institutions of civil society as they offer an alternative to the bureaucratic and unresponsive state machinery. They have loss of faith on state. To quote Rajani Kothari, the state has lost its role as an agent of transformation of protector of civil society.<sup>37</sup> Infact one finds that the whole relation between the state and civil society is increasingly visited by a growing coercion of the state apparatus. So these scholars hopes on smaller village level bodies, panchayat, non- governmental agencies and assumes that these institutions of direct participation would transform the nature and scope of the state.

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<sup>35</sup> Rajni Kothari, *State Against Democracy*, Ajanta, New Delhi, 1988, pp.11.15.

<sup>36</sup> M. Mohanty, P. Mukherji and A. Tornquist (eds.) *Peoples Movements*, Sage, New Delhi, 1998, pp.6.10.

<sup>37</sup> Rajni Kothari, *State Against Democracy*, Ajanta, New Delhi, 1988, pp.25-28.

According to Mr. Rajani Kothari a highly bureaucratized state restricts and does not augment avenues of popular participation. Instead of quartering freedom, it curbs individual liberty. Against this state, civil society is presented as the arena of self - management and active participation.<sup>38</sup> Most probably Mr. Kothari has confidence on civil society because of the failure of Indian State. So the move towards civil society is primarily a negative one due to lack of faith on state. While searching for an alternative, he has seen a dichotomy between people and the state elite.<sup>39</sup>

Mr. Rajani Kothari says that civil society emerges as an alternative to the state.. Conceived in this concept, civil society is seen as composed of non- government organisations through which people participate directly and manage their own affairs. As these institutions are independent of the state and government as they exist in different political systems. Civil society does not appear in this framework to be related with democracy.<sup>40</sup> So this argument perceives that civil society was strong in pre-modern India, it was governed through traditional community institutions that allowed people to manage their own affairs with little interference from the political regime.

### **Intermediary Institutions and Civil Society**

Mostly civil society is associated with voluntary and non- government bodies, which works as arena for the people to participate in various activities of civil society. But some social scientist has made some differentiation between the diverse forms of intermediary institution existing in civil society. For example, according to Andre Bettile, every society has a number of mediating institutions that link among individuals and also between state and citizens.<sup>41</sup> A society with only citizens at one end and state at the other would not only be difficult to live in but also difficult to conceive. This is a common feature of every human society. With the invent of democracy, the nature of these organisation undergone a change. Itr becomes open and secular institutions instead of observing the principles of hierarchy. Their membership is open to all without any consideration of race, caste, religion etc.

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<sup>38</sup> Rajni Kothari, *State Against Democracy*, Ajanta, New Delhi, 1988, p.31.

<sup>39</sup> *Ibid*, p.30.

<sup>40</sup> *Ibid*, pp.28-31.

<sup>41</sup> Andre Bettile, *Universities as Institutins E.P.W.*, Vol. XXX, No. 11.

The autonomy of civil society lies in the fact that they are neither controlled by state nor by religious organisation. They have an identity of their own that is recognized publicly, and they function in accordance with institutionally prescribed rules.<sup>42</sup> In contemporary India Betille observes banks, universities, hospitals, schools, professional associations are examples of these institutions of civil society.

### **Democracy and civil society**

The very norms of civil society prescribes for democratization. Simply, the existence of civil society is not enough. It has to incorporate all the values of democracy. As the discourse of civil society is of universality and inclusiveness in character, it provides the space around which straggles to gain entry into democracy can be structured.<sup>43</sup> Civil society gives the chance of inclusion of those excluded members of the political sphere of the state by providing them the scope for participation in relation with the state. The history of social straggles in civil society is always associated with rights.

There must be some criteria for admission into the democratic discourse of civil society. If we apply the Criteria of freedom and equality to individual discourses, a basic principle for admission into democratic space is established.<sup>44</sup> The discourse which do not meet these conditions can be excluded form the democratic discourse of civil society. It indicates that democratic discourses in civil society have to battle with those practices, which obstructs the realization of democratic idea. Then freedom and equality becomes the most desired values in this criteria..

To be more dynamic and democratic, civil society should not depend on state totally. In other words state should be neutral, which restricts itself to the task of governance only and should not intervene in the politics of civil society. Civil society has to engage the state before it can proceed with other tasks. So it is argued some scholars that only a democratic state creates a civil society and only a democratic civil society can sustain a democratic state.

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<sup>42</sup> Dipankar Gupta, *Civil Society on Indian context*, Contemporary Sociology Vol. 26.

<sup>43</sup> John Keans, *Democracy and Civil Society*, Verso, London, 1988, pp. 21-25.

<sup>44</sup> *Ibid.*, pp.26.28.

Due to activities and pressures from the civil society the state is open to people's voice. It does not mean that the task of civil society is over. In spite of the state's transformation to hear the voices of civil society, civil society has to keep constant vigilance over the state.<sup>45</sup> Political engagement never comes to end even after the process of expanding the sphere of the state in matters of rights and citizenship are completed. It is a continuing process. But political engagements are also related to economic power. When one thinks of freedom, one thinks of the freedom to command one's life, labour etc. This is absolutely necessary for a democratic society based on equality and respect for all its members.<sup>46</sup> In other words, freedom is about creating the socio-economic conditions of effective civil and political participation. This is needed for an effective civil society.

### **Social movement and civil society**

It is seen that inside civil society, in the discourse of rights, numerous social movements are occurring today. These movements have changed the meaning of governance system. Especially the marginalized sections of society like tribal, poor people, economically and socially backward communities, urban poor etc. are sidelined from the mainstream activities of the state. Their demands for rights expanded the civil society.<sup>47</sup> So the demands for these rights today explain the insufficiency of the existing civil sphere.

The appropriation of civil society and social movements will remain incomplete, unless civil society tries to transform the whole discourse of civil society without the help of the state. The practices inside civil society provide possibilities for reappropriation by popular movements because they provide the scope for engagement at the non-official political level. So the activities of civil society not only challenge the state but also the dominant classes inside civil society.<sup>48</sup> States and dominant classes do not voluntarily donate freedom of political initiative to the public sphere. The members of civil society have to demand and secure this freedom by themselves through political engagement, dialogues, debates etc.

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<sup>45</sup> Momon A. And S. Roy, *Civil Society in Bangladesh*, Calcutta University, Calcutta 1995, pp.277-285.

<sup>46</sup> Staffen Liadberg, Farmers Agitation Civil Society, *Sociology Bulletin*, March-Sept., 1992.

<sup>47</sup> M. Mohanty, P. Mukherjee and O. Taraquist, *People Movements*, Saga, New Delhi-1988, pp.21-23.

<sup>48</sup> Lifykhar Mallik, The State and Civil Society in Pakistan, *Asian Survey*, July 1995.

For the re-appropriation of civil society, there is need for an organized principle which will regulate them. The notion of an organized principle gives the idea that diverse and localized social movement in civil society must come together in a shared project of democratic concerns.<sup>49</sup> It emphasizes the need for a collective formula which can cover various social movements highlighting different dimensions of human experience and also create common area of concern and action. Each movement occupies it's own space it can fight independently the core issue of social movements.

Ultimately, it can be said that the relationship between state and civil society is of a mutual nature. This mutuality is manifested in autonomy from the state. Yet this autonomy is often relative. In order to influence public policy, civil organizations need to relate to the state.<sup>50</sup> The state on it's part, needs civil society in order to achieve its objectives. The model of development state, which says that progress can only be achieved through civil society, is an obstacle to the state directed developmental and modernization process<sup>51</sup>. So the existing associations of any kind, therefore, either be pacified or dismantled outright. The real scenario of the contemporary world proves that the state should not treat the organs of civil society as hostile phenomena. Public agencies should cooperate with such organs to establish a partnership with civil society. In this situation, the joint efforts of the state and civil society may offer the most efficient way of carrying out developmental process.<sup>51</sup>

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<sup>49</sup> A. Heans, Making Civil Society Work, Promoting Democratic Development, *World Development Report*, July-Dec., 1996.

<sup>50</sup> H.S. Macussin, N.G.O.s., State and Civil Society, *Review of African Political Economy*, Vol. 23, 1996.

<sup>51</sup> G. Mahajan, Civil Society and its Avatars, *E.P.W.* May15, 1999, p.1191.

Simultaneously, the state has the ability to strengthen civil society. It is found that only the state can provide the requisite conditions necessary for the use of common property resources. Thus, a favorable institutional framework generally supports the formation of an active, democratically operating civil society.<sup>52</sup> Due to this civil society itself facilitates the transition from a patrimonial to legal- rational regime. Democratically organized civil society promotes accountability and transparency. The organizations of civil society can serve as a check and balance to the state power. An active and unified civil society can be expected to exert pressure for more universalized and legalist state practices.

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<sup>52</sup> Neera Chandoke, *State and Civil Society*, Sage, New Delhi, 1995, pp.250-255.

## **Chapter - II**

## CHAPTER II

### LEGAL BASES OF THE CIVIL SOCIETY IN SRI LANKA

Civil society is as much important as other elements of the state for its existence, like – population, territory, sovereignty and government. The governance system of a state can be better understood by watching the activities of civil society. The proper balance between the three organs of a state-executive, Legislature and Judiciary is needed for smooth functioning of administration. But, here, the most important is the activity of civil society, which puts a watch on the activities of these organizations. If civil society is strong enough in its activities that signifies the good governance system of a particular state, every state must give some amount of autonomy to civil society by various Constitutional provisions. Not only each state but also the United Nations has strongly recommended in favour of a creation of strong civil society for the betterment of the whole human society. In most third world countries civil society exists on tradition, culture, religion, customary norms along with the Constitutional provisions. But after independence these countries have tried to give a definite shape to civil society by various sanctions, provisions etc. through Constitution.

As far as Sri Lanka is concerned, the Constitutions of 1947, 1972, 1978 and post-78 Constitutional amendments have given some provisions for the existence of a civil society. Soon after independence as a model democratic country of the third-world, Sri Lanka was in an advantageous position. With the Provisions for fundamental rights, Civil and political rights, independence of Judiciary, freedom of speech and expression, freedom of media, freedom to form various association, the people enjoyed some chance to interact with government and the various institutions representing government at various stages. In that way civil society was becoming more and more active gradually. But the ongoing ethnic conflict and some Constitutional amendments made by successive governments to control the ethnic conflict in various time has resulted in the erosion of autonomy of civil society. This chapter will deal with the legal base of civil society in Sri Lanka, provided through provisions like fundamental rights, civil rights, freedom of speech and expression, freedom of press, which actually provide the space to the citizens to participate in the activities of civil society.

## PROVISIONS OF FUNDAMENTAL RIGHTS:

Fundamental human rights mean “the equal and inalienable rights of all members of the human society. These rights belong to each and every person, by virtue of his inherent dignity and worth as a member of the human family. The preamble of the Universal Declaration of Human Rights states:<sup>1</sup> “Recognition of such dignity and human rights is the foundation of freedom, Justice, peace in the world. It is essential, if man is not to be compelled to have recourse as a last resort, to rebellion against tyranny and oppression that human rights should be protected by the rule of law.”

So, often it is said that fundamental right analysis is the “cutting edge of any form of political analysis: It is after all the indicator of how a society deals with the exception – those who are dissenters and the political and no-economically marginalised. Not only it is a source of legal analysis but also an indicator of the democratic space that is available within a given society.

So far as the protection of Fundamental Rights in Sri Lanka is concerned, for over two thousand years of the Island’s long history the court of Law has occupied a unique place in the system of governance. A hierarchical system of judiciary was one of its dominant feature. It continued till the British occupation of Kandy in 1850. The present system of court which was established since British occupation has also played a dynamic role as the fearless upholders of the principle of the equal Justice under the Rule of Law .<sup>2</sup> Under the doctrine of Rule of Law, which prevails in Sri Lanka, a person’s fundamental rights, such as more of personal freedom, freedom of speech and expression., freedom of peaceful assembly and association cannot be infringed without legal justification. He may always seek remedy according to the law of the land. In accordance with the doctrine of rule of law, the courts interpret strictly any statute which purports to interfere with the freedom of the citizen.<sup>3</sup>

<sup>1</sup> Veena Pani Panday, *International Perspectives On Human Rights*, Mohit Pub., New Delhi, 1999, P.28.

<sup>2</sup> Radhika coomaraswamy , *Analysis of Anglo-American Constitutional Tradition in a Developing society*, Vikas Pub., New Delhi, 1985, pp. 10-21.  
tution of Sri Lanka, 1978, published by Govt. of Sri Lanka.



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The 1947 Constitution of Ceylon did not contain a Bill of Rights. The section 29 which sought to provide safeguards for minorities against any discriminatory legislation proved to be ineffective. The Constitutions of 1972 and 1978 spelt out fundamental rights. But a serious drawback is that legislation could be challenged as unconstitutional only at the pre-enactment stage. The 1978 Constitution contains certain “entrenched” clauses. Their amendments require the approval of the people at a referendum.

In fact a Constitution may permit the restriction of certain fundamental rights in order to maintain a balance between the individual right and the interest of the society. The 1978 Constitution does not use the word “reasonable” although the supreme court interpreted the word “reasonable”.

### **EQUALITY BEFORE LAW:**

The Sri Lankan Constitution declares that people are equal before the law and are entitled to equal protection of the law. These are two aspects of the some principles of equal justice.<sup>4</sup> Equality before the law is the negative aspect and guarantees equal subjection of all classes to the law. Equal protection of the law is the positive aspect and means that persons similarly situated should receive similar treatment of law. By providing the provision of Fundamental Rights and equality before Law, the Sri Lankan Constitution has created a society in which legally each and everybody is equal as far as the state is concerned and their rights can not be taken away without reasonable reason. So ultimately this has given some space to the citizens to be a member of civil society on an equal basis.

### **RIGHT TO LIFE, LIBERTY AND SECURITY OF PERSON :**

The Constitution declares that no person shall be deprived of life, liberty or security except in accordance with the law 18 (A) (C). Deprivation of ‘life’ does not refer only to death. The prohibition against its deprivation “extends to all those limbs and faculties by which life is enjoyed”. Life also includes livelihood. Liberty of the

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4 N. M Parera , *Critical Analysis of the new Constitution of Sri Lanka*, Star press, Colombo , 1979, PP.11-15.

person means freedom from subjection to imprisonment, arrest or other physical coercion, or any other compulsion on the dignity of a person<sup>5</sup>

The objective of this provision of the Constitution is to protect the individual from arbitrary execution, arrest or detention. Section 18 (1) (C) of the Constitution expressly provides that no citizen shall be arrested, held in custody, imprisoned or detained except in accordance with the law. If the executive curtails his rights he may move to the highest court of original jurisdiction for their enforcement through various writs<sup>6</sup>

## **DEPRIVATION OF LIBERTY IN ACCORDANCE WITH LAW :**

a) Detention Under the public security ordinance :

The public security ordinance provides for the enactment of emergency regulations in the interest of public security, the preservation of public order, the suppression of mutiny, riot or Civil commotion or for the maintenance of supplies and services essential to the life of the community. In this act there are some provisions which provide for the detention of persons during the period when the proclamation of emergency is in force.

b) Arrest with warrant :

Under the provision of the criminal procedure code, the police can arrest a person and if so required show him the warrant or a copy of it signed by the person issuing it. The person arrested must be brought without unnecessary delay before the court before which such person is required by law to be produced.

c) Arrest without warrant :

Under section 23 of the criminal procedure code, any police officer can arrest a person without an order from a magistrate or without a warrant. As far as remedy is concerned, the writ of Habeas Corpus to it is very important. Almost from the inception of the supreme court, it has been regarded as the most important safeguard of personal freedom. The writ, available against any person detaining another

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5. J.A.L. Cooray, *Constitutional and Administrative Law of Sri Lanka*, Hansa Pub., Colombo, 1973, PP.518 – 520.

without legal justification, is used to secure the detainee's release from unlawful confinement<sup>7</sup>. By this provision the Constitution guarantees the freedom of life, liberty and security of a person, which is an essential feature of a civil society. Unless the citizens are secure regarding their freedom, how can they participate actively in civil society.

### **FREEDOM OF THOUGHT, CONSCIENCE AND RELIGION**

Under the Constitution 18 (1) (d), every citizen has the right to freedom of thought, conscience and religion. This right includes the freedom to have or to adopt a religion on behalf of his choice and the freedom either individually, or in community with others and in public or private to manifest his religion or belief in worship, practice etc.. The degree of religious freedom which exists in a society depends on the degree of its permissible manifestation in that society<sup>8</sup>

As civil society is also based on religion, tradition, custom, etc., it is essential for individuals to enjoy religious freedom. Though Sri Lankan Constitution accepts Buddhism as state religion, it has provided the freedom to people to propagate any religion, they like. So it has enhanced the freedom of individual to be active in civil society.

### **FREEDOM OF SPEECH AND EXPRESSION**

According to the Constitution of Sri Lanka every citizen has the right to freedom of speech and expression, including publication. One of the most precious freedom of the citizen is the right to express and propagate freely his ideas and opinions. Democratic government itself is based on freedom of discussion and the free exchange of ideas. Contending parties try their best to accept the reason. The appeal to reason which is the basis of democracy cannot be made without freedom of speech

The exercise of such freedom lies at the foundation of free government of a free people and the purpose of such a guarantee is to prevent public authorities from

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6. Ibid. P. 518-520.

7 K.M. deSilva, *Sri Lanka problems of Governance*, Konark, New Delhi, 1993, P.149.

8 Brain Seneworatne *Human Rights Violation in Sri Lanka*, Brisbane, Australia, 1986, P. 40.

assuming a guardianship of the public mind through the press, speech and religion.<sup>9</sup> Basically, this freedom rests upon the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.

Peaceful demonstration and peaceful persuasion may be regarded as manifestations of freedom of speech and expression as long as they are not “set in a background of violence” and are not against the interests of public order or the interests specified in section 18(2) of the Constitution.<sup>10</sup>

### **Legal Restrictions :**

Freedom of speech and expression, like the other fundamental rights is also subject to such restrictions as the law prescribes in the interests of the various matters specified in section 18 (2) of the Constitution. This freedom, which has existed under the common law, has been controlled by the ordinary law of the land, particularly the law relating to such matters as sedition, defamation, obscenity, contempt of court and offences against the official secrets act.

Similarly the penal code prohibits the signing, recitation or utterance of obscene songs ballads or words in a near public place. It is also an offence to disturb a religious assembly or make any utterance or sound with the deliberate intention of hurting the religious feelings of any person.<sup>11</sup> Under the official secrets act, it is an offence for any person entrusted with any official secret or secret document to communicate it to an unauthorized person. By providing the freedom of speech and expression, the Sri Lankan Constitution acknowledges that this is very much important for the activities of civil society. If one does not have the freedom of speech, how can he propagate new ideas, philosophy and views. With the help of this provision one can even criticize the government on any mistake committed by the state.

### **FREEDOM OF PRESS :**

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9 Sita Bhatia, *Freedom of press*, Vikash Pub., New Delhi, 1998, P. 21.

10 The Constitution of Sri Lanka, 1978, Pub. By Govt. of Sri Lanka.

11 J.A.L. Cooray, *Constitutional and Administrative Law of Sri Lanka*, Hansa Publishers, Colombo, 1973, P.531.

The Constitution 18(1) (9) states that the right to freedom of speech and expression includes publication. According to Article 19 of the International Covenant on Civil and Political Rights, the right to freedom of expression includes “freedom to seek, receive and impart information and ideas of all kinds”.<sup>12</sup> So it clearly indicates the freedom of press. The freedom of press means that as in the case of any citizen, it may publish without obtaining any preview license, anything it pleases so long as there is no infringement of the law.

The press must be free to publish fully and fearlessly and without restraint all facts and opinions concerning public matters so long as it is not against the public interest. Without such information the sovereign people cannot properly exercise the powers vested in them. The freedom of the press means the safeguards provided by law to secure the enormous power and authority of the press to use for the furtherance and not for the suppression of the individual and collective freedom. Every free man has the right to say what sentiment he pleases, before the public. To forbid this, is to destroy the freedom of the press. But if it publishes what is improper, mischievous or illegal, it must take the consequences of his own fault.

### **PRESS COUNCIL LAW**

The Sri Lankan press council law provides for the appointment of a Sri Lanka Press Council to request and 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 other related matters. On receipt of a complaint or otherwise, the council investigates the matter. It sees whether the published statement, picture or other matter distorts the fact. If so, the editor or journalist has committed a professional misconduct or breach of code of ethics of Journalism.<sup>13</sup> The council may hold an inquiry in the prescribed manner and if the council is satisfied after giving the newspaper, publisher, editor or journalist concerned an opportunity of being heard, it is necessary to do. It may give instructions to follow certain norms or can punish him.

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12 Veena Pani Panday, *International Perspectives On Human Rights*, Mohit Pub., New Delhi, 1999, P.26

13 K.M. deSilva, Sri Lanka: *The Problems of Governance*, Konark, New Delhi, 1993, P. 166.

By providing the freedom of speech and expression including the freedom of press, the Sri Lankan Constitution provides ample freedom to the common citizens to take part actively in various activities of civil society. A democratic political society or government founded on the consent of the people and the contribution of their ideas to public questions can rest only on free debate, and free exchange of ideas amongst the people. Truth can emerge only through the unhampered interplay of competing ideas. Here the press has a vital role to play. There cannot be any collective decisions, after mature deliberation upon any issue, unless there is an opportunity for free exchange of views among participants. On the one hand, the widest dissemination of information from diverse sources is necessary for public education, which is the foundation of a civil society.<sup>14</sup> On the other hand, a free discussion and criticism shows that the government remains responsible to the will of the people. Errors of government can be peacefully corrected and eliminated. Therefore, it is the free press, which performs this important task.

Freedom of the press, in short, forecloses the state from assuming a guardianship of the public mind. Authority is to be controlled by public opinion, not public opinion by authority. Even though as citizens they must abide by orders of public officers, laws passed by legislators, they must at the same time, remain free to criticize the competence of the orders made by public officers, the policies involved in legislative measures and the merits of Judicial decisions if they are to govern themselves.<sup>15</sup> The basic principle of democracy being that in government the deliberative forces shall prevail over the arbitrary decision making, Public decision becomes a political duty and the greatest means to freedom is an interest in people. Against it is one of the important function of the press is to expose the abuse and corruption of public officials". So it is often said that eternal vigilance is the price of liberty.

In a civil society, the rights of the press have to be harmonized with its duties and responsibilities towards society. For such harmonization, certain restrictions or regulations are necessary. What is objectionable is not restrictions or

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14 Sita Bhatia, *Freedom of Press*, Vikas Pub., New Delhi 1998P-10

regulations as such but the imposition of “arbitrary restrictions” which would make the freedom a mockery.<sup>16</sup>

## **FREEDOM OF ASSEMBLY AND ASSOCIATION**

Section 18 (1) (f) of the Constitution of Sri Lanka mentions that all citizens have the right to freedom of peaceful assembly and of association. This right includes the right to form and to join political party, trade unions and other organizations for the protection of their interests. The right to form an association includes the right to continuance of the association. As without freedom of speech there cannot exist the fundamental liberty of free elections where people make a choice of common policies that have been formulated by political parties and placed before them. From this point of view freedom of peaceful assembly and association, which includes the right of public meeting, is of even greater importance in Sri Lanka than other democratic countries where the mass media or the system of communication are more developed.

Further, as it has been observed the very idea of government which is republican in nature, implies a right on the part of the citizens to meet peacefully for consultation in respect of public affairs and to petition for a redress of grievances.<sup>17</sup> The right of assembly and association has been considered fundamental from these points of view. So it has been inserted in the Constitution in such a manner that it can't be changed by an ordinary majority as the case of other rights. But there is some legal restriction also.<sup>18</sup> Unlawful entry upon private land will constitute a breach of the law of trespass. By meeting in a public thoroughfare, a nuisance may be committed. Similarly, unlawful assembly can be banned also. An assembly of five or more persons is unlawful if the common object of the persons composing the assembly try to resist the execution of any law or any legal process. Similarly, the government has power to control meetings and processions. The police ordinance provides that no procession can be taken out or held in any public place without prior confirmation.

## **TRADE UNIONS**

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16 Sita Bhatia *Freedom of press*, Vikas Pub., New Delhi, 1998, PP.55 – 60

17 J.A.L.Cooray, *Constitutional and Administrative Law of Sri Lanka*, Hansa Pub. ,Colombo, 1997 PP.535-541.

18 Ibid, PP. 535-541.

So far as combinations of persons are concerned, trade unions have been given special provision in the law. The trade union ordinance, No-14 of 1935, provides that no legal proceedings can be taken against a registered Trade Union in civil courts on trade related issues on the ground that such act may induce some other person to break a contract of employment or trade. The objective of a registered trade union is that they are in restraint of trade, deemed to be unlawful so as to render any member of the trade union liable to criminal prosecution for conspiracy or otherwise or to render void or violable any agreement or trust<sup>19</sup> A registered trade union may sue and be sued and can be prosecuted also.

The freedom of assembly and association is very much needed for active participation in a civil society. Without this freedom, how can a citizen discuss economic or political issues, policies of the government etc. Again freedom of occupation and formation of Trade Unions is also needed because every human being will pursue the occupation according to his inner potential capacity. By recognizing this, Constitution of Sri Lanka gives some autonomy to civil society.

#### **FREEDOM OF MOVEMENT AND RESIDENCE**

Under the Constitution, every citizen has the right to freedom of movement and choose his residence within Sri Lanka (18-(1) (I) ). The object of the Constitution in providing this right is to protect not the general right of free movement which emanates from the freedom of the person, but an independent and additional right. That is the special right of a citizen to move freely throughout and reside anywhere within the territory of Sri Lanka.

This is meant to protect the citizens against provincialism and from unfair discrimination in the matter of free movement and residence of citizens. It is necessary also to participate in civil society as any citizen can go to any place within the territory of the country, according to his need.

#### **RESTRICTIONS ON FUNDAMENTAL RIGHTS AND FREEDOMS**

In any society enjoyment of Fundamental Rights and Freedom cannot be absolute and unlimited. There must be some restrictions to it. While enjoying

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<sup>19</sup> Brian Senawortne , *Human Rights violation in Sri Lanka* Brisbane, Australia, 1986, P. 58.

one's right he must not forget to give the chance to others to enjoy their rights. So to check the unlimited enjoyment of rights of somebody, some legal restrictions are needed. In that case, while the state gives the opportunity to every body to enjoy their fundamental rights, simultaneously the state can put some restrictions for the sake of national interests, development of weaker sections, down trodden etc.<sup>20</sup> As the law prescribes in the interest of national unity and integrity, national security, national economy, public order, protection of the rights and freedoms of others or in giving effect to the principles of state policy, it can put some restrictions on Fundamental Rights, under section 16.

In any case, the restrictions prescribed by law must not be arbitrary. They must be reasonable or objectively seen by the average prudent man to be in the interests of one or more matters specified in section 18 (2) of the Constitution. In other words, the restrictions must be related to the circumstances of each case. It should have a reasonable and substantial relation to any of the interests enumerated in the Constitution and which are sought to be protected.<sup>21</sup> The bill may not, under the guise of protecting the public interest arbitrarily or unnecessarily, put restrictions on the fundamental rights and freedoms of the individual. It is also mentioned that in the application of the test of reasonableness, "the nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, should all enter into the judicial verdict."<sup>22</sup>

## **DIRECTIVE PRINCIPLES OF STATE POLICY**

The Constitution of Sri Lanka framed out certain principles of state policy in the manner of the Irish-Indian and other Constitutions. These principles have been set for the guidance in the making of laws and the governance of Sri Lanka. The actual extent of the guidance at any particular time will naturally depend to a large extent on the political, social and cultural values prevailing among various social groups forming the nation. Principles of state policy must be followed as a

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20A. J. Wickramaratne, *Fundamental Rights in Sri Lanka*, Navrang, New Delhi, 1996, PP.480-489.

21 Ibid P.482.

21 A. J. Wickramaratne, *Fundamental Rights in Sri Lanka*, Navrang, New Delhi, 1996, P.482

22 K.M. deSilva, *Sri Lanka : Problems of Governance*, Konark, New Delhi, 1993, PP149-152

complimentary part of fundamental rights. By providing the restrictions on fundamental rights, the Sri Lankan Constitution puts some restriction on the utilization of the rights, freedom, independence given to the citizens. There is every possibility in each society that these provisions can also be misutilised. This is necessary, because uncontrollable freedom may create chaos in a civil society. But it is important here is that the restrictions must be reasonable and legally accepted.

## **INDEPENDENCE OF JUDICIARY**

For smooth running of administration in any country, the three organs of government must check each other. Legislature makes laws, executive implements them, where as Judiciary watches them. So whatever rights were provided in the Constitution, judiciary interferes in matters where rights of common citizens were encroached by government or somebody else. So the realization of the rights and freedom of all citizens in a country largely depends on the degree of realization of the principle of equal justice under the rule of law. This principle clearly demands that the persons administering Justice should be free to carry out their functions without fear or favour. So it is expected

that for free and fair play of Justice, it is essential in all courts that the judges who are appointed to administer the law should be permitted to administer it under the protection of the law independently, freely, without favour and fear<sup>23</sup>One of the chief means by which judicial independence is secured in Sri Lanka is the tenure of office and manner of removal of judges as provided in the Constitution. The judges of the court of appeal, of the supreme court or the courts that may be created by the National state Assembly, hold office during their good behaviour. They cannot be removed except by the president upon on address of the National State Assembly.<sup>24</sup> Section 131 of the Sri Lankan Constitution deals with the independence of Judiciary. This section states:

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23 J.A.L. Cooray , *Constitutional and Administrative Law of Sri Lanka* , Hansa Pub., Colombo, 1973 , PP.473-479.

24 The Constitution of Sri Lanka – 1978, Published by Govt. of Sri Lanka.

- (a) Every Judge, state officer or other person entrusted by law with judicial power or functions shall exercise such judicial powers and functions without being subject to any direction or other interference proceeding from any other person, except a superior court or institution entitled under law to direct or supervise such judge, state officer or person in the exercise or performance of such judicial powers and functions.
- (b) Every person who without legal authority therefore, interfere or attempts to interfere with the exercise or performance of the Judicial power or functions of any judge, state officer or person referred to above shall punishable by court.

Another provision which exists to secure the independence of the judiciary is the rule embodied in the standing orders of the National State Assembly. It maintains that the conduct of the judges and other persons engaged in the administration of Justice cannot be raised except on a substantive motion. Questions reflecting on the character or conduct of these persons can't be asked in the National State Assembly.

The courts must necessarily occupy a high position of power, prestige and importance in the life of a nation.<sup>25</sup> But the Judiciary is only one of the three ranches of Sri Lanka's democratic system of government. The courts cannot of course, remedy every kind of injustice or abuse in the complex governmental process.

As a matter of fact, in the mixed and changing society of Sri Lanka, the courts have quite justly come to be regarded as a symbol of the reconciliation between the expanding powers of government and the fundamental rights of the citizens under the law and the Constitution. Within the limits of their power and jurisdiction the court are performing dynamic role as the fearless upholders of the principle of equal justice under the Rule of law<sup>26</sup>.

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25 J.A.L. Cooray, *Constitutional and Administrative Law of Sri Lanka*, Hansa Pub., Colombo, 1973, P.492.

26 Radhika Coomaraswamy *The crisis of Anglo- American Constitutions in a developing society*, Vikas Pub., New Delhi, 1984,PP. 70-75.

The independence and impartiality of Judiciary is essential for the existence of a democratic system under the Rule of Law.<sup>27</sup> It is also an accepted fact that the success of parliamentary democracy is dependent to a large extent on the right to create public opinion. This right cannot exist in any appreciable measure without freedom of meeting and of discussion. The guarantee of these and other similar rights of the citizen depends on the effectiveness of government. The extent to which these rights are safe at any time against executive encroachment and abuse rests on the proper administration of justice by an independent judiciary. The maintenance of the independence of judiciary depends more on the Judges themselves and the state of public opinion in the country which needs their independence, impartiality and autonomy.

So independence of Judiciary is essential for an active and strong civil society. When the rights of the common citizens will be infringed either by government or somebody else it is the judiciary which will protect them. With the help of judiciary, people can raise their voice against any unlawful act of government. So this is necessary for the citizens to participate in dialogue, debate inside the civil society and when it is curtailed, judiciary can help them.

## **THE PREVENTION OF TERRORISM ACT**

The full title of this statute is the prevention of terrorism Act, No. 48 of 1979. It's main provisions fall into two categories :

- 1) It defines certain offences, and provides for their trial and penalties
- 2) It confers certain powers on the executive.

Many of the offences created by the PTA would already have been offences under the ordinary law- causing death, kidnapping, abduction, robbery, intimidation, offence relating to fire arms, explosives etc. Some less serious things like writing of

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<sup>27</sup> D.D. Basu: *An Introduction to the Constitution of India*, Prentice hall, New Delhi ,1993, PP. 265–266.

words which can create religious and communal disharmony, hostility between different communities and so also mischief related to public property etc. comes under its jurisdiction. For all offences under this act, it imposes a penalty of life imprisonment for the most serious ones, and imprisonment for not less than 5 years and not more than 20 years for the rest.

All offences under the Act may be tried without the preliminary inquiry. Any oral or written statement made by the police officer are admissible even if it is made in custody. The presence of magistrate is not necessary. Any document found in the custody, contract or possession of anyone accused of an offence under the act or of his agent or representative can be used against him in the trial.<sup>28</sup>

Anyone connected or concerned with or reasonably suspected of being connected with or concerned in any lawful activity, whom it may be convenient henceforth to call “a PTA suspect”, becomes a subject, without the need for anyone to be satisfied that he is a danger to the public safety.<sup>29</sup> Section 26 of this act says, “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”.

### **EMERGENCY REGULATIONS:**

Emergency rule in Sri Lanka is carried on by Emergency (Miscellaneous provisions and powers) Regulations made under the public security ordinance which dates back to British colonial period. Whenever that ordinance is activated by an official proclamation, the parliament must approve from time to time in accordance with Article 155 of the Constitution.

It is important that the changes made by the Regulation 15 A on 3<sup>rd</sup> June 1983 came under fierce attack from different sections of the civil society. It provides as follows: “It shall be lawful for any police officers of a rank not below that of assistant superintendent or any other officer authorized by him in that belief to take

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28 Paul schighart, *Sri Lanka – A mounting Tragedy of Errors*, International Committee for Jurists, Australia, 1984, PP. 29-35.

29 S.S. Mishra, *Ethnic Conflict and Security Crisis in Sri Lanka*, Kalinga Pub., New Delhi, 1995, PP. 68-75.

with the approval of the secretary to the ministry of Defense all such measures as may be necessary for the taking possession and burial or cremation of any dead body and to determine in his discretion the persons who may be permitted to be present at any assembly without the permission of such officer or authorized person or who obstructs such officer or authorized person in the exercise of the powers here in before conferred shall be guilty of an offence.”<sup>30</sup>

Sri Lanka is a signatory of International Covenant on civil and political rights since 1980 but the provisions in PTA (Terrorist Act) and Emergency legislation has made it contradictory to that declaration. According to the covenant, it has to respect and ensure for all its inhabitants all the rights and freedom as discussed one by one in this chapter. The Emergency regulation made situation worst as far as these rights are concerned. Whether such derogation are legitimate or not only can be determined by the provisions of Article 4 (1) of the covenant.

So in order to justify derogation under that article, there must be an emergency and it must be officially proclaimed. In addition, the measures taken must be

“strictly proportionate” to the threat presented.<sup>31</sup> In fact these conditions were satisfied when there was communal violence in 1979, 1981 and 1983. In that situation the government is bound to proclaim an emergency to bring back peace. It is necessary to stop violence and restore normal life in the concerned society.

The Sri Lankan authorities have consistently taken the view that the level of violence perpetrated by the Tamil militant groups inevitably leads to a critical situation which demands proclamation of emergency. If the Sri Lankan government is actually concerned for the life of common citizens, peace, Justice, prosperity, then it is good but the question is why such a miscalculation. While everybody has sympathy for the common citizens, does the government really needs the emergency regulation to protect and safeguard the life and rights of common people. It only can be declared according to the International Covenant of Human Rights; “in an exceptional situation of crisis or emergency which affects the whole population and

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30 Brian Seneworathne, *Human Rights violation in Sri Lanka*, Brisbane, Australia, 1986, P. 87.

31 Paul sieghart, *Sri Lanka – A Mounting Tragedy of Errors*, International committee for Jurists, Australia, 1984, PP. 47-48.

constitutes a threat to the organized life of the community of which the state is composed.”<sup>32</sup> Even if it falls within that definition the provision of PTA and emergency regulation 15A are anything other than grossly disproportionate to the threat presented and more than the exigencies of the situation.

These provisions, to a large extent, curtailed the freedom of common citizens which has squeezed the arena of civil society. These provisions clearly indicates that, it can be misused also.

## **ANALYSIS OF PROVISIONS OF VARIOUS CONSTITUTIONS**

If we make a comparison between the three Constitutions adopted in Sri Lanka so far, we will get a clear picture how the Constitution is frequently changed in order to strengthen the government or the political party in power, rather than the civil society. The makers of the Constitution of 1947 felt that westminister model was appropriate for Sri Lanka. They followed majoritarian democracy and the supremacy of parliament within a unitary state. They did not institute any scheme for sharing of power between the majority and minority because the minority group was capable enough to bargain with the majority.<sup>33</sup> In fact, it was proved wrong. With the disenfranchisement of the Indian Tamils, a political party catering to only to the Sinhalese could easily capture 2/3 majority in Parliament.

The 1972 Constitution was in many ways a culmination of the Westminister system of democracy .<sup>34</sup> The National Assembly or parliament was the supreme body with absolute powers. The tyranny of the assembly was to become a real possibility. In actual operation, the 1972 Constitution made the politician the central figure of the body politic. Again, Buddhism was given the status of ‘National Religion “ and Sinhala as the “Official Language” though Sri Lanka is multi-religious and multi-lingual society. The Constitution provided no accountability for promulgation of emergency.

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32 N. M. Parera ,*Critical Analysis of the New Constitution of Sri Lanka*, Star Press, Colombo, 1979, P.15-35.

33 Radhika Coomaraswamy, " The Constitution and Constitutional Reform" in K.M. deSilva (Ed.), *Sri Lanka – Problems of Governance*, Konark Pub., New Delhi, 1993, P. 128.

34.Ibid, P. 128.

Under the 1978 Constitution the liberal concept of check and balances reappeared. It strengthened judiciary. Supreme court was left with exclusive Jurisdiction on Constitutional matter. An independent Judicial service commission was established to give Judicial autonomy and independence. For the first time in Sri Lanka, the Constitution adopted Judicial Review for executive action.<sup>35</sup> The Bill of Rights under the 1978 Constitution was far stronger than that available under the Republican regime. Freedom from torture and freedom of belief were made absolute. The rights and restrictions were clearly enumerated and there was a general restriction on fundamental right based on 'general welfare' of society. But, in reality, the Bill of Rights was limited in its scope and application. These provisions only protected the rights of criminal defendants as provided "by law". This allowed for the enactment of prevention of Terrorism Act.

#### **CONSTITUTIONAL AMENDMENT IN THE POST 1980**

Several Constitutional amendments took place in late 1980s which had fundamentally altered structure and nature of the Constitution of 1972. For the first time, the principles of pluralism and devolution were recognized. These were made by thirteenth amendment which introduced devolution and sixteenth amendment which made Tamil also an official language. The net effect of these was to impose pluralism on the policy, thus ensuring that the amendments were there to stay, perhaps with some measures of refinements through political bargaining.<sup>36</sup> The amendments with regard to devolution fundamentally changed the structure of local government. After 1983, with the outbreak of ethnic conflict and a civil war in the north, the changes in the Constitution became substantive in character. The sixth amendment banned separatist movements but, in the process, destroyed Tamil parliamentary opposition. But the 13<sup>th</sup> and 16<sup>th</sup> amendments were major concessions to the Tamil demands.

#### **PROPOSALS FOR NEW CONSTITUTION IN 1997**

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<sup>35</sup> Ibid, P.128.

The Government released two drafts of its proposals for a new Constitution during 1997, the first in March and the second in October. In March 1997 draft for the first time included "right to life" as a fundamental right.<sup>37</sup> Certain new rights were included, some of the existing ones were expanded, Every person's right to respect for his private and family life, his home and his correspondence and communication is guaranteed as well as the right not to be subjected to unlawful attacks on his honour and reputation. The draft provides that an infringement of a fundamental right is justifiable if it is the result of "state action" including executive action. This is a welcome development as it would broaden the scope of fundamental rights Jurisdiction. It also provides for extension of the time limit within which an application can be filled in the supreme court regarding fundamental right violation. The proposal for Constitutional reform in October 1997, contains many developments in the fundamental rights chapter as compared with the March draft.<sup>38</sup> Article 10(14) contains a provision that a person shall not be punished twice for the same offence. Article 11 (12) contains an expanded non-discrimination clause to include ethnicity, gender, national or social origin, mode of acquisition of citizenship, marital status, maternity and parental status. Article 30, which provides for the remedy in the event of a violation of a fundamental right, specifies that "state action" includes Judicial action to the extent provided in the Article, but does not include legislative action. It also adds the words "acting bonafide" in the section dealing with public interest litigation.

An analysis of the three Constitutions and various amendments which took place in 1980s and 1990s shows us how much space and autonomy state provides to the civil society. How the rights and freedom provision of the Constitution really protect the citizens. It can be found that the concept and institutions of liberalism have undergone a change under the Sri Lankan political reality.<sup>39</sup> It's experience in a developing society with a different cultural heritage is a fundamental test of its

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<sup>36</sup> Radhika Coomaraswamy, "Constitution and Constitutional Reform" in K.M. deSilva (Ed.) *Sri Lanka-Problems of Governance*, Konark Pub., New Delhi, 1993.P.141-144

<sup>37</sup> *Sri Lanka : State of Human Rights 1998* , Law and Society Trust ,Colombo, 1999, P. 174.

<sup>38</sup> *Sri Lanka: State of Human Rights 1998, Law and Society Trust, Colombo, 1999, P.175.*

<sup>39</sup> Radhika Coomaraswamy, *The crisis of Anglo-American Constitutional Tradition in a developing Society*, Vikas Pub., New Delhi, 1984, P.59.

universal applicability. It's failure in such a contest wants the re-evaluation of application of that concept.

Sri Lankan experience shows the creation of institutions which multiplies political participation and expression of political freedom without the creation of a deadlock.<sup>40</sup> This is meant for creating a system which could make democracy not synonymous with periodic exercise of franchise but as an important aspect of man's self-expression. This type of political life attempts to accentuate the inter-relationship between authority and the political freedom of individuals. Another means through which political freedom expanded is through decentralization of power. It fills with the traditional system of organizations based on consensus building and village dispute settlement. The success of Sarvodaya has shown that the sentiments of shared

experiences, mutual responsibility and face to face interaction at the local level have immense popular appeal.

The lack of right consciousness may be analyzed with regard to particular areas of rights, where there has been much debate in the area of free press. In a developing society the role of media is noteworthy as the fourth estate of democracy. In the Constitution, though there is provision for freedom of media, the constant Constitutional amendments and illegal activities of government personnel have curtailed the freedom of media. So it becomes clear to us that a "right consciousness" has not developed in Sri Lanka for a wide array of reasons.<sup>41</sup> The first is the lack of legal discourse or doctrine in Anglo-American Constitutional system to deal with dilemmas of development in a crisis ridden society like Sri Lanka. As a result, we found in Sri Lanka, the Judiciary always supported executive rather than playing an independent role. Another issue is the lack of "public interest" legal skills, it also resulted in a scarcity of lawyers who can argue for a different legal discourse.

Analysis of all these Constitutional provisions clearly indicate that status of civil society in Sri Lanka is undermined. When the first Constitution was framed in 1947 there was some amount of space meant for civil society. But, later on,

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<sup>40</sup> Ibid, PP.60-65.

when the Constitution was changed and various amendments were accepted according to the need of the time, ultimately it has affected the civil society. So we find in Sri Lanka the civil society is not very strong, its space is limited. Whenever this state has faced challenges from civil society, its autonomy has been encroached by the state. So also the amendment provisions helped the state to change the civil society according to its own manner. Even whatever little space is provided to civil society, it has not been allowed to function properly. So we find that in Sri Lanka on the one hand, the state is giving some space to civil society, but, in the other hand, it takes away that freedom from enjoyment. The state is becoming gradually more and more stronger at the cost of civil society.

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<sup>41</sup> Diya Somasundaram (ed)., *The Third Wave – Governance and Public Administration in Sri Lanka*, International Institute for Ethnic Studies, Colombo, 1997, PP. 433-435.

## **Chapter - III**

## CHAPTER III

### THE STATE RESPONSE TO THE ETHNIC CONFLICT

The crisis of a society is somehow related to the crisis of ideology and so also the crisis of the political system which may erupts like a volcano any time. This has a clear implication for the system of governance. When the Constitution of a particular country cannot move in equal pace with the developments of civil society, it creates a critical situation. As civil society is also related with religion, custom, tradition, social norms, freedom of individuals and equality in society, this situation may lead to an acute crisis in a traditional society, which is being governed by modern democratic system.

One of the approaches to the analysis of the governance system in a particular country like Sri Lanka is the unadjustability of institutions moulded by Westminster system operating in the reality of a traditional society. This disjuncture leads to various unhealthy symptom in the development of institutional principles.<sup>1</sup> This has practically happened in Sri Lanka. Operation of the Constitutional values seems as if a part of the problem, but actually it is central to the governance system in any developing country which is facing such dilemma.

Fundamental Rights provided in the Constitution and its implementation are two different things in many developing countries, which is in a transitional phase according to the theory of developmental administration. These countries were under British subjugation for a long period. So after independence they have framed their Constitution by consulting other democratic Constitution and inserted Fundamental Rights. Also, it was found that Constitutional laws were given meanings according to the need of the time. This is different from the actual dream of founding fathers of the Constitution. This is a common phenomenon in many developing countries.

Sri Lanka is not an exception to this. But, here, it is important that why such a situation arose which compelled the state to behave in a violent and ruthless manner. What are the incidents leading to such a situation. In this chapter the reasons for the rising of ethnic conflict and the state's response to it will be discussed.

## THE RISE OF ETHNIC CONFLICT

The aftermath of independence in Sri Lanka witnessed the rise of Sinhalese ethnocentrism and Linguistic nationalism. One incident was, the acceptance of 'Lion' symbol in the national flag of Sri Lanka.<sup>2</sup> This type of events gradually led to say that there is no difference between Sinhalese nationalism and Sri Lankan nationalism. Soon after independence, the new government headed by United National party leader D.S. Senanayake accepted a policy which emphasised on the common interests of all the ethnic groups. But when S.W.R.D. Bandaranaike broke away from the UNP and formed Sri Lanka Freedom Party. (SLFP), it championed the cause of Sinhalese nationalism. The Sinhala language was accepted as one of the official languages with little provisions for Tamil speaking people. In fact, this threatened the very existence of national minority- the Tamil people.<sup>3</sup> To show their anger, Tamil federal party staged demonstration which culminated into anti-Tamil riot in which hundreds of Tamils died.

The Tamil's demanded that both Tamil and Sinhala be given official language status. They also pleaded for immediate cessation of Sinhalese colonisation of traditional Tamil area. So all these resulted in the historic "Bandaranaike – Chelavanayakam pact".<sup>4</sup> It recognised Tamil as the language of national minority along with Sinhala as official language, Tamil was the language of administration in Tamil dominated areas. The pact also provided for some decentralisation of power through Constitution of regional councils. But it could not be carried out due to objection from the Buddhist extremist leaders. This resulted in violent clashes between the Sinhalese and Tamils. This is known as "Race Riots of 1958" which was a disaster for the Tamils, as most of them living in Colombo and other coastal towns and in the plantation districts and agricultural colonies, were brutally attacked by the Sinhala mobs.

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<sup>1</sup> K.M. deSilva, *Sri Lanka -problems of Governance*, Konark Pub., New Delhi ,1993, P.126

<sup>2</sup> S.S. Mishra. *Ethnic Conflict and Security Crisis in Sri Lanka*, Kalinga Pub., New Delhi, 1995,P P.40-42

<sup>3</sup> *ibid*, PP. 45-60

<sup>4</sup> Satchi Poonambalam, *Sri Lanka- The National Question and the Tamil Liberation Struggle*, Zed Books, London, 1983, P.118

Mrs. Bandaranaike, after coming to power never showed any sympathy for Tamil and hoped that with state military power, it would suppress the Tamil separatist movement. Hence the arrest and detention of all the Federal party MPs for six months, the two-year state of emergency and military occupation of Tamil areas took place. All these gave rise to new era of oppression and growing rise of Tamil nationalism.<sup>5</sup> So they voiced their demand for self-determination. This culminated into the demand for a separate Tamil Ealam, comprising of the ancient Tamil areas of North and East of Sri Lanka.

One of the important factors for the ethnic conflict has been the economic competition for scarce resources. Before independence, the economic foundation was destroyed by the colonial system. But after independence no concrete step was taken by successive governments for re-building Sri Lankan economy. As far as education is concerned the Tamil people were in advantageous position due to proficiency in English. So they were in a better position as far as government jobs were concerned. But due to 'Sinhala only' legislation Tamils were placed in a disadvantaged position. Further, the "standardization" of university entrance test which reduced the Tamil representation in higher education.

Another issue which caused serious concern among the Tamils was the land settlement policy in the Tamil dominated areas. The 1972 Constitution accepted 'Sinhala' as the only official language and also gave special status to Buddhism. In the new Constitution it was mentioned that "it shall be the duty of the state to protect and foster Buddhism."<sup>6</sup> Naturally this created suspicion among Tamil people that they can be relegated to second class citizens by the new Constitution.

So in May 1972 all the Tamil political parties formed a Tamil United Front. In its Trincomalee conference, the TUF adopted a six point programme.<sup>7</sup> These are as follows:

1. A defined place for Tamil Language.
2. Sri Lanka should be a secular state.

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<sup>5</sup> Satchi Poonambalam, *Sri Lanka- The National Question and the Tamil Liberation. Struggle*, Zed Books, London, 1983, P.119.

<sup>6</sup> *ibid.* 173

<sup>7</sup> S.S. Mishra, *Ethnic conflict of Security crisis in Sri Lanka* Kalinga Pub., New Delhi, 1995, P. 53.

3. Fundamental rights of ethnic minorities should be embodied in the Constitution and made enforceable by law.
4. Citizenship for all those who applied for it.
5. Decentralization of the administration.
6. Abolition of the caste system.

Initially the major objective of the TUF was to secure regional autonomy for the Tamil areas. But in due course of time, its youth members demanded for an independent Tamil state popularised as “Ealam”. The Tamil youths who suffered most due to the discrimination in matters of education and employment, were frustrated. So they did not like the conventional method of Constitutional arrangement followed by elder generation and preferred violent methods.

The beginning of the Tamil separatist movement in a massive scale can be traced to March 1973, when many Tamil youths were arrested for staging black-flag demonstration during the visit of Mrs. Bandaranaike’s cabinet ministers to Jaffna. But, in later phase, government’s policy of arrest and detention of Tamils by using the emergency powers had provoked the Tamil youths to retaliate and confront the government. The Government imposed restrictions on the activities of the Tamil youths. Despite the restrictions, the Tamil militants organized a series of violent attacks against the police, military and others whom they considered as their enemy.<sup>8</sup>

After five years of emergency rule and acute oppression of human rights when parliamentary election took place in 1977, the TULF fought the elections with the demand for a separate “Ealam”. The TULF also got majority votes in Northern and Eastern provinces. But the government took no step to appease the demands of Tamils. Rather ethnic violence gradually erupted in Sri Lanka. In some cases government supported hooligans attacked the innocent Tamils.

The government imposed a state of emergency in the Island and appointed military authority to co-ordinate security arrangements in Jaffna with instructions to eradicate Tamil terrorists. Under these circumstances the Sinhalese army ruthlessly

carried out certain politically motivated crimes against the Tamils. Later on the government started a reconciliation process by appointing a presidential commission which recommended for the creation of District Development Councils (DDCs). But this proposal could not be implemented due to lack of political will of government.<sup>9</sup> Finally, the battle in the nature of terrorist violence reached its highest stage in July 1983. Tamil genocide took place in a massive scale. The July 83 riot started with killing of thirteen Sinhalese soldiers by L.T.T.E. The attack on the Tamils by the Sinhalese was motivated by hatred of minority and a desire for vengeance. It resulted in the death of hundreds of Tamils and destruction of their property. Compared to previous violence, the 1983 riot was organised in a way that the Sinhalese mobs carried voters list and detailed address of Tamil people and attacked them one by one. In this attack many Tamils staying in Colombo became homeless. Even police and security forces did not protect the common citizens. Either they stood as mere spectators or joined with the rioters. It was a failure of the government to protect the citizens.<sup>10</sup>

In 1987 an agreement was signed between India and Sri Lanka. But L.T.T.E. opposed the agreement. So they refused to obey it and continued the guerilla war. Ultimately it culminated into I.P.K.F – L.T.T.E war. The L.T.T.E is now fighting for a separate Ealam.

From the above analysis, it is clear that the contradictions between the Sinhala nationalism and Tamil nationalism has been escalated to such a height that the basic foundation of unity of the state is threatened. The lack of proper cultural assimilation in the society paved the way for a fragmented policy where inter-ethnic tensions were sharpened. In the post-independence period, the process of socio-economic development

brought the inter-ethnic differences into open for as various ethnic groups tried to make strong their position. Automatically it was reflected in the political field where mobilization along ethnic line took place. So it gave rise to ethnic consciousness and

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8 Satchi Poonambalam, *Sri Lanka -The National Question and Tamil Liberation Struggle*, Zed Books, London, 1983, P.180.

9 S.S. Mishra, *Ethnic Conflict and Security Crisis in Sri Lanka*, Kalinga Pub., New Delhi, 1995, P. 50

<sup>10</sup> Satchi Poonambalam, *Sri Lanka -The National Question and Tamil Liberation Struggle*, Zed Books, London, 1983, P.223.

identity by recourse to traditional ethnic differentiation and contradiction. As a result, ethnic tensions became more acute and gave way to serious ethnic or communal conflicts in the society.

When there is a violent uprising against the state and the state is confronting a grave threat, the system of governance takes a different shape in comparison to normal time. So in this situation, civil society is the first to suffer. This is a global phenomena and Sri Lanka is not an exception to this case. As the state faces challenges, it can retaliate in any manner, whatever may be harshness or brutality, it tries to establish the state hegemony over the civil society.

One of the methods used by the state to the ethnic conflict was the adoption of Prevention of Terrorism Act (PTA) and Emergency Regulations.<sup>11</sup> “With the help of PTA, the state authority has the power to detain a suspect for a long period without the opportunity for a judicial remedy”. So it carries the danger that the detainees will be illtreated in custody. It provides an open invitation for deprivation, assault etc., but the situation is worse when the detainee is in an army camp. There is no specific time limit for detention. This provision of the PTA is frequently pointed out by the ICJ and the Amnesty International etc.. They have investigated and reported a number of well documented allegations of the torture of detainees under the PTA, which the Sri Lankan government has denied.

Similarly with the help of emergency regulation, it is possible that it can be abused anytime.<sup>12</sup> If the executive can provide impartial and public inquiries into deaths in custody, or deaths at the hands of the security forces, it can also resort to extra-judicial killings. These powers has been used to ban the JVP, the LSSP and to arrest and detain a number of individuals. With the help of this provision, two Tamil news papers, “Sunthathiran” and the “Saturday Review” has been banned for publication. It has banned the opposition publication, sealed their printing press and a lot of other atrocities.

It is found that both PTA and emergency regulation are unjustified in law and that emergency rule throughout Sri Lanka can only be justified on the occasions like

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<sup>11</sup> Paul Schieghart, *Sri Lanka- A mounting Tragedy of Errors* International Committee for Jurist, Brisbane, Australia, March 1984, P. 31.

<sup>12</sup> Ibid P. 46.

July 1983 riot, the pre-I.P.K.F operation phase and again for a brief period to bring the situation under control. It could not be justified during the normal period, for extending the life of parliament without a general election and curtailing the freedom of press.

## **VIOLATION OF BASIC POLITICAL RIGHTS.**

Each and every party which came to power tried to consolidate their position by suppressing the opposition ruthlessly. When Jayewardane took power in 1977, he feared that, there is ever possibility for Mrs. Bandaranaike to come to power in the next election. So he set up a special court to try Mrs. Bandaranaike for abuse of power. When Mrs. Bandaranaike went to court of appeal, Jayewardane amended the Constitution (the First amendment) with his majority support in parliament.<sup>13</sup> This restricted the right of court of appeal to issue writs in certain circumstances. But it is important to remember here that the first Sri Lankan leader to subvert the legal system was Mrs. Bandaranaike herself.

As far as opposition inside the parliament is concerned, in 1977 election, the Northern Tamils had given their mandate to the TULF. The TULF was demanding a separate state for the Tamils. In August 1983, Jayewardane amended the Constitution for the sixth time, which made it illegal for anybody inside or outside Sri Lanka to preach separatism.<sup>14</sup> When the Tamils in parliament refused to agree with this, they were removed from parliament.

In October 1982 Jayewardane forcibly obtained resignation letters from members of parliament on the ground of re-constructing the parliamentary group.<sup>15</sup> He made the parliament and the country to run according to his desire. This is a basic violation of political democracy.

## **VIOLATION OF BASIC CIVIL RIGHTS:**

### **Attack on the freedom of press:**

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13 K.M. deSilva, *Sri Lanka- problem of Governance*, Konark Pub., New Delhi, 1993, PP. 42-82

14 Ibid, PP. 42-82

15 Ibid, PP. 42-82

Article 14 (1) (A) of the present Constitution guarantees to every citizen the freedom of speech and expression including publication. However, this right may be restricted by law in the interest of national security, racial and religious harmony or in relation to parliamentary privilege, contempt of court, defamation or incitement to an offence.<sup>16</sup>

The supreme court of Sri Lanka clearly expressed that the press does not enjoy freedom of speech and only individuals have such right. This has naturally created the problem for freedom of press. As the press is the center of information, if they do not have freedom, then how a healthy democratic tradition could be maintained? But at the same time, the Sri Lankan court has argued that every citizen is entitled to the freedom to receive information from the state. These two types of declarations are contradictory in nature. This clearly reflects the position of Sri Lankan press today.

In colonial time, the English press in Sri Lanka had a great deal of freedom and even if it supported the movement for independence. When Sri Lanka got independence these news papers supported the government policies unquestionably for the sake of national reconstruction. The close links of family and familiarity between the press owners of that time and the new ruling elite made the press to remain silent.<sup>17</sup> That's why in 1948, when citizenship act was passed, the press did not open its mouth. It did not discuss about the future of Tamil plantation workers who were mostly affected by this law. This partition attitude of press made the country to pay a heavy price as it failed to lay down a foundation for a solid democratic state. When Mr. Jayewardene was the leader of opposition, he made the protest against the nationalization of Lake House groups publication. He advocated the freedom of speech and expression, rights and independence of press etc.

When Mr. Jayewardene came to power, he changed the Constitution and established the presidential form of government. He promised to include the fundamental rights in the new Constitution which includes the freedom of expression. Although Jayewardene promised to privatise Lake House publication, he did not fulfil his promise.<sup>18</sup> He not only retained Lake House publication but also took over the

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<sup>16</sup> *The Constitution of Sri Lanka- 1978*, Published by Government of Sri Lanka.

<sup>17</sup> S.P. Senadhira, *Under Siege -Mass Media in Sri Lanka*, Segment Books , New Delhi, 1996,PP.10-20.

<sup>18</sup> S.P. Senadhira, *Under Siege -Mass Media in Sri Lanka*, Segment Books , New Delhi, 1996,PP.24-40.

Times of Ceylon group which was undergoing some financial crisis. He tried to use the powerful Sinhalese daily Lanakadeepa to attack the opposition and the persons inside his party who were opposing him. His period witnessed one of the dark phases as far as the freedom of press in Sri Lanka was concerned.

#### Restrictions on the Freedom of Expression:

In chapter 3 of the Constitution Article 15 says that the exercise and operation of the right to freedom of expression shall be subjected to such restrictions as may be prescribed by law in the interests of racial or religious harmony or in relation to parliamentary privilege, contempt of court, defamation or incitement of an offence. One of the controversies related to the freedom of press is the restriction due to parliamentary privilege. Law no 5 of 1978 amended by parliament made all offences specified in the schedule of the Act punishable by the supreme court and the national state assembly. This type of action, where one of the party is both accused and victim is strongly criticised. The judiciary also has limited freedom of speech in matters relating to the contempt of court- they have not shown liberal spirit as may have been expected by the custodian of fundamental rights.<sup>19</sup>

In one of the cases the parliament used its power to severely warn and fine editor Philip Cooray of the state owned "The Observer" for a minor error of caption mix up in February 1978.<sup>20</sup> On the request of Civil rights movement, a known Constitutional lawyer S. Nadesan published some article related to "The Observer" incident in the daily newspaper. "The Sun". As a result, parliament found him with guilty. But he was acquitted in the supreme court.

The emergency regulations in 1970s and 1980s had prohibited the affixing of posters or distribution of leaflets without permission of the inspector General of police. It also banned public meetings and processions, sealed printing presses, censored publications and broadcast. Even some regulations related to these changed without any notice. When emergency was proclaimed in May 1983, "The Saturday Review", an English weekly published from Jaffna, was banned by the state

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19 K.M. deSilva *Sri Lanka Problem of Governance*, Konark Pub., New Delhi 1993, P. 163

20 S.P. Senadhira, *Under siege - Mass Media in Sri Lanka*, Segment Books, New Delhi, 1996, P.33.

authority. Later on, the ban was lifted, but the editor was directed to submit every text including the advertisement for review, to the competent authority.

The supreme court has ruled that freedom of publications cannot extend to matters of official secrets and confidentiality. It said that the freedom to propagate one's ideas may be restricted in the interest of the national economy and the principles of state policy.

The Sri Lankan press council Bill was enacted in 1973.<sup>21</sup> It imposed censorship on certain types of publications under the press council law. Reporting of government decision making, fiscal policy, and official secrets, are prohibited from publications. It has serious implication for modern journalism because the leaking secret information to public gives the chance to them for more and more discussion but press council law imposes restriction on freedom of press. The most important thing in press council, law is the section 9, which deals with defamation. It empowers the press council on receipt of a complaint or even on its own powers, to investigate allegation of untrue, distorted or improper reporting and to order a correction, censure or demand on apology from the accused.

The issue of 'national security' in recent times has been the major ground for containment of press freedoms.<sup>22</sup> This restrictions has come in the form of emergency regulations and has the following criteria- editorial comments, feature stories, news reports or any subject related to national security must be approved by the competent authority. Publication of any cabinet paper requires the permission and no person can distribute among people any poster, handbill or leaflet without prior police permission.

The Broadcasting Act No. 37 of 1966 established a corporation for electronic media. But it does not follow the B.B.C pattern. It works like a government organization. All the members of this corporation were appointed by the minister and subject to his direction. Though private broadcasting organization exist with proper license, they are subject to control and supervision by Broadcasting corporation.

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21 K.M. deSilva , *Sri Lanka - problems of Governance* , Konark Pub., New Delhi, 1993. P. 21.

22 Report of University Teachers for Human Rights, Jaffna , no.8, 1991 P. 5.

23 S.P Senadhira, *Under Siege - Mass Media in Sri Lanka* , Segment Books, New Delhi , 1996 P.50

There are a lot of instances where journalist, reporters were threatened, abducted, tortured and murdered.<sup>23</sup> Some of them are:

- A journalist for the Rome-based Inter press service and a prominent broadcaster and actor in Sri Lanka, de Zoysa was abducted from the Colombo home, by six armed men, some in police uniforms, in February 1990. His body was found washed up on Koaralawella beach on February 19, 1990. His jaws had been broken and he had been shot twice at close range in the neck and the head.
- A case was filed against the news editor and the cartoonist of the 'Sunday Times' for publishing a cartoon depicting a senior security officer with skeleton in his cupboard. Court dismissed the case.
- Kelley Senanayake, former JVP member and proprietor of the Navamaga press, where the Sinhala weekly "Yukthiya" was published, was arrested in September 1991 after the newspaper had published an article covering the opposition attempt to impeach president Premadasa.
- Once the SLFP member assaulted the Lankadeepa reporter covering a meeting at the residence of the party leader, Mrs. Bandaranaike, at Horagolla.
- The political cartoonist of Aththa, Jiffrey Yoonus was assaulted and threatened that his life would be in jeopardy if he continued to publish cartoons satirizing president Premadasa.
- President Premadasa publicly warned the Sunday Times/ Lankadeepa owner Ranjit Wijewardene.
- A journalist and photographer of the state owned Disamina, who went to interview and photograph student demonstrators injured in a police attack and detained at the hospital premises by the police.
- Reporters and photographers who were covering an opposition leaflet distribution campaign at the Colombo Fort railway station were attacked by some people in the presence of police officials.

- A photographer of the Sinhala daily, Lankadeepa was mercilessly beaten by policemen when he was taking photographs at an opposition led rally to mark the human rights day on December, 10, 1992.

There appeared to be a great degree of openness and tolerance under president Wijetunga to begin with, but this has subsequently taken a serious and conventional path. On the one hand, the president has repeatedly emphasised that he is for the opening of media. On the other, the state owned press have launched a campaign against the 'alternative' media accusing them of selectivity and partisan reporting.<sup>24</sup>

Similarly in the case of electronic media, the government has licensed during 1993 two privately owned radio stations and two television channels. However, all these stations are debarred, by the terms of their licenses, from airing news bulletins, unless they reproduce. They have not chosen to do so and are thus without any news programme.<sup>25</sup> Similarly in the case performances have to be licensed by the public performance Board, but this does not apply to television. The state television authority has it's own internal mechanisms of evaluation and control. Due to their interference two popular TV serials were abruptly stopped in 1993.<sup>26</sup>

Similarly reporting the war incident has it's own problem. Mr. Iqbal Athas wrote an article regarding an army operation in the Sunday Times of October 1993. He got a threatening call from a army general. The newspapers who reported this incident also threatened. The LSSP also issued a statement on this question and it's leader Mr. Bernard Soysa also received death threats.<sup>27</sup>

#### Loss of Freedom of Peaceful Assembly and Association:

Freedom of peaceful assembly and association is a fundamental right granted to each and every citizen in a democratic country. But this was clearly violated in Sri Lanka, if any person who supports civil rights movement and criticises government for it's violation. For example, while addressing a meeting Mr. E. Saratchandran, the first chairman of Sri Lankan civil Rights movement was attacked in 1982, as his

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24 S.P Senadhira, *Under Siege - Mass Media in Sri Lanka*, Segment Books, New Delhi, 1996 P.50.

25 1993 in *Sri Lanka*, Law and society trust-, Colombo, 1995, P.31.

26 1993 in *Sri Lanka*, Law and society Trust, Colombo, 1995, P.31.

27 Ibid,P.34.

views were not supporting government's activities.<sup>28</sup> Another instance was in December 1982, when "voice of clergy" was opposed to Jayewardene's proposed Referendum, its meetings were disturbed. The Jayewardene's regime during late 70's and early 80's witnessed mass violation of this right.

Similarly the freedom of movement inside the country has been banned in some particular areas for a particular section of society. Some parts of northern and north eastern coastline has been declared prohibited zone and needed special permission to go to these areas. This has deprived a lot of fisherman from their livelihood. Again whole Jaffna and some part of Kilinochchi has also declared as prohibited zone.<sup>29</sup> No person including foreigners can move into these areas without prior permission. In fact, this is complete violation of civil rights of a citizen in a democratic country. Civilian life in Jaffna till today is a completely disturbed. Fearing any leakage of news to media, government strictly observed the rules and declared these as prohibited zones.

Threat to the freedom of association during these years come from the operations of the commission inquiring into the NGOs and from restrictive emergency regulations pertaining to the activities of trade unions. Arbitrary use of the powers has been vested in the police with regard to public assemblies. A case was filed by Uva wellassa women organization regarding denial of police permission for a demonstration in 1993.<sup>30</sup>

## **ATTACK ON THE INDEPENDENCE OF JUDICIARY**

For a long period, Sri Lanka has been enjoying the benefits of a respected and courageous judiciary, both before and after independence. The supreme court has produced many outstanding judges, who has done many land marking contributions to the civil society. This has resulted, on many occasions, conflict between the executive and legislature in different period. Basically judiciary in Sri Lanka always tried to maintain its independent, impartial and autonomous position.

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28 Report of University Teachers for Human Rights, Jaffna , no.8, 1991, P.35.

29 Brian Senewortne, *Human Rights Violation in Sri Lanka*, Brisbane , Australia, 1986,P. 60.

30 1993 in *Sri Lanka*, Law and society Trust, Colombo ,1994. P.28

When Mrs. Bandaranaike came to power in 1970, there was an insurrection. She had ordered arbitrary arrest, detention and established a criminal justice commission (C.J.C).<sup>31</sup> This was an important departure from the prevailing standards of criminal justice in Sri Lanka. But it was found that what was established by Mrs. Bandaranaike was used against her, when Jayawardane came to power in 1978.

The 1978 Constitution, in it's preamble, clearly mentioned the independence of judiciary and declared it as a fundamental value along with democracy, equality, justice etc.. Article 107, which is entitled as "Independence of judiciary" says that the chief justice, the president of the court of appeal and all other judges of these court who are appointed by president shall remain in office during good behaviour. The president can remove them only after an address to the parliament on the ground of proved misbehaviour. It must be supported by an absolute majority in parliament.<sup>32</sup>

Jayewardene dealt a severe blow to the independence of judiciary. Th courts were put in a sub-ordinate position to parliament without the power of judicial review of executive action, The Sixth amendment to the Constitution which seriously violated the civil rights of Tamils was challenged in the supreme court. In 1983, the supreme court awarded damage against the violation of fundamental rights of two citizens. The government paid the damages but promoted the police officers. These types of illegal and extra-Constitutional activities have downgraded the role of judiciary in protecting the civil rights. Its was a fact that the house of those three judges who were involved in that judgements were attacked by government supported terrorist. Even police did not provide the protection to the judges.<sup>33</sup>

Under the 1978 Constitution, the autonomy of previous supreme court exists no more. It gave president absolute power to appoint his own men as the members of jury. Though he confined his appointments largely to members of the previous judiciary, several members of the previous supreme court lost their office. New members were appointed, some junior judges became members of supreme court by

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<sup>31</sup> K.M deSilva , *Sri Lanka - problems of Governance*, Konark Pub. , New Delhi ,1993. PP.127-147.

<sup>32</sup> The Constitution of Sri Lanka 1978, published by Government of Sri Lanka.

<sup>33</sup> Paul Schieghart , *A mounting Tragedy of Errors*, International Committee for Jurists, Australia, 1984,PP.56-71.

superseding many seniors. Nobody questions the integrity and efficiency of judges, but it is clear that some of them are politically appointed.<sup>34</sup>

Such incident will hardly encourage the judiciary to remain independent, or to enhance public respect for its members, their judgements or the Rule of law. The supreme court is always bound by law and under the Constitution. It is ultimately accountable to parliament, which is responsible for the removal of judges on the ground of “proved misbehaviour”.<sup>35</sup> So if the supreme court misbehaves itself, that is exclusively a matter for parliament, not for the president. According to the Constitution the president has wide powers for a free democracy under the rule of law but he has heavy responsibility also. He cannot take decisions arbitrarily. And above all, the supreme court is the guardian of the fundamental rights, recognized by the Constitution.

#### **VIOLATION OF LIBERTY AND INTEGRITY OF A PERSON:**

Violence to an unescalated manner has been occurring in Sri Lanka due to the ongoing ethnic conflict between the two communities. Violence by both the groups and the state establishment and the Tamil revolutionary groups have caused the suppression of liberty and integrity of the innocent civilians.

The recent phenomenon of highest amount of violence clearly indicated the dissatisfaction among the Tamils. This has gathered momentum for a pretty long period of time, erupted like a Volcano in mid 80's and continuing till today. When the police and army try to solve it with the help of arms, this leads to a more critical situation. Initially, the Tamils had tried their level best to solve their problem in non-violent manner. Each time, their protest was met with callous attitude from government and later on through police, army etc, In 1956, when official language act was passed, Tamil politicians staged a peaceful demonstration. Sinhalese hoodlum assaulted them, while the police simply looked on. It was again repeated when Tamil

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<sup>34</sup> Ibid, PP.56-71.

<sup>35</sup> *The Constitution of Sri Lanka –1978*, Publishd by Government of Sri Lanka.

politicians staged a peaceful movement in Jaffna in 1961. There are a lot of instance in Sri Lankan history, where Tamil non-violent protest got answer in violent manner.<sup>36</sup>

All these activities culminated into a more violent situation in Sri Lanka since late 70's till today. The failure of negotiations and the response of government in strong armed methods, compelled the Tamil youths to take up arms. It is a matter of fact that initially Tamil revolutionaries are not in conflict with Sinhalese civilians. They were against the biased politicians.<sup>37</sup> When the security forces retaliated, it resulted in the victimization of innocent Tamil civilians. Instead of protecting the civil rights the Sri Lankan government is taking more and more repressive legislation which gives chances to the security forces to commit more serious violation of human rights. These are some of the reasons why liberty, privacy and independence of common citizens are violated.

One of the serious violation of liberty of a person is arbitrary arrest.<sup>38</sup> This problem affects primarily Tamils living in Colombo and other main town in the south. Round ups and arrests can occur at any time but the possibilities are increased whenever there is some LTTE activity. Various reports indicated that hundreds of people were arrested arbitrarily, their houses were searched. But police claimed that all who were taken into custody were those without identity papers or who were unable to explain their presence in the city. This had created panic in society.

The disappearance of people under mysterious situation is more tragic.<sup>39</sup> With emergency regulation 15 (A) in operation, no body knows the number of missing persons. They were branded as "Terrorists" by government. The parents of such youths became unsuccessful in tracing out their children. So obviously the conclusion is that, they might have been killed by the army and dead bodies were disposed.

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36 C. Suriyakumaran, *The anguish of 83*, Colombo, 1990, PP.10-25.

37 E.O. Balance- *The Cynide war and Tamil Insurrection in Sri Lanka 1973-88*, Brasslay, U.K., 1989, PP 15-30.

38 Brian Senewortne, *Human Rights Violation in Sri Lanka*, Brisbane, Australia, 1986, PP. 49-53.

39 Ibid, PP.49-53.

40 Ibid, PP.49-53.

Another method used by security forces is mass arrest, cordon off, search and kill.<sup>40</sup> Hundreds of such operations have been done by the security forces. Thousands of Tamil civilians lives under constant threat. The army cordoned off an area and all Tamil males between the age group of 15-30 were taken into custody. Their fault is that, they belong to a particular community. They were held in detention camps. Some of them died there due to torture and unhygienic conditions. One of the most serious incidents of mass arrest occurred in August 1984 when the security forces rounded up roughly 500 youths on the ground of checking Identity card at Jaffna. So what is being reported actually is a small fraction of this. The provisions of the PTA along with emergency prevents the judiciary to inspect these detention areas. These draconian laws helps the army to violate human rights simply.

#### The Role of Army and Police:

The most important function to be performed by Sri Lankan army since its formation is to assist the civilian authority to maintain internal security in time of crisis. In fact armies all over the world do the same thing along with protection of country's sovereignty. While the policemen are trained to protect the life of citizens, the army is trained to face the external aggression. But, in Sri Lanka, the Army and police believes that they are fighting a war against a crime. In a war between two countries each group seek to pursue its national interest by defending its territory and fighting against the enemy. But if it happened within a country, the situation will explore to such a level, which is unimaginable. Practically that has happened in Sri Lanka. It has turned into an acute civil war. The division among two groups is such that each group treats the other as an enemy.

More or less the same is with police. They are also insincere, insensitive and ineffective. They took a long time to complete their inquiries, even in a small issue, even in a case where large number of people were involved. For example, in the case of July 1983 riot, when the police was asked to investigate, it could not solve the case

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in proper time<sup>41</sup>. Challenging them means challenging the state. The human rights violation in Sri Lanka has occurred to a maximum extent by these people only.

#### Violation of Human Rights by Tamils:

It will be a distortion of fact, if we consider the violation of human rights is only done by state authority. As response to the ethnic conflict, when state authority takes some violent steps, the Tamil groups follow more violent methods. Initially, the militant Tamil youths were targeting the people from government establishment and security forces in the north and east, whom they regarded as their enemy. Later on, they started to target Sinhalese civilian living in Tamil areas, in some cases even in Sinhalese areas. Again, it is their feeling that Tamil people have been suffering since a long period due to the Sinhala people and now it is the turn of Sinhalese to face the same situation.<sup>42</sup> These Tamil groups attack the Tamil civilians in the north, whom they suspect informers and betrayers. In some cases, civilians were threatened and relieved of money, food and occasional shelter by these groups.

Similarly the L.T.T.E also captured a number of journalists, writers, artists and tortured them.<sup>43</sup> Some individuals identifying themselves as members of the Liberation Tigers of Tamil Ealam (LTTE) forcibly entered Sosapali Norbert's home in Koukuvil Jaffna on May 7, 1991 and removed him. He has been neither seen nor heard of since. He was widely respected among the plantation Tamils for his literary journalism. He was favouring non-violent agitation by the Tamils. Three members of a drama group were abducted by the L.T.T.E on August 30, 1991.

V. Senathan, a mechanical engineer who was working with red cross society and established co-operative workshop in Jaffna, was abducted by the L.T.T.E in mid April 1992. Rajaratnam, a former political activist and who was active in helping the victims in obtaining medical help and he was famous for helping others in times of need, was abducted by the L.T.T.E in February 1992. Maniam who was the owner of a popular Jaffna book shop was detained by the LTTE in December 1991. It was

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<sup>41</sup> Paul Schieghart, *A mounting Tragedy of Errors*, International Committee for Jurists, Australia, 1984. P.71

<sup>42</sup> E.O. Balance- *The Cynide war and Tamil Insurrection in Sri Lanka 1973-88*, Brasslay, U.K., 1989, PP.15-30.

<sup>43</sup> S.P Senadhira, *Under Siege - Mass Media in Sri Lanka*, Segment Books, New Delhi,

believed that the reason for his abduction was his links with students and intellectuals who frequently visit his shop. Similarly Dr. Rajani Thiranagama who was a leading human rights activist and the person behind formation of university teachers for Human Rights and co-author of the book, "The Broken palmyra" which documented the human rights violation in Sri Lankan society was murdered by the LTTE.<sup>44</sup> Shanmugalingam was a Jaffna based journalist who had worked as a reporter at different times during the period 1986-1989 for various newspapers was killed by the LTTE in 1989. He had expressed the views which were contrary to those of the LTTE.<sup>45</sup>

Whatever may be the cause of violence civilians are the greatest sufferers. They are being victimised without any cause. It is a threat to human society. It disturbs peace and prosperity of the country. It must be condemned no matter whether it has been done by the state or terrorists. Due to these activities, civil society is polarised and divided into various groups. It becomes acute when the groups became more hostile towards each other and use arms. This has happened in 1983 and in 1989 when there was a campaign against the JVP and this reflects the continuing civil war in northern and eastern part of Sri Lanka till today. The Sri Lankan experience shows that when in some part of state human rights, freedom, rule of law etc. being violated, the whole civil society is getting disturbed.

For the smooth governance of a country, free participation of people in each of every sphere of state activity is necessary. But when the fundamental rights, freedom, civil rights, independence of judiciary, freedom of media etc. being violated then how the civil society will function in a given society? Civil Society in Sri Lanka is totally brutalised by these activities. The traditionally rooted societies where modern democratic system were adopted after independence are not able to function properly according to the principles of democracy.<sup>46</sup> As civil society also takes its root in history, tradition, religion, culture etc. so we find a clash between the state and the civil society. Particularly that has happened in Sri Lanka. In order to stop ethnic

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1996, PP.110-115

44 Report of University Teachers for Human Rights, Jaffna, No.10, 1998,P.02.

45 S.P. Senadhira, *Under Siege - Mass Media in Sri Lanka*, Segment Books, New Delhi, 1996,P.113

46 Radhika Coomaraswamy, *An Analysis of the Anglo-American Constitutional Tradition in a Developing Society*, Vikas Pub., New Delhi, 1984,PP.59-84.

conflict, state took some drastic action, which was challenged by a particular group. This gave rise to more hegemonic role of the state, at the cost of civil society.

## **Chapter - IV**

## **CHAPTER IV**

# **RESPONSE OF THE CIVIL SOCIETY TO THE STATE ACTION**

When the State undergoes a crisis, the governance system gets totally disturbed, administrative system will be questioned, and the role of the state becomes doubtful. Automatically, the fundamental rights, human rights, basic principle to be followed in a democratic society gets violated and the space given to the civil society is shortened. So, the need of the hour is establishing a strong civil society . It has to play a dynamic role through the agencies like media, N.G.O., various organizations related to the Judicial system. Lawyers association, human rights group, civil liberties group, Teachers association etc. play a crucial role at such a critical Juncture.

The reality is that in the third world countries, when social conflict escalates the state encroaches upon the civil society. Due to mass illiteracy, lack of effective social communication, lack of adequate rights awareness and above all the abuse of power by state authority, the common citizens are unprotected. But a positive symptom being seen in these societies as the civil society is gradually spreading its arena to challenge the state hegemony in times of crisis. It is interesting to analyse how the civil society becomes active whether at the people themselves or with the active support, from outside, like the international N.G.O.s.. As a matter of fact that the civil society is gradually becoming more active in safeguarding the citizens. This is clearly visible in case of Sri Lanka today.

The previous two chapters have dealt with the analysis of legal base of civil society in Sri Lanka and what has been the state response to the on going ethnic conflict there. This chapter analyses how, inspite of state repression, the civil society has tried to assert its role and demanded its space through various organs like press, N.G.O.s, human rights group, lawyers association, teachers association and various civil right movements.

The civil society responds the state oppressive actions in order to protect, activate and emerge its role as the protector of common citizens. It is found that

whenever the state action becomes more and more oppressive beyond a certain limit, it becomes impossible for the civil society to bear such hegemony. So it tries to come to a normal situation in order to maintain a balanced relation between the state and civil society. In Sri Lanka, how various actors in the civil society played their role in order to challenge the state's hegemonic role is the basic theme of this chapter.

### **ACTIVE ROLE OF JUDICIARY AND OTHER ORGANIZATIONS :**

The years of experience under the prolonged emergency really gave a new dimension to the role of Judiciary. Gradually the Judiciary started to play its role more actively. The excess made under the emergency provision, the PTA, role of army and police and even of the role of militant groups at the same time gave new meanings to the fundamental rights of citizens. Especially the year of late 1980s and early 1990s witnessed a metamorphic transformation regarding the role of Judiciary.

Regarding Emergency, previously the courts have no power. According to the provisions of Emergency the legislature will enact laws and the executive has exclusive discretionary power regarding its imposition. The court cannot challenge the declaration of emergency. But it is found today that Judiciary has transcended this barrier. For the first time it has challenged the authenticity of emergency regulation as it suppresses the 'Freedom of speech' provision of the citizens, which is provided in the Constitution<sup>1</sup>

The court has found that in some cases, police has crossed its limit and arbitrarily arrested and tortured some innocent persons. The Judiciary criticised it in strong words and warned them also and encouraged the people to bring these types of cases to courts for verification. These are two important cases which are relevant to this issue.<sup>2</sup> One is the arrest of Nallanayagam, who was heading the Batticaloa citizens committee, he was arrested in 1985 on some misinformation. The other is the famous de Zoysa case. A Journalist and a prominent broad caster. de Zoysa was

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1. J. Wickramaratne, *Fundamental rights in Sri Lanka*, Navrang Pub., New Delhi, 1996, P. 15-28

2. Ibid, P. 15-28

organization established for such purpose .<sup>5</sup> They will deal with the preparation and submission of an amended petition, a fixatives, documents, written submissions and other materials, in classification and in support of such complaint. Such complaint was received and shall be dealt with under the application of article 120 (2) of the constitution.

If such person notifies the court at any time that he does not desire that any action be taken, all proceedings in respect of that case will be terminated. Sri Lanka has not made any such significant progress in P.I.L. in comparison to Indian. The "Ceylon Daily News" of 3<sup>rd</sup> October 1996 reported that some parliamentarians belonging to the Government had sought an extension to Presidential Commission of inquiring look into sudden disappearances, citing the fact that only 800 out of 32, 000 cases recorded, so far have been investigated.<sup>6</sup>

Similarly the 'Island' of 8<sup>th</sup> October 1996 reported over crowded prisons and back log of cases in courts . Some years back the Institute of Human Rights petitioned the chief Justice invoking section 44 (7) of SCR 1990, seeking inquiry into violation of equal protection provided in the Sri Lanka Constitution, caused by large number of persons missing in Jaffna area. Similarly, in the Boosa case, the court addressed to mind the early trial or release. The question of payment for damage caused by long under-served detention still to be answered. Again, under the Prevention of Terrorism Act many individuals are released only after long period of detention and without being charged. So right now, we find in Sri Lanka, many commissions are inquiring into cases of disappearance, corruption, malpractice , torture etc.

The gradual awareness regarding the protection of human rights in Sri Lanka has resulted in the introduction of 17th Amendment to the Constitution<sup>7</sup> It has dealt

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5. Diya Somasundaram , *The Third wave- Governance and public Administration in SriLanka*, International Institute of Ethnic Studies, Colombo, 1997, P.35

6. Ibid, P.35

7 K.M. deSilva , *SriLanka -problems of Governance* Konark Pub., New Delhi , 1993, .PP140 -145

8 "Law and Society Trust Fortriqntly Review" , Colombo, April 1999, P.27

9 "Ibid, P.87

organization established for such purpose .<sup>5</sup> They will deal with the preparation and submission of an amended petition, a fixatives, documents, written submissions and other materials, in classification and in support of such complaint. Such complaint was received and shall be dealt with under the application of article 120 (2) of the constitution.

If such person notifies the court at any time that he does not desire that any action be taken, all proceedings in respect of that case will be terminated. Sri Lanka has not made any such significant progress in P.I.L. in comparison to Indian. The " Ceylon Daily News" of 3<sup>rd</sup> October 1996 reported that some parliamentarians belonging to the Government had sought an extension to Presidential Commission of inquiring look into sudden disappearances, citing the fact that only 800 out of 32, 000 cases recorded, so far have been investigated.<sup>6</sup>

Similarly the 'Island' of 8<sup>th</sup> October 1996 reported over crowded prisons and back log of cases in courts . Some years back the Institute of Human Rights petitioned the chief Justice invoking section 44 (7) of SCR 1990, seeking inquiry into violation of equal protection provided in the Sri Lanka Constitution, caused by large number of persons missing in Jaffna area. Similarly, in the Boosa case, the court addressed to mind the early trial or release. The question of payment for damage caused by long under-served detention still to be answered. Again, under the Prevention of Terrorism Act many individuals are released only after long period of detention and without being charged. So right now, we find in Sri Lanka, many commissions are inquiring into cases of disappearance, corruption, malpractice , torture etc.

The gradual awareness regarding the protection of human rights in Sri Lanka has resulted in the introduction of 17th Amendment to the Constitution<sup>7</sup> It has dealt

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5. Diya Somasundaram , *The Third wave- Governance and public Administration in SriLanka*, International Institute of Ethnic Studies, Colombo, 1997, P.35

6. Ibid, P.35

7 K.M. deSilva , *SriLanka -problems of Governance* Konark Pub., New Delhi , 1993, .PP140 -145

8 "Law and Society Trust Fortriqntly Review" , Colombo, April 1999, P.27

9 Ibid, P.87

with the protection of rights and added some new provisions to the constitution. It has come out of the recommendations of the All Party Conferences and the youth commission reports. It is meant for establishing access to justice as a fundamental right, to expand freedom of speech to include freedom of publication and information, and to ensure that at the time of arrest a person shall be informed of the reason for his arrest, and be allowed to consult a lawyer. It introduces the broader term of " State action" as the basis of fundamental rights litigation, rather than executive and administrative action " <sup>8</sup> The person who is accused in criminal case in high court and the court of Appeals may be provided by an attorney, if the situation demands. In fact, the government does not provide attorney in any case, though legal aid organisations assist some defendants. Public trial by the Jury is the accepted norm there.

### **Some Significant Judgements By The Judiciary**

During the year 1996, in the case of S.U. Mahalingan. V. OIC, Tanama police station and another involving violations of Article 13 (1) and (2) was settled when the respondent formally apologized to the petitioner for his m/s conduct and agreed to pay a sum of Rs. 20,000 to the petitioner at the instance of the supreme court. <sup>9</sup>

Similarly, the court was called upon to interpret "executive or administrative action" in M.T.A. Forook V.OIC munuwangoda police station , specifically as to whether Judicial action falls within preview of " executive or administrative action".<sup>10</sup> The petitioner alleged violations of Article 13 (1) and (2) after he was taken into custody by the respondents and then detained by a magistrate.

The main issues involved in this case were (1) whether the first and second respondents were acting in accordance with the procedure established by the law, (2) Whether the detention of the petitioner was made in accordance with procedure established by the law, (3) If the answer to the second is negative, had there been a violation of any fundamental right recognized by the constitution.

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<sup>10</sup> *Sri Lanka -State of Human Rights 1997* , Law and Society Trust, Colombo,1998, P. 87

The court found the first two questions in the negative, finding that there was a violation of Article 13(1) and noting that "even if a law enforcement officer is empowered to deprive a person of his personal liberty, he must do so strictly in accordance with procedure established by the law.

The case of Gamini Athulorale and others V. IGP and others involving Violation of Articles 14 (1) (a) (b),<sup>11</sup> Was it related to the May Day processions and a UNP rally for which permission had been denied by the respondents. The UNP's request for permission from the Kandy police was refused for " security, and administrative' reasons. The first respondent contended that although the May Day rallies of the main political parties were generally held in Colombo, permission was granted to other political parties constituted discrimination against the petitioner. The court gave the verdict that, it was a violation of the right to the Freedom of speech and expression guaranteed under Article 14 (1) (a) and the freedom of peaceful assembly guaranteed under Article 14 (1) (b) of the constitution.

Similarly, the case of Wimal Feunando V. Sri Lanka Broad-casting corporation and others was an important case<sup>12</sup> The petitioner, a participatory listener in the non-formal education programme ( NFEP) of the Sri Lanka Broadcasting Corporation (SLBC) education service, alleged that his fundamental right of the freedom of speech and expiration, including publication, guaranteed by Article 14 (1) (a) of the constitution was infringed by the respondents by the sudden cancellation of this program. The Court gave the verdict that, while such criticism must be deplored when it is without Justification, the right to make and publish legitimate criticism cannot be denied. Here it is important that the Governmental media policy was intended to encourage criticism, in the public interest , in order to expose shortcomings. The right to equality requires that the media itself is not immune from justifiable criticism, internally and externally. It's main argument is that the freedom of speech included the freedom of information also.

In 1997, there are some significant judgements were delivered by the Supreme Court of Sri Lanka. One was the B.S. Coory V. Secretary, Ministry of Defense .<sup>13</sup> Mr. Cooray who was the secretary - General of the U.N.P. was arrested and detained on the ground that he was conspiring to assassinate the president. They made access to

the validity of the detention order issued under the Emergency Regulation 17 (1), which. This regulation authorizes the Secretary , Ministry of Defense to make a order for a particular period. In fact the order relating to Mr. Cooray did not contain any reference to time period. So the court concluded that the arrest and detention of Mr. Cooray was unconstitutional as it had not followed the procedure established by law.

Similarly, in the case of N.K.K. Kalupahana, Lawyers for Human Rights V. OIC , police, <sup>14</sup> the court overruled the preliminary objection that the application was time barred under Article 120 (2) of the Constitution (which requires that fundamental rights petitions be filed within one month of the alleged violation). The court said that the alleged offender was responsible for preventing the aggrieved person from filling the petition within the correct time frame, either by arresting or detaining him.

Similarly, in the case of M.A. Ayub V. I.G.P . and three others, the petitioner alleged unfair dismissal as well as racial abuse and physical assault. <sup>15</sup> The case involved Articles 11 and 12 (1), but allegations under Article 11 were withdrawn. The court gave the verdict that the protection of law , which Article 12 (1) guarantees, is not just the protection of the criminal law, but the law in general. The court cannot lightly assume that that norm is otherwise. There are no absolute or unfettered discretions in public law, discretions are conferred on public functionaries in trust for the public, to be used for the public good, and the propriety of the exercise of such discretion is to be Judged by reference to the purposes for which they were so entrusted.

Similarly, the case of P.D. Saranapalo V. Senior superintendent of police and six others related to the refusal to grant permission to the Nava Sama Samaja party (NSSP) to hold a May Day procession. <sup>16</sup> Leave to proceed was granted in relation to alleged violations of Article 12(1), 12 (2), 14 (1) (a) and (b) . The fourth respondent Deputy inspector General of police, had denied the permission to hold the rally. Due to security reason the court however stressed that the constitution is the supreme law of the country and that power granted under the police ordinance is

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13 *Sri Lanka -State of Human Rights 1997* , Law and Society Trust, Colombo,1998, P. 77

14 *Ibid*, P.77

subjected to the provision of the Constitution. With regard to freedom of expression, Justice Amersinghe said, "while I do not accept the view that on apparently limitless variety of conduct can be labeled as "speech", whenever the person engaging in the conduct intends to express an idea, I do however accept the fact that marching , parading and picketing on the streets and holding meetings in parks and other public places may constitute methods of repression under Article 14 (1) (a) (b) of the constitution. Streets and parks and public places are held in trust for the use of the public." <sup>17</sup>

The case of A Gunawardena and another V.OIC, police station and four others involved the arrested of the petitioners on the ground that they possessed anti-government literature. <sup>18</sup> . They alleged the violations of Articles 12 (2), 13 (1) and 14 (1) (a). The court referring to its earlier decisions, laid down certain criteria that must be taken into consideration when computing compensation :

- (1) The importance of freedom of speech
- (2) The right to criticise governments and political parties .

The State was directed to pay Rs. 60, 000 to each petitioner and the first and second respondents were directed personally to pay Rs. 5000 to each petitioner.

Similarly, in the case of N.K. Kalupahan, Lawyers for Human Rights the court stated that the victim had been tortured over an extended period with severe consequences <sup>19</sup> . The first respondent had attempted to seek an award of Rs. 200,000 as compensation .Out of this sum, the first respondent was ordered personally to pay Rs. 50,000. The court also directed the second respondent, the IGP, to ensure that neither the petitioner nor any members of her family be subjected to any harassment by the first respondent or police.<sup>17</sup>

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## **Other Organizations Associated with Judicial Process**

The Bar Association of Sri Lanka which is consisting of lawyers of various courts of Sri Lanka has played a pivotal role in providing Justice to the common citizens.<sup>20</sup> Especially when poor and innocent citizens, who are not acquainted with legal procedure were victimized by police and Army, went to the court for Justice. The Bar Association helped them in many cases. Even in some cases, it has filed the petition for the victims. Sometimes, it has formed fact-finding teams to investigate the incident. In the famous deZoysa case, the Bar Association of Sri Lanka, found the police inquiry to be "wholly unsatisfactory" and has called for the setting up of an independent commission of inquiry.

Regarding fundamental rights, there is a parliamentary commissioner for administration "who has Jurisdiction over human rights complaint"<sup>21</sup>. But these complaints have to be channelised through Parliament and Parliament must decide what action to take. There is another organization named "Commission for the Elimination of Discrimination and monitoring of fundamental Rights, established under the Sri Lanka "Foundation law"<sup>22</sup> It has received thousands of cases and complaints in the form of administrative hearings where, after inquiry, it attempts to settle the disputes with the consent of the parties concerned. It aims at compromise, consensus and corrective action rather than the punitive remedies available under the supreme court. If there is any problems a confidential report may be sent to the president for proper action.

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17 *Sri Lanka - State of Human Rights 1998*, Law and Society Trust, Colombo, 1999, P.98

18 *ibid*, P. 98

19 *ibid*, P. 98

20 Patricia Hydman, *Serendipity under Siege* Spokesman, Nuttingham, U.K. 1988, P. 11-20

21 K.M. Silava, "Sri Lanka - Problem of Governance", C.I.R. New Delhi, 1993, P.60-62

22 *ibid*, P.60-62

23 *Law and Society Trust fortnightly Review*, April 1994, Vol.- IV, Colombo, P.25

Similarly, there is an organization called Law and society Trust <sup>23</sup>. Basically it deals with fundamental right, legal issues and other social issues related with constitutional problems. It is consisting of various legal personalities. Its aim is to raise public awareness on all issues, concerning the legal rights of citizens and gaining wider recognition of law as society's instrument for peaceful change. It also discusses the reports of various international organizations dealing with human rights issues of Sri Lanka and publishes regularly an "Overview" related to fundamental rights, media , emergency rule, the status of human rights in Sri Lanka in a particular period

There is an organisation named Human Rights Task Force (HRTF) <sup>24</sup> It was constituted in 1991. Its primary objective is to monitor the observance of fundamental rights of persons detained in custody. Its function is to identify all detainees and maintain a comprehensive register of all persons held in detention and to monitor their welfare. It is allowed to enter and inspect places where persons are detained and to hold inquiries into any complaints received by it. If its directions are not complied with, it has the power to report the matter to the president for executive action. The HRTF cannot go before the supreme court independently in defense of the fundamental rights of a person. It does not have the power to recommend relief or make an order to the release of a detainee.

The concepts like human rights, constitution, law, Judiciary, bureaucracy etc. in the post independent developing societies of the third world today, give rise to the basic question regarding the art of governance.<sup>25</sup> This depends on the strengthening of the institutions of governance. The other aspects of governance like the franchise right or participation in decision making process etc. can be improved. But, when the issues of justice and fair play comes and human rights issues are related to them it needs some institutions which can check the illegal activities of legislature and executive. So, there is a need for independence of Judiciary. That is, the check and balance system can be maintained between various organs of government within a state structure. The development of such institutions in a traditional society will definitely take much time.<sup>26</sup> But reality is

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<sup>24</sup> *Law and Society Trust fortnightly Review*, April 1994 , Vol.- IV, Colombo, P.25

that in most of the developing countries, there has not been much emphasis on this aspects of governance. Sri Lanka is not an exception to this issue . In fact, there is a growing belief among the people of these countries that independent institutions are necessary for the development and progress of a nation. In Sri Lanka , after years of emergency and crisis, there is a growing belief that such institutions are important for non-violent settlement of disputes.

### **Active Role of the Media.**

For the smooth functioning of democracy in a country, along with the three organs of government, the ' press' plays an important role. The free and vigilant nature of press makes democracy more vibrant and strong. The demarcating principle of freedom of speech and expression also gives the chance for freedom of press. It can raise any issue which has importance in society, investigate it, analyse it and then reach a conclusion. It can criticize the government or can praise, when it finds appropriate. The check and balance method in a democracy can be made more accurate. If there is an independent press. So freedom of press is important in any society. The real duty of the press is to bridge the gap between state and society by linking the three organs of government to civil society.

The ethnic violence has led to gradual erosion of the freedom of press. However, the media in Sri Lanka has played an active role in the Sri Lanka society is the theme of this part. Some leading Journalist formed the "Free Media Movement" (FMM) in 1991<sup>27</sup>. The FMM has conducted seminars in various parts of the country to highlight the press curbs and drawn the public attention to the issue. The first public rally, organized by the movement at Nugegoda in Colombo suburbs was a great success. It has protested the government interference. On

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26 Radhika coomorasway *An analysis of Anglo- American Constitutional Tradition in a Developing society* , Vikas Pub., New Delhi, 1984, P. 60-71

27 *Law society Trust fortnightly review* , April 1994 , Vol. -14, Colombo,P. 34

28 *ibid*, P. 34-35

29 S.P. Senadhira, *Under Siege -Mass Media in SriLanka*, Segment Pub., New Delhi,1996,P.52

30 *Law society Trust fortnightly review* , April 1994 , volume -14, Colombo, P.31

22<sup>nd</sup> February 1993, the police detained six Journalists.<sup>28</sup> The FMM asked for the appointment of a commission to inquire into the incidents of assault and harassment of Journalists. They urged for greater constitutional safeguards to ensure the right to free expression and access to information.

After the assassination of president Premadasa in May 1, 1993, Prime Minister Mr. Wijetunge took over as president. The new president took a number of steps to maintain the freedom of press<sup>29</sup>. One such step was to withdraw his predecessor's order for compulsory telecast of the state Television corporations news bulletin on all T.V. channels simultaneously. He also lifted some of the emergency regulations which led to free flow of information and ensured further freedom of expression to some extent.

In 1994, the government directed the news team to telecast the meetings and rallies of opposition parties also<sup>30</sup>. The Television viewers, who could see only the faces of President Premadasa and his cabinet members previously, now got different things in Television, so they praised the new media policy of the government. The SLRC chief, Mr. Perrera went ahead and invited radical intellectuals, artists, poets, authors, etc. to participate lively and popular T.V. discussions and as a result, the credibility of media was restored gradually. These type of activities signify that more and more space is being provided for the freedom of media. The government has licensed two privately owned radio stations and two television channels in 1994<sup>31</sup>

The sudden announcement of election in 1994 before its actual schedule gave ample scope to the media to be the watchdogs of the society. As a result of pressure from media, the two major political parties also gave substantial attention to the media policy in their respective election manifesto. The people's Alliance headed by Mrs. Kumaratunge stated that the freedom of the individual cannot be safeguarded without a viable system of checks and balance operating as a restraint on governmental power. It is possibly only if there is healthy and open expression of public opinion without any restraints. Therefore, they attached great importance to strengthen the media and providing a proper guideline under which

the media can function independently.<sup>32</sup> This includes significant changes with regard to the pattern of ownership, policy objectives, the legislative instruments, administrative policy in respect of such matters which will facilitate a sound media environment.

Similarly, the UNP manifesto showed that it will try to restore the freedom of media in Sri Lanka.<sup>33</sup> There will be no censorship or control of news comments. The media has an important role to play in the dissemination of news, it can also criticize the government when the situation demands to create public awareness which is needed for a healthy society. The opposition parties will have access to television to propagate their views. They will also further strengthen the freedom of electronic media by establishing an independent media commission.

When the People's Alliance government took office on August 19, 1994, there were visible signs of improvement in media freedom." The Lake House Group" newspapers such as the " Daily News, " The observer" and " Sunday observer" gave sufficient coverage to opposition news.<sup>34</sup> The London based International centre against censorship said in a special report on Sri Lanka released on October 31, 1994,<sup>35</sup> that it welcomed the efforts made by the Peoples Alliance government to safeguard the freedom of expression and freedom of media. The denial of freedom of expression through both formal and informal means, has in the past, caused devastating effect on the Sri Lankan society. Thus, the reform of both law and practice regarding censorship is very much necessary in Sri Lanka.

The Government announced in its media policy that, all electronic media will be granted the right of gathering and disseminating news and state owned media will not be used by government's propaganda only.<sup>36</sup> It expressed that, all types of media should present a balanced coverage of news having their responsibility towards the society. The subject of media freedom has gained considerable importance in the past few years, particularly due to direct and indirect restriction imposed on the media by the previous government, and broad based activities by journalists to expand the scope of media freedom in the country.

Various organization, citizens and people from media had demanded that media democracy can best be protected by,

- (1) Freeing the existing media from political /government control.
- (2) Creating new institutions aimed at guaranteeing media freedom of both print and electronic media.
- (3) Promoting a new democratic media through new practices.

The threats in the past few years in Sri Lanka against journalists as well as media institutions were largely made in response to their attempts to expose and bring to notice of the public corruption and abuse of political power. As a gesture of commitment, the government has provided such facilities which are needed in carrying out their duties and responsibilities effectively and efficiently. This is gradually visible in Sri Lanka now. As for as the implementation of all the above policy is concerned the Sri Lankan Government is giving chance for the media personal, their professional association and media institutions to participate in the activities of the civil society.

Though the government controls the country's largest newspaper chains and owns the radio and Television services, there are a variety of independent news papers and Journals provide a full range of viewpoints on foreign policy and most domestic matters without partisan manner, including human rights issues. Many small circulation periodicals are also published by opposition political parties, which operate without any inference from anybody. The Supreme Court also gave the verdict in favour of freedom of press in a number of cases where Journalists were either arrested, detained, attacked or murdered. One is the case of. Nadeson who had written some articles in "The observer" regarding the law of parliamentary privilege and the exercise of Judicial power by Parliament <sup>37</sup>. Parliament charged him with breach of privilege but supreme court acquitted him.

We find today that the fourth estate of democracy, the media, in Sri Lanka has started to enjoy the freedom. With it's vibrant and open activities, it will

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37 S. P. Senadhira, *Under siege - Mass Media in Sri Lanka*, Segment Pub., New Delhi , 1996. P.52

be able to bridge the gap between the people. It may criticize the government or praise and will reflect the public opinion properly which is a positive symbol of the civil society.

### **The N.G.Os and Professional Associations:**

The ongoing ethnic has created a grave threat to the human rights, social rights, etc. This is a negative symbol of development in a particular society as far as civil society is concerned. In such a situation the role of voluntary organizations, N.G.O.s is noteworthy. If they play an active role, there will be some amount of solution to the immediate problems faced by the common people. In this context, it is relevant to discuss the activities of some of these groups in the Sri Lankan context. In spite of restrictions imposed by the state, these actors of civil society tried their level best to reach at the door step of innocent citizens.

In the early 1980s, when the Sri Lanka's record of violation of human rights touched its height, it was criticized by almost by many even though the Sri Lankan government refused to accept this. For instance, in 1987, the U.N. sub-commission on the Elimination of Discrimination against minorities passed a resolution against Sri Lanka.<sup>42</sup>

During the same period, a large number of N.G.Os were working in Sri Lanka to protect human rights. Sometimes back a government survey estimated that there were about 2000 N.G.Os, many of them, were autonomous. Due to the expansion of this sector, their activism in human rights field grew, which has caused considerable concern to the government. Even the Government has appointed a commission to inquire into the activities of the N.G.Os<sup>43</sup>. But professional organizations like Bar association, the association of working Journalists, association of university Teachers for human Rights etc. are active in their respective fields. The autonomy and independent spirit of these organizations have helped enormously for the expansion of the civil society.

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41 *Law society Trust fortnightly review*, September 1997. Colombo, P.72

42 Amnesty International Report, 1990.

There is an N.G.O named GANDHIYAM.<sup>44</sup> It is a registered society for community and social services. The Gandhiyam was established to help the Tamil refugees, mainly the plantation Tamils who fled from the estates. With the financial and material support from NOVIB (Holland), Oxfam (U.K.), Bread for the world (Germany), world council of churches and many other organizations of Tamil expatriates, Gandhiyam took the tremendous task of rehabilitating 40,000 and refugees in Trincomalee, vavuniya, Batticola districts. The government was dissatisfied over Gandhiyam's activities, and the army destroyed its office, several re-settled villages, burnt down buildings, set fire to crops, harassed and tortured the resettled Tamils. The head of the N.G.O. was arrested and detained by police, without any charge. This indicates that in spite of state restrictions and imposition of regulation, how N.G.Os played an active role to protect the common citizens in the crisis period.

Similarly, the organisation called Movement for Inter Racial Justice and Equality (MIRJE) has played a pivotal role in the ethnic conflict.<sup>45</sup> It was established by father Paul Casper. When there was a county wide anti-Tamil fanaticism and rioting organized by other influential groups, the MIRJE condemned the violence and highlighted the violation of human rights. It tried to assert the democratic rights of all section of people irrespective of race, caste, religion, language and culture.

The University Teachers Association for Human Rights (Jaffna) was formed at the university of Jaffna, as a part of the national organization of university Teachers for Human Rights<sup>46</sup>. Its aim is to challenge the external and internal terror engulfing the Tamil community as whole by making the perpetrators accountable and to create a space for humanizing the social and political spheres relating to the life of Sri Lankan community. They have mentioned in a document, "it dwells on the rising tide of internal and external terror, the hundred of lives which included the best among us, that were

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<sup>43</sup>. *Sri Lanka - State of Human Rights 1997*, Law and Society Trust, Colombo, 1998, P.201

<sup>44</sup> Satchi poonmbalam, *National Conflict and Tamil Liberation Struggle*, Zed Book, London, 1986 P.

<sup>45</sup> *Report of university Teachers for Human Rights*, Jaffna, No. 10, 1998, P.119

<sup>46</sup> *ibid*, P. 1-5

continuing to fall prey to a home grown totalitarian ethos and our complicity, complacency and cowardice that brought about this state of affairs. They have appealed to the people to read the document.

In exposing violations of human rights by the state forces, it asked for restraint and observance of human rights. It had argued that the stabilization of such attitudes is a necessary pre-condition for the revival of healthy political activity within the Tamil community. On many occasions these groups have confronted Sri Lankan government official and the Army officers.

Dr. Rajani Thiranagama who was a faculty member of medical science Department of Jaffna University and a pioneering figure behind the formation of this group was killed by the Tigers on 21<sup>st</sup> September 1989<sup>47</sup>. Few knew the Tiger so closely from within as Rajani did and was at the same time possessed such acute skill to watch their activities. "Broken palinyra" clearly indicates this. Due to constant effort of the university Teachers Association for Human Rights, the civil society in Jaffna is making a slow recovery. Both in north as well as east the time has come for the professional to take over the society. They have expressed the view that there is a need for all the citizens up Sri Lanka to come forwards for the growth of the civil society. Though several attempts have been made to destroy its credibility, this group is continuously fighting to establish peace since the last twelve years.

Similarly an organization called , the Tamil Refugees Rehabilitation organization (TRRO).<sup>48</sup> has played a tremendous role in rehabilitating the refugees in early 1980's. It has collaborated with Gandhiyam. But a restriction was imposed by the government on its activities. President and Secretary were detained under the PTA.

Similarly there is a group known as " Social scientist Association " <sup>49</sup>. Its founder was Mr. Charles AbeySekara. In the early 80's it has brought out a pioneering collection of papers in the volume entitled " Ethnicity and Social change in Sri Lanka" which made a significant contribution to debunking

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<sup>47</sup> Report of University Teacher for Human Rights, Jaffna, No. 10, 1998, P.06

<sup>48</sup> Ibid, P.112

chauvinist reading of history , which was the root of the state ideology. It has clearly analysed how the building of a plural nation and of working class solidarity had been subverted by a ruling class whose outlook was essentially feudalistic.

There is an organization called the "Committee for Rational Development."<sup>50</sup> " The years following the holocaust of July 1983 were very difficult years for the systems of governance . Raising sane opinion on the Tamil question proved extremely difficult . This group published the work entitled, " Sri Lanka: The ethnic conflict- Myths, Reality and Perspectives ". They have addressed some heart searching issues arising from the July 1983 violence.

Similarly, there is an established church named as JDCSI <sup>51</sup> This is a member of the National Christian council which was supported by several churches and has a justice and peace commission that is endowed with a full time staff. It's priest Rev. Arupalan was killed by the Army. But this organization has played a pivotal role in the activities of relief and rehabilitation inspite of being blamed as anti-government.

Similarly, there were some persons who were at the individual level and also at the organizational level, tried their level best for the protection of human rights. One of them Gamini Navaratne who was the editor of "Saturday Review" <sup>52</sup> He saw the role for the paper as providing source material for human rights documentation . This served valuable purpose. Lists of victims on yearly basis were published in this paper. Gamini saw in these an effective counter to the government propaganda. The Saturday Review was itself a microcosm which shaped and influenced the destiny of the community, as well as the individuals during it's active life spanning the five most important years in the 80's.

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49 *Report of University Teacher for Human Rights, Jaffna*, No. 10, 1998, P. 120

50 Ibid, P. 120

51 Ibid, P. 120

52 Ibid, P. 110

Similarly Charles Abeysekera consistently campaigned for solution to the ethnic problem on federal lines.<sup>53</sup> His scholarly stature and personal charm comprising friendliness with simplicity, kept him above sectarianism and thus helped to hold several activist groups together on common causes. As a relentless campaigner of minority and human rights for 20 years, since his retirement from civil service, he was associated with MIRJE and CRM. Both these groups focussed critically on the misuse of the PTA and the protection of human rights.

The Civil Rights Movement basically focussed on how human rights violation occurring due to inhuman activities of the Army and police. They have produced several fact finding reports. It has criticized the government for illegal detention of innocent Tamils and the conditions under which they were treated inside the detention camp, especially under the PTA and Emergency regulation.

The campaign for the Release of political prisoners ( CROPP) is mainly composed of civil rights activist belonging to the Sinhalese community.<sup>54</sup> It has raised its voice against the draconian PTA and Emergency regulation and the illegal detention of innocent civilians . They have said that the general atmosphere of repression and violation of basic human and civil rights has brought a new dimension to the struggle for democracy.

Similarly a lot of N.G.O.s have there highlighted the violation of human rights by various means. For instance, the role of Amnesty International, I.C.R.C., U.N.H.R.C., Doctors without Borders etc. Though these are international organization with the help of hundred of local N.G.O.S, they are engaged in protecting the human rights at gross root level . Their reports cited affidavits submitted by alleged victims, as well as statement of doctor's who claim to have treated the victims and said that, they were able to corroborate their allegations of ill-treatment. But the government states that, because the alleged victims are not identified in the report, it is unable to respond to specific allegations of torture.

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53 *Report of University Teacher for Human Rights, Jaffna, No. 10, 1998, P.120*

54 *Ibid, P.120*

55 *Amnesty International Report.1986, P. 5-10*

Though these international organizations are not a part of the Sri Lankan civil society, due to their constant effort, civil society in Sri Lanka is gathering momentum.

All these activities gradually compelled the government to be sensitive to the criticisms of human rights in Sri Lanka. The government continues to respond to questions on human right practices put up by <sup>1</sup> National Human Rights commission. The government established a commission for the elimination of discrimination and the monitoring of fundamental rights in 1986.<sup>56</sup>

In January 1991, the president appointed a commission to inquire into allegations of abduction and disappearances occurring after January 11, 1991. It was regarding the identity of missing people.<sup>57</sup> Important here is that the commission also empowered to report on legal measures to be taken against perpetrators and to assess current law relating to the problems and remedial measures necessary to deter future incidents. According to the government reports the commission has actually played active role in locating the persons and their family members regarding "disappearances". Similarly the government established a committee consisting of three members in 1988 to review the PTA and Emergency regulation cases and makes recommendation also.<sup>58</sup>

All these accounts clearly signifies that the actors of civil society such as N.G.O.s, various human rights organization, civil liberties group etc. can play an active role in a crisis period. The scenario of ongoing ethnic conflict in Sri Lanka has given the opportunity to these organizations to be more active, which we find in the above analysis. Definitely this has spread the field of activities of civil society in Sri Lanka today.

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56 *Sri Lanka- State of Human Rights 1998*, Law and Society Trust, Colombo, 1999, P.36

57 *Sri Lanka- State of Human Rights 1997*, Law and Society Trust, Colombo, 1998, P.18

58 *Sri Lanka State of Human Right 1997*, Law and Society Trust, Colombo, 1998, P.18

## **Chapter - V**

## CHAPTER V

### CONCLUSION

The governance system of a country can run smoothly provided there is a proper balance between the state and civil society. Wherever there is some imbalance between state and civil society it has created crisis in that society. As it is found in Sri Lanka, to solve a problem, the State hegemonies itself at the cost of the civil society. According to the provisions of the constitution the state provides ample amount of freedom, rights etc. to the citizens to become members of the civil society.

A mere declaration of fundamental rights in a constitution does not ensure their enforcement and guarantee respect to them. The external environment should be conducive to the protection of and advancement of rights. A democratic tradition and a dynamic political environment is essential. This is exactly the problem of the third world countries. We do not have a health democratic tradition. This is seen by the political instability, one party rule and military dictatorship. In some countries we see a constitutional authoritarianism behind the façade of democracy. These are the common problems with most of the developing countries.

These problems compounded by factors such as ethnic and religious violence, terrorism and political assassination. The state's response has been the use of emergency powers and in some cases, state sponsored terrorism. Long periods of a state emergency are frequent phenomena there. Ultimately this gave rise to a situation where restrictions of rights by the state authority becomes the order of the day.

When the relationship between state and civil society is discussed, the factors like social composition of the society concerned, the strategy of economic development and the opportunity provided to each and every group of people in this context, political culture, administrative machinery, governance system etc., come to the forefront automatically. It is important that the proper checks and balance method between the organs of government like – executive, Judiciary and legislature is relevant in this context. The role of mass media is crucial also. If all these work properly then civil society and state relationship will be balanced and it will improve the governance system. In the context of Sri Lanka, the discussion of the activities of these sectors provide us a clear picture regarding how to strengthen the relationship between state and civil society.

It is found in Sri Lanka that the democratic system was ruthlessly violated. Parliamentary system of democracy converted into presidential system. The party, which came to power, always tried to oppress the other. The chapter three of this dissertation elaborately discussed this aspect. So to strengthen the democratic system a healthy political culture must prevail there. Political parties must be policy based rather than personality based. Politicians must achieve a balance between co-operation and conflict and master attitudes of fostering friendly and honorable relation among contending leaders. Opposition views must be respected. Parliament should be given ample scope to function as the true representative house of the people. The voice of the oppressed, minorities, weaker section of the society must be reflected through the parliament. The recent phenomena of freedom to opposition inside and outside parliament is an improvement in this direction.

The paradigm of developmental democracy relates to the question of participatory democracy. In this case the devolution of power and empowerment of the poor and vulnerable groups is important. So participation is of central concern in any discussion of development in wider human terms. It is important in this context that participatory development and democracy are identical concepts. But the formal participation in election is not enough. It is a token system only, unless power is shared between different communities from local to national level. It would ensure not only access to resources, land, education, and employment opportunity but also strengthen the civil society. That is needed in Sri Lanka today. The steps like provincial devolution of power and formation of 'citizens committee' and election for provincial government are milestones in this direction.

The role of executive is also important in this context. They must work as the iron framework for the process of development. They must be committed to the policies, programs etc., not to the party or leaders in power. That is lacking in Sri Lanka. The social composition of bureaucracy must reflect the whole society and not of a particular community. Then only in Sri Lanka proper administrative machinery will be established, which will be impartial in implementing policies.

For smooth functioning of democracy, there is need of an independent, impartial and autonomous Judicial system. It is relevant to each and every country. The state must guarantee the protection of Judiciary from any type of encroachment. This is, to day, needed in Sri Lanka. It's independence has been violated many times in Sri Lanka. In spite of that Judiciary in Sri Lanka today gradually started to play

its autonomous role. It has given some land marking Judgements. But it has to play a more active role through the process like Judicial activism, Judicial review, through the process of Public interest litigation etc.. The establishment of provincial high court and its power to issue writ of Habeas Corpus is a positive symbol. If these provisions are observed properly, then it will definitely strengthen the civil society there.

The role of media is noteworthy here. It links the people to the government by reflecting the views of both these groups. A strong media works like a proper watchdog of civil society. In Sri Lanka the freedom of media being curtailed and strict regulations are established. In spite of that, media in Sri Lanka has been playing a noteworthy role. The announcement of Independent media commission and less governmental control on media will surely improve the activities of civil society. Only then the media can enjoy the freedom along with its social responsibilities.

The role of state apparatus like Army and Police is also important in this context. The unbalanced civil-military relationship invites chaos, disorder to any society. In Sri Lanka the ongoing ethnic conflict has allowed the government to militarize the society as a result of which civil society has been assaulted. Similarly, the ethnic composition of Army and Police reflect that minorities were neglected in this field. In Sri Lanka it was found that the ruthless oppression, violation of human rights, torture etc. became the order of the day in North and East. So role of the army in civil administration is required in exceptional cases. But it is being violated in Sri Lanka. So their role must be limited and more humanitarian approach should be accepted by Army and police. Only then civil-military balance will be maintained properly and civil society will be protected.

As civil society also rests on language, religion and culture, these aspects must be given due importance by the state concerned. As these factors can unite a society or divide also, acceptance of national religion and language which belongs to a particular community created hatred among the others. The state should provide freedom and must respect the sentiments and views of other communities. Then only the civil society will be strengthened. That is needed in Sri Lanka today.

The conflict between the majority vs. minority is a common phenomenon in each and every country but it takes a critical shape when the minorities are deprived of their rights. This has happened in Sri Lanka. A proper admission policy, employment opportunity, economic facility, political participation etc. must be

provided to these minority communities in a proportional manner. They should not feel alienated by the state. This is needed in Sri Lanka today for enhancing the governance system. If these policies are implemented, then the state civil society relationship will be balanced.

The individuals inside the state need some types of association or organization etc. for their own advancement and proper channelization of grievances. In Sri Lanka the professional associations like Bar Association, University Teachers Association and the association of civil liberties groups have played a pivotal role during the critical phase of ethnic conflict. Their activities must be strengthened today to make civil society more vibrant.

The N.G.O.s also work as an intermediary organization of civil society. In Sri Lanka they have been playing an active role in protecting the common man from terrorism and state atrocities. Even government has established commissions to regulate their activities. But in Sri Lanka what is needed is that N.G.Os. must be allowed to strengthen. Thus, this civil society will be more vibrant.

The state and nation-building process among the third world countries is relevant to be discussed here. Almost all the countries of the third world started the 'state-building' process without giving proper importance to 'nation-building' process. As the societies are composed of multiracial and multi-cultural groups, this has created division among people in later phase. Without taking all these groups into a common thread the state undermined some particular groups. This has happened in Sri Lanka. So ultimately this process kept the civil society fragmented. In Sri Lanka the nation building process must be strengthened along with state-building process. This will accelerate developmental process and strengthen civil society.

The centralizing tendency of the state has bedeviled the objective of developing socio-political harmony and the overarching national consciousness. The inability of unwillingness of state to accommodate social diversity and provide democratic space to a variety of groups, has nurtured and intensified centrifugal tendencies. The acceptance of coercive strategies and the gradual erosion of democratic rights and freedom in Sri Lanka disturbed the Civil Society.

The development of a strong consciousness is mitigated by the overwhelming politicization of society imposed by nation building imperative. The development of institutions like civil society would serve as independent guardians of rights. But in

Sri Lanka, civil society is seen as not as the measure of the democratic health rather as a potential threat to the nation.

Independence is seen as regaining of sovereignty by the imagined community of the nations in the third world countries. Rights are seen as the chances for emancipation by citizens. Where as within the political unit, corresponding duties as citizens are stressed along with assertion of the rights of the majority. These are the means towards the end of forging as viable and secure collective entity of the nation – state.

Minorities are doubly disadvantaged - as citizens and persons. They have responded in various ways and with mixed results depending on their particular circumstances. Again the degree of self-expression of these groups are seen as inimical to the national cohesion of the state. These are considered as potentially inimical due to their size, location and other considerations in side the state. The consistent denial of meaningful redress through political accommodation by state serves to heighten the ‘imagined community’ and political consciousness of the minority and provides a major impetus for secession through armed struggle. As these incidents occurred in Sri Lanka, it brutalized the civil society there.

To maintain a proper balance between the state and civil society the governance system must be strengthened in Sri Lanka. The governance systems includes all these parameters described in this chapter. Civil society must not be seen as antagonistic to state rather as a catalyst for enhancing development process. They are complementary to each other. The recent proposals declared by Mrs. Chandrika Kumaratunge reflects some steps in this direction. This is a positive symbol for strengthening civil society. This will definitely reduce the ethnic conflict within the available parameters of state structure. This is applicable not only in Sri Lanka but also to all the developing countries in the world.

## BIBLIOGRAPHY

- Alagappam, M.V.M. , *Tears in Teardrop Island*, Sterling Publication, Bangalore, 1985.
- Arasaratnam, S., *Sri Lanka after Independence - Nationalism, Communalism & Nationbuilding*, University of Madras, Madras, 1986.
- Bhaduri. S. & Afsar Karim., *SriLankan Crisis*, Lancer Publisher, New Delhi, 1990.
- Bose, Sumantra, *State, Nation & Sovereignty - SriLanka, India & Tamil Elam Movement*, Sage, New Delhi, 1994.
- Chandoke, Neera, *State & Civil Society*, Sage, New Delhi, 1995.
- Chattopadhaya, H.P., *Ethnic Unrest in Modern SriLanka*, M.D. Publishers, New Delhi, 1994.
- Coomaraswamy, Radhika, *Ideology & Constitution*, Konark, New Delhi, 1995.
- , *An Analysis of Anglo-American Constitutional Tradition in a Developing Society*, Vikas Publishers, New Delhi, 1984.
- DeSilva, K.M. *SriLanka-Problems of Governance*, konark, New Delhi, 1993
- , *Managing Ethnic Tensions in Multi-Ethnic Societies;* SriLanka, 1880-1985, Lanham, 1986.
- , *Repairing the Whirlwind, Ethnic Conflict & Ethnic Politics in SriLanka*, Pengiun, New Delhi, 1998.
- Dharamdasini, M.D.(ed). *Sri Lanka- An Island of Crisis*, Shalimar, Varanasi, 1988.
- Dubey, Swaroop Rani *One day Revolution in sriLanka - Anatomy of 1971 Insurrection*, Alekh Publisher, Jaipur, 1988.
- Fries, Yovonne *The Undesirables*, K.P. Bagchi & Company, Calcutta, 1984.
- & Bibin Thomas,  
Fernando, T. *Modern Sri Lanka: A Society in Transition* Syracuse, 1978
- & R.N. Kearney, (ed.),  
Hydman, Patricia, *Sri Lanka Serendipity Under Siege*, Spokesman, U.K., 1995
- Nottingham,  
Jacob, Lucy, *Sri Lanka From Dominion to Republic*, National publishers, New Delhi, 1973

- Jayatilaka, D., *Sri Lanka, the Travels of a Democracy, Unfinished War, Protracted Crisis*, International Centre for Ethnic Studies, Colombo, 1995.
- Jayasekera, P.V.J.,(ed.), *Security Dilemma of a Small State*, Part One, South Asian Publication, New Delhi, 1992.
- Jupp, James, *Sri Lanka - 3<sup>rd</sup> World Democracy*, Frank Press, London, 1978.
- Keans, John, *Democracy & Civil Society*, Verso, London, 1988.
- Kearney, Robert N., *Communalism & Language in the Politics of Ceylon*, Duke University Press, North Carolina, 1967.
- , *The Politics of Sri Lanka*, Cornell University Press, London, 1973.
- Kothri, Rajni, *State against Democracy*, Ajanta, New Delhi, 1988.
- Mallick, Ross, *Development, Ethnic & Human Rights in South Asia*, Sage, New Delhi, 1998.
- Mamoon, A. & M.Roy *Civil Society in Bangladesh*, Calcutta University, Calcutta, 1995.
- Manor, James (ed.), *SriLanka in Change & Crisis*, Crom Helm Ltd., London, 1984.
- Mishra, S.S., *Clinic conflict & security crisis in Sri Lanka*, Kalinga, New Delhi. 1995.
- Mohanty, Monoranjan. *Peoples Movements*, Sage, New Delhi, 1998.
- Mukerjee, Partha & Tranquist Alle (ed.), *Ethnic Conflict & re-Conciliation in SriLanka*, University of Hawai Press, Honolulu, 1987.
- Monogaram, C., *An Island that have changed*, Peoples Publishers, New Delhi 1971.
- Mukerjee, Sadhan, *Nationality, Citizenship & State*, Allied Publishers, Bombay, 1996.
- Oommen, T.K., *Society & Space*, West View Press, Oxford, 1996.
- , *Critical analysis of the new constitution of the SriLanka Government, Promulgated on 1978*, State Press, Colombo, 1979.

- Peebles, Patrick., *Social Change in 19<sup>th</sup> Century Ceylon*, Navrang, New Delhi, 1995.
- Phadnis, Urmila., *Ethnicity & Nationbuilding in South Asia*, Sage, New Delhi, 1990.
- , *Religion and politics in SriLanka*, Manhor, New Delhi, 1976.
- Piyadasa, L., *Sri Lanka The Holocaust & After*, Marram, London, 1984.
- Ponambalam, Satchi, *The National Conflict & Tamil Liberation Struggle*, Zed Books, London, 1983.
- Peacock., A., *Minority Politics in Srilanks*, Arihant Publishers, Jaipur, 1989.
- Ram, Mohan., *Srilanka – The Fractured Islandm*, Penguin, New Delhi, 1989.
- Ranatunga, Sinha, *Politics of Terrorism : The Sri Lankan Experience*, Beconen, 1988.
- Roberts, Micheal, (ed.), *Collective Identities, Nationalities & Protest in Modern Sri Lanka*, Margo Institute, Colombo, 1979.
- , *Explaining Confrontation in Sri Lanka, Politics, Culture & History*, Harewod Publisher, Switzerland, 1994.
- Schieghart, Paul., *A Mounting Tradeegy of Errors*, International Committee for Jurist, Austrilia, 1984.
- Senawartne, Brain., *Human Rights Violation in Sri Lanka*, 1986.
- Seth , D. L. & Ashish Nandy, (ed.), *The Multiverse of Democracy*, Sage, New Delhi, 1996.
- Shivasthamby , K., *Society & polity in Sri Lanka*, New Century Books, London, 1995.
- Shivasthamby , K., *Society & polity in Sri Lanka*, New Century Books, London, 1995.
- Sivaraj, A. V., *Politics of Tamil Nationalism in Sri Lanka*, South-Asian Publishers, New Delhi, 1996.
- Somasundaram, Diya, *Scarred minds – The Psychological, Impacts of War on Sri Lankan Tamils*. Sage, New Delhi, 1998.
- Somasundaram Diya, (ed.), *The Third Wave – Governance & Public Administration in Sri Lanka*, International Institute for Ethnic Studies, Colombo, 1997.

- Somsasundaram, D & Sangham, *Sri Lanka – The Conflict Within*, Sage, New Delhi, Vani 1988.
- Spencer, Janathan. (ed.), *Sri Lanka - History & Roots of Conflict*, Routledge, London, 1990.
- Suryanarayanan, P. S., *The Peace Trap: An Indo- Sri Lanka Political Crisis*, East- West Press, New Delhi, 1988.
- Swamy, M. R. Narayana., *Tigers of Sri Lanka*, Konark, New Delhi, 1994
- Tessa, J. B. & R. Desilva, (ed.), *Buddhist Fundamentalism & Minority Identities in Sri Lanka*, State University
- Thambiah, S. J., *Sri Lanka : Ethnic Fratricide & the Dismantling of Democracy*, L. B. Tours Pub., Chicago, 1986.
- Tyagi, A. R. & A. Bharadwaj, *The Working of Political Democracy in Ceylon*, Sultan Chand & Sons, New Delhi, 1969.
- Vaidik, V.P., *Ethnic Crisis in Sri Lanka – India’s Options*, National Publishing House, New Delhi, 1986.
- Vittachi, V.P., *Sri Lanka – What Went Wrong*, Navrang, New Delhi, 1995.
- Wickramratne, J., *Fundamental Rights in Sri Lanka*, Navrang, New Delhi, 1996.
- Wijemanne, Adrian, *War & Peace in Post Colonial Ceylon, 1948-1991*, Orient Longman, New Delhi, 1996.
- Wikramasinghe, Neera, *Ethnic Politics in Colonial Sri Lanka, 1927-47*, Vikas Publishing House, New Delhi, 1995.
- Wilson, A. J. *S. J. V. Chevanayakam & The Crisis of Srilanka : Tamil Nationalism 1947-1977*, Horst & Company, London, 1994.
- Wiswarnagapla, W. A., *Ethnic Strife & Politics in Sri Lanka*, Navrang, New Delhi, 1994.
- Wiswawarangapla, W. A. & L. D. hewagama, *Recent Politics in Sri Lanka : The Presidential Election & Referendum at 1982*, Navrang, New Delhi, 1983.
- Wriggins, W. H., *Ceylon :Dilemmas of a New Nation*, Princeton University Press Princeton, 1960.
- Zafurllah, H.M., *SriLanka's Hybrid Presidential & Parliamentary System and the Separation of Power Doctrine*, University of Malayasia, Kualalampur, 1981.

Zeylanicus, *Ceylon Between Orient and Occident*, Elek books, London, 1970.

## ARTICLES

- Akhtar, Shaheen, "Peace Process in Sri Lanka: Problems & Prospects", *Regional Studies*, 15(1) Winter 1996-97.
- Canagaretana, Sujit M., I "National at the Cross –roads: Sri Lanka the mid 1990' *Australian Journal of International Affairs*, 50(2) ; July 1996.
- Chakravarty, Nikhil, "Path Breaking Initiative" *Mainstream*, 19<sup>th</sup> August, 1995.
- Criss, Hann, "Nation-State Religion & Uncivil Society" , *Deadalus* , Spring , 1997.
- Daniel, N. Nelson, 'Civil Society Endangered", *Social Research*, Summer, 1996.
- David, A. Kumar, "SriLanka : Is There a Way Out?", *Capital & Class* (40) Spring 1990.
- Desilva, K:M., "Decentralization and Regionalism in the, Management of SriLanka's Ethnic Conflict", *International Journal of Group Tensions*, Vol. 19,No, 4, 1989.
- Fernando, Nilan, "SriLanka in 1989: Maintaining the State, *Biiss*, 11 (1) Jan90.
- Ghosh, Sanjaya, "Civil Society In North -East India", *Mainstream*, June 97.
- Heanis, Arel, "Making Civil Society Work -What Donors Can Do", *World Development Bulletin*, October,1996.
- Hindwani, Sudhir, "SriLankan Crisis", *Mainstream*, 15<sup>th</sup> February ,1997.
- Hoole, Charles, "Towards a Total Utopia; Expl8ining a Solution to the Political Crisis in SriLanka", *Gandhi Marge*, 11(4), Jan-March 1990.
- Hyndman, patricia, "SriLanka: A study in Microcosm of Regional Problems and the Need For More effective Protection of Human Rights", *Denver Journal of International law and Policy*, 20(2), Winter, 1992.

- Jacob, Lucy, "Challenges to National Integration to SriLanka; Some Perspectives of Tamil Problem", *South Asian Affairs*, Vol1, January, 1982.
- Kadirgamar, Silan, "Whither SriLanka? Hope For A Solution to the ethnic Conflict", *Japan Asia Quarterly Review*, 27(0), 1996.
- Lindberg, Soffron, "Farmers Agitation, Civil Society and the State " *Sociological Bulletin*, March -September, 1992.
- Maner, James, "SriLanka: Explaining the Disaster", *World Today*, November, 1983.
- Matthews, Bruce, "SriLanka in 1988, Seeds of the Accord", *Asian Survey*, 29(2) February 1989.
- Mallick, Ifftikhar, "State and Civil Society in Pakistan, From Crisis to Crisis", *Asian Survey*, July 1996.
- Phadnis, Urmila , "Role of State in SriLankan Ethnic Crisis", *Mainstream* 24<sup>th</sup> November, 1990.
- Roberts, Micheal "Nationalism, the Past and the Present : The Case of SriLanka ", *Ethnic and racial Studies*, 16(1) January., 1993
- Roberts, Michael, "For humanity, For the Sinhalese : Dharmapala as Crusading Boast", *Journal of Asian Studies*, 56(4) November, 1997.
- Roggers. John. J ., "Social Mobility, Popular Ideology and collective Violence in Modern SriLanka", *Journal of Asian Studies*, August, 1991
- Sahadevan, P., "Why the Casefire Failed in SriLanka ", *Mainstream* .  
 -----  
 "SriLanka in 1992: A Year of Mixed  
 results" *Strategic Analysis*, 16(4) ; July 63.  
 9<sup>th</sup> March, 1991
- Schaffer, H. B ., " SriLanka in 1995: A Difficult and disappearing Year ", *Asian Survey*, 36(2) ; February 1996.
- Singer, Marshall. R ., "SriLanka's Tamil - Sinhalese Conflict, Alternative Solutions", *Asian Survey* 32(8) August 92.

- Slater, Richard, "Approach to Strengthening Local Government :  
Lessons From SriLanka ", *Journal of Public  
Administration and Development*, 17(2) , May 1997.
- Spencer , Johnathan, Collective Violence and Every day Practice In  
SriLanka *Modern Asian Studies*, 24(3) , July 1990.
- Tiruchelvan, Neelam, "SriLanka : Crisis of Constitutionals ", *Mainstream*  
28<sup>th</sup> September , 1991.

## **REPORTS :**

A.I.C.C. Reports on Internal Crisis in Sri Lanka , 1998.

Civil Rights Movements Report on 29<sup>th</sup> September, 1989, South -Asian Bulletin.

Extracts from Amnesty International Reports in 1989, South Asian Bulletin 9(1) , 1989.

Towards Liberation , L.T.T.E., Political Committee Report , 1984.

Reports of University Teachers for Human Rights Report

Reports of Law & Society Trust

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THE INDIAN EXPRESS

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